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The Law of License

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T H E L A W O F L I C E N S E

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C o r n e l l U n i v e r s i t y

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C O N T E N T S.

DEFINITION AND DESCRIPTION.

A license is an authority to do a particular act or series of acts upon another's lands, without possessing any estate therein. This is the definition generally adopted, and is framed from the point of view of the person granting the authority. A satisfactory description of the effect of a license was given by Chief Justice Vaughan: "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful." Thomas v. Sarrell, Vaughan, 351.

The term has not always conveyed the same meaning. It was one of the old rules of law that a license could not be pleaded unless it appeared to be by deed. There the word must have been equivalent to easement. In some of the old books, "license to alien" or "license to give livery of seizin" are not uncommon, where the expression is apparently synonymous with "power". In more recent times there has been confusion, "for that is often called a license which is more than a license."

The distinction between an easement and a license is, according to Kent, often exceedingly subtle. In Pierrepont v. Barnard, 6 N.Y., 279, it is said that an easment is

"A permanent interest in the land for some specified period, amounting to an estate in the land, which is assignable, is irrevocable and gives a right at all times to enter and remain in possession during its continuance." While a license "Is a mere authority to enter upon the land of another for a temporary purpose and to do a particular act or series of acts upon the land, and gives no estate or interest in the land upon which the act or acts are to be done." This is another way of saying that an easement is an estate and a license is not an estate. The distinction is not found in the character of the acts to be done, nor is it contained in the temporary or permanent character of the right which is in question, as one might be led to suppose from the above quotation. But it lies in the fact that the owner of an easement can maintain his rights, while a licensee, as a rule, has no rights to maintain. The subteelty of the distinction, therefore, is that required to determine whether a given transaction or agreement should be construed in such a way as to create or convey an estate in lands, or simply as a personal authority to do certain acts.

A lease creates an estate in lands and entitles the lessee to possession. But between the rights of a tenant strictly at will or at sufferance and those of a licensee, as against the lessor in the one case and the licensor

in the other, there is practically no difference. Neither can claim any extension of his privilege or estate against him from whom he derives his right, and in either case any act denoting an intention to terminate existing relations is sufficient to accomplish that result.

Such being the characteristics of a license, it is evident that it is not within the Statute of Frauds. The first and fourth sections of that Statute deal with estates and interests in lands; but a license passes neither an estate nor an interest in land. It may therefore be proved by parol at any time unless there appears to be better evidence.

HOW CREATED.

According to the manner of their origin, licenses fall naturally into three classes. They may be created by express agreement of the parties; they may result from transactions without regard to the intention of the parties, because a want of legal formality prevents them from having any other effect; and they may be implied from the relation of the parties, or the nature of circumstances without an agreement of any kind. For convenience, these classes may be called express, constructive and implied license.

EXPRESS LICENSE.

Express license results from agreement. In effect it is a privilege or permission to go upon or exercise some right over the land of the grantor. It is sometimes a close question as to the intention of the parties, whether it was the purpose to grant such a privilege merely, or an interest of a more permanent nature; but if the intention was to grant a license, it may be done by parol, by writing or by deed, and all of the methods are equally valid.

In Price vs. Case, 10 Conn., 374, the owner in fee of a tract of land orally gave permission to the father of the plaintiff to erect a house on his land, and it was claimed that this permission passed an interest of a permanent nature. But the Court replied:

> "When this license is given by parol, it imports just what men unskilled would think it imported. A good understanding existing between these two men, and the owner of the land being willing to have the other for a neighbor, instead of giving him a deed of land, which would authorize him to introduce any one he might choose, says 'you may build you a place to

live in'. It is a personal privilege - - - and we have no hesitation in saying that it expires when he who is the object of it dies."

A written agreement between the parties by which the first agreed that the second should have leave to cut timber and wood on his land, and the latter agreed that the former should have leave to flow his lands by a dam, was held to confer licenses upon the parties, which though mutual to a certain extent, in that one may have been given in consideration for the other, were yet independent, so that one party might revoke whether the other revoked or not. Dodge vs. Mc Clintock, 47 N.H, 383.

