

# The 'creation' of servitudes by acquiescence

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## A. Introduction

§ 946. The principle seems to be, that mere acquiescence may, as *rei interventus*, make an agreement to grant a servitude or to transfer property binding, or may bar one from challenging a judicial sentence: But that where there is neither previous contract nor judicial proceeding, there must be something more than mere acquiescence; something capable of being construed as an implied contract or permission, followed by *rei interventus*. Where great cost is incurred by operations carried on under the eye of one having the right to stop them; or where, under the eye and with the knowledge of him who has the adverse right, something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission, as a fair ground of right.

§ 947. Although it is rightly said that mere acquiescence cannot confer a right of property, it may confer a right of use of property or servitude.<sup>1</sup>

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<sup>1</sup> GJ Bell, Principles of the Law of Scotland (4th edn, 1839, reprinted, Edinburgh Legal Education Trust 2010) §§ 946-947.

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At its core, ownership encompasses the right freely to enjoy and dispose of property and exclude others from using it.<sup>2</sup> This entitlement is limited by contractual agreements or subordinate rights such as servitudes. That servitudes can be expressly, impliedly or by prescription is well established, but other, less frequently encountered methods require some further exploration. One of these is given in § 947 of his *Principles of the Law of Scotland* by George Joseph Bell. The express reference to servitudes is an addition from earlier editions of the work, which suggests a reappraisal on part of the author.<sup>3</sup> Following this approach, if a proprietor knowingly remained inactive while his neighbour undertook costly or permanent acts facilitating use of his land, this could be sufficient to constitute a real right which would be enforceable against anyone who owns the land.

Such a method of creation would, however, stand in conflict with essential property law principles surrounding publicity and the discoverability of real rights in relation to third parties and future owners, particularly in cases where the purported servitude is not accompanied by any constructions on the land that could fulfil the need for publicity. Claims based on acquiescence have not consistently been enforced against subsequent owners who had no knowledge of the alleged encumbrance. Therefore, earlier references to servitudes may not have used the term in the technical sense. Instead, the doctrine could fit more consistently within the framework of personal bar.<sup>4</sup> Following this approach, acquiescence thus only creates a personal right against the landowner who fails to raise timely objections against the acts, although its effect may also be extended against acquirers of the land who themselves have actual or constructive knowledge of what has been installed on their property.

In this understanding of the rule, allowing the use of the land to continue without the consent of its owner is considered justified because challenging the servitude now would be inconsistent with the landowner's previous inaction and cause prejudicial loss to the claimant. While this is the best explanation of the doctrine and its extension to bind singular successors in certain cases, acquiescence may not fit perfectly under the heading of personal bar in all aspects. The landowner is typically only able to raise objections after the claimant has acted in a way that is objectionable, for example by beginning to undertake construction works on the purported burdened property. The silence can only become relevant after there was opportunity to react. Therefore, there is no room to argue that the claimant has relied upon it, which would normally be a requirement for personal bar to be constituted. This potentially leads to a tension between acquiescence and how personal bar is often conceived.

Drawing from other instances of acquiescence, such as the closely related issue of encroachment, may help resolve this issue. If there were a requirement that the claimant reasonably believed his actions were unobjectionable, the cases could still fit within a broader understanding of personal bar founded on good faith. A comparison of the treatment of acquiescence in these different contexts may therefore contribute to a refined understanding of personal bar. Properly understood, the doctrine can accommodate the alleged creation of servitudes.

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<sup>2</sup> J Erskine, *An Institute of the Law of Scotland* (1773, reprinted Edinburgh Legal Education Trust 2014) at II, I, 1.

<sup>3</sup> In the 3rd edn (1833), § 947 stops after 'right of use of property', with no explicit reference to servitudes.

<sup>4</sup> E C Reid and J W G Blackie, *Personal Bar* (2006).

This work has two principal objectives. First, it considers acquiescence as a standalone doctrine to clarify the necessary and sufficient conditions under which it can entitle the claimant to continue the use of the neighbouring land. Second, it evaluates whether such a limitation of the burdened proprietor's ownership should be seen as amounting to a servitude or merely a personal right in favour of the benefitting proprietor. By placing acquiescence within the wider framework of property law, the paper ultimately argues in favour of the latter position, though not without recognising that this requires a slightly expanded conception of personal bar.

