Licence, Interest and Contract

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I

Our present picture of the law of licence is one of great ugliness and incoherence. The picture is clouded by an obscurantism yielding neither general sense nor basic principles, though the licence is today the most fertile, and certainly the most discussed, single field of legal activity.[1] In the end, things may perhaps sort themselves out more clearly; but the process also needs some speeding-up if legal developments are not to be measured geologically. For the existing confusion there are, broadly speaking, two primary reasons. The licence occupies the uncharted borderland between contract and real property and is thus caught by conflicting terminologies and different ways of thinking. Again, the licence suffers from the chronic legal affliction of overloading concepts with (what we hope are) deducible associations. In this paper I wish to concentrate on some of the central isssues, for my main object is to eliminate some famous difficulties and to propound a more rational explanation.

II

Turn which way we may, *Wood* v. *Leadbitter*[2] always comes up for

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[1] For the recent discussions, see Walford, The Nature and Effect of Licences (1947), 11 Conv. (N.S.) 165; Wade, What is a Licence? (1948), 64 L. Q. Rev. 57; Wade, Licences and Third Parties (1952), 68 L. Q. Rev. 337; Megarry, The Deserted Wife's Right to Occupy the Matrimonial Home (1952), 68 L. Q. Rev. 379; Hargreaves, Licensed Possessors (1953), 69 L. Q. Rev. 466; Crane, Licensees and Successors in Title of the Licensor (1952), 16 Conv. (N.S.) 323; G. L. Williams, Interests and Clogs (1952), 30 Can. Bar Rev. 1004; Cheshire, A New Equitable Interest in Land (1953), 16 Mod. L. Rev. 1; D. Pollock, Possession and the Licence to Occupy Land (1952), 16 Conv. (N.S.) 436; Sheridan, Licences to Live in Houses (1953), 17 Conv. (N.S.) 440; Marshall and Scamell, Digesting the Licence (1953), 31 Can. Bar Rev. 847; Mitchell, Learner's Licence (1954), 17 Mod. L. Rev. 211. And see also Hohfeld, Fundamental Legal Conceptions (1923) p. 160.

[2] (1845), 13 M. & W. 838.

reconsideration.[3] For that decision is the congener of the modern idea of a licence and poses one of the major questions. Wood sued Leadbitter in trespass to his person, because the latter (acting on behalf of his employers) had forcibly ejected him from the Doncaster race meeting. Wood had bought a ticket of admission, and the whole argument revolved around the problem whether this ticket was a revocable or an irrevocable licence. The decision, with Baron Alderson speaking for the court, was that the licence was freely revocable since it was what he called a "mere licence", that is, a licence unaccompanied by a grant.[4] *A priori* this must rank as a very odd decision, doing "manifest injustice"[5] to an invitee holding a ticket he has paid for. Moreover, everything in the decision seemed to depend on the doctrine of revocable licence, so that subsequent discussion has mainly fastened on this doctrine and its limitations.

But, in doing this, the discussions perhaps missed the most relevant problem. For what, let us ask again, was the precise trouble between Wood and Leadbitter's employers? Wood, we find, had been warned off because of "malpractices of his on a former occasion, connected with the turf";[6] he was, we can assume, not the kind of person to be allowed entrance on a respectable racecourse. And, once this important fact is taken into consideration, Wood's eviction becomes, far from being arbitrary, a perfectly justifiable action. Wood would never have gained admission from the stewards directly, and it will therefore be remembered that he had bought his ticket from an agent: the contract of admission between Wood and the stewards was thus really a contract between the latter and an undisclosed principal. Thus seen, these facts closely resemble those in *Said* v. *Butt*,[7] where Said, wanting to attend a theatrical première and knowing that the manager would not sell him a ticket, got his friend to buy one for him. When Said turned up at the theatre, he was refused entry. McCardie J. upheld this refusal on the ground that there was no contract for admission because of the mistake of identity.[8] Obviously, even if Said had slipped inside unnoticed, the manager would, on the same ground, have been entitled to evict him.

This principle meets, entirely and exactly, Wood's unsuccessful

[3] Cf. the remarks by Evershed M. R., Equity after Fusion (1948), Journal of the Soc. of Public Teachers of Law, p. 177.

[4] 13 M. & W. at pp. 852, *854*.