A case often cited as an example of a license created by deed, is Jackson v. Babcock, 4 Johns., 418. Where a privilege called in the instrument itself a "lease" was given to the grantor of the defendant to build a house near a mineral spring, and cultivate certain contiguous lands, and the grantor of the "Lease" covenanted that the lessee should not be disturbed in his possession and enjoyment while it was his pleasure to remain. The court said that the instrument was a mere license, a personal privilege to inhabit, terminating as soon as the licensee sold the premises. It has been doubted whether such an instrument was technically

a license, for it appears that the "Lessee" or "licensee" had an interest or estate in the land even as against the grantor, at least being a tenant at will. The grantor therefore may have named the instrument more accurately that the court.

A better example is that of the East Jersey Iron Co. v. Wright, 32 N.J. Eq., 248, where the agreement was that a person and his representatives should have exclusive right and privilege of raising and removing ores from certain lands, together with the privilege of entering into and upon said lands for the purpose of raising and removing ores, and of erecting such buildings and machinery as might be necessary for carrying on the mining business, and providing for a royalty per ton on the ores removed, and for notice upon ceasing to exercise the privilege. Another example is Shepherd v. McCalmont Oil Co., 38 Hun., 37.

These cases make it at once apparent why a license granted with the greater solemnity of a sealed instrument gives no greater rights that one created by parol. It is purely a question of interpretation. Whenever it is found that the intention of the parties was that a personal privilege should pass and not an interest in land, then the instrument is called a license, and passes only such pri-

vileges as are given by any other license.

Being of equal validity, licenses granted by writing or by deed may be varied by parol, at least where they would be revocable. Colcord v. Carr, 3 S.E., 617 (Ga.), though meagerly reported, seems to be a case of a license granted by writing subsequently modified by parol. But there can be no doubt on this point, for it would be strange if a person could revoke but could not modify a permission. No compulsion rests upon the other party to exercise the changed privilege.

The intention of the parties being found, the presence or absence of consideration is immaterial. Nothing is added to the efficacy of a permission, nor is its nature altered by the fact that its is given for consideration. Weisman v. Lucksinger, 84 N.Y., 31.

A license may be granted on condition. Every such condition is a condition precedent, or rather the doctrine of conditions precedent and conditions subsequent is not applicable to such agreements. The agreement is that the licensee may do certain acts without being regarded as a trespasser, provided he fulfils a certain condition; whether this condition is to be performed before or after the acts for which he has a license is a matter of

no consequence, for if he fails in either case, the protection is forfeited. Freeman v. Headley, 33 N.J..523. Mumford v. Whitney, I5 Wend., 380.

CONSTRUCTIVE LICENSE.

"That no incorporeal inheritance effecting lands," Says Alderson B, in Wood v. Leadbitter, I3 M. & W., 838, "can either be created or transferred otherwise than by deed, is a proposition so well established that it would be mere pedantry to cite authorities in its support. All such inheritances are said emphatically to lie in grant and not in livery, and to pass by mere delivery of the deed. In all authorities and text books on the subject, a deed is always stated or assumed to be indespensably requisite."

On the other hand the statute of frauds declares that all leases, estates and interests, and all uncertain interests in lands, must be proved by writing. If, therefore, through ignorance or mistake, an incorporeal hereditament is undertaken to be created or conveyed without a deed, or any estate or interest in lands is attempted to be secured by parol, it is eveident that in either case the transaction fails to accomplish its object. It does not follow that

the agreement is of no avail. Any act done under and by virtue of it must be with the consent of the owner of the land, and exempts the other person from an action of trespass. An oral sale of anything that the Courts construe as an interest in land is invalid. The most common example is the sale of standing trees. Such a sale does, however, give a license to go upon the land and sever the trees from the land. In all cases where the interest is not incorporeal such transaction come in conflict only with the statute of frauds, and are construed as licenses by virtue of its operation. But when an interest of an incorporeal nature is in question, the courts have not been uniform in the reasons they assign for failing to give effect to the intention of the parties. Some basing their decisions on the provisions of the statute of frauds, others on the common law rule, that all incorporeal hereditaments must be created by deed.

In Hewlins v. Shippam, 5 B. & C., 221, where a drain constructed through the lands of the defendant, under an oral permission given for a valuable consideration, was obstructed by the defendants, it was argued for the defendants that the permission was void under the statute; but

the court,without dealing with that consideration,adjudged it invalid by the common law,as it was an incorporeal heridatament and did not rest in deed. Cook v. Stearns,II Mass , 533,on the other hand,where the right claimed under the license was equally incorporeal,was based wholly on the statute of frauds.