## B. A note on *rei interventus*

The term acquiescence has been used in circumstances where a claim is advanced on the basis of some form of prior, but formally defective, agreement. This seems to be what Bell refers to as 'mere acquiescence' amounting to *rei interventus* in § 946.<sup>5</sup> One instance of this is the case of *Melville v Douglas's Trs*,<sup>6</sup> where a proprietor's acquiescence in relation to the claimant's building on and possession of the land was averred as a means of proving the terms of a preceding oral contract of sale, the existence of which was not disputed between the parties. The court in this case was clear that the argument would not have succeeded on the basis of acquiescence alone, although the issue here was the transfer of ownership rather than the creation of a servitude.<sup>7</sup> In the later case of *Wark v Bargaddie*,<sup>8</sup> acquiescence was plead to justify the mining of coal in breach of lease conditions. Refusing this argument, the court goes even further than this, stating that 'in truth, acquiescence is only important as being evidence of consent' and criticising the Inner House from which the case was appealed for having approached acquiescence as a standalone issue.<sup>9</sup> In these cases, the doctrine is only said to operate as a means of validating, as *rei interventus* or homologation, a contract that is deficient in its formalities.

Considering acquiescence separately from the prior contract was not the appropriate way of dealing with the appellant's argument in *Wark*<sup>10</sup> because that would require additional elements beyond the lack of objection, which were not present in this case. Given that the cases of an alleged prior contract and standalone acquiescence will not have the same factual requirements, they should best be understood as different categories altogether.<sup>11</sup> This paper, however, is not concerned with the operation of personal bar in the context of a defective agreement, which has since been superseded by the rules in the Requirements of Writing (Scotland) Act 1995.<sup>12</sup> Rather, the discussion here focusses on what is needed for acquiescence to constitute a servitude, or more properly, to bar a landowner from disputing its existence, with no preceding expression of consent.

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<sup>5</sup> Bell, *Principles* (n 1) at § 946.

<sup>6</sup> *Melville v Douglas's Trs* (1830) 8 S. 841.

<sup>7</sup> (1830) 8 S. 841 at 843 per Lord Gillies.

<sup>8</sup> *Wark v Bargaddie Coal Company* (1859) 3 Macq. 467. The decision of the Inner House will be returned to below.

<sup>9</sup> (1859) 3 Macq. 467 at 487 per Lord Cranworth.

<sup>10</sup> (1859) 3 Macq. 467 at 480 per Lord Chancellor Campbell.

<sup>11</sup> The same distinction is drawn in A G M Duncan, 'Servitudes' in Sir Thomas Smith and Robert Black (eds), *Stair Memorial Encyclopaedia: Property* (vol 18, 1993) at para. 462.

<sup>12</sup> Requirements of Writing (Scotland) Act 1995, s.1(5).

### C. Elements of acquiescence

Acquiescence may arise in cases where the landowner stays silent while the other party builds on his land to make use of it as though facilitating the use of a servitude. However, failure to challenge such behaviour can never by itself be a sufficient condition for depriving that proprietor of his rights, provided that he brings action within the prescriptive period of twenty years.<sup>13</sup> Further elements need to be established in respect of the parties' dealings for acquiescence to operate. The acts of the claimant need to be of a costly or permanent character such that being denied the benefit of them would cause him detriment.<sup>14</sup> Furthermore, the landowner's silence is meaningless unless he is in a position to raise objections, which implies it is necessary that he knew of the acts of the claimant and that they constituted a breach of his proprietary rights.

#### (i) *Nature of the acts: costly or permanent*

Acquiescence is typically argued reactively to justify the behaviour of the claimant who has carried out works on another's land without an apparent legal basis. However, not just any conduct can be basis of such a claim. In respect of the character of the acts, great costs or manifest permanency are key aspects to be established if acquiescence is to be proven.<sup>15</sup> Costs arise where the claimant incurs expenses for the purposes of enjoying the purported servitude. The paradigm example is laying pipes with the intention of exercising a service media servitude. In the case of *Stirling v Haldane*,<sup>16</sup> water was taken from one river for industrial use and drained in polluted form into another. Despite falling short of the period required for positive prescription before there was a challenge, the pipes were allowed to remain in place on the basis of acquiescence. It was an essential part of the decision that the pursuer was allowed 'to spend so much money without challenge'.<sup>17</sup> A similar argument was put forward by the claimants in *Macgregor v Balfour*<sup>18</sup> who sought an interdict against the removal of a sink after 'having been allowed to incur the expense of laying down the drain'.<sup>19</sup> The issue of costs, however, proved to be fatal in this case, as one of the reasons for rejecting the plea was that the expenses were not sufficient to imply that a permanent right had been acquiesced in.

