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Revocation of a "License Acted Upon" - Mayor and City Council Of Baltimore v. Brack

REVOCATION OF A "LICENSE ACTED UPON"

Mayor and City Council of Baltimore v. Brack[1]

Several years ago the City of Baltimore, defendant-appellant, without consideration, obtained oral consent to lay a water main, sewer, and drain across the land in question from the then owners, Mr. and Mrs. Lacey. Pursuant to this oral consent, the City constructed a water main, sewer, and drain across the land in question, entirely below the surface except for several fire plugs and cover plates over valves. At the time these utilities were constructed, or subsequently, negotiations were conducted between the City and Mr. and Mrs. Lacey for the purpose of securing a legal easement to the City, but for some reason the negotiations were not successful. In 1936 the land in question was purchased by Brack, plaintiff-appellee, with full knowledge of the presence and use of these utilities. In 1937 plaintiff-appellee filed his bill of complaint seeking a permanent injunction, compelling a removal of the utilities or the payment of compensation for their use. The defense of the City was based upon the existence of the oral consent from Mr. and Mrs. Lacey under the theory that: (1) A license becomes irrevocable after it has been acted upon by the licensee; or (2) where a license has been acted upon, the licensee is entitled to compensation as a condition precedent to revocation. The trial court entered a decree ordering removal, and the City appealed. *Held:* Affirmed, and cause remanded, with leave to the City to apply for a stay until final condemnation proceedings can be consummated.

The Court properly held that the oral consent given by Mr. and Mrs. Lacey constituted a mere license and not a legal easement, both because of the requirements of the Statute of Frauds, and also because the parties clearly did not intend to create a permanent interest in the land. Their subsequent negotiations for the purpose of creating a legal easement indicated that the parties were fully aware of the fact that a mere license had been created by this oral consent. It is well settled that since a license does not create a property interest in the land, no formalities are required for its creation;[2] it may be implied from the relation of the parties, from the conduct of the landowners, or may be ex-

[1] 3 Atl. (2nd) 471 (Md. 1939).

[2] Pursell v. Stover, 110 Penn. 43, 20 Atl. 403 (1885); Bay View Land Co. v. Ferguson, 53 Wash. 323, 101 Pac. 1093 (1909); Lockhart v. Geir, 54 Wisc. 133, 11 N. W. 245 (1882); Noftsger v. Barkdall, 148 Ind. 531, 47 N. E. 960 (1897); Fisher v. Johnson, 106 Iowa 181, 76 N. W. 658 (1898).

pressly granted by parol. The corollary of this rule is that a license may be revoked as simply as it was created;[3] by express notice, by a sale or lease of the licensor's premises, by the death or insanity of either party, and by any number of similar acts inconsistent with the existence of the license.

Licenses are usually classified into six well defined groups: (1) a license coupled with an interest or grant;[4] (2) a bare unexecuted license; (3) a license to extinguish an easement;[5] (4) a license with a contract against revocation;[6] (5) a license with an executory promise to execute a legal easement;[7] and (6) a bare license acted upon. The oral consent involved in this case clearly falls within the sixth class, a bare license acted upon. The construction of the water main, sewer, and drain upon the licensors' land by the City clearly constitutes an "acting upon".

Where a bare license has been acted upon by the expenditure of money by the licensee in the construction of an artificial structure or condition on the licensor's land which will be rendered practically valueless to the licensee by the revocation of the license, there are three totally different views as to its revocability: (1) absolute revocability, (2) absolute irrevocability, and (3) conditional revocability.

The rule of absolute revocability is based upon the strict application of the Statute of Frauds.[8] The purpose of this Statute is to prevent the creation of property interests in land by ambiguous oral agreements. Therefore, to hold an oral license irrevocable because it has been acted upon would be a violation of the spirit of the Statute, and would create insecurity to titles in land. Under this view a license after being acted upon retains its original characteristics as a contract right only, and as not creating any interest in the land other than relieving the licensee from liability as a trespasser.