There is no conflict between the two classes of cases, for courts must find that incorporeal heriditaments are interests in land,in order to bring them within the statute. The modern tendency is to hold the statute in regard,but the principles of the common law are invoked if it is necessary. In Wisconsin,there was given by parol a right of way for drawing logs for a single season. The court held that,if the transaction had been a lease,it would have been valid under their statute; but the right of way was not the subject of a lease; and,being incorporeal,it could not by the common law be created for a single year by parol. Quinneen v. Rich,22 Wis.,524.

The same result is brought about when there is an attempted conveyance of real property,but where,through some defect,no title passes. A vendee,in such a case, who in ignorance of his lack of title,exercises authority over the land,cannot be regarded as a trespasser.

In Little v. Willford,31 Minn., 173; 17 N.W.,282, a church had been erected on land supposed to have been conveyed by the plaintiff to trustees,for the congregation, but which,through a defect of parties to the deed under the Minn. statute,was not conveyed to them. The court held that,while the deed did not run to or purport to convey any right or interest to the parties by whom the building was erected,it was doubtless understood by all the parties, including the plaintiff,to be an act authorizing the erection of the church upon the land as was done. The plaintiff meanwhile acquiescing with knowledge of the facts. "That an entry and improvements made under such circumstances are properly adjudged to be with the license of the owner of the land, is well settled." It was also pointed out that the fact that the parties are ignorant of the effect of the deed does not make the transaction any the less a license. Walter v. Post,4 Abb. Pr.,389.

IMPLIED LICENSE.

Numerous instances occur where a license is implied, and thus is a good defense to an action of trespass, from the relation or conduct of the parties or from circumstances surrounding the case. Men could not be social beings,

business could not be carried on,emergencies could not be met,nor could the authority of the state be made available if it were necessary to obtain permission in every case before it would be lawful to go upon the land of another. Custom and necessity have combined to raise a presumption that certain acts are done with the landowners consent.

A classification has been made of this kind of license into those implied by the owner and those implied by the law. Cooley on Torts,3 Ed.,356. In one sense all implied licenses may be said to be implied by law. The distinction appears to be a valid one when considered with relation to the question of revocation. Those implied by the owner could be revoked by the owner. Those implied by the law are good without regard to the actual state of mind of him on whose land they are to be executed.

Of those implied by law may be mentioned that of an officer of the law to enter and serve or execute a valid process; that of the public authorities or private individuals to enter and make what use of adjoining premises may be necessary or convenient in case of a fire breaking out in a city; to enter and abate a nuisance on proper occasions; to enter a post office for mail at reasonable hours. If the distinction pointed out is the

real one, the implied license to a proper person to enter an inn or a coach of a common carrier is implied by law.

Those implied by the owner are more numerous. Below on Torts, 175, classifies implied licenses into ten classes, which are well defined. Omitting those already mentioned as implied by law, and designating each class by its original number, the third class is, when the party in possession of land has bound himself by debts to another, without any stipulation as to place of payment. Fourth, When a party in possession holds as tenant a piece of property of another. In such a case the law allows the latter to make an entry upon the land for the purpose of ascertaining whether his interests are regarded properly by the possessor. Fifth, Where goods have been sold which lie upon the property of the vendor. Sixth, Where the possessor of lands has wrongfully burdened another with the possession of his (the former's) goods. In such a case, the goods may be taken and put upon the owner's premises. Seventh, Where a man's goods, without his act have gotten upon the land of another. In such a case, the owner of the goods may enter and take them. Eighth, Where a person enters the premises of another to succor his beast which is in danger of perishing, and Tenth, Where an

entry hasbeen made upon the lands of another by reason of necessity,to escape some personal injury without the fault of the person entering.