[5] See Lord Simon in *Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.*, [1948] A.C. 173, at p. 191.

[6] 13 M. & W. at p. 838.

[7] [1920] 3 K.B. 497.

[8] See *ibid.* at pp. 500-503.

claim against Leadbitter. As in *Said*'s case, Wood's contract of admission was void for mistake and, since it was void, he was properly ejected. The question, therefore, was not whether Wood's ticket was a revocable or an irrevocable licence; the point was simply that there was, in view of the mistake of identity, no valid contract or "leave or licence" to begin with. It may be asked why two different principles were needed to arrive in practically identical situations at substantially identical conclusions. More particularly, how could McCardie J. adopt an approach that was clearly so much neater than Baron Alderson's tortuous principles? The answer lies in the historical accidents of case-law; especially in the fact that when *Wood* v. *Leadbitter* was decided no doctrine of mistake or mistaken identity was as yet developed. It would have been impossible (and perhaps unthinkable) for Alderson B. to explain his decision otherwise than he did.

In addition, *Wood* v. *Leadbitter* was confronted with several other difficulties. In the first place, no similar situation had previously arisen; indeed, the relevant precedents showed that the common law had consistently respected paid licences (or contracts) to enter or occupy land. Baron Alderson was thus compelled to reinterpret the previous cases, in particular *Webb* v. *Paternoster*[9] and *Tayler* v. *Waters*,[10] a reinterpretation which, though a remarkable *tour de force*, remained most unconvincing. Secondly, the only material that Alderson B. could derive in support for his decision was some rather nebulous *obiter dicta*,[11] on the one hand, and, especially, Vaughan C. J.'s famous statement in *Thomas* v. *Sorrell*,[12] on the other. The chief justice had distinguished between a licence coupled with a grant (for example, licences to hunt or cut timber on another's land coupled with grants to carry away the deer killed or the timber cut) and a licence which is mere permission and which "only makes an action lawful, which without it had been unlawful".[13]

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[9] There are five reports (1619), Palm. 71, 2 Rolle 143 and 152; Noy 98; Pop. 151; Godb. 282. The facts are unusually interesting: *A* licensed *P* to put a stack of hay on his (*A*'s) land. *A* then leased the land to *W* and the hay remained there for two years. *W*'s cattle wasted the hay, and *P* sued in trespass. It was held that the action did not lie, as *P* had not removed the hay within reasonable time, the damage thus coming to him by his own fault. The decision, therefore, merely limited the liability for cattle-trespass; it did not establish that *A* could arbitrarily revoke his licence to *P*.

[10] (1816), 7 Taunt. 374. See also discussion Wade, 64 L. Q. Rev. at pp. 64-5. The other relevant decisions were: *Wood* v. *Lake* (1791), Say. 3 (for a manuscript report see 13 M. & W. at p. 848); and *Wood* v. *Manley* (1839), 11 Ad. & E. 34.

[11] See the remarks by Dodderidge J. in *Webb* v. *Paternoster* (1619), Palm. 71.

[12] (1673), Vaugh. 330, at p. 351. [13] *Ibid.*

Vaughan C. J.'s statement has so often been repeated that it is perhaps time to call attention to its true and, as we shall see, its very limited significance. What the chief justice was seemingly trying to establish was the inherent difference between two kinds of permissions or licences. Thus a permission to eat one's meat[14] became, once the meat was eaten, an (as it were) "consumed" permission in the sense that the licensee could not be made to disgorge the meat; the effect of such a permission was absolutely final since the property was "altered or destroyed"[15] with its consumption. On the other hand, a permission merely to use land or things was not final or self-consuming in the same sense; for it could leave legal relations subsisting between the parties, at least to the extent that the licensee would eventually have to return the land or things since what he had acquired was only a right of user. At no point, however, did Vaughan C. J. suggest that these rights of user were arbitrarily revocable by the licensor. Nor indeed did the question arise, for *Thomas* v. *Sorrell* was concerned not with contracts or licences we are here discussing but with the totally different problems concerning the effectiveness of royal dispensations.[16]

But in *Wood* v. *Leadbitter*[17] Baron Alderson tore the chief justice's words from their context and furthermore transformed them into the much broader distinction between "mere licences" and licences coupled with a grant, to make only the latter irrevocable by dint of the addition of the grant.[18] This distinction involved the further proposition that "a licence by A to hunt in his park, whether given by deed or by parol, was revocable",[19] a proposition which made nonsense of the law of both formal and informal contracts if it meant that *A* could freely revoke his promise.[20] If the propo-

[14] Vaughan C. J. said *ibid*: "So, to licence a man to eat my meat, or to fire the wood in my chimney to warm him by, as the act of eating, firing my wood, and warming him, they are licences; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, *by consequent* and not directly, and *as it effect*, a dispensation or licence, may *destroy and alter property*." (My italics)

[15] See footnote 14 *supra*.