The rule of absolute irrevocability is based upon the belief that a fraud would be committed upon he licensee if, after the expenditure of money and labor on his part, the licensor should be permitted to revoke his license, and thus

[3] 5 Ill. Law Quarterly 26; 26 Yale Law Journal 395.
[4] Ely v. Cavanaugh, 82 Conn. 681, 74 Atl. 1122 (1910).
[5] Winter v. Brakwell, 8 East 308 (1807).
[6] Wood v. Leadbitter, 13 M. & W. 838 (1845); Hurst v. Pictures Theaters Ltd., (1915) 1 K. B. 1.
[7] Cook v. Pridgen, 45 Georgia 331 (1872); Cumberland Valley R. Co. v. McLanahan, 59 Penn. 23 (1868).
[8] Pifer v. Brown, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497 (1897); Jones v. Stover, 131 Iowa 119, 108 N. W. 112, 6 L. R. A. (N. S.) 154 (1906); Mumford v. Whitney, 15 Wend. 381, 30 Amer. Dec. 60 (1836); Lawrence v. Springer, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702 (1892); Foot v. N. H. and Northampton Co., 23 Conn. 214 (1854).

render this expenditure of little value tothe licensee.[9] Some of the cases supporting this rule are based upon the theory that the expenditure of money and labor by the licensee constitutes a consideration for the license, so as to make the license enforceable in equity as an executory contract to execute a legal easement. The expenditure of money and labor upon the land of the licensor constitutes a taking of possession and making of permanent improvements, so as to take an oral license out of the Statute of Frauds, and make it enforceable in equity by specific performance. This theory is sound if its application is limited to those cases where the parties intended to create a legal easement, but through lack of the requisite formalities a mere license resulted. But in the great majority of cases of licenses there is no evidence of any intention of the parties to create a permanent legal interest in the land itself in the nature of an easement. In most cases it is the gratuitous and friendly act of a neighbor without any thought of the possibility that he is creating a permanent burden upon his land. To construe such a license into all executory contract to execute an easement merely because the licensee has expended money and labor pursuant to it, is to disregard the true intentions of the parties and to penalize an act of neighborly friendship.

By far the majority of cases supporting this rule of irrevocability do so on the theory of estoppel. They reason that the action of the licensor, in standing by and watching the expenditure of money and labor without warning the licensee as to the revocable character of his license, constitutes an implied representation that he will not revoke the license. By virtue of such a representation the licensor is said to be estopped to exercise his power of revocation so long as the structure or condition, created by the money and labor, is of benefit to the licensee. The objection to this theory lies in the fact that an actual misrepresentation or misleading conduct cannot be found. Both parties are equally aware of the nature of the licensee's rights. The licensor is not in such a position that he has superior knowledge of the legal rights of the parties, so as to owe the licensee a duty to speak. The licensee is equally aware of the facts, and has acted with full knowledge of his rights.

[9] Stoner v. Zucker, 148 Calif. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704 (1906); Rearick v. Kern, 14 S. and R. (Penn.) 267, 16 Am. Dec. 497 (1826); Appeal of Clelland, 133 Penn. St. 189, 19 Atl. 352, 7 L. R. A. 752 (1890); Curtis v. La Grande Water Co., 20 Oregon 34, 23 Pac. 808, 10 L. R. A. 484 (1890); Miller and Lux v. Kern County Land Co., 154 Calif. 785, 99 Pac. 179 (1908).

No basis exists for construing the licensor's silence as an implied representation that he will not revoke. In jurisdictions raising such an estoppel, the licensor's power of revocation is only restricted during the life of the structure or condition created by the expenditure of money and labor.