In addition to those might be mentioned the merchant, who impliedly invites any one to come upon his premises and examine or purchase his wares. Or the professional man,whose office the public may enter on business. Gowen v. Philadelphia Exchange Co.,5 W. & S.,I4I. So persons in the habit of visiting others may assume that they have permission to go upon the premises for that purpose. A person coming to an unknown obstruction in a highway may go upon the adjoining land to pass by the obstruction. Campbell v. Race, 7 Cush.,408. Under this head should come the case of Meig's Appeal,62 Pa. St.,29,where it was held that in time of war the government had an implied license to build barracks and hospitals on the commons of a city when no objection is made by the city; And Heaney v. Heaney,2 Denio,625,where it was said that persons navigating public waters have an implied permission to fasten boats to a dock such as the one in question. Lakin v. Amos,I0 Cush,at page 220,held that the law will imply a license from a mother to a son to open a vault and

leave there the corpse of his brother,from the nature and exigencies of the case,the relation of the parties,and the well established usage of a civilized and Christian community. Where persons are accustomed to walk or to be for a long time,they are acting under the implied permission of the owner. Driscoll v. Newark & Rosendale &c. Co.,37 N.Y..637. The presence of a person when another is building a dam so that the water will encroach upon his land is evidence from which the jury may imply a license. Johnson v. Lewis, I3 Conn.,303.

This enumeration of implied licenses is not exhaustive. The occassions on which they arise are very frequent,and it would not be profitable to attempt to point them all out,if indeed it would be possible to do so.

EFFECT OF A LICENSE.

"By the common law,every man's house is his castle. Why? Because it is surrounded by a moat or defended by a wall? No! It may be a straw hut; the wind may whistle through it,the rain may enter it,but the king can not." This doctrine is one of the most firmly founded of the English law,and by it any intrusion,however slight,on the dominion of a proprietor,is a trespass. Yet men are con-

tinually going upon others' land. License is unceasingly called upon"to make that lawful which without it had been unlawful".

Whenever a license is given to do any particular act,it is lawful to take the means necessary to perform that act. It legalizes the entry of a sufficient number of servants and excuses any injury which is the natural result of the act. Sterling v. Worden, 5I N.H.,2I7. Selden v. Del & Hud. Canal Co.,29 N.Y.,634.

When a license is given,the law imposes upon the licensor the duty of extra care in case of danger. A man must not give permission to another to cross his premises on which he knows that there are hidden pitfalls,without giving notice of their existence. If a licensor's business is such as to render it dangerous to those whom he permits to use his land,he must use extra care and reasonable precaution to prevent injury. It makes no difference whether the license is express or by implication. "If the owner of property has been accustomed to allow others a permissive use of it,such as to produce a confident belief that the use will not be objected to,and therefore to act on the belief accordingly,he must be held to exercise his rights in view of the circumstances,so as not to mislead others

to their injury without a proper warning of his intention to recall the permission." Kay v. Penn. R.R.Co.,65 Pa. St.,269. Driscoll v. Newark & Rosendale Co.,37 N.Y.,637. Houston & T.C.R.R.Co. v. Boozer,70 Tex. 560. S.C. 8 S.W.,II9. This duty,however,is restricted to cases of unusual danger,and when known to the licensor and not known to the licensee. Where the source of the danger is not known to the licensor,or where it was not to be expected from a proper exercise of the license,no warning is required, and no liability rests upon the licensor,nor is he bound to repair for the benefit of the licensee. Batchelor v. Fortesque,L.R.,II Q.B.D.,474. Ivay v. Hedges, L.R. 9, Q.B.D.,80. And it is to be presumedthat greater care is requisite in case of a direct invitation to come upon lands,than when such use is merely permissive. Wright v. Boston &c. R.R. Co., I42 Mass.,296.

The licensee assumes to act with due diligence, and negligently to do nothing which would result injuroiusly to the property. Eaton v. Winnie,20 Mich.,I56. Selden v. Del. & Hudson Canal Co.,29 N.Y.,634.

No prescriptive right can be acquired under a linense. A man's use may be open and notorious,but it cannot be

adverse when it is avowedly exercised by the permission of another. Nor does the length of time in which the use has been enjoyed strengthen the claim.. Cox v. Leviston,63 N.H.,283. But after the revocation of a license, user may become adverse. Vehter v. Raritan Water Co., I9 N.J. Eq.,I42. Eckerson v. Crippen,II0 N.Y.,585.

A licensee cannot deny his licensor's title. Glynn v. George,20 N.H.,II4..

Where improvements are made on the strength of a license,they do not become part of the realty. It is presumed that there is no intention to permanently attach them to the realty,when the holding is so precarious. Such buildings do not come under the same principle as those erected wrongfully on the land. They remain personal property. Barnes v. Barnes,6 Vt.,388. Ingals v. St. Paul M. & M. R'y. Co.,40 N.W.,528. (Minn.). But where there are circumstances to negative the intention of the parties that buildings shall remain personality,then such buildings become fixtures. Where a person had license to build,with the undertsanding that the land should be afterwrd conveyed to him,the structures were a part of the real estate. Leland v. Gosset,I7 Vt.,403.

