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# THE TERMINATION OF BARE LICENCES

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## I. INTRODUCTION

THE essence of a licence relating to land is that it confers on the licensee a right to occupy or use the land in question without granting him a proprietary interest. However, "licences" as a category have little or no conceptual or functional unity. The term "licence" is used to describe the right of an almsperson to occupy rooms in an almshouse,[1] the right of a postman to approach a householder's front door to deliver a letter,[2] the right of the purchaser of a cinema ticket to occupy a seat in the cinema while the film is being shown[3] and countless other situations. A licensee may have exclusive possession of the land which he occupies (as in the "exceptional categories" referred to in *Street* v. *Mountford*[4]) or may have a right to share occupation with others[5] or may enjoy a much more limited right (such as a right to cross land belonging to another[6] or to fix an advertisement to a structure belonging to the licensor[7]).

For the purposes of classification the primary distinction is between licences coupled with an interest and other types of licence. In a case involving a licence coupled with an interest, the licence is ancillary to the interest (such as where A, a landowner, sells standing timber to B and gives B a licence to enter upon A's land to cut the timber and remove it[8]). The importance of the distinction is that a licence coupled with an interest is always irrevocable. As Alderson B. explained in *Wood* v. *Leadbitter*: "supposing the grant ... to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own

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[1] *Gray* v. *Taylor* [1998] 1 W.L.R. 1093.
[2] *Robson* v. *Hallett* [1967] 2 Q.B. 939, 951; *Lambert* v. *Roberts* [1981] 2 All E.R. 15, 19.
[3] *Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B. 1.
[4] [1985] A.C. 809.
[5] *AG Securities* v. *Vaughan* [1990] 1 A.C. 417.
[6] *Wallis* v. *Harrison* (1838) 4 M. & W. 538.
[7] *King* v. *David Allen & Sons (Billposting) Ltd.* [1916] 2 A.C. 54.
[8] *James Jones & Sons, Ltd.* v. *Tankerville (Earl)* [1909] 2 Ch. 440.



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grant''.[9] However, the irrevocability of a licence coupled with an interest is nothing to do with the licence as such; rather it is to do with the interest, which must be proprietary in nature.[10] In the majority of cases involving a licence coupled with an interest, the interest is an interest in land: for example, where A grants B a profit à prendre over part of A's land and a right of access to the servient land over another part of A's land. However, the interest with which a licence is coupled may be a chattel interest.[11]

Once licences coupled with an interest are put to one side, those that remain can be divided into two broad groups: contractual licences and bare licences.[12] As regards contractual licences, whether the licence is revocable and, if so, whether the licensor has to give the licensee a period of notice of revocation depends on the terms of the contract and any relevant statutory provisions.[13] Although the parties' agreement may contain provisions which set out how the licence may be terminated, there have been a significant number of reported cases in which the parties' agreement has either only partially dealt with the issue of termination or has not dealt with the issue at all. In these cases the courts have had to imply terms on termination. Depending on the circumstances, the court may conclude that the licence is not revocable,[14] that it is revocable at will or that it is revocable on the giving of a period of notice.[15] Furthermore, irrespective of the terms of the contract between the parties (whether express or implied), where a contractual licensee occupies premises as a dwelling, the licensor must comply with the Protection from Eviction Act 1977 in order for the licence to be validly brought to an end; it is provided that, as regards a periodic licence falling

[9] (1845) 13 M. & W. 838, 845. See also Coleridge J. in *Wood* v. *Manley* (1839) 11 Ad. & E. 34, 37–88.

[10] Cf. *Vaughan* v. *Hampson* (1875) 33 L.T. 15 and *Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B. 1 which extended the notion of a licence coupled with an interest in cases where no proprietary interest was involved. Both cases must be regarded as having been wrongly decided on this point, though the result in *Hurst* v. *Picture Theatres Ltd.* can be explained on another basis (see the speech of Viscount Simon L.C. in *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173, 188). See also the judgment of Megarry J. in *Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd.* [1971] 1 Ch. 233, 243–245, 254 and the judgment of Mahon J. in *Mayfield Holdings Ltd.* v. *Moana Reef Ltd.* [1973] 1 N.Z.L.R. 309, 315.

[11] *Wood* v. *Manley* (1839) 11 Ad. & E. 34; *James Jones & Sons, Ltd.* v. *Tankerville (Earl)* [1909] 2 Ch. 440.

[12] Some make a threefold division (contract, bare and estoppel), but it has been rightly pointed out that "[p]roprietary estoppel has no necessary connection with the law of licences": C. Harpum, *Megarry & Wade: The Law of Real Property*, 6th ed. (London 2000), para. 13–037. See also R.J. Smith, *Property Law*, 3rd ed. (London 2000), p. 429.

[13] Protection from Eviction Act 1977 (as amended).

[14] *Llanelly Railway & Dock Co.* v. *London & North Western Railway Co.* (1875) L.R. 7 H.L. 550.

[15] Compare *Minister of Health* v. *Bellotti* [1944] K.B. 298 and *Australian Blue Metal Ltd.* v. *Hughes* [1963] A.C. 74, 98.

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within the scope of the legislation, the licensor must give the licensee four weeks' notice of termination.[16]

The position with regard to bare licences should be more straightforward. In the first place, the legislation which governs the termination of occupational licences has no application to licences which are given "otherwise than for money or money's worth".[17] Equally significantly, as the fundamental feature of a bare or gratuitous licence is that it is not based on a contract, it might be supposed that a bare licence imposes no obligations on the licensor. If this were the case, once revocation has occurred, the licensee (strictly speaking, the former licensee, who no longer has the licensor's consent to use or occupy the land) would, on failing to vacate the land, immediately become a trespasser. There are, however, four aspects of the law which indicate that the law relating to bare licences is not quite as simple as this. First, through the operation of the doctrine of proprietary estoppel, the licensor may be estopped from revoking the licence. Second, a licence which has been acted upon is not revocable. Third, on revocation of a bare licence, the licensee must be given a reasonable "period of grace" or "packing-up period"[18] and only at the end of this period does a licensee, who has failed to vacate the land, become a trespasser. Fourth, it is sometimes said that a bare licence may be revoked only "on reasonable notice".[19]

As will be seen from the discussion which follows, there is some overlap between these four strands in the case law—most of which find their origins in the period before the fusion of the administration of law and equity in the latter part of the nineteenth century. In the modern context, there are numerous situations which might reasonably be regarded as falling within the scope of more than one of the potentially relevant doctrines. In practice, much may turn on how a particular case is argued.

