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WORDS WHICH WILL CREATE AN
EASEMENT†

ALFRED F. CONARD*²

A few years ago, when I first began to interest myself in easements, I walked into the office of one of the right-of-way counsel for the Rural Electrification Administration. I asked him what were some of the easement problems which were troubling practicing lawyers in the field. He had a problem, a simple beginner's problem. From the center drawer of his desk he produced a short mimeographed form, pushed it over to me, and asked, "Does that convey an easement?"

Prior to this time I had stored my mind with many of the truths about easements which are perpetuated in the treatises on the subject. Easements are not any part of the soil; nothing of the corporeal clay clings to them. They are intangible, mere rights. They are, if truth be known, incorporeal hereditaments. Yet they are interest in land. In this they are to be distinguished from licenses, which, equally intangible, are not interests in land. From profits, too, easements must be distinguished, for it has been said that an easement is a privilege without profit. He who takes the untamed flood flowing across the land has an easement; he who takes the untamed fowl flying above it has a profit. Finally an easement must be created by some undefined transaction called a grant.

None of this information aided me in answering the REA lawyer's question. I, therefore, turned from the treatises to the cases, and searched

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†This is one of a series of articles on easement creation. It was preceded by The Requirement of a Sealed Instrument for Conveying Easements (1940) 26 IOWA L. REV. 41; Easements, Licenses and the Statute of Frauds (1941) 15 TEMPLE L. Q. 222.
anew. Such relevant observations as I have gleaned appear in the following pages.

I. WORDS OF CONVEYANCE

A. Grant, Convey, Transfer

If there be need for a magic word of transmutation to evoke an intangible easement from the clay of an estate, it is the term grant. Baron Littleton used this term,¹ as Lord Coke later explained, to describe conveyances of incorporeal things, while feoffments covered conveyances of things corporeal.²

This distinction was one of nomenclature; it did not reflect any rigid differentiation in conveyancing language. Littleton distinguished similarly between feoffment (in fee simple), and gift (in fee tail),³ either of which was best expressed by the same Latin words do or dedit⁴ (I give or I have given). As far as concerned the words employed, a grant was hardly distinguishable from a feoffment or gift, "for the operative words therein commonly used are dedit et concessi, 'have given or granted.'"⁵ There is no evidence that other words could not be used. More recently, sell and convey have been considered effective.⁶ Grant was and is the apt word, and evidences an intent to create an easement rather than a mere license when other phrases in the agreement are inclusive.⁷

It is interesting that American reform of conveyancing law has not tended to supply alternatives for the time honored word grant, but to extend its use to the conveyance of estates for which it was formerly inappropriate.⁸ It seems unfortunate that they have not gone further, like the English Law of Property Act of 1925,⁹ to provide that the word grant shall not be indispensable. Some statutes have created the presumption that by grant a fee simple estate is conveyed,¹⁰ or that unencumbered title is warranted.¹¹ It therefore seems desirable while using

¹. LITTLETON, TENURES (c. 1480) § 1.
². Co. LITT. *9.
³. Id. § 57.
⁴. 2 BL. COMM. *316.
⁵. Id. at *317.
⁶. Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356 (1886).
⁸. See CAL. CIV. CODE (Deering, 1937) § 1092; D. C. CODE (1929) tit. 25, § 141.
⁹. 15-16 GEO. 5, c. 20, § 51 (1) (1925).
¹¹. CAL. CIV. CODE (Deering, 1937) § 1113.
this apt term, carefully to restrain its effect as a conveyance and as a warranty.

B. Bargain and Sell

_Bargain_ and _sell_ will offer a tempting aberration to one who has conveyed many an estate by these words, and knows that they fall within the strictest judicial conception of "words of conveyance." They operate, however, upon a peculiar principle. By virtue of a consideration, which must always be expressed in a bargain and sale, a beneficial use, cognizable by a court of equity, arises in the bargainee. By virtue of the Statute of Uses, the equitable use becomes a legal title in the instant of its creation. If there be any difficulty in creating a _use_ of an easement, or in the statutory transmutation of the _use_ to a legal title, it will be an obstacle to conveying an easement by way of bargain and sale.

It was not inherently unthinkably before the Statute of Uses that the ownership of an incorporeal thing should be divided between the legal title and the equitable use; this much is clear from a case of 1522 involving a rent charge.?? This rent had been granted to the defendant by J out of land which J held for the use of N, the defendant having notice of N's use. Did the defendant obtain beneficial ownership of the rent, or was N its true owner? This was the question. It was argued at unusual length, with the Chief Justice maintaining the defendant's position against the assault of the puisne justices until one of the latter observed, "I think you argue much for your pleasure."

In none of the arguments of numerous counsel and judiciary was it doubted that the rent could be held by the defendant for the use of someone else.14 Pretty clearly, it would have been so held had it been an existing rent which was gratuitously transferred to the defendant.15 There might be some convenience to N, if he owned a rent in someone's land, in having its nominal title transferred to the defendant. But if N owned the land itself there would be no apparent convenience in creating a rent to issue out of it only to be rendered back to N pursuant to the use; therefore the law would not imply any intention to separate the use from the legal

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12. _Y. B. Mich._ 14 Henry VIII, f. 4, pl. 5.
13. _Id._ at f. 10 B. The Chief Justice indignantly replied: "Surely not, and I do not yet know whether I will agree to your opinion."
14. "But if the grant was to his [N's] use, this would have been good. For I know well that one can grant rent to one's use." Per Serjeant Willoughby, _Id._ at f. 5 A.
15. Such a case, evidently hypothetical, is put by _PERKINS, PROFITABLE BOOK_ (Greening's ed. 1827) *102, § 530. This work dates from about 1532.
The parties might desire such a division, and an express declaration of use would be honored; but it was not to be presumed. Perkins, writing contemporaneously with the Statute of Uses, noted reservedly that "it was said" that no resulting use would be implied in the creation of a rent. He probably had no doubt that a rent could be created upon an express use. Sir Francis Bacon in 1602 expressly asserted as much:

"If I grant a rent charge de novo for life to a use, this is good enough; yet there is no inheritance in being of this rent."18

Perhaps Bacon's view had already ceased to be good law when he put it forth. It had been said in Chudleigh's Case that,

"to the execution of a use by force of this statute, four things are requisite. 1st, There ought to be a person seised . . . 3dly, There ought to be a use in esse . . . ."19

These words, to be sure, did not refer directly to either rents or commons, and they indicate merely that such uses cannot be executed by the statute. But Chudleigh's Case was later to be cited to show that no incorporeal use could be raised out of a corporeal estate after the statute, with an ingenious explanation supplied by Chief Baron Gilbert. He conceded that a rent or common could be created to the grantor's use before the statute; but after it, if a landowner granted the use of a rent, retaining the legal title in himself, the legal title of the rent merged with (or never separated from) the title of the land itself; the rent died a-borning.20 In the meantime, the rule had been applied to a case in point—Beaudely v. Brook. The owner of land by indenture had bargained and sold part of the land with a right of way over other land,

"which cannot be good; for nothing but the use passed by the deed, and there cannot be a use of a thing which is not in esse, as a way common, etc., which are newly created; and until they be created, no use can be raised by bargain and sale . . . ."21

Thus the rule that no uses would be implied in the grant de novo of an incorporeal thing became a rule that no such use could be created de novo.

Side by side with the rule about uses in things incorporeal created de novo, there grew up another rule inhibiting uses in certain kinds of

16. "For the law cannot intend such a grant to be made to the use of the grantor." PERKINS, op. cit. supra note 15, at *102, § 531, citing the yearbook case in note 12, supra.
17. PERKINS, op. cit. supra note 15, at *102, § 531.
18. BACON, STATUTE OF USES (Rowe's ed. 1806) *43.
20. GILBERT, USES AND TRUSTS (3rd ed. 1811) *85-*86, *286-*287. Accord: PERKINS, op. cit. supra note 15, at *102, § 531, editor's note (i); 2 BACON, ABRIDGMENT (Bouvier's Am. ed. 1868) "Bargain and Sale" (B).
things incorporeal even if already in esse. This rule was reported by Perkins as little more than a rumor.

"And it is said by some, that if a man hath common in gross, which is certain, in fee, and he grant the same common to a stranger in fee, without any consideration, etc., that the grantee shall be seised of the common to his own use; because the profit of a common is to be taken by the mouths of the cattle, so that the profit is consumed, etc."

This rule, it will be observed, was one of presumed intent only; no use would be held to result. "It was clear that an express use might be effectively declared in the grant of an existing common. Even as a rule of presumed intent, it commanded little respect from Perkins. If a common were consumed by pasturing, it was equally plausible that a rent would be consumed by collecting; means could be devised of making either inure to the benefit of someone else.

The doubted doctrine made a new appearance nearly a century after Perkins, when Justice Doderidge was expatiating somewhat irrelevantly upon the nature of uses, while advising the House of Lords about an Earl’s title. He informed the assembly that,

"uses cannot be raised of such things, quae ipso usu consumuntur, as commons, ways in gross, authority granted to a man and his heirs to hunt in any park, chase or forest. As touching the inconveniences that would ensue thereof. He may covenant to stand seized to the use of others, as joint-tenants, and so may bring in as many officers as he pleaseth."

To Doderidge, it is clear that the presumption against uses was not rebuttable, as it had been to Perkins, but conclusive.

Although a contemporary of Doderidge, Sheppard in his Touchstone ignored the doctrine that there could be no use in a common. He averred that a common could be bargained and sold, although he recognized that a bargain and sale would not raise "estovers, and such like things, de novo," —the rule of Beaudely v. Brook. Indeed, the reasoning in that decision assumed the non-existence of the rule which Doderidge propounded. But after another century, it was a settled dogma that no use could arise in a right of common or a right of way in gross whether de novo, or in esse.

22. PERKINS, op. cit. supra note 15, at *102, § 531, citing no authority.
23. Id. at *102, § 537.
24. See note 15, supra.
25. SHEPPARD, TOUCHSTONE (2d ed. 1651) 222.
Gilbert, Sanders, and Greening agreed to this. Sanders had in 1792 a lingering doubt which induced him to refer to the older law, and to warn:

"It therefore seems prudent, in all cases of grants of rent charges in fee (which are in esse at the time of the grant) or commons in gross, to insert some consideration, or make some declaration of the uses, if the consideration be only that of five shillings or the like."  

In 1827, Greening deemed the warning to be an obsolete one, and it had already been eliminated from Sanders' revision of 1824.

The authority cited in these later cases for the impossibility of uses in ways and commons was Doderidge, but the reason given was not his. Inasmuch as Perkins' allowance of expressed uses had been limited to commons that were certain, the peril to which Doderidge pointed, of increasing the burden of the servitude through uses, may have seemed hollow. The reason adduced by these later writers was more like that which Perkins had noted only to refute—ipso usu consumuntur—they are exhausted by their very use. The exhaustion was a theoretical rather than an actual one; the impossibility of uses in commons or ways was compared by Doderidge to the impossibility of uses in chattels, whose ownership was considered less adapted to fractionation than the ownership of real property. It will be recalled that the use of chattels, which the law courts rejected, survived in the guise of the equitable trust, but no such blessing visited easements and profits in the classical period of the common law.