[16] This case is, indeed, the *locus classicus* on the dispensing power of the Crown.

[17] (1845), 13 M. & W. 838.

[18] *Ibid.* at pp. 844-5.

[19] *Ibid.* at p. 845.

[20] It is clear that Alderson B. excluded Wood's remedy in damages for breach of contract as against the owners of the racecourse, although he admitted (13 M. & W. at p. 855) that Wood might have "a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him". Since the owners never authorized, or would have authorized, the issue of a ticket to Wood, this possible right to damages could never have arisen. This complete denial of any contractual remedy seems part and parcel of the whole doctrine of revocable licence,

sition merely meant that a licensor could revoke a mere permission (unaccompanied by deed or valuable consideration), this was not news; but this innocuous principle would of course have been of no assistance in the decision against Wood.

There was, in the third place, a further difficulty with which Alderson B. had to grapple. For the licence to Wood could be conceived of as a licence coupled with a grant, since it "granted" a right of way over the racecourse as well as "something more".[21] This was actually an easement in gross which, at that time, was a valid interest in land capable of forming the subject of a grant.[22] Nevertheless Alderson B. held that the grant of this easement was invalid since it had not been made by deed on the assumption that all "interests in land" had to be conveyed by deed.[23] But, again, was this particular assumption really correct? Was it the case that this easement in gross was an interest of the kind strictly requiring formal conveyance? It will be remembered that Wood's ticket only meant to give a "right of way" for a very few days; in other words, it was not an estate in fee, or for life, or a leasehold interest for more than three years, for the conveying of which a deed was admittedly required.[24]

Be this as it may, the legal effect of *Wood* v. *Leadbitter* was drastic: it made it impossible to acquire by a simple contract a large number of "incorporeal" rights however short the duration of those rights. And this, it must again be stressed, was a novel and curious doctrine without previous authority at common law.[25] Indeed, there was even greater complication when later it became established that easements in gross could not even be created by deed.[26] The upshot was that the law was left with an unworkable situation that

which is further substantiated by the fact that Wood could not even recover from the owners the price he had paid for the ticket.

[21] 13 M. & W. at p. 843.

[22] The notion that only easements between adjoining (dominant and servient) tenements could constitute valid interests in land seems to be a later discovery, the first expressions of which are *Hill* v. *Tupper* (1863), 2 H. & C. 121; *Mounsey* v. *Ismay* (1865), 3 H. & C. 486; *Rangeley* v. *Midland Ry* (1868), L.R. 3 Ch. App. 306, at pp. 310-311. See on this point, Wade, 64 L. Q. Rev. at p. 67; Crane, *op. cit.*, at p. 335.

[23] Crane, *op. cit.*, at p. 335 n. (u).

[24] See *Hewlins* v. *Shippam* (1826), 5 B. & C. 221, for (apparently) the first intimation that an easement must be created by deed; in this case, however, the easement was for a freehold interest.

[25] There was a further difficulty which Baron Alderson did not deal with. At common law, an *executed* (as distinct from an executory) licence was regarded as irrevocable, although this doctrine seems to have been limited in the nineteenth century to permanent acts done on the licensee's own land: *Liggins* v. *Inge* (1831), 7 Bing. 682. In equity this doctrine was not so limited: see Crane, *op. cit.*, pp. 328-330.