The rule of conditional revocability has been adopted in several states because it preserves the Statute of Frauds from infringement, but still protects the licensee from loss of his expenditures.[10] Under this rule the licensor's power to revoke is unimpaired, but as a condition precedent to exercise of the power he must place the licensee in status quo. As a result of this requirement the licensor must fully compensate the licensee to the extent to which his expenditure of money and labor will be rendered valueless by the revocation of the license. It should be noted that this condition is in no manner dependent upon or limited by the benefit which the licensor has received from the expenditure. The case of *Gilbert v. Schwerle*[11] is an excellent illustration of the application of this rule. In that case oral consent to remove sand and gravel was given without consideration. The licensee proceeded to install the necessary machinery at considerable expense. Subsequently the license was revoked, and in an action for damages by the licensee, the court allowed compensation for the cost of installation and removal of the machinery.

This rule of conditional revocability seems to have been fully adopted in the earlier Maryland cases. In *Addison v. Hack*[12] the court approved the doctrine of conditional revocation where the power of revocation exists, but found that the license involved in that case was not a bare license acted upon. Again in *Lake Roland Electric R. Co. v. Baltimore*[13] the court by way of dictum approved the rule of conditional revocation, but found that the expenditure of money and labor was not incurred in good faith in reliance upon the license. Finally in *Northern Central R. Co. v. Canton Company*[14] the court expressly stated: "These tracks having been laid by the parol license of the Canton Company, that company cannot now revoke the license and require the removal of the tracks without making full com-

[10] Woodbury v. Parshley, 7 N. H. 237, 26 Amer. Dec. 739 (1834); Gilbert v. Schwerle, 49 S. D. 370, 207 N. W. 163 (1926); Savage v. City of Salem, 23 Oregon 381, 31 Pac. 832, 24 L. R. A. 787, 37 Am. St. Rep. 688 (1893); Lane v. Miller, 27 Ind. 534 (1867); Androscoggin Bridge v. Bragg, 11 N. H. 102 (1840).

[11] *Supra*, n. 10.

[12] 2 Gill 221, 41 Am. Dec. 421 (1844).

[13] 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126 (1893).

[14] 104 Md. 682, 65 Atl. 337 (1906).

pensation." It must be noted that in all of these cases the rule of conditional revocation was stated as requiring the payment of "full compensation" for the loss resulting to the licensee. In none of these cases was there any intimation that the recovery should be limited to the benefit received by the licensor from the expenditure.

However, when the later case of *Brehm v. Richards*[15] was decided, the Court of Appeals expressly limited the compensation of the licensee to the benefit received by the licensor from the expenditure. In that case the licensee had constructed a paved road across the licensor's land in a location such that part of it was of benefit to the licensor and part of sole benefit to the licensee. In the body of the opinion the rule of conditional revocation, as stated by the earlier Maryland cases, seems to be approved and adopted, yet in the decree the right of compensation is expressly limited to "those portions of the road which he (licensee) will cease to use upon the issuance of the injunction, and which are beneficial to Brehm in his use of the bridge and way." This decision is a clear modification of the rule of conditional revocability as stated in the earlier cases, and in result a repudiation of that rule and the adoption of the rule of absolute revocability coupled with a right to recover from the licensor any benefit which he has received from the expenditure. This is merely the recognition of the fact that the exercise of the power of revocation makes any benefit received by the licensor an unjust enrichment and the basis of recovery in quasi-contract. If the right of compensation is to be limited to the benefit received, then it must be limited to recovery against the licensor himself and not against a subsequent assignee with notice. As a quasi-contract based upon unjust enrichment, only the person receiving the benefit will be liable.

With this interpretation of *Brehm v. Richards*[16] the present case is in accord. Here the plaintiff-appellee against whom compensation was claimed was not the original licensor. Therefore any right to compensation for the benefit received must be restricted to recovery against the original licensors, Mr. and Mrs. Lacey. From this case we may conclude that Maryland has joined in the majority view supporting the doctrine of absolute revocability, but will permit recovery in quasi-contract against the original licensor for any benefit which has been received from the expenditure.

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[15] 152 Md. 127, 136 Atl. 618, 56 A. L. R. 1103 (1927).
[16] *Supra*, n. 15.