In addition to the mass of cases which are regarded as raising the doctrine of proprietary estoppel, the law reports reveal a steady trickle of other cases which raise questions surrounding the termination of bare licences. However, in doctrinal terms, these cases are not entirely consistent and there is something to be said for having another look at the materials with the aim of generating a more straightforward and coherent framework. Although the law relating to the termination of bare licences has in many respects

[16] See Protection from Eviction Act 1977, s. 5 (as amended by Housing Act 1988, s. 32).
[17] Protection from Eviction Act 1977, s. 3A(7)(b).
[18] These expressions are used by Lord Macdermott in *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173, 204, 206.
[19] See C. Harpum, *Megarry & Wade: The Law of Real Property*, 6th ed. (London 2000), para. 17–003.

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come to be dominated by proprietary estoppel, problems can arise in cases where the licensor wishes to bring to an end a gratuitous arrangement (whether in the family context or arising out of a relationship at arm's length) in circumstances in which the licensee cannot invoke the doctrine of proprietary estoppel. In policy terms, the question in these cases is to determine what obligations, if any, ought to be imposed on the licensor.

## II. Proprietary Estoppel

One of the most striking developments in English property law over the last hundred years or so has been the expansion and refinement of what has come to be known as the doctrine of proprietary estoppel. A detailed consideration of the doctrine is outside the scope of the present discussion.[20] For present purposes, the important point to note is that, in certain circumstances, a licensor will be prevented from acting in a way which is inconsistent with a gratuitous licence if the licensee has acted to his detriment on a representation or common understanding that he has acquired (or will acquire) an interest in the property in question.

Notwithstanding the absence of a bargain between the parties, in cases where the licensee's use or occupation of the land is protected by proprietary estoppel, the expectation fostered by the licensor's representation or the parties' common understanding and the licensee's reliance on that representation or common understanding acts as a check on the licensor's freedom to terminate the licence. The doctrine of proprietary estoppel does not dictate a particular result—in the sense that, once an equity has been established, the court has a discretion as to how that equity should be satisfied.[21] At one end of the spectrum, it may be decided that the equity should be satisfied by the transfer of the land to the licensee;[22] at the other, if there has been a long passage of time between the common understanding and the moment when the licensor wishes to revoke the licence, the court may conclude that the licensee's equity has already been satisfied by the extended period of rent-free use or occupation enjoyed by the licensee.[23] Nevertheless, although the court's discretion is not subject to any formal limitations, much of the case law supports the proposition that the court will, as far as possible (and as long as it does not lead to injustice), seek to satisfy

[20] See K.J. Gray & S.F. Gray, *Elements of Land Law*, 3rd. ed. (London 2000), paras. 7.18–7.27; C. Harpum, *Megarry & Wade: The Law of Real Property*, 6th ed. (London 2000), ch. 13.
[21] *Crabb* v. *Arun D.C.* [1976] Ch. 179.
[22] *Pascoe* v. *Turner* [1979] 1 W.L.R. 431.
[23] *Sledmore* v. *Dalby* (1996) 72 P. & C.R. 196.

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the equity by conferring on the licensee the interest which he believed he had already acquired (or would acquire).[24]

## III. Licences "acted upon"

There is a common law doctrine according to which a licence which has been acted upon cannot be revoked by the licensor, notwithstanding the fact that the licence is gratuitous. This doctrine can be traced back at least to the seventeenth century.[25] The following example, taken from *Liggins* v. *Inge*,[26] is provided by *Megarry & Wade*:

> where A, with B's permission, lowers a river bank and diverts part of the flow of a river over a weir which he has constructed, that licence cannot be revoked so as to make A's conduct tortious.[27]

The basis of the rule was explained in *Winter* v. *Brockwell*.[28] Lord Ellenborough C.J. "thought it very unreasonable, that after a party had been led to incur expense in consequence of having obtained a licence from another to do an act, and that the licence had been acted upon, that other should be permitted to recall his licence and treat the first as a trespasser for having done that very act".[29] Consequently, the doctrine applies to a licence to do specific acts (typically, to undertake building or similar works) which involve the licensee in expenditure, but not to "a licence to do acts which consist in repetition, as to walk in a park, to use a carriage way, to fish in the waters of another".[30] So, in a case such as *Greasley* v. *Cooke*[31] there can be no possibility of the licence becoming irrevocable at common law by virtue of the fact that the defendant, by occupying the premises to which the licence related, "acted upon" it. At common law, revocation of a licence "to do acts which consist in repetition" does not cause loss to the licensee, who returns to "the same situation as he was before it was granted".[32]

[24] See S. Moriarty, "Licences and Land Law: Legal Principles and Public Policies" (1984) 100 L.Q.R. 376, 377–388. For consideration of the principle (and its limits) see *Burrows* v. *Sharp* (1991) 23 H.L.R. 82.

[25] *Webb* v *Paternoster* (1619) Pop. 151 is said to lay down the rule that "a licence executed is not countermandable; but only when it is executory": Lord Ellenborough C.J. in *Winter* v. *Brockwell* (1807) 8 East 308, 310.

[26] (1831) 7 Bing. 682.

[27] C. Harpum, *Megarry & Wade: The Law of Real Property*, 6th ed. (London 2000), para. 17–012.

[28] (1807) 8 East 308.

[29] At p. 310.

[30] Tindal C.J. in *Liggins* v. *Inge* (1831) 7 Bing. 682, 694. Cf. *Feltham* v. *Cartwright* (1839) 5 Bing. N.C. 569, to which Megarry J. referred in *Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd.* [1971] 1 Ch. 233, 255.