Service media servitudes normally require the installation of structures such as pipes, tanks or dams. This is not necessarily the case with other kinds of servitude. For instance, an approximate cost of £500 in relation to a parking space in *Moncrieff v Jamieson*<sup>20</sup> was not sufficiently costly, distinguishing this situation from the 'major works and expenditure' which has given rise to acquiescence in preceding cases.<sup>21</sup> The court in *Ben Challum Ltd v Buchanan*,<sup>22</sup>

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<sup>13</sup> Prescription and Limitation (Scotland) Act 1973, s.3(2).

<sup>14</sup> Bell, *Principles* (n 1) at § 946.

<sup>15</sup> D J Cusine and R R M Paisley in *Servitudes and Rights of Way* (1998) at paras. 11-37 to 11-46 organise their discussion around these points introduced by Bell. This approach is adopted and expanded on as a useful structure in this work.

<sup>16</sup> *Stirling v Haldane* (1829) 8 S. 131.

<sup>17</sup> (1829) 8 S. 131 at 135 per Lord Pitmilley.

<sup>18</sup> *Macgregor v Balfour* (1900) 2 F. 345.

<sup>19</sup> (1900) 2 F. 345 at 350.

<sup>20</sup> *Moncrieff v Jamieson* 2005 1 SC 281. The servitude was established on other grounds, but acquiescence failed because the essential elements were not established. The argument was abandoned on appeal.

<sup>21</sup> 2005 1 SC 281 at para 28 per Lord Marnoch.

<sup>22</sup> *Ben Challum Ltd v Buchanan* 1955 S.C. 348.

in the context of building bungalows and petrol pumps contrary to feu conditions, suggests that physically altering a structure, as opposed to merely using it, could give rise to acquiescence. It was decisive that ‘the erections in question were no trivial matter.’<sup>23</sup> On the whole, it appears to be a requirement that some construction works must have been carried out on the burdened property to enable the conduct, which is more likely to occur in the context of water supply or building support than, for example, access or parking.<sup>24</sup> In practice, the need for costly constructions therefore widely limits the application of acquiescence to certain kinds of servitude.

Even if the costs are not great enough to be conclusive by themselves, acquiescence may still operate if what the claimant has done is manifestly permanent. It will not always be possible or necessary to separate expenditure or permanency as distinct grounds, given a costly building is clearly also intended to remain in place. When the development of land without title was acquiesced to in *Macnair v Cathcart*,<sup>25</sup> the houses were both valuable and ‘could not now, without great injury and devastation, be restored’.<sup>26</sup> It is important to emphasise here that the permanency of the act must be manifest, meaning it must have been obvious to the landowner that his rights would be breached indefinitely. This is relevant in the decision of *Balfour*,<sup>27</sup> when the court notes that the works failed to assert the creation of a right, ‘as distinguished from a tolerance during pleasure’.<sup>28</sup>

The difference between the assertion of a permanent right and a merely tolerated act can be explained by analogy to the constitution of servitudes by positive prescription, which uses similar terminology. For example, in the recent case of *A C & I C Fraser & Son Limited v Munro*,<sup>29</sup> the court contrasted both “toleration” with the “creation” of a right of servitude by acquiescence and “tolerance” with the creation of a right of servitude by positive prescription.<sup>30</sup> In the prescriptive context, ‘where possession is attributable to permission or tolerance, the landowner may bring the arrangement to an end at any time’.<sup>31</sup> By contrast, a landowner’s inaction in the face of a claimant’s assertion of right will lead to the creation of a real right if it continues for the prescriptive period.<sup>32</sup> Which category a case falls into may be determined by the nature of the claimant’s possession: if the claimant’s behaviour is such that the reasonable landowner would not have allowed it to continue in the absence of a servitude, he will be considered to have asserted a right.<sup>33</sup>

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<sup>23</sup> 1955 S.C. 348 at 356 per Lord President Clyde.

