APPELLATE JURISDICTION. (a)

Special Appeal No. 634 *of* 1861.

KESAVA PILLAI.....*Appellant.*

PEDU REDDI and others.....*Respondents.*

When a tenant by his lessor's permission erected a dam upon his holding and thereby obstructed the natural flow of the water to other lands of the lessor :— *Held* that the mere permission did not amount to a grant.

Held also that there was no implied grant of the right to use water so as to derogate from the rights of those through whose lands the stream would otherwise flow.

Held also that the right under the permission might be terminated by revocation of the latter, but that such revocation would only be permitted on the terms of the landlord paying to the tenant the expenses which that permission had led him to incur.

Even when the dominant and servient tenements are the property of different persons, a man may license an act in its inception and yet be entitled to relief when the act is found to have injurious consequences which he could not have contemplated at the time of the license.

1863. *March* 14. *S. A. No.* 634 *of* 1861.

THIS was a special appeal from the decision of George Ellis, the Judge of Cuddalore, in Appeal Suit No. 61 of 1858.

Branson and *Sadagopacharlu* for the appellant, the plaintiff.

Norton for the respondent, the second defendant.

The facts and arguments appear from the following judgment, which was delivered by

HOLLOWAY, J :—This was a suit to compel the removal of a dam erected by the tenant upon the land held by him of the plaintiff.

The Civil Judge finding that an agent of the plaintiff had assented to the erection of the dam, and that the plaintiff had ratified his act, decided that the defendant could only be compelled to remove it upon the terms of paying the defendant for the expense which he had incurred ; but he did not make a decree accordingly.

It has been argued for the special appellant that the defendant having had the benefit of the dam is not entitled to any compensation.

(a) Present : Strange and Holloway, J. J.

1863.
March 14.
S. A. No. 634 of 1861.

On the other hand the learned counsel for the respondent has strenuously contended that the conduct of the plaintiff has amounted to a license, and that the defendant having incurred expense in consequence, the license has become executed and therefore irrevocable. For this position, the class of cases of which *Liggins* v. *Inge*(*a*) is the principal, was cited. That case is still an authority, as Williams, J. stated in *Davies* v. *Marshall* (*b*). It has not, as has been erroneously supposed, been overruled by the more recent case of *Wood* v. *Leadbitter*(*c*).

In truth however, *Liggins* v. *Inge* with the class to which it belongs is inapplicable to the present question. There the irrevocable license was merely construed to have prevented the plaintiff from complaining that the erection of a weir had obstructed the usual flow of water to the plaintiff's mill. It was an obstruction upon the land of the defendant by the defendant and became legalized by the act of the father of the plaintiff who, being a party to the act, was prevented from complaining.

The present is the case of a tenant erecting a dam upon his landlord's land and thereby, as is averred, obstructing the natural flow of water to other lands of the same owner. To sustain the argument of the learned counsel for the respondent, we must be prepared to hold that there is an implied grant of a right to the use of water derogating from the natural rights of those through whose lands the stream would otherwise flow. We must, in fact, hold that a positive easement has been created by the plaintiff in favour of one portion of his own property and against another. The dominant and servient tenements are the property of the same person. There are unity of title and unity of possession, for the possession of the tenant is, for the purpose of the present question, that of the plaintiff.

It is clear that no length of possession would give the defendant a title by prescription, because the possession is confessedly precarious. There can be no pretence for saying that this mere permission amounted to a grant ; for, if so, on every right of way exercised merely by the permission of

(*a*) 7 Bing. 682. See too *Winter* v. *Brockwell* 8 East 308 ; *Gale on Easements*, 3d ed. 26, *et seq.*

(*b*) 31 L. J. C. B 65.

(*c*) 13 M. & W. 838.

1863. *March* 14. *S. A. No.* 634 *of* 1861.

the grant or an easement would be created by grant. The case is simply one of tenant derogating from the natural rights of other tenants by permission of their common landlord.

It is quite clear that such a right, existing only by permission, may be terminated by the revocation of that permission; but following the authority of several cases in the late Sadr Court, we are of opinion that the revocation should only be permitted on the terms of the plaintiff paying to the defendant the expenses which he was induced by that permission to incur.

This was the opinion of the Civil Judge, who did not embody it in his decree. We shall alter his decree accordingly, and looking at the nature of the contention on both sides, we make no order as to costs.

We must not, however, be supposed to have decided that if the dominant and servient tenements had been the property of different persons there would have been an irrevocable license. A man may license an act in its inception and yet be entitled to relief when it is found to have injurious consequences which he could not have contemplated at the time of the license : *Bankart* v. *Houghton(a)*. Whether he can or cannot revoke it is a question upon the facts of each particular case. The termination or narrowing of easements by irrevocable license and the creation of easements by such license, will probably be found to be wholly different questions ; but we give no opinion now upon that subject, because the first section of the Statute of Frauds presents the case to the English lawyer in an aspect wholly different to that in which, if it should ever arise, it would come before us.

Appeal allowed.

(a) 27 Beav. 425, 431, per Romilly M. R.