The state of the common law on bargains and sales of easements, at the time of its reception in America, may be said to have been this: A man could not by bargain and sale create a new easement in his land, either in gross or appurtenant, for two reasons, because it was not in esse, and because its possession was its use, so that there could be no further use. If a man owned an existing way in gross, he was prevented from conveying it by bargain and sale by the second reason only; the same inhibition did not apply to such other things incorporeal as rents. If a man owned an existing way appurtenant to an estate, it went with the estate, and rules peculiar to conveyance of easements were irrelevant.

27. Sanders, Uses and Trusts (1792) 78; id. (4th ed. 1824) 63-64.
29. Sanders, op. cit. supra note 27, at 77-78.
30. See note 28, supra.
31. See text accompanying note 22, supra.
32. See text accompanying note 24a, supra.
33. The protection of an equitable right to a privilege, as though it were the privilege itself, as in Frogley v. Earl of Lovelace, Johns. 333 (V. C. 1859), may be considered a belated recognition of the unexecuted use.

http://scholarship.law.missouri.edu/mlr/vol6/iss3/1
There is no evidence that any of this learning about uses in rents, commons and ways ever became naturalized in this country. It was adverted to by an early Maryland court, in deciding whether or not a statute governing deeds of bargain and sale should govern deeds of easements; counsel had argued that the statute would not govern, because there could be no bargain and sale of an easement \emph{de novo}. The court replied:

\begin{quote}
"It is assuredly no disrespect to the Legislature of 1715 to suppose, that at the time of their passage of the law . . . they may not have recollected this technical, subtle distinction, between the mode of transferring rents and ways \emph{in esse}, and \emph{de novo} . . . "\end{quote}

With equal lack of disrespect, it may be supposed that the court itself failed to recollect an equally subtle distinction between rents \emph{in esse} and ways \emph{in esse}. It may even be supposed that other American courts have forgotten, or have chosen not to remember, either distinction. Their silences imply that \emph{bargain and sell} are as effective as other words to convey easements \emph{in esse} or \emph{de novo}. They will obviously be held effective under a statute such as one prevailing in New York where "deeds of bargain and sale . . . are declared grants." Fortunately, the words commonly used in deeds of most states have come to be "grant, bargain and sell;" if the last two verbs do not help, at least they do not hinder the work of the first.

Even if it be held that "bargain and sell" create no use upon which the Statute of Uses can operate, that will hardly prevent the creation of a right. If actual consideration has been paid, or prejudicial action been taken, it seems certain that modern courts of equity will award judicial protection, as in \emph{Frogley v. Lovelace}. These words of conveyance would disclose an intent to create an easement under the narrowest of holdings.

\textbf{C. Lease, Let, Demise, Rent}

The words by which estates for years are usually created are \emph{let}, \emph{lease}, and \emph{demise}. No blight of juristic diversities has repelled extension of the same terms to easements when conveyed for limited periods. In a yearbook of 1443, we read that a tithe could be granted or leased for years although it was more doubtful that the tithe of a future year could be sold. In the seventeenth century, one might lease "anything corporal or incorporeal;"
while he might lease by the word "grant," he might as aptly do so, it would appear, by the words "demise" or "let." 40

A number of modern cases have held that an easement arose where the word "lease" or "let" was used, without questioning the sufficiency of these words of conveyance. 41 Where trouble has arisen, it has been because the parties purported to lease, not an easement, but land itself, or a wall or roof, for a purpose so restricted that full possessory rights were evidently more than the lessee desired. The problem is the same which Bracton noted seven hundred years ago. Laymen then wanted to convey rights connected with churches—that is, rights of appointment to a benefices—but "by reason of their simplicity" they purported to convey the churches. 42 Today, they want to lease the right of posting bills on a wall, or of hunting on a farm; by reason of the lessors' simplicity, occasionally abetted by the lessees' duplicity, they purport to lease the wall or the farm. It is not too hard for a court to see in such cases that the parties desired no possessory estate, but an easement. The bill-posting cases seem to agree on this interpretation; 43 even where an instrument provided that it should be construed as a lease, not as a license, the Massachusetts judges avoided declaring it to create a true leasehold. 44 It is interesting, however, to note the growing sophistication of the advertisers' draftsmen. At the turn of the century they were "renting;" 45 later, they were "leasing;" 46 and by 1928 some careful lawyer had provided for a sealed "grant" of "the exclusive right and privilege to occupy and use;" 47 another, who retained the word "lease," showed by a special clause his desire to secure the benefits of a true leasehold estate. 48

Hunting leases and similar agreements run into the same sources of confusion as do advertising leases. Usually they are more aptly phrased

40. Id. at 266.
42. BRACONI, I DE LEGIBUS ANGLIÆ (Rolls ed. 1878) 420, f. 53.
to enable the hunt club to raise a crop of oats than to shoot ducks. Judge Nortoni observed in a typical Missouri case:

"It is true this document stipulates the expiration of the privilege therein granted at a definite time and in this respect resembles a lease . . . And it is true, too, that it stipulates for the cash payment of one hundred dollars . . . as if such is the rent reserved for a lease . . . Furthermore, the document recites that it is a lease and, besides, choice technical words of demise are employed therein." 49

But after noting covenants which disclosed that the lessor was to continue tilling the land, the court determined that the instrument did not confer exclusive possession, and therefore did not create a leasehold estate. A statutory proceeding for regaining possession in landlord and tenant cases was accordingly held inapplicable. On analogous facts in other states, it has been held that the "lessee" has not a right of bringing in unlimited associates who would surcharge the servitude, 50 or that the statutes of forfeiture for waste are inapplicable. 51