<sup>24</sup> E C Reid and J W G Blackie, *Personal Bar* (n 4) at para. 6-61, although there are exceptions to this. For example, in *Munro v Jervy* (1821) 1 S. 161, a right of access to the neighbour’s roof to clean a chimney did require creating an aperture in the wall. These works were held to be sufficient for acquiescence to be relevant.

<sup>25</sup> *Macnair v Cathcart* (1802) Mor 12832.

<sup>26</sup> (1802) Mor 12832 at 12833.

<sup>27</sup> (1900) 2 F. 345.

<sup>28</sup> (1900) 2 F. 345 at 352 per Lord President Balfour.

<sup>29</sup> *A C & I C Fraser & Son Limited v Munro* (2024) SAC (Civ) 41.

<sup>30</sup> [2024] SAC (Civ) 41 at para. 16 and 19 (“toleration” and “tolerated” / acquiescence) and para. 24 (“tolerance” / prescription).

<sup>31</sup> [2024] SAC (Civ) 41 at para. 24 per Sheriff Principal Derek C W Pyle.

<sup>32</sup> Prescription and Limitation (Scotland) Act 1973, s 3(2).

<sup>33</sup> A Peterson, *Prescriptive Servitudes* (2020) at paras. 8-17 to 8-20.

Turning to acquiescence, the need to assert a right in this way can explain the requirement for something to be built. A claimant would not normally incur these great costs if his benefit was precarious and could be stopped by the landowner at any time. In turn, it would appear that works should be considered sufficiently costly and permanent for the purpose of acquiescence if they are such as a reasonable landowner would challenge unless the claimant was entitled to make them by virtue of an existing servitude. As such, assertion of a right can serve as a useful benchmark for what constitutes a relevant act of servitude.

(ii) *Silence*

Although it is well established that inaction alone is not sufficient,<sup>34</sup> lack of objections is clearly a necessary condition before the doctrine can operate. A proprietor cannot be said to have acquiesced to an act if it is established that he protested upon becoming aware of the acts. *Pollock v Drogo Developments Ltd*<sup>35</sup> is an example where objections prevented the constitution of acquiescence. The case also clarifies that an effective challenge need not involve court proceedings. It was sufficient that the landowner 'raised their objections through proper channels' within their correspondence.<sup>36</sup>

A term pervasively used to describe the behaviour of the landowner is "representation", but it should be emphasised that the term in this context covers also non-verbal conduct and even inaction.<sup>37</sup> It does not seem that the claimant needs to have been actively encouraged by the other party. The English case of *Ward v Kirkland*<sup>38</sup> summarises this point, stating 'abstention as well as a request or incitement can fall within the principle.'<sup>39</sup> Therefore, "silence" in this context is to be understood as a range of conduct from failure to respond to verbal encouragement. While any of these can give rise to acquiescence, how the landowner behaved in a specific case may influence the court's evaluations of blameworthiness.<sup>40</sup>

It has been argued that, to have legal effect absent a prior contract,<sup>41</sup> the circumstances of the silence must be such that they amount to tacit agreement. This seems to be what is meant when Bell, in his *Principles*, notes a requirement for 'something capable of being construed as an implied contract or permission'.<sup>42</sup> This is reflected in the case law as well, with express references to such a threshold reaching from the eighteenth century to modern decisions. In *Kincaid v Stirling*<sup>43</sup> it was alleged that the acts were done with 'the consent, at least by the tacit approbation' of the landowner. Similarly, in *Johnston v The Walker Trustees*,<sup>44</sup> Lord Adam speaks

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<sup>34</sup> 1955 S.C. 348 at 356 per Lord President Clyde, citing J Rankine, *The Law of Land - Ownership* (4th edn, 1909) at 479.

<sup>35</sup> *Pollock v Drogo Developments Ltd* [2017] CSOH 64.

<sup>36</sup> [2017] CSOH 64 at para. 27 per Lady Wise.

<sup>37</sup> E C Reid and J W G Blackie, *Personal Bar* (n 4) at para. 2-10.

<sup>38</sup> *Ward v Kirkland* [1967] Ch. 194. Reid and Blackie, *Personal Bar* (n 4) at para. 1-40, commenting on J Rankine, *A Treatise on the Law of Personal Bar in Scotland* (1921), question the transferability of the English estoppel into Scots law. But the position on what makes for constitutive silence is very likely the same.