[26] See footnote 22 *supra*.

made a whole range of rights of user not creatable at all. Such, then, was the paradox of *Wood* v. *Leadbitter:* though it reached a most justifiable result, it did so by enunciating principles so faulty that they led to a legal *cul-de-sac.*

So matters stood until *Kerrison* v. *Smith.*[27] Here the defendant orally agreed to let his wall to plaintiff for bill-posting for a year. The defendant arbitrarily repudiated the agreement and the plaintiff sued him for breach of contract in the county court. On the authority of *Wood* v. *Leadbitter,*[28] he was held to have no cause of action and was therefore nonsuited. But, on appeal, the plaintiff's action was upheld and it was clearly decided that damages will lie for the revocation of a licence even if unaccompanied by a grant. This decision was an important reassertion of the enforceability of valid contracts, and perhaps for the first time really met the challenge presented by the stultifying principles of Baron Alderson's creation.[29]

Indeed, in *Hurst* v. *Picture Theatres*[30] the enforceability of such contracts was carried a considerable stage further. Hurst, as is well known, had purchased a ticket for a cinema, and was turned out from the show under the mistaken belief that he had not paid for his seat; he sued for assault and recovered substantial damages. Thus, the decision not merely recognized the existence of a valid contract, it also declared equitable remedies (in this case, the injunction) available for the prevention of a breach of contract.[31] The most remarkable thing about *Hurst*'s case, however, is this: because the action was framed in trespass, the plaintiff, if he was to be successful, had to be given a right going beyond a mere right to damages for an ordinary breach of contract: his contract had to be made specifically enforceable. And we have thus the strange phenomenon that this extension of the specific enforceability of contract was made possible, not through an action in contract, but by an action in tort.[32]

[27] [1897] 2 Q.B. 445. [28] (1845), 13 M. & W. 838.

[29] See footnote 20 *supra.* It needs to be pointed out that *Kerrison* v. *Smith* was preceded by two decisions which reached a similar result: *Wells* v. *Kingston-upon-Hull Corp.* (1875), L. R. 10 C.P. 402; *Butler* v. *Manchester, Sheffield and Lincolnshire Ry* (1888), 21 Q.B.D. 207. In both decisions Baron Alderson's principles were simply held "inapplicable" and their difficulty evaded. This was perhaps good enough in *Butler* (a contract of carriage), but bad in *Wells,* where Lord Coleridge C. J.'s reasoning (see especially L.R. 10 C.P. at p. 409) leaves much to be desired.

[30] [1915] 1 K.B. 1.

[31] See especially Buckley L. J., *ibid.,* at pp. 8-9.

[32] This explains the usual objection that Hurst could not actually have specifically enforced the contract in any practical way. Although it is difficult to accept Sir Frederick Pollock's "fanciful suggestion [31 L. Q. Rev.

Much has been said about this decision,[33] and it certainly is true that the reasoning of the majority in the Court of Appeal is basically in utter disaccord with the reasoning of Baron Alderson. In this respect, therefore, *Wood* v. *Leadbitter*[34] can now only be regarded as an obsolete and superseded, even if not an expressly overruled, decision.[35] At the same time, however, *Hurst* and *Wood* are not mutually incompatible, if we consider their actual results alone: for whereas in *Wood* the eviction was justifiable, in *Hurst* it was improper. Moreover, in *Winter Garden Theatre (London) Ltd.* v. *Millenium Productions, Ltd.*[36] the principles enunciated in *Hurst* were given full approval, the House of Lords expressly recognizing that such contracts could be made specifically performable by way of an injunction. In short, contracts concerning rights of user in or over land can now be made specifically enforceable quite independently of any proprietary notions; we no longer need "grant" or "interest" to make even a mere licence irrevocable.

III

Having dealt with the legal problems as between the contracting

9] that a judge on the spot, *e.g.*, race stand or theatre, might have granted an ex parte injunction" (see Wade, 64 L. Q. Rev. at p. 62, n. 32), it seems on the other hand perfectly sensible to say that in this sort of situation an action in trespass is simply a substitute for the injunction that would be otherwise, but is not here, available to the plaintiff. Furthermore, the substantial damages which a plaintiff can thus recover in tort not only reflects the special loss occasioned by the breach of a specifically enforceable contract but, inversely, also expresses the rule that equitable remedies are only then available where ordinary contract damages (*e.g.*, price for a cinema ticket) would be most inadequate. For a somewhat similar point, see Hutton, The Remedy of an Ejected Licensee (1954), 17 Mod. L. Rev. 448.

[33] Cf. Keeton, Introduction to Equity (3rd ed., 1952) pp. 74 ff.; Wade, 64 L. Q. Rev. 57, and literature there cited. For a brilliant judicial discussion of the inconsistencies, see *Cowell* v. *Rosehill Racecourse Co. Ltd.* (1937), 56 C.L.R. 605.