[31] [1980] 1 W.L.R. 1306.

[32] Tindal C.J. in *Liggins* v. *Inge* (1831) 7 Bing. 682, 694.

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The doctrine of a licence acted upon operates only to prevent the licensor from requiring the licensee to undo the specific acts in question. If, for example, B licenses A to build a wall in such a way that it blocks the light to B's window, once A has built the wall B cannot revoke the licence and require the wall to be pulled down. However, the doctrine cannot be used to circumvent the rule that an interest in land (such as an easement) must be created by deed. For example, in *Hewlins* v. *Shippam*[33] the defendant gave the plaintiff oral permission to construct a drain on the defendant's land and to pass waste water through it. It was held that, when the defendant blocked the drain, the plaintiff had no cause of action. The defendant could not have revoked the licence to construct the drain and have required the plaintiff to remove it, but the doctrine of a licence acted upon could not have the effect of creating an easement (in this case, to run waste water through the drain) in the plaintiff's favour. The rule established in *Hewlin's* case was applied a few years later in *Cocker* v. *Cowper*.[34]

There is an obvious parallel between the common law doctrine of a licence acted upon and the equitable doctrine of proprietary estoppel—though there are also important differences between them. First, one of the conditions for the application of proprietary estoppel is that the party who seeks to raise the estoppel had a belief that the property in question is his or that the owner has given or will give him the property or an interest in it.[35] In formal terms, there would appear to be no such requirement for the common law doctrine; all that is required is that the licensee acted upon the licence. However, in practice, it is almost inevitable that a person who is licensed to do something (such as to construct a drain) will have a belief that he thereby acquires a corresponding interest in the land. Second, under the common law doctrine the licence becomes irrevocable, whereas the doctrine of proprietary estoppel gives the court a discretion as to how to satisfy the equity. In this respect, the common law may provide the licensee with a more extensive remedy. Third, although the scenario illustrated by *Hewlins* v. *Shippam* falls outside the common law doctrine, equity can give relief in this type of case. This was apparent even before the fusion of the administration of common law and equity. For example, in *Duke of Devonshire* v. *Eglin*[36] the parties agreed that the plaintiff would construct a watercourse through the defendant's land for a "reasonable and proper sum". The watercourse was built

[33] (1826) 5 B. & C. 221.
[34] (1834) 1 Cr. M. & R. 418.
[35] J. McGhee, *Snell's Equity*, 13th ed. (London 2000), para. 39–15.
[36] (1851) 14 Beav. 530.

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in 1840 and used until 1849, when the defendant blocked it. It was held by Romilly M.R. that the defendant could not revoke the licence to use the watercourse.[37] Although the judgment does not expressly refer to what is now known as the doctrine of proprietary estoppel, the report of the argument of Palmer and Curry on behalf of the plaintiff clearly reveals that the notion of estoppel was at the heart of the plaintiff's contentions.[38] Under the modern law, there can be no doubt that, in cases like *Hewlins* v. *Shippam*, proprietary estoppel will come to the rescue.[39]

Although, in certain respects, more extensive than the equitable doctrine, the common law doctrine has been "largely eclipsed"[40] by proprietary estoppel.[41] Indeed, in the twentieth century there appear to be no reported cases in which the common law doctrine has been applied.[42] In practice, in those cases where the common law doctrine is potentially relevant, the licensor will be estopped—on the basis that the licensee, in the belief that he had acquired (or would acquire) an interest in the land, relied to his detriment on the licence. Furthermore, in this type of case, it is reasonable to suppose that the court will normally concretise the inchoate equity by granting the licensee a perpetual interest in the land.[43]

## IV. The "Packing-up Period"

In *Cornish* v. *Stubbs*[44] the plaintiff had possession of premises under a tenancy which was terminable by weekly notice, but with an express provision allowing the plaintiff a reasonable period in which to remove his goods on the expiry of the notice to quit. The plaintiff was also licensed by the defendant to stack timber on the land adjoining the demised premises. When the defendant gave notice terminating the tenancy and revoking the licence, the plaintiff organised an auction of the timber which had been stacked on the defendant's land. On the day of the proposed auction the defendant locked the gate, thereby preventing the auction from

[37] See also *Powell* v. *Thomas* (1848) 6 Hare 300.
[38] (1851) 14 Beav. 530, 532 ("the Defendant having consented to the making of the watercourse, and stood by and allowed the Plaintiffs to expend money in its construction, on the faith of that consent, could not be permitted to recal [*sic*] the licence").
[39] *Ward* v. *Kirkland* [1967] Ch. 194.
[40] C. Harpum, *Megarry & Wade: The Law of Real Property*, 6th ed. (London 2000), para. 17–012.
[41] The eclipsing of the common law doctrine by equity seems to have started in the nineteenth century: *Powell* v. *Thomas* (1848) 6 Hare 300; *Duke of Devonshire* v. *Eglin* (1851) 14 Beav. 530.
[42] The doctrine was, however, referred to in *Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd.* [1971] 1 Ch. 233. Even in the nineteenth century, there were cases in which the common law doctrine was not referred to even though the facts would appear to fall squarely within its scope: see, for example, *R.* v. *The Inhabitants of Hordon-on-the-Hill* (1816) 4 M. & S. 562 (in which B licensed A to build a house on land owned by B).
[43] *Ward* v. *Kirkland* [1967] Ch. 194. Cf. *Inwards* v. *Baker* [1965] 2 Q.B. 29.
[44] (1870) L.R. 5 C.P. 334.

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going ahead. In relation to revocation of the licence, it was held that the plaintiff had a right to a reasonable time to remove his goods.