<sup>39</sup> [1967] Ch. 194 at 239 per Ungood-Thomas J.

<sup>40</sup> See Part E below.

<sup>41</sup> See Part B above.

<sup>42</sup> Bell, *Principles* (n 1) at § 946.

<sup>43</sup> *Kincaid v Stirling* (1750) Mor. 8403.

<sup>44</sup> *Johnston v The Walker Trustees* (1897) 24 R. 1061.

of 'consent implied in acquiescence' to variations of building restrictions,<sup>45</sup> and, in *Ben Challum*,<sup>46</sup> Lord President Clyde discusses 'acquiescence by implied consent' when a factor of the landowner was present for the building works.<sup>47</sup> The court in *Cowan v Kinnaird*<sup>48</sup> goes even further than this, asserting that 'acquiescence is nothing but implied consent'.<sup>49</sup>

The terminology is slightly misleading, however, because this is unrelated to prior consent in any contractual sense.<sup>50</sup> The operation of the law does not rest on a claim regarding either party's opinion on the use of the property, even objectively construed from a reasonable perspective. Consent may be referred to as a justificatory rationale, but this should not be confused with a legal requirement. Indeed, if the circumstances of a case did include a permission of the landowner, this could have the opposite effect of preventing acquiescence.<sup>51</sup>

### (iii) Knowledge

No one can object to a breach of his rights if he is unaware of it. There are two aspects of this requirement: knowledge of the facts and knowledge of the legal implications.

If a proprietor is actually aware of an interference, then he can be expected to challenge it. *Robson v Chalmers Property Investment Co Ltd*<sup>52</sup> is a very clear example of a case where the relevant facts were known, because the burdened proprietor was involved in carrying out the constructions needed by the benefitted proprietor to enjoy the benefit. The servitude was ultimately established on interpretation of the deed, but it was held that the alternative case of acquiescence could have succeeded as well. Actual knowledge of the facts is also established if the landowner was present to observe the acts of the claimant. In *Muirhead v Glasgow Highland Society*,<sup>53</sup> the proprietor disputing acquiescence was a tenant in the neighbouring building while works in breach of a servitude were ongoing, and they were obvious when he bought the land. Thus, he was unable to deny knowledge of them and could be bound by acquiescence on this basis. This case discussed the abandonment of a right rather than its creation, and it was the benefitting proprietor whose acquiescence was alleged. However, the issue of knowledge seems to apply equally to both kinds of cases and comparisons may be drawn.

Absent evidence of actual knowledge, acquiescence can also be established on the basis of constructive knowledge. What the burdened proprietor is deemed to know can be inferred in reference to what can reasonably be expected of him. *Stirling v Haldane*<sup>54</sup> was a case where water from one river was diverted for industrial use and then drained into another. The burdened proprietor was found to have acquiesced in these acts even though 'it did not appear

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<sup>45</sup> (1897) 24 R. 1061 at 1073 per Lord Adam.

<sup>46</sup> 1955 S.C. 348.

<sup>47</sup> 1955 S.C. 348 at 357 per Lord President Clyde.

<sup>48</sup> *Cowan v Lord Kinnaird* (1865) 4 M. 236.

<sup>49</sup> (1865) 4 M. 236 at 241 per Lord Justice-Clerk Inglis.

<sup>50</sup> See Part B above.

<sup>51</sup> See Part C(i) above.

<sup>52</sup> *Robson v Chalmers Property Investment Co Ltd* 1965 SLT 381. The House of Lords does not discuss the argument because the primary submission of the claimant succeeded.

<sup>53</sup> *Muirhead v Glasgow Highland Society* (1864) 2 M. 420.

<sup>54</sup> (1829) 8 S. 131.

whether he was personally cognisant of it or not', simply on the basis that he was living in the neighbourhood.<sup>55</sup> Similarly, in *Aytoun v Melville*,<sup>56</sup> a proprietor was deemed to know of the building of a mill despite having been abroad at the time, because he should have appointed an agent in his place.

Therefore, the knowledge condition can be met by virtue of the landowner's proximity to the activity or if there was enough indication of it that he should have been prompted to inquire. Imputing knowledge might appear controversial at first glance, given that it could work to limit someone's rights in their absence and without any active conduct that could be characterised as blameworthy. From the perspective of the claimant, however, constructive knowledge is needed to protect him from being prejudiced where the other party wilfully turns a blind eye. A court has to strike a balance between these positions to assess what is fair in the particular circumstances.

