

1868.
May 26. Upon proof of the execution of the document the order will go for its registration.

Appellate Jurisdiction (a)

Special Appeal No. 144 of 1868.

KRISHNA..... *Special Appellant.*

RA'YAPPA SHANBHA'GA..... *Special Respondent.*

In a suit to establish a right of water and for damages for interruption of the same the facts were:—Plaintiff and defendant by agreement between them constructed a dam across a main channel, and from thence a smaller channel was made through the land of the defendant to the plaintiff's land, by means of which it was agreed that the plaintiff should be at liberty to irrigate his fields. This agreement was acted upon for a long course of years.

Held, that the agreement was not a mere parol license revocable at the pleasure of the defendant, but an agreement which created a right of easement, unlimited in point of time, to the use of the water by the plaintiff, and imposed upon the defendant the corresponding duty of allowing the accustomed supply to flow.

A mere license differs in its effects from a license coupled with the creation of an interest. The former is revocable, but the latter is subject to the same incidents, and is as binding and irrevocable as any other contract, gift, or grant.

The law in this country does not require that any agreement between natives, whether in regard to the transfer or creation of an interest in land, or otherwise, should be in writing; nor does it distinguish between agreements under seal and by parol.

Kesava Pillai v. Peddu Reddi and others (1, Madras High Court Reports 258) distinguished.

1868.
 June 8.
S. A. No. 144
of 1868.

THIS was a Special Appeal against the decree of T. Muthusami Aiyar, the Principal Sadr Amin of Mangalore, in Regular Appeal No. 27 of 1866, reversing the decree of the Court of the District Munsif of Mangalore in Original Suit No. 200 of 1862.

Sanjiva Rau, for the Special Appellant, the plaintiff.

Rama Rau, for *Páarthasaradhy Aiyangár*, for the Special Respondent, the fourth defendant.

The Court delivered the following

JUDGMENT:—In this case the admitted facts are that the plaintiff and defendant by agreement between them con-

structured a dam across a main channel, and from thence a smaller channel was made through the land of the defendant to the lands of the plaintiff, by means of which it was agreed that the plaintiff should be at liberty to bring water for the irrigation of his fields. This agreement has been executed and acted upon for a long course of years, and the only matter of fact upon which the parties were at issue was whether the privilege of using the water extended to the plaintiff's fields Nos. 1 and 2, or was limited to his other fields, and both the Lower Courts have found upon the evidence afforded by long continued usage that the two fields in question were included in the agreement. The case is thus simply one of an agreement between the parties, and no question of title by prescription arises. The Munsif upheld the agreement, and awarded damages for the loss caused by the defendant having obstructed the flow of water to the two fields in question. The Principal Sadr Amin on the contrary held that the right claimed by the plaintiff was in the nature of an easement, and that a special grant in writing was essential to its acquisition, and that the agreement in this case was a mere parol license revocable at the pleasure of the defendant, and for this he relied on the case reported in 1, *Madras High Court Reports*, 258. We are clearly of opinion that the Principal Sadr Amin is in error and has been misled by some general expressions to be found in the judgment referred to. Without saying how far we should have concurred in the decision in that case, it is sufficient to observe that that was a case of an arrangement between a landlord and his tenant as to something to be done on his own land, and cannot govern a case like the present, of an agreement between strangers for the creation of an easement over one tenement in favor of another tenement. Now a mere license passes no interest nor alters or transfers property in anything, but merely makes an act lawful which without it had been unlawful, and this is in its nature revocable, and even by English Law, a license under seal (provided it be a mere license) is as revocable as a license by parol. But a mere license is something quite different from a license coupled with the creation of an interest. When that exists in a valid form it operates as a contract or a gift or grant, and is subject to the same incidents, and

1868.
June 8.
S. A. No. 144
of 1868.

1868.
June 8.
S. A. No. 144
of 1868.

is as binding and irrevocable as any other contract, gift, or grant. Here undoubtedly there was an agreement which created the interest or right of easement in favor of the plaintiff on which his cause of action rests. There is nothing in the law of this country which requires that any agreement between natives of this country whether in regard to the transfer or creation of an interest in land or otherwise should be in writing. The necessity under English Law of a grant in writing and under seal for the creation of such an incorporeal right as an easement is due entirely to reasons derived from the Feudal and Statute Law (*Hewlins, v. Shippam* 5 B. and Cr. 221), and even where there is no such grant, but the agreement has been executed and expense incurred on the faith of it, a Court of Equity will not permit one party to be guilty of the fraud of depriving the other of the enjoyment of the benefits contracted for by reason of the want of a complete legal title (*Duke of Devonshire v. Eglin* 14 Beav 530). In the present case the agreement between the parties being valid by the law of this country, which does not admit of any distinction between agreements under seal and by parol, it gave a right unlimited in point of time to the use of the water, and imposed on the defendant the corresponding duty of allowing the accustomed supply to flow, and having been executed and as respects the fields in question acted upon for a long course of years, ought clearly to be maintained. We need only refer to, that we may not be supposed to have overlooked, the further class of cases in which there is a license by A to B to do something upon B's land, the effect of which may be to narrow or extinguish an incorporeal right or easement enjoyed by A over B's land; such license may even by English law be by parol in respect to things of common or general right, and when once executed, is irrevocable.

The result of our judgment will be to reverse the decree of the Principal Sadr Amin, and to restore that of the Munsif; but before we can finally dispose of this Special Appeal, it is necessary to refer the case to the Principal Sadr Amin to find what amount of damages the plaintiff is entitled to by reason of the wrongful act of the defendant