Although *Cornish* v. *Stubbs* involved a contractual licence, the reasoning of the Court of Appeal did not use the contractual nature of the licence as the peg on which to hang the licensee's right to a period of grace in which to vacate the land. In subsequent cases it has been established that a bare licensee, whose licence has been revoked by the licensor, does not immediately become a trespasser; he has a packing-up period in which to remove himself and his belongings from the land.[45] This rule has been affirmed in many different contexts and appears entirely uncontroversial. Since there are many cases (such as those involving occupational licences) in which it is not practicably possible for the licensee to vacate the land immediately on being informed that the licence has been revoked, there is no plausible alternative to the law's recognition of a period of grace in cases involving the termination of a bare licence. There is, of course, no hard and fast rule as to how long the packing-up period should be—as what is reasonable depends on the circumstances. In a case in which a door-to-door salesman is asked by the owner-occupier to leave, a reasonable period would, in most cases, be no more than a few seconds.[46] At the other end of the spectrum, on the termination of a bare licence of residential or commercial premises, a reasonable period would normally be sufficient to allow the licensee to find alternative accommodation and may be as much as a year[47] (or even more[48]). If the licensor seeks to remove the licensee before the period of grace has elapsed or otherwise interferes with the licensee's packing-up period—for example, by refusing the licensee access to the land to remove his goods—he commits a wrong for which he may be liable in damages.[49]

Since many of the cases have involved contractual licences, there is a temptation for the licensee's packing-up period to be seen as a facet of the contractual relationship.[50] However, a contractual analysis cannot explain why a bare licensee, no less than a contractual licensee, is entitled to a period of grace. Although the cases support the existence of the packing-up period even in cases

[45] See, for example, *E. & L. Berg Homes Ltd.* v. *Grey* (1979) 253 E.G. 473.
[46] See *Robson* v. *Hallett* [1967] 2 Q.B. 939 and *Lambert* v. *Roberts* [1981] 2 All E.R. 15 (both cases involving uninvited police officers).
[47] *E. & L. Berg Homes Ltd* v. *Grey* (1979) 253 E.G. 473.
[48] See, for example, *Governing Body of Henrietta Barnett School* v. *Hampstead Garden Suburb Institute* (1995) 93 L.G.R. 470 (although it should be noted that the analysis of Carnwath J. was in terms of reasonable notice of revocation, rather than a reasonable packing-up period).
[49] *Cornish* v. *Stubbs* (1870) L.R. 5 C.P. 334.
[50] See, for example, *Kerrison* v. *Smith* [1897] 2 Q.B. 445.

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involving a bare licence, in few of the cases is there any analysis of its basis. For example, in *Robson* v. *Hallett* Lord Parker C.J. said that, on the revocation of the licence, "a reasonable time must be implied"[51] for the licensee to leave the land, without addressing the fact that, as the case involved a bare licence, there was no contract into which the licensee's right to a period of grace could be implied.

The fact that the licensee's packing-up period does not have a contractual origin is made clear in *E. & L. Berg Homes Ltd.* v. *Grey*.[52] In this case the defendants had occupied land belonging to the first defendant's employer for twenty-six years, though there had been no formal agreement and the defendants, who did not pay anything for use of the site, were bare licensees. When the licence was revoked the question arose as to whether the defendants had any basis for resisting the plaintiff's action for possession (for example, on the basis of proprietary estoppel). Although the Court of Appeal held that the circumstances did not give rise to an equity in the defendants' favour, they were entitled to a reasonable time in which to vacate the site. Brandon L.J. relied on *Minister of Health* v. *Bellotti*[53] and added: "That was a case involving a contractual licence without any express terms, but I do not see why similar principles should not apply in the present case."[54] In *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* (which also concerned a contractual licence) Lord Macdermott explained the basis of the packing-up period in the following terms:

> Th[e] period of grace can, of course, be the subject of agreement, but it exists for gratuitous as well as for contractual licences and, on that account, must, I think, be generally ascribed to a rule of law rather than to an implied stipulation.[55]

The only conclusion which can be drawn from this analysis is that interference with the licensee's packing-up period constitutes a tort.

A question arises as to whether interference with a licensee's packing-up period is a separate tort or, simply, the application of other torts in a particular context. In many cases, the licensor's interference with the packing-up period will satisfy the conditions for liability under one or more of a number of other torts: if the licensor physically removes the licensee while the latter is not a trespasser, the licensor is liable for battery; if, during the packing-up period, the licensor prevents the licensee from re-entering the

[51] [1967] 2 Q.B. 939, 953.
[52] (1979) 253 E.G. 473.
[53] [1944] K.B. 298.
[54] (1979) 253 E.G. 473, 476.
[55] [1948] A.C. 173, 204.

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land in order to remove his goods, the licensor commits the tort of conversion; a licensor who packs up the licensee's personal property and physically removes it from the land is guilty of trespass to goods and conversion. However, not all situations involving interference with the packing-up period fall within other tortious categories. For example, in a case involving an occupational licence, the licensor's interference with the packing-up period cannot constitute trespass to land if, as is normally the case, the licensee does not have possession of the land. The argument that interference with the licensee's packing-up period is a distinct tort is supported both by *Cornish* v. *Stubbs*,[56] in which the licensee, who was prevented from entering the premises during the period of grace, was held to be entitled to damages and by the *Winter Garden Theatre* case.[57] As already noted, according to Lord Macdermott's analysis, the packing-up period is based on a "rule of law" which imposes an obligation on the licensor not to interfere with it.[58]

## V. "Reasonable Notice"

The question of reasonable notice is a problematic one, not least because there seems to be a conflict within the literature and the cases. Whereas it is said by *Megarry & Wade* that a bare licence can be revoked "at any time on reasonable notice",[59] according to Gray a bare licence is "revocable at will by the licensor without any necessity of prior notice".[60] How is this apparent divergence to be resolved? There are three possibilities.