Concerning the proper name for the interest created, the authorities are highly inconsistent. It is usually enough to say that it is not a lease but a license. 52 But when the "licensee" asks for protection against annoyance by the landowner it becomes necessary to find a better name for the interest, and call it a lease, at least for purposes of the instant controversy. 53 A South Dakota court seems to have analyzed the situation correctly in calling the interest neither a license nor a leasehold, but an easement in gross or (if strict easements must be appurtenant) a servitude. "It is not necessary that the word 'grant' be contained in the instrument in order to constitute the given right an easement or a servitude." 54

II. WORDS OF PROMISE

Students of medieval law have marvelled at the capacity of our forebears to reify rights—to think of a duty to pay money in future years as a thing which might be transferred today. Thus only was it possible to grant or reserve a rent which would thenceforth issue from the land. 55 It was an

51. Treisch v. Doster, 171 Ga. 525, 156 S. E. 231 (1930) ("turpentine lease").
52. Id.; see also Forsyth v. Nathansohn, 139 Ore. 632, 9 P. (2d) 1036 (1932).
54. Thompson v. Finnerud, 51 S. D. 106, 212 N. W. 497 (1927). While textbooks have preserved the term profit à prendre for privileges of taking, it is seldom employed, and more seldom understood, by American judges.
equally strange reification which enabled early English judges to conceive of light and air, received over a neighbors land, as something actually possessed, so that its enjoyment for twenty years ripened to a title. It goes without saying that ways and commons, like land itself, were granted, and became the property of the grantees.

The medieval landowner's aptitude for reifying legal relations is equalled only by our present-day ineptitude. We covenant to pay rent, and regard its issuing from the land as a quaint way of saying that the duty extends to the transferees of the covenantor. The right to light and air we analyze as a right that one's neighbor shall refrain from obstructing it; an English judge, struggling with the doctrine that long enjoyment of light and air implies a grant, conceded that,

"light and air . . . are not the subject of an actual grant; but the right to insist upon the non-obstruction and non-interuption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air."

We can, and sometimes do, grant an affirmative easement, but it is also possible to think of its creation as an undertaking by one's neighbor that he will allow the use of his land and that he will refrain from obstructing such use. In fact, the cases disclose that many laymen and many lawyers thoughtlessly employ words of promise rather than words of grant when they want to set up easement relationships. Every such document sows the seed of litigation.

The failure to use words of conveyance, which purport to transfer ownership of a form of property from the grantor to the grantee, has been regarded by some judges as a fatal omission. A New Jersey Vice-Chancellor reasoned thus about a sealed writing which lay before him:

"Is it a grant, a lease, or merely a license? The language, it will be observed, is purely promissory or executory: 'It is agreed that Rude, and those who succeed to his rights, shall have the exclusive right and privilege &c.' Nothing passes presently as under technical words of grant, dedi et concessi. To constitute a grant, it is not indispensable that technical words shall be used, but they must be words which will manifest the same intention. No such words are found here."

Although this Jersey case involved a mining right rather than a typical easement, its reasoning was cited and adopted by a Tennessee court in appraising an agreement for a watercourse. The landowner had declared in a sealed instrument:

"I . . . have bargained and agreed, and do hereby bind myself, to allow the Warner Iron Company to pass the muddy water . . . by and through my farm . . . as long as said . . . Company may wish to run, or have run, said washers."

The court observed, "The instrument contains no words of grant," and for this and other deficiencies declared it a mere license.

A trustful Michigan lumberman built a logging track after the landowner's agent had assured him by correspondence:

". . . he says it's all right, go ahead, and you may have time to take your lumber off. Mr. Spencer will expect the same privilege to cross your lands to cut his timber."

Again the judges ruled, "these letters certainly constitute no grant . . . because they do not contain words indicative of a grant." Another case in which absence of words of grant seemed fatal involved a railroad siding in Mississippi. The agreement provided:

"The party of the first part hereby agrees to furnish, free of charge to the party of the second part, all of the ground needed for the construction, use, and maintenance of the said spurs . . . and to give the party of the second part secure and exclusive possession thereof. . . ."

The court declared: "It is simply a license, and nothing more. It is not a license coupled with any interest in the land. There are no words of grant in the instrument."

A rule requiring that easements arise only by words of conveyance is the apparent premise of these cases; all other transactions create mere licenses. No such rigidity would be looked for in Bracton's time, when inept gifts were interpreted "according to the simplicity of laymen;" but it might be expected to disclose itself in the rigid era following Lord Coke. Interestingly enough, research has disclosed no such hallowed lineage for the doctrine in question. In 1692, a landowner had covenanted in a bond that it should be lawful for the plaintiff, his heirs and assigns, to use a way through a close. The King's Bench resolved, "that it was a good grant of the way, and not only a covenant for the enjoyment, as was objected," and that the stopping of it by a stranger was, "a trespass, for which the plaintiff may have his remedy by action of trespass."
A celebrated American student of the common law, Justice Holmes, declared: "There is no doubt that an easement may be created by words sounding in covenant."62

The notion that words of conveyance are necessary to create an easement is a recent American manufacture. I have traced it to no earlier source than the *dictum* which a New Jersey Vice-Chancellor uttered in 1880.63 He was attempting to decide whether a certain mining agreement created a revocable or irrevocable privilege, and sought to find the answer by aid of the rules which declare that a license is revocable and an easement irrevocable. To find the answer in this way, he had to discover only whether the agreement created a license or an easement.64 Groping for a clue to this dilemma, he hit upon the rule of *Wood v. Leadbitter*65 that an easement must be created by "grant." This rule, as originally propounded, had reference to the need of a sealed instrument, which was a requirement of the common law grant.66 But the Vice-Chancellor gratuitously assumed that a "grant" is a document which uses the word "grant" or a synonym.67 Thus was born the remarkable doctrine illustrated by the cases described above.

