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TORTS - LICENSEES - REVOCABILITY OF LICENSE GRANTED BY THEATRE TICKET

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TORTS — LICENSEES — REVOCABILITY OF LICENSE GRANTED BY THEATRE TICKET — Plaintiff was forcibly ejected from defendant's theatre by defendant's employees and brought this action for damages for assault and battery. Defendant offered testimony attempting to justify the ejection on the ground that plaintiff was creating a disturbance. The trial judge instructed the jury that the question of plaintiff's conduct was immaterial and that a theatre owner could eject a patron at any time with or without cause. *Held*, that the instruction was erroneous. Despite the revocable character of the license

granted by a theatre ticket a theatre owner does not have the right to eject a patron without cause. *Cummings v. St. Louis Amusement Co.*, (Mo. App. 1941) 147 S. W. (2d) 190.

The instant decision recognizes the general rule in this country to the effect that a theatre ticket gives the purchaser merely a revocable license and that when it is revoked the patron becomes a mere trespasser subject to removal by the theatre owner through the use of reasonable force if necessary.[1] The American decisions have relied mainly on the leading English case of *Wood v. Leadbitter*,[2] in which it was held that a license was revocable because it neither creates an interest in land nor is an incident to a validly executed and enforceable grant of such an interest.[3] *Wood v. Leadbitter* has, however, been overruled in England by *Hurst v. Picture Theatres*,[4] which held that the license granted by a theatre ticket was irrevocable. The rather tenuous reasoning of the *Hurst* case has been severely criticized both here [5] and in England [6] and was expressly rejected as authority by the High Court of Australia.[7] The main objection to the *Hurst* case seems to be that calling a theatre ticket an irrevocable license is in effect creating an easement in land by an extremely informal conveyance which does not fulfill the requirements of the statute of frauds, and also a theatre ticket to common understanding scarcely purports to create a right in rem in realty.[8] A reason commonly asserted in favor of the rule of the *Wood* case is the rather negative one that a theatre, unlike a common carrier, is a private enterprise and therefore the proprietor has the right to eject or exclude whomever he pleases.[9] The instant decision pays lip service to the generally stated rule by admitting that the license created is revocable, but holds that the revocation can be effected only for good cause. This would seem to be

[1] 30 A. L. R. 951 at 952 (1924); Boswell v. Barnum & Bailey, 135 Tenn. 35, 185 S. W. 692 (1916); De La Ysla v. Publix Theatres Corp., 82 Utah 598, 26 P. (2d) 818 (1933). Contra, 30 A. L. R. 951 at 954 (1924).

[2] 13 Mees. & W. 838, 153 Eng. Rep. 351 (1845).

[3] It was held that the license could be revoked even though it was a breach of contract to do so. Usually the damages for the breach are confined to the price of admission. See 30 A. L. R. 951 at 954 (1924); 42 HARV. L. REV. 834 (1929).

[4] [1915] 1 K. B. 1.

[5] 13 MICH. L. REV. 401 (1915); 27 HARV. L. REV. 495 (1915).

[6] 31 L. Q. REV. 217 (1915); SALMOND, TORTS, 9th ed., 259 et seq. (1936).

[7] Cowell v. Rosehill Race Course, Ltd., (Australia, 1937) 56 Commonwealth L. Rep. 605, 43 Argus L. Rep. 273, noted 5 UNIV. CHI. L. REV. 301 (1938).

[8] Holmes, J., in Marrone v. Washington Jockey Club, 227 U. S. 633, 33 S. Ct. 401 (1913); annotation, 43 L. R. A. (N. S.) 961 (1913). Moreover, the court assumes that specific performance of the contract will be given in equity, thus giving the theatre patron a valid equitable right which English law courts have had to recognize since the Judicature Act. However, this overlooks the extreme likelihood that equitable relief would be denied because money damages for breach of contract would be adequate, or that equity would not give specific performance of a right to sit through a theatrical performance on the ground that the matter is too trivial for equitable cognizance. Equity, by traditional maxim, does not stoop to pick up pins.

[9] Boswell v. Barnum & Bailey, 135 Tenn. 35, 183 S. W. 692 (1916); Capital Theatre Co. v. Compton, 246 Ky. 130, 54 S. W. (2d) 620 (1932); Horney v. Nixon, 213 Pa. 20, 61 A. 1088 (1905); annotation, 1 L. R. A. (N. S.) 1184 (1905).

a rather strained construction of "revocable license," since its commonly accepted meaning is that it is revocable at the will of the licensor.[10] The court is hence adopting a modification of the rule of the *Hurst* case without admitting it. At first blush one might be inclined to sympathize with the reluctance of the court to give a theatre owner the right to eject a patron whose conduct is beyond reproach. On closer inspection, however, it seems clear that even though a theatre owner has this right, he will not be likely to abuse it, since commercial self-interest and the fear of antagonizing his customers will deter him. Moreover, the court in reaching essentially the same result as the *Hurst* case, makes itself vulnerable to much of the criticism directed at that decision. Perhaps a satisfactory compromise might be worked out between the alternatives of giving the theatre goer an easement on the one hand, and giving the theatre owner the absolute right to eject without cause on the other. It could be admitted that the license created by the theatre ticket can be revoked at will, and that the patron thereby becomes a trespasser. But it could also be recognized that the theatre owner has breached his contract in revoking the license without cause, and therefore should not automatically be given the normal privilege of using reasonable force to expel the trespasser. Instead, it should be determined whether in light of all the circumstances it was reasonable for him to exercise that privilege.[11] Conceivably, if the theatre goer's conduct is exemplary, the theatre owner might be liable in damages for the use of even reasonable force in ejecting him, despite the fact that at the same time the patron might be liable for nominal damages for trespass.

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[10] 2 TIFFANY, REAL PROPERTY, 2d ed., 1206 (1920). In most of the cases the defendant theatre owner in his answer claimed the right to eject the plaintiff theatre-goer without cause, and it was this right which was upheld in the Leadbitter case, and in all of the cases which follow the majority rule. The right was denied in the Hurst case, however.

[11] See PROPERTY RESTATEMENT, TENTATIVE DRAFT No. 12, § 66, comment b (1939).