First, it is possible that in the quoted extracts the word "notice" is being used in two different senses. A requirement that a person should be given "notice" may mean either that the person must be informed of something (*i.e.*, given notification that something has happened) or that the person must be given advance warning of something (*i.e.*, given a period of notice before something happens). If *Megarry & Wade* are using "notice" to mean notification and Gray uses it to signify advance warning there is no conflict between them. Second, it is possible that the proposition that a bare licensee is entitled to "reasonable notice" of revocation (in the sense of

[56] See Bovill C.J.'s judgment at (1870) L.R. 5 C.P. 334, 338.
[57] [1948] A.C. 173.
[58] At p. 204.
[59] C. Harpum, *Megarry & Wade: The Law of Real Property*, 6th ed. (London 2000), para. 17–003.
[60] K.J. Gray, *Elements of Land Law*, 2nd ed. (London 1993), p. 898. In the new edition—K.J. Gray & S.F. Gray, *Elements of Land Law*, 3rd. ed. (London 2000)—the equivalent passage reads: "effective revocation of a bare licence generally requires no prior notice" (p. 156). See also J.-A. MacKenzie and M. Phillips, *Textbook on Land Law*, 8th ed. (London 1999), para. 17.2.2; J. Stevens and R.A. Pearce, *Land Law* (London 1998), p. 413; M.P. Thompson, *Land Law* (London 1995), p. 169.

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advance warning) is based on an insecure doctrinal foundation and the cases, to the extent that they support it, are wrongly decided. Third, if the authorities support the proposition that a bare licensee is entitled to "reasonable notice" (in the sense of advance warning), it may be that, in substance, this requirement is simply a different way of analysing the bare licensee's entitlement to a packing-up period; *i.e.*, a bare licensee is entitled either to advance warning of revocation or to a period of grace after revocation (but not both). Which of these possibilities is the correct one?

### *A. The First Possibility*

A licence cannot be regarded as having been revoked unless the licensee has been notified of the revocation. There is an obvious parallel here with the law relating to tenancies at will. If the landlord terminates a tenancy at will by physically re-entering the land, the termination takes immediate effect;[61] if, however, the landlord terminates the arrangement by an act away from the land (for example, by transferring the land to another), the tenancy at will comes to an end when the tenant at will becomes aware of the act in question.[62] It would be odd if the position in relation to bare licences were any different. So, for example, R.J. Smith states: "It has always been clear that [a bare licence] can be terminated by giving notice to the licensee."[63] If authority were needed to support this proposition it is provided by the early seventeenth century case of *Webb* v. *Paternoster*.[64] Although there may be legitimate disagreement about exactly what this case stands for, it seems to have been accepted in *Wood* v. *Leadbitter*[65] that it is authority for the proposition that a licensee must be given notice of revocation.

As already noted, there is scope for confusion because of the fact that the word "notice" may be used to signify either notification or advance warning. In *Norris* v. *Checksfield*, for example, Woolf L.J. said that "[n]o notice [was] required to terminate the employee's licence".[66] In this extract the word "notice" was being used to mean period of notice or advance warning rather than notification. By contrast, when in *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* Lord Porter said that "a licence is prima facie terminable at once after

[61] See Lord Denman C.J. in *Turner* v. *Doe d. Bennett* (1842) 9 M. & W. 643, 646. See also the judgment of Isaac J. in *Landale* v. *Menzies* (1909) 9 C.L.R. 89, 133.
[62] Co. Litt. 55b.
[63] *Property Law*, 3rd ed. (London 2000), p. 429.
[64] (1619) Pop. 151.
[65] Alderson B. in (1845) 13 M. & W. 838, 846–847.
[66] [1991] 1 W.L.R. 1241, 1248.

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notice to determine has been given",[67] the word "notice" signifies notification. Accordingly, it is possible that the authorities which indicate that a bare licensee is entitled to notice mean simply that revocation depends on the licensee being notified of it. However, this is unlikely given that the phrase used by Stirling J. in *Aldin* v. *Latimer Clark & Muirhead & Co.*,[68] one of the cases cited by *Megarry & Wade*,[69] is "reasonable notice". Although, in the context of the case,[70] either meaning is possible, the addition of the epithet "reasonable" suggests that "notice" was being used to signify advance warning, rather than notification. Furthermore, the twentieth century cases which discuss the bare licensee's entitlement to notice of revocation[71] are clearly concerned with the period of notice.

### *B. The Second Possibility*

If it is assumed that "notice" means advance warning (rather than simply notification), the second possibility is that the cases which support the idea that a bare licensee is entitled to "reasonable notice" of revocation do not rest on a firm foundation. Although in cases involving contractual licences the court will often imply a term that, in light of the surrounding circumstances, the licensor must give the licensee a reasonable period of notice of termination, there can be no principled argument for a licensor having a similar obligation in the context of a bare licence; the gratuitous nature of the licence means that the licensor cannot be under any contractual obligations to the licensee. Any hardship which might be caused to the bare licensee by the sudden revocation of the licence is satisfactorily dealt with by the rule that a bare licensee is entitled to a reasonable packing-up period.

In terms of the authorities the starting-point must be *Aldin* v. *Latimer Clark & Muirhead & Co.*[72] X was the owner of land, some of which was leased for 21 years to the plaintiff for use in connection with a timber business. X gave the plaintiff permission to put some ventilators in one of the demised buildings. This arrangement was not recorded in a formal agreement and no consideration was paid for the permission. The plaintiff put in the

[67] [1948] A.C. 173, 196.
[68] [1894] 2 Ch. 437.
[69] The other case cited is *Armstrong* v. *Sheppard & Short Ltd.* [1959] 2 Q.B. 384. This citation is not easy to explain as there appears to be no discussion of the question of notice by Lord Evershed M.R., who gave the judgment of the Court of Appeal.
[70] For a detailed discussion of the decision see the text at nn. 72–83.
[71] *Canadian Pacific Railway Co.* v. *The King* [1931] A.C. 414; *Governing Body of Henrietta Barnett School* v. *Hampstead Garden Suburb Institute* (1995) 93 L.G.R. 470.
[72] [1894] 2 Ch. 437. In the account which follows the facts relevant to the main issue in the case (namely, the landlord's implied covenant not to derogate from his grant) are omitted.