The doctrine cannot be defended on grounds of social policy;68 it would have to be sustained, if at all, in like manner with the disreputable rule that a fee can be created only by using the term "heirs." The latter rule has survived merely because it is part of our legacy of common law, which we have received *cum onere*; but the doctrine under present dis-

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64. Obviously this was the same question with which he started, stated in nouns instead of adjectives. Having failed to perceive this, the judge was predetermined to reach a fallacious result.

65. 13 M. & W. 838 (Ex. 1845).

66. This interpretation was obscured by Baron Alderson's observation that a license would be still a mere license although under seal. But this would be true not for lack of the form of a grant, but for lack of intention to grant an irrevocable interest, or easement, or because the interest granted was one not permitted by law to be an irrevocable interest.

67. The Vice-Chancellor made the error of confusing the legal conclusion which we call a *grant* with the operative fact of using the word *grant*; compare Hohfeld, *Faulty Analysis in Easement and License Cases* (1917) 27 YALE L. J. 66, reprinted in *FUNDAMENTAL LEGAL CONCEPTIONS AND OTHER ESSAYS* (1923) 160.

68. Something might be said for a doctrine that words of conveyance are necessary to show intention to confer a complete legal title, as distinguished from a contract which equity would enforce if supported by consideration. A similar doctrine exists in regard to creating estates in fee. See Note (1935) 33 Mich. L. Rev. 1268; *Tiffany, 2 Real Property* (2d ed. 1920) 1604-05, § 435. But the doctrine in question denies that the agreement is effectual even in equity; all the cases cited for it above are equity cases.
cussion is, as a legacy of common law, an exposed impostor. Later discussion will refer to varying groups of cases in which it is being disregarded. All that remains is to show that the very cases which gave it currency employed it as an excuse for reaching conclusions to which the courts were impelled by other considerations. In the East Jersey case, a mining agreement provided for no royalties except on sale of ore, and nothing had been done, since an initial assay, in the dozen years since the license was given. A finding of abandonment or forfeiture on such facts is a commonplace of mining law. The Nunnelly agreement was by its terms to last only "as long as said . . . Company [without mentioning successors or assigns] may wish to run . . . said washers . . . ;" at the time of the controversy, the original company had sold out to a successor. The licensor in the Michigan case had made known that he wanted to sell, and that he intended to make no commitment which would discourage a purchaser; the controversy arose between the licensee and the purchaser. The Mississippi spur track agreement contained a clause for termination on thirty days notice, which had been given. We may well suspect that the absence of words of grant is not so fatal as dicta would indicate.

Two cases strikingly parallel to the decisions discussed confirm the suspicion with the force of a demonstration. In the same volume of Tennessee reports with Nunnelly v. Southern Iron Co., discussed above, appears Nunnelly v. Warner Iron Co., in which were litigated the royalty obligations of the same company which obtained the flowage license. The mining agreement provided:

"It is hereby agreed . . . that the party of the second part shall have the exclusive right to mine . . . for the term of years specified." (Italics mine)

The actual defendant was the Southern Iron Company, which had succeeded to both mining and flowage rights; the court held it entitled to mine on the same conditions as its predecessor.

69. See cases discussed below under headings, Shall have the right, etc., Promise not to interfere, and Release.
70. East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248 (1880).
71. (1926) 40 C. J. 1028, § 634; (1917) 18 R. C. L. 1190, § 98.
74. Belzoni Oil Co. v. Yazoo & Miss. Valley R. R., 94 Miss. 58, 47 So. 468 (1908).
75. Note that these are almost the very words used, and held insufficient, in East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248 (1880).
In the same year in which the above Mississippi case was decided, the same court decided a case involving a spur contract of nearly identical terms. The controversy arose differently; the landowner had without notice blockaded the spur, and now sued the railroad company for breaking his fence; it was held not liable. Chief Justice Whitfield, who called the contract "simply a license" in the former case, now said,

"... it provides for no mere license. It is a contract made upon a valuable consideration binding the respective parties to the discharge of certain respective obligations." 78

When it comes to a showdown, words of promise are not incapable of creating rights which have the force of easements.

A. Shall Have the Right, etc.

In the conservative New Jersey Chancellor whom I have quoted above recoiled from the ambiguous expressions which would confront him, once the door were opened to words of promise, his fears were not groundless. Easiest of solution are the cases where it is agreed that someone shall have a right or privilege. In an Iowa case, a stipulation in former litigation had settled that "the plaintiffs may have the right to have a sidewalk..." The court ruled laconically, "The stipulation created an easement." 79 In New York, owners of lands abutting on a ten foot strip mutually covenanted and agreed that each of them, his heirs and assigns, should forever have and enjoy the use in common of said lot as a passageway. "The agreement... was effectual as a grant to establish a perpetual easement." 80 If similar language is added to the description in a deed of land in otherwise usual form, its effect as a grant is particularly obvious. 81 It is evident that the words of promise do not create merely a right to equity's aid in obtaining an easement, but a true easement.