ABUSE OF LICENSE.

Permissionto do an act implies that it is to be lawfully done. Such permission may be abused,and cannot be extended to cover excesses of the privilege granted, or misconduct in the exercise of the privilege. In considering this question an important distinction is to be made between licenses implied and imposed by law,and those expressly granted by the parties. This distinction was well pointed out in the Six Carpenters' Case,and subsequent decisions have not modified the doctrine,nor stated it more forcibly. "And first it was resolved when entry,authority or license is given to any one by law and he doth abuse it,he shall be a trespasser ab initio; but where entry,authority or license is given by the party and he abuses it,there he must be punished for his abuse,but must not be a trespasser ab initio. And the reason for this difference is that in the case of general authority or license of law,the law adjudges by the subsequent act quo animo,or to what intent he entered,for acta exteriora indicant interiora secreta. But when the party gives an authority or license himself to do anything,he cannot for any subsequent cause,punish that which is done by his own authority or license." Six

Carpenters' Case,8 Co.,146. The reasoning in the case applies with equal force to all cases of implied license. It is not probable that the court had in mind a distinction between licenses implied by law,and implied by the parties, but they intended to include both in the expression"given by law." Jewell v. Mayhood,44 N.H.,474. It is an abuse of a license to do any other act besides that for which permission was given,or to refuse to do a lawful duty imposed upon one in the exercise, or to do the act in a manner different from that imposed by law or by agreement of the parties. Attack v. Bramwell,3 Best & S.,520.

REVOCATION.

It is a common remark that licenses are in their nature revocable. If this truth had been constantly borne in mind,a great deal of the confusion on this branch of the subject would have been avoided. Cases of apparent hardship frequently arising,and denial of relief seeming especially inequitable in many cases; and early decisions in the English Courts,being either inaccurately or incompletely reported,or containing statements of general principles of law broader than the facts of the case would warrant; and the desire of the courts to break away from useless

technicalities, and incorporate the spirit of the equity into the law in some instances; such cases have contributed to make the question of revocation of parol license, so far as authority goes, one of great uncertainty. Aside from the somewhat technical rule that an incorporeal hereditament cannot be created except by deed, there are others reasons why it is highly important that licenses be held revocable. Parker C.J., in Cook v. Stearnes said that "If the defendant's plea (of license) were held to be a bar, all the mischiefs and uncertainties which the Legislature intended to avoid (By the Statute of Frauds) would be renewed; and purchasers of estates would be without means of knowing whether incumbrances exist or not on the land which they purchase." And in Wilkins V. Irwin, 33 Ohio St., I38., it is said to be "The policy of the law that all titles to land when effected by written instruments shall appear upon the appropriate record, so that all may be informed who hold incumbrances, their character, and where the title reposes or is vested. But is this secret license mode of incumbrance to be maintained? If so, incumbrances might frequently be found to exist, against which no diligence could guard or vigilance protect. Our records would cease to be reliable guides. To avoid all uncertainty

to notify all wishing information regarding land titles our registry laws were created,and their purpose cannot be defeated by claims of the character we are considering."

Such considerations are a sufficient basis for the general proposition that licenses are revocable. In the application of this principle,however,other interests are affected and other principles become involved, Modifications thus brought about and those contended for by certain courts will be considered as exceptions to the general rule.

FIRST, When coupled with an interest. That a license coupled with an interest is irrevocable is undisputed law. The interest must be a valid one legaly obtained and the license is regarded as incidental to the interest. If the license in such a case is of a permanent character,or is independent of the interest,it so far ceases to be coupled with an interest and loses thus far its exceptional character and may be revocked the same as any other license,though not so as to prohibit the owner from removing his property. Cooley on Torts 2nd. Ed., 260. Hazleton v. Putnam,3 Wis. 307. In this class of cases,it is not that the license is irrevocable, but a person cannot in this way nullify a contract,or dispossess a neighbor of his goods which are without fault of the owner

upon such person's land. Most of the authorities are cases of the removal of property from another's land.