[34] (1845), 13 M. & W. 838.

[35] See, however, Wade's argument, 68 L. Q. Rev. at pp. 345-6.

[36] [1948] A.C. 173. Some difficulty arises in connection with *Thompson* v. *Park*, [1944] K.B. 408. *T* and *P* had agreed to amalgamate their preparatory schools for the duration of the war and to use *T*'s buildings. Owing to differences between them, *T* gave notice terminating the agreement. *P* refused to accept this and later physically forced his way back into *T*'s building. *T* applied for an interim injunction, which was granted by the Court of Appeal. It is submitted that, although *P* was not entitled to the self-help of forcible re-entry, his rights as a contractual licensee were not so slender as the court deemed them. It is true that the law will not specifically enforce an agreement "for two people to live peaceably under the same roof" ([1944] K.B. at p. 409). This however does not mean that the agreement cannot be specifically enforced to protect *P* from premature eviction. The distinction between the remedies of specific performance and injunction closely corresponds to that between *executory* and *executed* licences, which latter have (at least in equity) usually been held to be irrevocable. For a different interpretation of *Thompson* v. *Park*, see Wade, 64 L. Q. Rev. at pp. 61-2 and *passim*.

parties, let me briefly examine how successors in title affect the whole position. This position, too, was made immeasurably more complicated by the confusing distinction between mere "licences" and "grants" which originated with *Wood* v. *Leadbitter*.[37] For this created the belief that, whereas "proprietary interests" lie in grant, only "personal privileges" can derive from contract. The idea was (and the theme has not yet subsided) that there is something of a barrier between "grant" and "contract" roughly corresponding to the difference between "property" and "agreement". Upon analysis, however, the barrier can be seen to be in many ways imaginary, since the relevant differences are overdrawn.

There is, of course, a long historical tradition why we talk of "grants" (or "granting") in connection with property in land. During the mediaeval period one could not acquire an estate without the ritual of livery of seisin:[38] the land had to be, physically or symbolically, granted by the feoffor to the feoffee; and a convenant, however solemnly it stated the parties' agreement to sell and purchase, was not enough to convey ownership. With the disappearance of livery of seisin and its replacement by the deed of feoffment, the grant of land by physical transfer became a grant by the conveyance of a document, one reason for this being that every deed had not only to be signed and sealed, it had also to be delivered. Today even this documentary grant has lost much of its former importance due to developments in equity, which, by adapting its instrument of specific performance, could then dispense with the necessity of form.[40] In other words, we can now acquire landed interests through the medium of simple contracts, that is, by valid agreements to buy and sell. It is true that such interests are called "equitable" instead of "legal", but this is no more than a difference of label, which only affects a bona fide purchaser without notice.[41] Until that creature makes its rare appearance, legal and equitable interests remain *pro tanto* indistinguishable. It is thus no longer correct to say, provided law and equity are considered together, that proprietary interests must lie in grant or that, conversely, contracts give rise to "personal privileges" only.

Yet this notion that contracts can create but rights *in personam*,

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[37] (1845), 13 M. & W. 838.

[38] For a brief account, see Holdsworth, Historical Introduction to the Land Law (1927) pp. 112-116, *130*.

[39] *Ibid.*, p. 290 and *passim*.

[40] *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, is the obvious illustration; but see also *Jones* v. *Tankerville*, [1909] 2 Ch. 440.

[41] See Hohfeld, Fundamental Legal Conceptions (1923) p. 121.

as distinct from rights *in rem*, was transmuted into a further misconception. For it began to be assumed that only such were proper legal interests which could be, or were, created by deed. This led to extraordinary confusion about the meaning of "interests in land", a confusion which, though it did not affect the law of corporeal hereditaments, the types and the conveyancing of which had become more or less fixed or stable, nevertheless became acute in connection with those rights of user of relatively short duration which were either technically easements in gross[42] or which were not regular "leases" because not conferring exclusive possession.[43] Since such rights of user could not be created by deed and could (if at all) only be created by contract, it was somewhat hastily concluded that they were at most contractual rights operative only as between the contracting parties.[44]