For knowledge of the law, it is generally presumed that a person is be aware of his own legal position (*ignorantia juris non excusat*), which means that it will not be possible to preclude acquiescence by ignorance on this basis.<sup>57</sup> There might be an exception to this rule if the burdened proprietor is in a vulnerable position. This is suggested in *MacIntyre v Orr*<sup>58</sup> in the context of the diversion of water. In Lord Deas' opinion, acquiescence, even by the claimant's predecessor, could not be established because he was of old age and not in a financial position to obtain legal advice.<sup>59</sup> The point might best be rationalised by saying that it generally constitutes a defence to acquiescence if the party did not have an opportunity to object to the acts.<sup>60</sup> In the English case *Duke of Leeds v Amherst*,<sup>61</sup> the defender was not held to have acquiesced in a breach of his ownership rights which occurred while he was below the age of legal capacity and therefore unable to raise proceedings. If the alleged burdened proprietor needs to have had the possibility to act, this implies a temporal dimension. One of the reasons why acquiescence failed before the Inner House in *Wark v Bargaddie Coal Company*<sup>62</sup> was because 'knowledge afterwards [...] is not enough to take away a heritable right, or restrain a landlord in the exercise of such a right'.<sup>63</sup>

Lack of knowledge was also the decisive factor in *Earl of Kintore v Alex Pirie & Sons Limited*,<sup>64</sup> where the alleged burdened proprietor could not have been aware that the work the claimant carried out on his own land would mean an increased abstraction of water. It was successfully argued 'the alterations in the defenders' mill, [...] were operations *in suo*, which pursuers could

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<sup>55</sup> (1829) 8 S. 131 at 132.

<sup>56</sup> *Aytoun v Melville* (1801) Mor 8. The rationale is not explicit in the judgement, but the case is cited in *Melville v Douglas's Trs* (1830) 8 S. 841 at 842: 'a landed proprietor, if he goes abroad, is bound to have some representative or factor here to superintend his estate, and so to prevent his neighbours from being misled into the belief of his acquiescence'.

<sup>57</sup> Although the maxim is often discussed in the context of criminal cases, *CIN Property Ltd v Dollar Land (Cumbernauld) Ltd* 1991 S.L.T 211 per Lord Justice-Clerk Ross is an example of its application to Scottish land law.

<sup>58</sup> *McIntyre v Orr* (1868) 41 Sc. Jur. 112.

<sup>59</sup> (1868) 41 Sc. Jur. 112 at 117 per Lord Deas.

<sup>60</sup> Reid and Blackie (n 4), paras. 2-35 to 2-36.

<sup>61</sup> *Duke of Leeds v Amherst* (1846) 2 Ph 117.

<sup>62</sup> *Wark v Bargaddie Coal Company* (1856) 18 D. 772.

<sup>63</sup> (1856) 18 D. 772 at 776 per Lord Justice-Clerk Hope.

<sup>64</sup> *Earl of Kintore v Alex Pirie & Sons Limited* (1903) 5 F. 818.



not have prevented, and were not bound to take any notice of'.<sup>65</sup> This suggests that the need for an opportunity to object not only restricts knowledge, but also the nature of the acts that can be relevant.<sup>66</sup> Generally, a party only has title to raise judicial proceedings after his rights have been breached. If the building works are undertaken entirely on the land of the claimant, then the potentially burdened owner has no grounds for raising judicial challenge until he started to use them in a way that burdens his neighbour. Although treated distinctly from encroachment cases, acquiescence therefore normally requires also buildings on the land of the potentially burdened proprietor.<sup>67</sup> There may be an exception to this rule in cases on interests in water, because the landowner would have the power to raise a case against the diversion of the river flow even if this did not involve building on his land.

A landowner can be expected to raise objections only if the nature of the acts is such that he has the power to stop and he is deemed to have known about them. This is necessary before his lack of response is seen as amounting to acquiescence, as opposed to “mere silence”. With this definition in place, it becomes possible to determine the content of the right that is being conferred and to locate acquiescence within the wider legal doctrine. A consideration of singular successors of the parties reveals the significant distinction between a real right and a personal exception or defence.