This principle was referred to by one of the judges in Webb v. Paternoster,Palmer 7I. But the leading case is Wood v. Manly,II A & E.,35,where it was held that trespass would not lie for breaking open a gate and removing a stack of hay which the defendant had previously bought, a license ~~and~~ to remove the hay having been given at the time of the purchase,and assented to by the tenant when he took possession,it being held that the license was irrevocable.

This principle has been applied in a variety of circumstances. In this connection should be mentioned the cases of the oral sale of standing timber. Such a sale, though within the statute of Frauds by the weight of authority,operates as a license to sever the trees from the realty, when they at once become personal property and pass tp the vendee. He thereupon has a valid interest in the trees,and cannot be prohibited from going upon the land and removing them within a reasonable time. The cases are too numerous to mention, Owen v. lewis 46 Ind,489, Claflin v. Carpenter,4 Metc. 580,being good illustrative cases. Houses erected under a license which are personal property or other property upon land under like cir-

cumstances may be removed within a reasonable time after revocation. Rogers v. Cox,96 Ind.,I57; DeHarro v. U.S. 5 Wallace,599; Ingals v. St. Paul M.& M. Ry. Co., 40 N.W. 524; Cornish v. Stubbs,Law Reports 5 C.P.334; Mellor v. Watkins,L.R. 9 Q.B. 400. The sale of the chattel on the land of the vendor with permission to enter and remove it makes such entry lawful. Long v. Buchannan, 3 Gill & J, II8; Or a conditional sale with leave to enter and retake possession on failure of condition. Heath v. Randall,4 Cush,I95.

Cases of this description are frequent, and are all decided in accordance with the same principle.

SECOND, When executed. It is often said in the course of an opinion that a license executory is always revocable, but when executed it becomes irrevocable. The truth in the statement has been repeatedly pointed out,that an executed license cannot be revoked so as to make acts done under it before revocation unlawful. This doctrine seems also to have taken its rise in the case of Webb v. Paternoster, Palmer 7I. But the case on which the modern doctrine rests is that of Winter v. Brockwell,8 East.,309. Here Lord Ellenborough remarked that he thought it very unreasonable that after a party had been led to incur expense,

inconsequence of having obtained a license from another to do an act, and after the license had been acted upon, that the other should be permitted to recall his license, and treat the first as a trespasser for having done that very act. That he had afterward looked into the books upon this point, and found himself justified by the case of Webb v. Paternoster, where Haughton J. lays down the rule that a license executed is not countermandable, but only when it is executory. And here the license was executed. This case was decided in 1807. In 1803 Lord Ellenborough in Fentiman v. Smith 4 East., 117, where the privilege claimed was the right to maintain a tunnel across the land of another as an appurtenance to a mill, had said that the allegations of the pleadings could not be sustained without showing that the appurtenances were legally such; and that the title to have the water flowing in the tunnel over the defendant's land could not pass without a deed. These opinions apparently contradictory, were enough to cause the cases to be distinguished, and it was pointed out in Hewlins v. Shippam, that in Winter v. Brockwell the sky-light which was the object of a license was erected wholly on the land of the defendant, and was not a servitude on the land of the plaintiff; apparently counting as of little

importance the fact that the framework of the sky-light was nailed to the plaintiff's house. Overlooking this incident which did not form a distinct question, the case is the leading authority for an important principle that a license to do something on one's own land which interferes with an easment of the licensor on the lands of the licensee when executed, cannot be revoked. This doctrine was further enforced and explained in the case Liggins v. Inge, 7 Bing., 682. Here there had been a license by the plaintiff's father permitting the defendants to lower the banks of the stream, and erect a weir, whereby less water flowed to the plaintiff's mill. The Court pointed out that everything had been done on defendant's own land and was lawful except for the right of the plaintiff; and since the water of the stream was publici juris, and belonged to him who first appropriated it, there was no reason why one could not relinquish the right obtained by user, and thus enable any other one to make such use of it as if his prior right had never attached. The true doctrine and its limitations is well illustrated by the case of Morse v. Copeland, 2 Gray 302. In this case the owner of a dam licensed an adjoining proprietor to build an embankment to prevent the water from overflowing his land, and also

to dig a ditch to drain the surface water through the land of the owner of the dam. It was held in accordance with the principle stated, that the license to build and maintain the embankment could not be revoked, but that in regard to the ditch was revocable.