This calls for some broader comment on the nature of interests in land, although it is of course impossible to do here complete justice to this complicated subject. But the basic problem can perhaps be briefly explained by the following example. Suppose (facts similar to the *Winter Garden* case[45]) that *A*, the owner of a theatre, "leases" to *X* the use of the theatre for a period of ten years. Now if *A* dies, and the theatre is devised to *B*, what is *X*'s position? Does *B* take the theatre subject to *X*'s licence? In view of what has been said already, the answer should be obvious. Since it now is recognized that the licence (or contract) is irrevocable between *A* and *X*, that is, the contract is specifically enforceable during the currency

[42] See also footnote 22 *supra*. Easements in gross of short duration need to be carefully distinguished from similar easements meant to enure in perpetuity. There is a strong case against the creation of *perpetual* easements since, as was said in *Keppell* v. *Bailey* (1834), 2 My. & K. 517, it "is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given". Thus, this policy against such perpetual easements is in effect a salutary, if severe, restriction of the *jus disponendi*. Nor is this policy, it is further submitted, in serious disagreement with the nineteenth century redefinition of easements, whereby perpetual easements could only exist for the benefit of a dominant tenement. In so doing, the law, while protecting rights of way, support of light, often most essential for the enjoyment of property, prevented the creation of other, and perhaps less essential permanent restrictions. In this sense, it seems substantially true to say that the categories of easement are closed, even though some exceptions had subsequently to be made for telephone wires, and the like.

[43] The doctrine of "exclusive possession" is old (cf. *Hare* v. *Celey* (1589), Cro. Eh's. 143) and is regarded as one of the hall-marks distinguishing "leases" from "licences": see *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; *Glenwood Lumber Co. Ltd.* v. *Phillips*, [1904] A. C. 405. But see footnote 53 *infra*.

[44] For the clearest statements to this effect, see *King* v. *David Allen & Sons, Billposting, Ltd.*, [1916] 2 A. C. 54; *Clore* v. *Theatrical Properties, Ltd.*, [1936] 3 All E.R. 483. See also Wade, Licences and Third Parties (1952), 68 L. Q. Rev. 337, at p. 347.

[45] [1948] A. C. 173.

of the agreed period by way of an injunction, it must also follow that *X*'s rights cannot merely cease because of *A*'s premature demise. For the legal policy making the injunction applicable against *A* alive must also apply as against *A*'s successor. Suppose then that *A*, instead of dying, sells the theatre to *C*, who (let us assume) takes with notice of *B*'s licence. Clearly this variation cannot be treated differently from the former (*B-X*) situation. For to allow *C* to acquire the theatre unincumbered would mean to allow *A* to derogate from his contract when it has already been decided that *A*'s licence to *X* is irrevocable because of the injunction. To say then that the original *A-X* contract is specifically enforceable amounts, in effect, to saying that *A* acquires an interest in land not only against *A* but also against his successors, although this is an interest which is limited by the agreed duration of the contract. This, indeed, was the whole point of the reasoning in *Tulk* v. *Moxhay*,[46] and it is unfortunate that this point seems to have been lost sight of in the course of later developments, which severely limited the operation of restrictive covenants, contemplating perpetual duration, by converting them into quasi-easements.[47]

But in depicting *X*'s rights against *A* and his successors, I covered only half the picture. We must now ask what rights *A* has against *X*; more precisely, does *X* by his contract also acquire a much wider interest which will, on his (*X*'s) side, be both transferable and inheritable. It can be seen that this poses a very different problem and that it by no means follows that *X* has an assignable interest only because his right of user is protected. For, returning to my previous example, it will be obvious that *A*, the theatre-owner, may have special reasons for wanting *X*, and not *X*'s successors, to use his premises. In this, *A* is like many another lessor who is vitally concerned in the character and credit of his lessee.[48]

Moreover, on this basis even *Clore* v. *Theatrical Properties, Ltd.*[49] is perfectly supportable. Here a "lessor" by deed granted to a "lessee" the free and exclusive use of the refreshment rooms of a theatre for the purpose of supplying refreshments to the theatre's

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[46] (1848), 2 Phil. 774. See also Denning L. J. in *Bendall* v. *McWhirter*, [1952] 2 Q.B. 466, at pp. 480-1.

[47] *Formby* v. *Barker*, [1903] 2 Ch. 539; *Millbourn* v. *Lyons*, [1914] 2 Ch. 231; *L.C.C.* v. *Allen*, [1914] 3 K.B. 642. These developments are very similar to those described in footnotes 22 and 42 *supra*.