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ventilators at his own cost. X sold the retained land to the defendant who erected a structure on the land in such as way as to interfere with the plaintiff's ventilators. There are two important points which emerge from this brief account of the facts. First, and most fundamentally, the defendant was a successor in title of the original licensor. However, neither the arguments of counsel nor the judgment of Stirling J. refer to the third party point raised by the case, which seems to have proceeded as though the defendant had been the original licensor. Second, although Stirling J. stated that the licensee was entitled to "reasonable notice of the revocation of the licence",[73] it is far from clear that a revocation of the licence (*i.e.*, the permission for the plaintiff to put in ventilators) by the defendant was involved. In substance, what the plaintiff was complaining about was that the defendant's building obstructed the flow of air to the ventilators, not that the licence had been revoked.

Counsel for the plaintiff put forward two arguments.[74] One was based on the doctrine of estoppel as formulated in *Ramsden* v. *Dyson*.[75] Although the report of counsel's argument is rather thin, this argument appears to be sound. An equity had arisen in the plaintiff's favour as he had relied to his detriment on a common understanding with X that he would have a flow of air to the ventilators. On the assumption that the defendant had notice of the equity, there is no reason why the defendant should not have been estopped from interfering with the plaintiff's flow of air. Unfortunately, Stirling J. made no reference at all to the estoppel argument and it seems that the analogous case of *Duke of Devonshire* v. *Eglin*[76] was not cited.

The other argument was that the licence to put in the ventilators had been acted upon and, therefore, on the authority of *Winter* v. *Brockwell*,[77] the defendant could not revoke it. Stirling J. rightly rejected this argument on the basis that *Winter* v. *Brockwell* was distinguishable. For reasons already considered,[78] the doctrine of a licence acted upon meant only that the defendant could not have required the plaintiff to remove the ventilators; it did not mean that the defendant was prevented from obstructing them. As Stirling J. recognised,[79] the case was, in fact, indistinguishable from *Hewlins* v. *Shippam*.[80] The plaintiff's claim to a right to a flow of air to his

[73] At p. 448.
[74] At pp. 440–441.
[75] (1865) L.R. 1 H.L. 129.
[76] (1851) 1 Beav. 530.
[77] (1807) 8 East 308.
[78] See the text at nn. 33–34.
[79] [1894] 2 Ch. 437, 448.
[80] (1826) 5 B. & C. 221.

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ventilators, even if it could have existed as an easement,[81] could not have succeeded because the proper formalities had not been complied with.

Having ignored the estoppel argument and dealt with the doctrine of a licence acted upon, Stirling J., like a magician pulling a rabbit out of a hat, concluded, on the authority of *Cornish* v. *Stubbs*[82] and *Mellor* v. *Watkins*,[83] that the plaintiff had a good cause of action for damages because the defendant had not given the licensee reasonable notice of revocation. It has already been noted that the characterisation of the facts as involving revocation of the licence cannot be supported. However, if it is assumed that the facts had given rise to a revocation issue, do the cases referred to by Stirling J. support his conclusion?

*Cornish* v. *Stubbs*, the facts of which have already been considered,[84] concerned a contractual licence and is, therefore, clearly distinguishable from the scenario in *Aldin* v. *Latimer Clark & Muirhead & Co*. Furthermore, the court's discussion of the licence point in *Cornish* v. *Stubbs* focused solely on the packing-up period and the question whether or not a licensee is entitled to a notice period was not considered. In *Mellor* v. *Watkins* W owned two houses (Nos. 4 and 5). No. 5 was let to X, who sub-let the cellars to the defendant (who was the tenant of No. 4). W subsequently let No. 5 (including the cellars) to the plaintiff. The plaintiff, without objection from the defendant, put some pipes and bell-wires in the cellars of No. 5. In July 1872 the plaintiff demanded possession of the cellars of No. 5, but the defendant refused to vacate the cellars on the basis that he had not been given a valid notice to quit. In January 1873 the defendant cut off the plaintiff's water supply by blocking the water pipe in the cellar and cut the pipes and bell-wires installed by the plaintiff. The plaintiff brought an action for being kept out of possession of the cellars and for the damage caused by the cutting of the pipes and wires. Before termination of the sub-tenancy of the cellars the plaintiff was regarded as a licensee of the defendant in respect of the pipes and bell-wires. Two judges gave reasoned judgments.[85] Cockburn C.J. talked only of the packing-up period and Blackburn J. agreed that the licensee was entitled to "sufficient time to remove the articles from the premises".[86] Accordingly, the *ratio decidendi* must be regarded as being based on the period of grace

[81] Compare *Cable* v. *Bryant* [1908] 1 Ch. 259 and *Bryant* v. *Lefever* (1879) 4 C.P.D. 172.
[82] (1870) L.R. 5 C.P. 334.
[83] (1874) L.R. 9 Q.B. 400.
[84] See the text at n. 44.
[85] The third judge, Lush J., concurred with both reasoned judgments (at p. 406).
[86] At p. 405.

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point.[87] However, Blackburn J. added the following observation: "at all events [the licensor] is bound to give the licensee reasonable notice".[88] No authority is given for this statement, which was not necessary for the decision.

It is submitted that, on the basis of these cases, the proposition that a bare licensee is entitled to a period of notice of revocation, as well as being contrary to principle, is without any convincing authority to support it.

### *C. The Third Possibility*

In *Canadian Pacific Railway Co.* v. *The King*[89] the appellant had erected telegraph poles on land belonging to the Crown without the latter's permission. Although the appellant had originally been a trespasser it was accepted that, by virtue of the Crown's acquiescence over a long period, it had become an implied licensee. The Privy Council held that the Crown was not entitled to revoke the licence summarily. The opinion of the Board was given by Lord Russell, who stated that "a licensee whose licence is revocable is entitled to reasonable notice of revocation".[90] In applying this principle Lord Russell drew a distinction between cases where the licensee had not relied upon the licence (in which case the licence can be determined "*brevi manu* at the will of the licensor") and cases where reliance on the licence has "involved the licensee in obligations in other directions" (in which case the licensee is "entitled to breathing space"[91]). As the appellant's licence fell within the second category, Lord Russell held that on the facts of the case the appellant was entitled to notice of revocation which would give it "an interval of time between the service of the notice and the specified date, sufficient not only to allow the removal of the poles and wires from off the property of the Crown, but also to enable the appellant to make arrangements for the continuance of the telegraph line by the erection of poles and wires elsewhere than on Crown property".[92] A similar analysis was adopted by Carnwath J. in *Governing Body of Henrietta Barnett School* v. *Hampstead Garden Suburb Institute*.[93] A school was located in premises belonging to the institute. Although there had been a relationship between the school and the institute over a number of

[87] The decision could also have been justified on the basis of the doctrine of a licence acted upon. See the text at nn. 25–43.
[88] (1874) L.R. 9 Q.B. 400, 405.
[89] [1931] A.C. 414.
[90] At p. 432.
[91] *Ibid.*
[92] At pp. 432–433.
[93] (1995) 93 L.G.R. 470.