Analagous to these are cases under statutes for the flowing of lands by mill-dams. There the right to flow is derived from statute, and the only question as between the parties is as to the damages caused by the flowing of the lands. It is said in Clement v. Durgin, 5 Greenl, 9., that "These damages the party may waive or relinquish by parol. He thereby gives the other party no new interest, or right over his lands; but he foregoes the right to damages which he might have enforced by complaint in the nature of a personal action. The license given might have been countermanded before it was acted upon; as if a party promises to give money no action lies upon it, but having given it, he cannot recover it back. He cannot reclaim what he has given away." Smith v. Golding, 6 Cush., 154, adopts the same view as to the nature of the agreement, and decides that no writing is necessary, but leaves undecided the question of revocability in such a case. Though Clement v. Durgin was soon limited to the facts there

appearing by Seidenparger v. Spear, I7 Maine, I23, there seems to be no objection to the holding in this view of the case.

A careful survey of the line of cases here referred to shows that they do not sustain the doctrine contended for. There are cases, however, which squarely assert the broad proposition that a license executed is irrevocable. Notable among these is Taylor v. Waters, 7 Taunt, 373, where a Theatre ticket for twenty years given for a valuable consideration and used for several years was held to give an irrevocable license to enter the theatre for the remainder of the time. This case was overruled by Wood v. Leadbitter, I3 M & W., 838 on the ground that such a right must be created by deed. The latter case was followed and enforced by McRea v. Marsh, I2 Grey, 2II, and Burton v. Scherpf, I Allen, I33. An early American case frequently cited in support of the irrevocability of an executed license is Ricker v. Kelley, I Greenl., II7. The case came up on demurrer and it was held that an executed license may be proved by parol, a position never disputed. It was also pointed out as a distinguishing feature that property placed on the land of another under a license remains the property of him who places it

there,and cannot be removed and appropriated by the owner of the land without notice of revocation and a reasonable time for it to be removed by its owner. Few if any American cases hold directly the proposition that a license executed is irrevocable; usually other facts exercise a controlling influence. The broad proposition is frequently met with in the course of opinions,as in the case of Clement v. Durgin above,even in such a state as Massachusetts where the policy of the Court has always been strongly against the principle. But probably no case has been decided directly on this principle. In some states,the doctrine after finding favor has been repudiated,as in New Hampshire,in the case of Houston v. Laffee,46 N.H.507, and in Illinois in National Stock Yards v. Wiggins Ferry Co.,II2 Ill.,384; and in Maine as before mentioned. It may be said of other cases where the doctrine is maintained that they are founded on precedents that are no longer followed and are untenable on principle.

THIRD, When given on consideration or executed at great expense. When a parol license has been obtained and acted on at considerable expense,it is the doctrine of many cases that the license cannot be revoked at least without paying all expenses that have been incurred.

Suits in law have been brought and the courts have denied relief, saying that if the plaintiff had any remedy, it was in equity, Foster v. Browning, 4 R.I. 47. The ground on which it was supposed that equity would interfere is virtual fraud, or estoppel, and the court would be asked to decree an injunction or specific performance. It is said that the licensors conduct is a direct encouragement to spend money and his revocation, if permitted, would amount to a fraud.

This particular doctrine has not received much sanction from English Courts. In the United States, it seems that it was first accepted in the case of LeFevre v. LeFevre, 4 S.&.R., 241. Rerick v. Kern, 14, S.& R., 267 followed, and formulated the doctrine that "a right under a license, when not specially restricted, is commensurate with the thing for which the license is granted." This principle has been adhered to in subsequent Pennsylvania decisions, McKellip v. McIlhenny, 4 Watts, 317, logically holding that a license binds a purchaser from a licensor, and passes to an assignee of the licensee; though in Huff v. McCauley, 53 Pa. State, 206, the Court said that the Doctrine of Rerick v. Kern is beyond the common law and the equity practice of other states, and limits its appli

cability to cases where money has been expended or where the parties cannot be placed in statu quo. This is the law in Indiana, Campbell v. I. & V.R.R.Co., 110 Ind. 490; In Iowa Decorah &c. Co. v. Greer, 49 Iowa, 490 and in Ohio Wilson v. Chalfaut, 15 Ohio Rep., 249, unless the case of Wilkins v. Irvin, 33 Ohio St., 138, throws doubt on the subject in that state. Nebraska and Nevada are said to maintain the same principle, and the recent case of Clark v. Glidden, 15 Atlantic, 385, in Vermont must proceed on that ground. Other states have given more or less sanction to the principle, but in Illinois, New Hampshire and Maine it has been expressly repudiated after finding some recognition.