[48] See, for example, *Sowler* v. *Potter*, [1940] 1 K.B. 271, and compare also *Tolhurst* v. *Associated Portland Cement Manufacturers (1903), Ltd.*, [1902] 2 K.B. 660, esp. at p. 668, *per* Collins M. R.; and *Kemp* v. *Baerselman*, [1906] 2 K.B. 604.

[49] [1936] 3 All E.R.483.

patrons; both the theatre and the licence were assigned to other persons, and the "lessor's" assignee brought an action to prevent the assignee of the "lessee" from exercising the licence. In this the plaintiff succeeded, and perhaps nothing can be said against this particular aspect of the decision. But Lord Wright M.R. again reverted to the theory that this was "a personal contract", which was "only enforceable between parties between whom there is privity of contract".[50] The assumption was that the plaintiff could not maintain his action unless the "lessee" was denied every tittle of a title. This, as we have seen, meant to confuse two separate issues, that is, a licensee's (protected) interest by way of lien, or clog, or fetter,[51] and his (unprotected) interest by way of possessing an asset assignable to other parties. Thus, even a licence can confer an interest, just as a lease containing a covenant not to assign or underlease[52] is a recognized interest.[53]

IV

In *Errington* v. *Errington*[54] the implications of the *Hurst*[55] and *Winter Garden* cases[56] were finally given full expression. In *Errington*, a father, wishing to provide a home for his son and daughter-in-law, bought a house for them for £750. He borrowed £500 from a building society and paid £250 of his own money in cash. The father then allowed the couple to go into possession, and further orally promised them complete legal ownership, provided they regularly paid

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[50] *Ibid.* at p. 490.

[51] See the language used by Denning L. J. in *Bendall* v. *McWhirter*, [1952] 2 Q.B. 466, at pp. 478, *483*.

[52] At one time, indeed, convenants against assignment were regarded as "usual" ones: see *Folkingham* v. *Croft* (1796), 3 Anst. 700; *Bell* v. *Barchard* (1852), 16 Beav. 8. However the law later hardened against making them usual covenants: *Bishop* v. *Taylor* (1891), 64 L.T. 529; *Re Lander & Bagley's Contract*, [1892] 3 Ch. 41; *De Soysa* v. *De Pless Pol*, [1912] A.C. 194.

[53] Another result seems obvious: the old conception of a "lease" needs considerable redefinition, especially as regards the doctrine of "exclusive possession". For since the *Winter Garden* case even a tenant without exclusive possession will be protected, whether he be called "lessee" or "licensee". See also footnote 57 *infra*. But the law has also changed in further respects, *i.e.*, in the requirement of "notice" and the doctrine of "letting into possession". As regards the former, it is clear that in certain situations even "lessees" with full possession may not be entitled to the usual notice to quit; as in the *Winter Garden* case the length of notice will be dependent on the terms of each contract: see *Minister of Health* v. *Bellotti*, [1944] K.B. 298; *Ministry of Agriculture* v. *Matthews*, [1950] 1 K.B. 148. As regards "letting into possession", the doctrine seems to have been killed by *Booker* v. *Palmer*, [1942] 2 All E.R. 674, for which see also footnote 62 *infra*. It would be better frankly to recognize these important changes than to maintain the artificial dichotomy of lease and licence.

[54] [1952] 1 K.B. 290.

[55] [1915] 1 K.B. 1.

[56] [1948] A.C. 173.

off the loan. The daughter-in-law regularly paid the instalments, but when the father died he left all his property, including the house, to his widow, who now claimed possession. The Court of Appeal held that the couple were licensees with "an equitable right to remain so long as they paid the instalments, which would grow into a good equitable title to the house itself as soon as the mortgage was paid".[57] The licensees, moreover, had "acted on the promise, and neither the father nor his widow, his successor in title, can eject them in disregard of it".[58] In short, not only was the relationship between the father and the couple held to be an irrevocable licence, but the daughter-in-law also acquired an interest against third parties.