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decades, the school was, in legal terms, a bare licensee. The institute gave the school nine months' notice of termination of the licence. It was held that the notice was of no effect because the notice period was too short.[94]

Both of these cases present certain problems. First, there is no consideration of the legal basis for imposing on the licensor an obligation to give a period of notice before revocation is effective. One of the features of this area of the law is that both courts and commentators sometimes fail to distinguish adequately bare licences from contractual licences. It is not difficult to see how this has come about, since at common law both contractual and bare licences were revocable at will. However, during the last one hundred years or so, the courts have developed the notion that there may be implied contractual restrictions on the revocation of contractual licences. As a consequence, the distinction between bare and contractual licences has become all the more important. The idea that a licensee is entitled to a reasonable period of notice seems to have been imported from the contractual licence cases into *Canadian Pacific Railway Co.* v. *The King* and the *Hampstead Garden Suburb Institute* case without it having been realised that, in the absence of a contract into which terms can be implied, there is no legal basis to support it.

Second, the only authorities referred to by Lord Russell in *Canadian Pacific Railway Co.* v. *The King* are *Cornish* v. *Stubbs*[95] and *Mellor* v. *Watkins*.[96] It has already been seen that neither of these cases provides convincing authority for a bare licensee being entitled to a reasonable period of notice.[97]

Third, much of Lord Russell's opinion and Carnwath J.'s judgment is more consistent with the notion that a bare licensee is entitled to a period of grace on the revocation of the licence, rather than a period of notice prior to revocation. In addition, although the judgments are phrased in terms of "reasonable notice", when the cases are referred to in the books, either they are cited as though they were concerned with the packing-up period[98] (or as though they involved a contractual licence[99]) or the distinction between the packing-up period after revocation and the notice

[94] The case was significantly more complicated than this brief summary suggests: the purpose of the notice of revocation was not to require the school to vacate the premises but to bring matters to a head, with a view to putting the occupation of the school on a more commercial basis; it was accepted on all sides that there was no way in which the school could have re-located in nine months.

[95] (1870) L.R. 5 C.P. 334.

[96] (1874) L.R. 9 Q.B. 400.

[97] See the text at nn. 82–88.

[98] See, for example, C. Harpum, *Megarry & Wade: The Law of Real Property*, 6th ed. (London 2000), para. 17–003; P. Sparkes, *A New Land Law* (Oxford 1999), p. 377.

[99] C. Harpum, *Megarry & Wade: The Law of Real Property*, 6th ed. (London 2000), para. 17–008.

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period prior to revocation is blurred.[100] This gives credence to the third possibility—namely, that, in those cases where it has been held that a bare licensee is entitled to a reasonable period of notice of revocation of the licence, the notice period is, in substance, simply another way of looking at the packing-up period.

In a case involving a bare licence, it appears at first glance that it does not much matter, in practical terms, whether the court decides either that the licensee must be given one month's notice of revocation or that, although the licence can be terminated at will, the licensee is entitled to a period of grace of one month. However, matters are not quite as simple as this. There are indications in the cases concerning contractual licences that the notice period and the packing-up period are not necessarily alternatives. Lord Macdermott's speech in the *Winter Garden Theatre* case seems to be premised on the idea that a contractual licensee is entitled both to a reasonable period of notice of termination and to a period of grace.[101] If the revocation of bare licences is approached from the perspective of the licensor being under an obligation to give a reasonable period of notice, a court might end up concluding that a bare licensee is entitled both to advance warning of revocation and a packing-up period. Moreover, even on the assumption that the two periods are alternative ways of looking at the same problem, their practical results are not necessarily the same. If the situation is analysed in terms of the packing-up period, the licensee has a reasonable period from the moment that the licensor notifies the licensee of the revocation. However, in *Canadian Pacific Railway Co.* v. *The King* and the *Hampstead Garden Suburb Institute* case, which were analysed in terms of the licensor's obligation to give a reasonable period of notice, failure by the licensor to give a reasonable period of notice rendered the notice totally ineffective.[102] As a consequence, the effect of importing a requirement of reasonable notice into cases involving a bare licence may well be that the licensee is given a longer breathing space than is needed in the circumstances.

Fourth, although in *Canadian Pacific Railway Co.* v. *The King* the Privy Council understandably rejected the appellant's argument based on proprietary estoppel (as, notwithstanding the fact that the appellant relied upon the implied licence, the appellant did not have

[100] See, for example, the statement in M. Dixon, *Principles of Land Law*, 3rd ed. (London 1999), para. 9.3.1 that "the licensor may terminate the licence by giving reasonable notice to the licensee" for which *Robson* v. *Hallett* [1967] 2 Q.B. 939 and the *Hampstead Garden Suburb Institute* case (1995) 93 L.G.R. 470 are cited.

[101] [1948] A.C. 173, 208. See also Sir Valentine Holmes K.C. (*arguendo*) at p. 187; Lord Diplock in *Greater London Council* v. *Jenkins* [1975] 1 W.L.R. 155, 158.

[102] See P. Sparkes, *A New Land Law* (1999), p. 378.