Viewed analytically, a provision that one shall have a right or have a privilege is a highly accurate mode of describing the effect of an affirma-

77. Belzoni Oil Co. v. Yazoo & Miss. Valley R. R., 94 Miss. 58, 47 So. 468 (1908).
78. Illinois Central R. R. v. Sanders, 93 Miss. 107, 112, 46 So. 241, 242 (1908). See also New York City v. New York & S. B. Ferry & S. T. Co., 231 N. Y. 18, 131 N. E. 554 (1921), where Justice Cardozo seems to have given effect to a similar agreement; the principal point involved was absence of an acknowledgment.
tive easement. That its effectiveness should be questioned is no tribute to the logic of the law. It is only when the easement is a negative one that the expression becomes inept. To say that A shall have the privilege of opening windows which overlook B's land is inaccurate, because A may do so without any privilege. What A wants is a right that B refrain from obstructing the light or air. Very properly, such Hohfeldian exactitude is not expected of every conveyance. If the description of the premises includes "a privilege of putting windows in" the wall adjoining land of the grantor, it creates a negative easement.\footnote{Kesseler v. Bowditch, 223 Mass. 265, 111 N. E. 887 (1916).}

\textbf{B. Promise Not to Interfere}

Occasionally a landowner who contemplates the use of his land by someone else neither conveys nor provides that someone shall have a right, but promises that he will not interfere with the other's enjoyment. This mode of expression is most likely to be hit upon when the negative easement of light and air is envisaged. It has been seen that one English judge went so far as to say that this right arises "more properly" by a covenant than by a grant.\footnote{Moore v. Rawson, 3 B. & C. 332 (K. B. 1824).} That was going further than necessary, for there is no more impropriety in granting a negative than an affirmative easement.\footnote{When A creates an affirmative easement in favor of B, his right of excluding B is extinguished, and B gets a privilege of entering; this is not a transfer of A's privilege, since he may still use the land, not interfering unduly with B. When A creates a negative easement in favor of B, A loses a privilege of obstructing B's light (for instance), and B gets a right that A shall not obstruct it. In neither case is B given rights identical with A's previous rights, as occurs when A sells the land (his multital rights and privileges therein) to B, who thereafter has similar rights and privileges.} The law clings to the concept of grant in both cases. But it is harder for most people to reify the negative easement and so it has become established that a promise not to build operates as a grant of an easement of light and air.\footnote{Hogan v. Barry, 143 Mass. 538, 10 N. E. 253 (1887); Hasselbring v. Koepeke, 263 Mich. 466, 248 N. W. 869 (1933), noted in (1934) 19 IOWA L. REV. 627.}

A promise not to obstruct the use of an affirmative easement is less usual, and less logical. A right of way consists of more than the right that it shall not be closed; it consists also of a privilege of using it without being a trespasser. Whatever merit this distinction may have, it does not correspond to anything likely to be present in the intentions of the parties. In a Florida case a sealed agreement to "allow [certain alleys] to remain..."
open” was regarded “as one creating an easement.” The same effect was achieved by an Iowa decision upon a contract “to permit [the defendant] to proceed on the work and complete the grotto.” The court refused to clear the land of this cloud on its title; in equity, the agreement created an “irrevocable license.” Although the court did not say so, the agreement had manifestly the same effect in burdening the land as a true easement.

C. Release

Who are the lawyers, we ask ourselves as we read the cases, who have failed to realize that a privilege is a thing to be granted, rather than a series of acts to be promised? How did it happen that the uniform spur contract of Mississippi railroad companies contained no words of conveyance? One answer lies on the surface. That contract was not drawn by the real estate lawyers who obtained the main line rights of way, but by the counsellors of the commercial lawyers, who drew customer contracts and bills of lading. They thought in terms of promises to be performed; they did not know that performances which concern land cease to be the subject of promises and become things real.

If the easement problem had fallen to the claims department, still different words would have clothed the same thought—that the railroad should not be liable. Claims lawyers live in a world of liabilities, from which escape is achieved through a single avenue—the release. If floods should drown the fields behind a railway embankment, and a claim is made, the claims men would obtain a release of past and future damage, carefully extending to the successors in title of both parties, but devoid of words of grant. Precisely this situation arose in a British Columbia case, and it was held that the release had created an easement. A student editor who had read in the books that an easement must arise by grant, pronounced confidently:

“In holding that it creates an easement the court in the principal case is clearly wrong. An easement can ordinarily be created only by grant. Fentiman v. Smith, 4 East, 107 (K. B. 1803); Fitch v. Seymour, supra.”

86. Sewell v. Burdine, 80 Fla. 718, 87 So. 143 (1920). The same agreement was later held to be a license, by reason of an ambiguous clause limiting the agreement’s duration. Burdine v. Sewell, 92 Fla. 375, 109 So. 648 (1926).
88. See also Illinois Central R. R. v. Sanders, 93 Miss. 107, 46 So. 241 (1908).
89. See note 60, supra.
90. Note (1927) 40 Harv. L. Rev. 498. The editor conceded that a release “licenses . . . the acts complained of as against the owner or his successors in title” without explaining how such a legal result would be properly designated.
The cases which he cited condemned a *parol* license and *parol* release respectively.

The decision of the British Columbia Court of Appeal seems wiser in this instance than the Harvard reviewer's strictures upon it. Justice MacDonald had, he said, "inclined to the view during the argument, that it was a misnomer to apply the term 'easement' to the situation created by this agreement," and could not "find in the books any example of an easement thus indirectly created." But it fulfilled a standard easement definition—a privilege whereby one landowner was obliged to suffer something on his own tenement for another's advantage. The Justice concluded:

"... I am of opinion that the agreement does amount to more than the mere settlement of damage claims. The effect of it is that water and debris may be allowed to flow over the defendant's land with impunity... I find, therefore, that an easement was created by the agreement in question. ..."