#### D. Singular successors

The law has not always been clear as to what the effects of acquiescence are once the necessary elements are successfully proven. One possible view is that the inaction of the landowner can in these circumstances be constitutive of a servitude. If this was the case, the right would, as a title condition and real right, encumber the burdened property and be enforceable against whoever happens to own the benefitted one. This seems to be accepted by Bell,<sup>68</sup> and some of the relevant case law can be quoted in support. In *McIntyre v Orr*,<sup>69</sup> Lord Deas pronounced: ‘I do not doubt that a right of servitude [...] may be extended as well as restricted or abandoned by acquiescence’.<sup>70</sup> In the same spirit, the sheriff in *More v Boyle*<sup>71</sup> directly cites the passage from the *Principles*, contending that ‘in certain circumstances, a servitude or some similar right may be created by acquiescence’ and allowing a proof before answer.<sup>72</sup> However, this approach arguably conflicts with the principle of publicity and the discoverability of encumbrances. As a matter of policy, it seems desirable that the methods of creating servitudes without registration should be limited to avoid unforeseeable burdens on singular successors. In cases that were brought by purchasers of the land, rather than the original parties, these fairness considerations seem to have led the court to deny the claim.

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<sup>65</sup> (1903) 5 F. 818 at 839. This argument was accepted at 849 per Lord President Balfour: ‘the pursuers had no power to stop or interfere with what the defenders were thus doing within their own property’.

<sup>66</sup> See Part C(i) above.

<sup>67</sup> W M Gordon & S Wortley, *Scottish Land Law* (vol 2, 3rd edn, 2020) at para. 25-50, cites *Ferguson v Barklie* an unreported case discussed in K G C Reid and G L Gretton, *Conveyancing 2019* (2020) at 21.

<sup>68</sup> Bell, *Principles* (n 1) at § 946.

<sup>69</sup> (1868) 41 Sc. Jur. 112.

<sup>70</sup> (1868) 41 Sc. Jur. 112 at 117 per Lord Deas.

<sup>71</sup> *More v Boyle* 1967 S.L.T. (Sh. Ct.) 38.

<sup>72</sup> 1967 S.L.T. (Sh. Ct.) 38 at 40 per Sheriff R. H. McDonald, Q.C.

The alternative is to understand acquiescence to operate as personal bar. This implies that only the person who was silent while the construction works were undertaken is now prevented from challenging them. The claimant would not receive the benefit by right and the immunity would not normally extend to his singular successors. This analysis of acquiescence has been confirmed in *Moncrieff*,<sup>73</sup> where the Inner House disregarded the proposition that the cases where the buildings were allowed to remain in place would confer a real right.<sup>74</sup> Broadly speaking, it was held that the use of the land can continue only if the successor has himself acted in a way that would bar him from objecting. This is analogous to the law of encroachment, where acquiescence may operate to keep the buildings in place. Drawing on comparisons to these circumstances help to explain what is required when acquiescing to servitudes.

One such reason why a successor might be barred is because the works were obvious when he acquired the land. In the case of *Muirhead*<sup>75</sup> discussed above, it was a successor who challenged the buildings that contravened the servitude, and his case failed because he ‘saw the state of matters at the time of his purchase, and he was bound to inquire and satisfy himself how that state of matters had come about. He was not entitled to shut his eyes, and then to plead ignorance as a singular successor’.<sup>76</sup> The cases suggest that personal bar may exist if the purchaser can see what has been done so that constructive knowledge can be inferred. Such a rule would cohere with how sales of land burdened by servitudes are treated elsewhere. Absolute warrandice in the sale of heritable property, for example, excludes encumbrances of which the purchaser had constructive knowledge,<sup>77</sup> which arguably includes those that could have been discovered by inspection of the property.<sup>78</sup> Scots law generally anticipates that a buyer will inspect the land prior to purchase, and he will therefore not be protected against anything constructed on it.

Conversely, attempts to rely on acquiescence by successors failed where the construction works relevant to the servitude cannot be seen. This was a significant obstacle in *Moncrieff*<sup>79</sup> because there nothing remained ‘visible and obvious’.<sup>80</sup> This is typically the case for works occurring underground, such as mineral works or pipes. In *Balfour*,<sup>81</sup> acquiescence not only failed on the point of costs, but also because the drain-pipe was not obvious to the claimant who was a successor.<sup>82</sup> From these authorities, it can be concluded that a successor can be held to have acquiesced to the activity if he saw or, as a matter of constructive knowledge, should have seen that his predecessor had allowed it.