But there is another and even more interesting aspect of this decision. For though the facts, as Lord Justice Somervell said, were not "unnatural", they were "so far as the researches of counsel and ourselves have gone, legally novel".[59] Nor was this at all surprising: the novelty was that the arrangement between the Erringtons was in the nature of a gift, though a gift subject to certain conditions.[60] It was not a tenancy or an ordinary contract (or bargain) since the couple had neither to pay a rent nor give any other price to the father.[61] So far equity had intervened only to prevent the premature revocation of a licence, provided there was a "valuable" contract to begin with; furthermore, this equitable intervention had always been based upon the supposition that damages alone would be an inadequate remedy for the breach of this type of contract. In *Errington* v. *Errington* there really was no such original contract; and the enormous significance of the decision therefore lies here, that it has extended the scope of the equitable licence to protect even gratuitous family arrangements.[62]

[57] [1952] 1 K.B. 290, at p. 296. To be able to say this, Denning L. J. had also to establish that the couple were not merely tenants at will, though having exclusive possession. On this the previous cases were most confusing; the confusion was to think that although a person could be a "tenant" for one purpose (*e.g.*, acquiring a right under a limitation act: see *Lynes* v. *Snaith*, [1899] 1 Q.B. 486) he was also a "tenant' with regard to "notice". This shows again that our whole conception of "lease" and "tenancy" requires considerable recasting.

[58] *Ibid.* at p. 300.

[59] *Ibid.* at pp. 293-4.

[60] See Hargreaves, Licensed Possessors (1953), 69 L. Q. Rev. 466, at pp. 476-7.

[61] If this situation was a gift, it follows that the arrangement could not have been an "estate contract", which has been advanced as an alternative, and less unsettling, ground for the decision: see Wade, 68 L. Q. Rev. at p. 350.

[62] "Family arrangement" seems an appropriate expression to describe these new gratuitous, but enforceable, relations. The expression is also gaining increasing currency: see, *e.g.*, *Cobb* v. *Lane*, [1952] 1 All E.R. 1199, at p. 1201, and Crane, *op. cit.*, at p. 324; but see also its earlier usage as in

It can be seen, in conclusion, that the law of licence has travelled a long way despite most inauspicious beginnings. In *Wood* v. *Leadbitter*[63] even a paid-for licence was held to be revocable, though the decision is entirely justified for (as we have seen) very different reasons. But the decision left a legacy of impossible principles, and the subsequent story of the law is simply the struggle of their circumvention. This struggle brought forth several by-products, both positive and negative. On the negative side, the price paid for *Wood* v. *Leadbitter* has been extraordinary legal confusion. On the positive side, the licence made possible a wider application of contract to include the creation of short-term easements in gross[64] as well as irregular "leases";[65] it also extended the specific enforceability of contracts by revealing the effects of the availability of an injunction;[66] and, finally, the licence even paved the way towards a recognition of some "novel" family arrangements.[67]

15 Halsbury's Laws of England. Moreover, the criterion of "family arrangement" gives us a means of distinguishing, in a sensible way, *Errington* v. *Errington* from *Booker* v. *Palmer*, [1942] 2 All E.R. 674, where a *stranger* was gratuitously let into exclusive possession, for a stated period, but was held to have no durable rights. For a general discussion of enforceable gratuitous promises, see my Rationale of Gifts and Favours, soon to be published by the Modern Law Review.

[63] (1845), 13 M. & W. 838.

[64] *Hurst* v. *Picture Theatres, Ltd.*, [1915] 1 K.B. 1.

[65] See footnote 53 *supra*.

[66] Perhaps much of what we mean by the specific execution of contracts will have to be rewritten. In this we shall have to pay close attention to Denning L.J.'s excellent remarks (cf. *Bendall* v. *McWhirter*, [1952] 2 Q.B. 466, at p. 480), which show great historical insight.

[67] Nothing has here been said of other recent developments which are associated with the licence but which do not involve the ordinary law of contract. Thus, the "licence" has been used to give the deserted wife a (temporary) right to stay in the matrimonial home, though this right derives from the status of marriage rather than an express permission: see *Bendall* v. *McWhirter*, [1952] 2 Q.B. 466. Again, the licence has been used to loosen certain provisions in the Limitation and Rent Restriction Acts, thus giving the courts greater discretionary power for their application: see *Cobb* v. *Lane*, [1952] 1 All E.R. 1199; *Marcroft Wagons* v. *Smith*, [1951] 2 K.B. 496. For a full discussion, see the recent articles referred to in footnote 1 *supra*