The same conclusion had already been reached elsewhere, notwithstanding the Justice's failure to discover the cases. In New York, a release of future damages from the slipping of a railway embankment in wet weather was held to create an easement or servitude which bound the successors of the grantor. In the same state, abutting owners' consents to the building of a street railway were held more than licenses—they were at least "property." Where a Wisconsin owner attempted to recall his written release, the court ruled,

"the use in the instrument of the words, 'remise, release, and forever discharge,' etc., indicates pretty clearly an intention to give something more than a mere license; to grant an easement in the land."

Pennsylvania recently signified her assent to the same principles; but the opinion on this point was not strictly necessary, since words of grant had been wisely included with the words of release. The instrument involved in this case was an excellent example of careful draftsmanship with an eye to every legal objection; the questions which took the case into the highest court were not concerned with the sufficiency of the document, but with the capacity of the parties to achieve its effect. The release cases

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94. Walterman v. Norwalk, 145 Wis. 663, 668, 130 N. W. 479, 489 (1911).
draw no distinction between the legal and equitable aspects of the rights created, and it appears that the release is equally effective in either forum. The mention of grant in the Wisconsin cases quoted above points to a conveyance of legal title.

Which releases create easements, and which do not, the few cases hardly permit us to say. Unless future as well as past damage is included, no easement is created. But future damage may be suffered by various persons. The question is most likely to arise when the land of the releasor has come into the hands of a new owner who complains of continuing damage. If his rights are limited by the release, the land is indeed burdened with an easement; the cited cases show that his rights are thus limited if the release referred to damage which the leasor’s heirs, successors and assigns should suffer.

In a Wisconsin case, the question arose in simpler form, without transfer of title. The releasor attempted to enjoin the continuance of a nuisance as to which he had released all claim. Injunction was refused on the ground that an easement had been created. The same result could have been reached by way of specifically enforcing the contract of release, but not so satisfactorily; the releasor would have remained apparently free to abate the nuisance privately, provided he could complete the job before an injunction caught up with him. The releasor had not merely incurred a contract obligation; he had lost all the privileges and rights which are lost by a transfer of property. Conversely, the releasee had gained more than a contract right; he had gained a right in rem in the older sense of a right of which the infringement is not only a breach of promise, but a trespass. The court very properly declared that an easement had arisen.

Under the guise of releases, easements may be lurking in many unsuspected places. Leases by railroad companies sometimes contain a clause releasing all claims by reason of fire damage, the effect of which is discussed as an aspect of covenants running with the land. Perhaps it would be more enlightening to say that the clause creates an easement; rather than binding the releasor to any active duties, it confers on the releasee a privilege of maintaining a fire nuisance; the covenant doctrines about touching and concerning land, and about things de novo or in esse, would then be inapplicable.

96. See note 94, supra.
Another implication of the creation of easements by release is a caution to property lawyers. The client who is about to covenant against incumbrances must be questioned not only concerning his grants and his contracts, but also about his releases. It was just such a covenant which was enforced in the British Columbia case. Between sale and conveyance, a vendor had settled a pending damage suit against a railroad and had given a broad release. Unwittingly, it would seem, he created a new incumbrance for which he was obliged to indemnify his vendee.

D. Promise to Convey

None of the confusion which greets a promise to permit use of land confronts an undertaking which contemplates a later transaction which will confer legal ownership. The language which expresses the undertaking to convey need not be artistic, if it evidently contemplates an act of formal creation, and shuns words of license. No doubt it is best to refer to a prospective deed or making of title; yet an agreement "to dedicate," however inaccurate, points to an easement rather than a license. Letters which contemplate the completion of title by exercise of the eminent domain power are sufficient.

Only one qualification is advisable in speaking of such agreements. The interests which they create are described as equitable, not legal. For that reason, it may be presumed that the promisee could not maintain suit for damages on account of interference with his property right. This inadequacy of legal remedy is a blessing under a thin disguise, for the promisee receives at the chancellor's hands an injunction against interference, with or without a decree for conveyance of legal title. Since modern easement owners almost always prefer specific to general relief, an enforceable promise to convey an easement is practically as much to be desired as an executed conveyance.

98. See note 91, supra.
100. Wetherell v. Brobst, 23 Iowa 586 (1867).
103. This disability may be imaginary; I have found no case denying a right to damages on this ground. The contrary is indicated by a case in which damages were awarded for interference with a right to dig gravel, because “equity regards it as an executed contract and will not permit it to be revoked.” Gilbert v. Schnuerle, 49 S. D. 370, 207 N. W. 163, 164 (1926). Compare Hurst v. Picture Theatres, [1914] 1 K. B. 1, awarding damages for interference with an equitable right to attend the theater.
III. Words Implying Actual Intention to Have an Easement

If the word implied had not been so recklessly employed, it would be unnecessary to employ so clumsy a phrase as words implying actual intention. Unfortunately, "implied easements" arise by the strangest of implications. When a man has sold a landlocked lot, fully intending to charge extra for a right of way, we think it infamous; we imply an easement of necessity just because we know that the vendor doesn't intend to give one. Implication is another thing when two lots have been served by the same driveway and one is sold without providing for the use of this convenient approach; we think the parties would probably have provided for its use had they thought of it, and we imply it because its omission is owing to their want of any intention whatever. These are the common cases of implied easements. They are well named, for it is only the easement that is implied; no intention is implied, unless it be negative or contrary intention.