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a belief that it had acquired or would acquire an interest in the land in question), the *Hampstead Garden Suburb Institute* case might more convincingly have been decided on the basis of the equitable doctrine. One aspect of the school's estoppel argument seems to have been accepted—notwithstanding the court's rejection of the argument that the school was entitled to rent-free use of the premises indefinitely and that the institute was estopped from terminating the licence. Because of the school's involvement in an appeal launched to raise funds for the school and the institute, it would have been unconscionable for the institute to have treated the licence as terminated at the end of the notice period. On the facts, Carnwath J. decided that the appropriate period of notice was one which would have allowed the statutory procedures imposed on the governors in respect of discontinuance of the school or transfer to another site to have been completed. This was assessed as two years and three months. Although Carnwath J. rightly rejected the school's estoppel claim to indefinite rent-free occupation,[103] there appears to have been enough reliance on a common understanding that the institute buildings would continue to be the home of the school along with the other activities of the institute to give rise to an equity in the school's favour. From the perspective of the doctrine of proprietary estoppel, the most appropriate solution would have been to concretise the equity by giving the school a licence to occupy the site for a minimum of five years, the period which evidence suggested the school would have needed to find a new site and to carry out a properly planned programme of relocation.[104]

## VI. Conclusion

There is almost no aspect of the law relating to licences over land which has not, at some time or another, given rise to problems. This seems to be an area of law in which the relevant authorities are not always cited and in which the courts have pursued false trails and taken wrong turnings.[105] Although one might imagine that bare licences would present few problems the foregoing discussion has indicated that this is not the case.

[103] Cf. T. Kerbel [1996] Conv 63, 66.

[104] It is worth noting that, although Carnwath J. adopted a similarly narrow view of the doctrine of proprietary estoppel in *Gillett* v. *Holt* [1998] 3 All E.R. 917, this view was rejected by the Court of Appeal [2000] 3 W.L.R. 815.

[105] An obvious example is the heretical doctrine propounded by Lord Denning M.R. to the effect that a contractual licence takes effect as an equitable interest in land (see *Errington* v. *Errington* [1952] 1 K.B. 290 and *Binions* v. *Evans* [1972] Ch. 359), which, notwithstanding the House of Lords' decision in *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175, was not definitively rejected until *Ashburn Anstalt* v. *Arnold* [1989] Ch. 1. See C. Harpum, *Megarry & Wade: The Law of Real Property*, 6th ed. (London 2000), paras. 17–016–17–019.

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In factual, rather than conceptual terms, cases involving bare licences can be placed into two categories. The first category includes cases where the licence confers a benefit on the licensee, who incurs no corresponding detriment. A good example is provided by *Heslop* v *Burns*,[106] in which the owner of a house permitted the defendants to occupy the house rent-free for 14 years. There was no evidence to suggest that the defendants had expended any money on the house during their period of occupation, other than the usual living expenses. Cases involving this type of "one-sided" licence present fewest problems, both doctrinally and practically. If the licensee has not acted to his detriment, there is no policy reason why the licensor's freedom of action should be unduly circumscribed. In terms of fairness, the only rationale for the law's intervention is to ensure that the licensee is given a reasonable period in which to make alternative arrangements (where necessary). The packing-up period provides the mechanism whereby the law can achieve an appropriate balance between the licensor's interest in determining the licence and the licensee's interest in not suffering excessive disruption. Although having a common law origin, the packing-period is a flexible tool. This is illustrated by the *Berg* case[107] in which the licensees, who had occupied the licensor's land rent-free for more than a quarter of a century, were allowed a period of grace of 12 months in which to find alternative accommodation notwithstanding the fact that they could not rely upon an equity of estoppel in their favour. Since, in the context of bare licences, the packing-up period cannot have a contractual origin, interference with the packing-up period, to the extent that it constitutes a wrong, must constitute a tort. Furthermore, it is a distinct tort (which might be referred to as "the rule in *Cornish* v. *Stubbs*"), rather than a facet of another nominate tort.

The second category, which might be termed "two-sided" licences, includes cases where, although there is no contractual bargain between the parties, the licensee, as a consequence of the (express or implied) licence, undertakes some activity or incurs some expenditure which otherwise he would not have undertaken or incurred. The courts have dealt with cases falling within this category in one of three ways: the largely forgotten common law doctrine of a licence acted upon; the equitable doctrine of proprietary estoppel; the licensor's obligation to give reasonable notice.

[106] [1974] 1 W.L.R. 1241.
[107] *E. & L. Berg Homes Ltd.* v. *Grey* (1979) 253 E.G. 473.

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In policy terms, it is far from clear that the licensor's obligation to give reasonable notice is required to ensure that a "two-sided" licensee does not suffer hardship as a consequence of the licence's summary termination; the doctrine of proprietary estoppel and the packing-up period provide the courts with sufficient tools to enable the licensee's reasonable expectations to be protected. All the cases in which the basis of the court's decision has been either the doctrine of a licence acted upon or the licensor's obligation to give reasonable notice could have been decided equally (or more) satisfactorily by the proper application of the doctrine of proprietary estoppel or the packing-up period. Furthermore, there is no argument of principle in support of the proposition that a licensor should be under an obligation to give the licensee a period of notice before revocation of a bare licence is to take effect. It does not follow from the fact that a contractual licensee will normally be under an implied obligation to give the licensee a reasonable period of notice that a similar obligation arises in the context of bare licences. When bare licences are located in the broader picture of rights in relation to land, the notion that a bare licensee is entitled to a period of notice is illogical. The bare licence's closest analogue is not the contractual licence, but the rent-free tenancy at will. Given that, as regards a tenancy at will, there is no need for a notice to quit,[108] the law would be incoherent if, in relation to a bare licence, the licensor were under an obligation to give the licensee a reasonable period of notice. To the extent that they support the existence of such an obligation, the cases should be regarded as having been wrongly decided.

[108] See Roskill L.J. in *Crane* v. *Morris* [1965] 1 W.L.R. 1104, 1109; Denning L.J. in *Martinali* v. *Ramuz* [1953] 1 W.L.R. 1196, 1199.

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