Without testing the question by taking up in detail the elements of estoppel, the fact that there is no deception seems to be decisive of the question. Both parties have full knowledge of all the facts. The licensee knows that title is in the one granting the permission. The silence of the licensor while the other party is making expenses does not work an estoppel, for if he should break the silence, he could only remind the other that title is in himself and that the license is subject to revocation at his pleasure; and this the other is conclusively presumed to know. If it be urged that were estoppel

applied,the grantee might as well be presumed to know that a license accompanied by expense on his part is irrevocable,it may be replied that all agree that a mere naked license is always revocable; and it would be a perversion of the principle of estoppel to hold that a person may hasten to make expense in order to estop the revocation of a license.

It is to be presumed,therefore, that when a person goes to expense on the strength of a license,he does so relying on the good will of the licensor or on the mutual benefit of its exercise to prevent a revocation. If his real intent and expectation is otherwise,it is without foundation,for he should have acquired a legal right if he wishes to enjoy one. Woodward v. Seely,II Ill.I57;Hodgkins v. Farrington, 22 N.E.,73 (Mass.); and National Stock v. Wiggins Ferry Co. II2 Ill,384.

The same consideration answers the position often taken that a person cannot revoke without offering to repay expenses wherever the expenses are incurred in the execution of the license. But where the license was originally granted for consideration,other principles are involved. Such agreements are not against the policy of thelaw,Freeman v. Headly,33 N.J.Law,523. If the license

is revoked before its exercise is begun, there is no reason why the consideration may not be recovered. In any case if it is possible to determine what part of the consideration should be returned, there seems to be no reason why it should not be recovered on the ground of partial failure of consideration. Smart v. Jones, I5 C.B. N.S., 7I7 is referred to as an example of a recovery allowed for a breach of contract brought about by the revocation of a license which had been granted for consideration. 2 Gray's Cases on Property, 368 and Note. Damages were allowed not only for the consideration advanced but for prospective profits on the transaction. It will be found that the revocation of the license did not have any effect upon this decision. It was a sale of an interest in land within the fourth section of the statute of Frauds, and a written memorandum of the contract was made. There was therefore a valid contract which could be proved, and a breach of it gave a right of action for damages the same as a breach of any other contract.

Cases of active fraud may arise when equity should interfere. And when the circumstances are the same as those where specificm performance of a parol contract for the sale of land is decreed, equity will decree specific

performance of what in its inception was a license. All of the requisite elements to take a parol sale out of the statute must be present. There must be an intention on the one side to grant and on the other to obtain a right, anestate,and the transaction must be followed by acts referable solely to the supposed contract. This principle was recognized and wellillustratedin the cases of Wolf v. Frost,4 Sand. Chanch.,72,Hazleton v. Putnam,3 Wis,II7 and Johnson v. Skillman,29 Minn,27; in all of which casesequity refused to interfere,,in the first because the action of the licensee was not referable solely to the agreement,in the second because the agreement was too indefinite,and in the last for both of those reasons and also because there was an adequate remedy at law under the Minn. statutes. In Cook v. Priden,40 Ga.,53I,the court decreed specific performance on the ground that the conditions for specific performance were fulfilled.

The result of this study is that on principle and by the weight of authority,licenses are revocable,unless they are coupled with an interest, or are in the nature of a relinquishment of a negative easement or personal right,or the circumstances are such as to justify a decree for specific performance.

WHAT REVOKES?

A license may of course be expressly revoked. An act which renders any authority inoperative is sufficient in the case of a license. A transfer of the property over which it is to be exercised or the death of either party operates as a revocation. The same result occurs when there is a subsequent grant of a privilege to another person inconsistent with the exercise of a license formerly given. Eckerson v. Crippen, 110 N.Y. 585. Being personal in its nature a license cannot be assigned; but it is not clear that an attempted assignment would in all cases operate as a revocation. An act indicating an intention to revoke is sufficient. This was held to be the case in Lockhart v. Gier, 54 Wis., 133 on the commencement of a suit for damages, and it was held that damages might be recovered from the time of beginning the action. Many of the cases cited elsewhere are also authorities on the question of what amounts to a revocation.

TABLE OF CITATIONS.