Circumstances there are which imply an actual intention to create an easement, although none of the words which have been used can be twisted into express declaration. The easement comes into being because the intention can be inferred from what was said; it would not arise without the expressions from which the intention is inferred. A Colorado case is illustrative. A coal mining lease was given to a miner who also had rights to coal in adjoining land, which he could conveniently operate through the shafts of the lease in question. To prevent his neglecting the leased coal in favor of the adjoining, a special clause was inserted, providing on certain contingencies for royalties on adjacent coal brought through the leased land. The miner took out adjacent coal, but did not so neglect the leased coal as to incur the contingent royalties, and the landowner sued for the reasonable value of using his land for a passageway for adjoining coal. The lessee contended first that he had an "implied easement"—that the lease of coal adjacent to other coal of his implied the right to mine both through the same shafts; this contention was rejected. No "implication" arose independently of intention. Yet an easement did arise, by reason of the actual intention which could be inferred from the written agreement. Its provisions for contingent royalties revealed that the parties had contemplated the extraction of adjacent coal through the leased area. The court declared:

"Where a contract discloses the intention of the parties that certain privileges should form an incident thereof (as this lease certainly discloses with respect to coal mined from adjacent
premises on royalties not exceeding ten cents per ton), an easement may be acquired by contract.106

Four other cases which illustrate the rise of easements by inferred intention present a single fact pattern. In each case a contract was made for construction of the physical apparatus of a right of way. Adjoining owners agreed to construct a common stairway and common plumbing facilities;107 a landowner agreed to "clear and make a road," adding a covenant to maintain and defend it as a right of way;108 another agreed to "open . . . as a private alley . . . the following described strip . . . to be used as a private alley so long as the party of the second part, her heirs and assigns, shall require the same for such purpose;"109 another promised to "allow" certain land "to remain open."110 In each case an easement arose.

Two cases111 permit the inference of intention to create an easement from a receipt of consideration, such as "Received May 15, 1862 of G . . . $25 in full for 22 feet as an outlet."112 To the New Jersey Vice-Chancellor113 and the Harvard editor,114 who took so literally the statement that an easement must be created by grant, these cases may have come as a rude blow. What became of the rule that an easement must arise by grant? The rule was in fact directly or indirectly recognized in all the cases. Some held that the non-positive language actually operated as a grant. In one case, where the agreement was under seal, the court observed,

". . . it is insisted that the right of way contract does not grant an easement. . . . The grant of a right of way does not have to be in any particular form of words. The expression, 'right of way' is a common expression occurring so frequently that . . . its meaning is well understood by intelligent persons. . . . In this case, so far as the formalities of the alleged grant are concerned, they were all met."115 (Italics mine)

The Florida court said of the sealed agreement which it had to consider, "We regard the agreement as one creating an easement. . . ."116 In

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112. See Iowa case in preceding note.
113. See note 57, supra.
114. See note 90, supra.
116. Sewell v. Burdine, 80 Fla. 718, 87 So. 143, 144 (1920).
states where seals are no longer considered necessary for real conveyances, unsealed agreements were thought to have similar effect.\textsuperscript{117} All the agreements were written and signed, satisfying the Statute of Frauds. These cases are to be distinguished from those where the construction of a way pursuant to oral agreement creates an easement.

Other opinions were more guarded in speaking of such indirect manifestations of intention. In the Michigan and Iowa cases,\textsuperscript{118} the agreement was evidently considered to be effective only in equity; in the latter case, a decree was rendered for a formal conveyance to perfect the right. Two other judges who thought that the agreements were grants were willing to add a hitch to the tether by noting that the agreement would be enforced by the chancellor if not by the law judge:

"This language in itself is sufficient to pass to the grantee this private way. . . . But suppose it was not. Certainly there appeared on record an agreement for the conveyance of a private way, to compel specific performance of which contract an action lies both against the grantor . . . and his remote grantee, the defendant, who is charged with notice. . . ."\textsuperscript{119}

Whether the rights created by these indirect agreements are legal or equitable must remain obscure. The difference is seldom material.\textsuperscript{120} All the cases of implied intention which I have discussed granted equitable relief, and so they do not prove that a legal right had arisen.

IV. Conclusion

If you have in mind the creation of an easement, your guiding principle is plain. Your purpose will reveal itself most clearly to the judge who scans your work if you avoid telling the reader what you will let your grantee do, and what you will refrain from doing; you must tell him the name of the right you are creating (an easement), and that you are conveying (granting) that right. Having done that, you may safely explain what the easement will allow or require to be done. But this advice is


\textsuperscript{118} Wetherell v. Brobst, 23 Iowa 586 (1867); Outhwaite v. Rodgers, 214 Mich. 346, 183 N. W. 74 (1921).


\textsuperscript{120} The difference between legal and equitable interests in possessory estates is kept alive by two doctrines: (1) that a legal title is necessary to support the action of ejectment; (2) that equitable title cannot be forced on an unwilling purchaser. The first doctrine is inapplicable to easements because injunction rather than ejectment is the usual remedy for protection of easements. As to the second, I have found no case where the purchaser objected to taking title to an easement because it was only equitable.
superfluous, because the draftsman who knows he is creating an easement will proceed properly without prompting.

If you have in mind something to be done, or not to be done, upon land, do you mean that your contract, release, or consent shall be immune from commutation from a specific right or privilege to a mere damage claim? If so, it is likely that you are thinking about something that might be called an easement. Name it, and grant it, as above. But this advice is probably futile, because it is unlikely to be read until too late. Neither you nor I read law review articles when drafting documents. If we read them at all, which is rarely, it is after the document has been drawn, acted on, litigated, and held invalid by the nisi prius and supreme courts. Our petition for rehearing is pending, and we are ready to search the most unlikely sources.

All is not yet lost. Although the draftsman did not realize he was dealing with an easement, a learned judge may take some pleasure in exercising greater acumen. The judge may look at the contract, release or consent and recognize that the parties groped blindly toward that elusive non-possessory interest in land, an easement. The best of judges have been willing before this to look through clumsy words to the parties’ intentions.