The same rationale might apply where the successor has been in correspondence with either the claimant or the previous landowner, although the case law on this question has not been entirely consistent. In *A C & I C Fraser v Munro*,<sup>83</sup> a letter addressing the variation of the

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<sup>73</sup> 2005 1 SC 281.

<sup>74</sup> 2005 1 SC 281 at para. 27 per Lord Marnoch and paras. 83-85 per Lord Hamilton.

<sup>75</sup> *Muirhead v Glasgow Highland Society* (1864) 2 M. 420.

<sup>76</sup> (1864) 2 M. 420 at 427 per Lord Deas.

<sup>77</sup> *Whyte v Lees* (1879) 6 R. 699.

<sup>78</sup> K G C Reid, ‘Warrandice in the Sale of Land’ in D J Cusine (ed), *A Scots Conveyancing Miscellany* (1987) at 160.

<sup>79</sup> 2005 1 SC 281.

<sup>80</sup> 2005 1 SC 281 at para. 27 per Lord Marnoch, citing (1899) 2 F. 345.

<sup>81</sup> (1900) 2 F. 345.

<sup>82</sup> (1900) 2 F. 345 at 352 per Lord President Balfour.

<sup>83</sup> (2024) SAC (Civ) 41 at para. 19 per Sheriff Principal Derek C W Pyle.

vehicular access route did not assist the claim, even though its receipt was acknowledged on behalf of the successors. But in that case the necessary features of cost or permanency could not even be established in relation to the original parties, so that the continued relevance of acquiescence was not an issue. In *McIntyre*,<sup>84</sup> the negotiations prior to the sale of the land were relevant in determining whether the buyer could object to the taking of the water. It was held that, if there had been a bar against the previous owner, then the successor was sufficiently put on his guard that the exception would also be pleadable against him. It was also relevant that the purchase price was much lower due to the burden on the land, and the claimant must have been aware of this.<sup>85</sup>

This discussion seeks to show that the concept of personal bar can be broad enough to explain its effect against certain singular successors who themselves had knowledge of the acts of the claimant and are thus deemed to have acquiesced to them. This has been found in cases where the works were obvious or there was some form of communication to alert the buyer. The apparently ongoing effect of acquiescence can therefore be explained by the obviousness of the works affecting the position of the parties personally rather than some subsisting servitude. Given that anything constructed on the surface of the land is normally going to remain visible, the benefit would attain the quasi-permanency that gives the appearance of a real right.

## E. Personal bar

From the considerations of the treatment of singular successors, the preferable view is that acquiescence creates only personal rights for the claimant rather than a servitude, and indeed there is some evidence in the case law to suggest that, correctly interpreted, this has always been the position. Therefore, it is probably best analysed as a form of personal bar, a subject of which Reid and Blackie have provided a definite analysis on which this paper substantially draws.<sup>86</sup> There are explicit references to acquiescence as personal bar as early as 1829 in the above cited case *Stirling v Haldane*.<sup>87</sup> The past use of the term “servitude” in this context has been explained, as it ‘appears to have been used in a loose and wider sense, importing a merely personal right, rather than in the narrower sense of a real right’.<sup>88</sup> However, this analysis is not without its problems, because acquiescence does not include all aspects personal bar is understood to require.

The classical definition of that concept is set out in the case of *Maclaine v Gatty*.<sup>89</sup> ‘Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different

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<sup>84</sup> (1868) 41 Sc. Jur. 112 at 119 per Lord Deas.

<sup>85</sup> (1868) 41 Sc. Jur. 112 at 120 per Lord Ardmillan.

<sup>86</sup> E C Reid and J W G Blackie, *Personal Bar* (n 4). In particular, Reid and Blackie identify the two requirements of (i) inconsistent conduct and (ii) unfairness as providing an analytical framework for the whole law of personal bar.

<sup>87</sup> (1829) 8 S. 131 at 135 per the Lord Justice-Clerk, referring to *Lord Forbes v Leys, Masson, and Co.* (1831) 9 S. 933: ‘we sent a question of acquiescence to the Jury Court, assuming the principle that acquiescence will bar’. The language is not atypical and can be found in many of the referenced cases.

<sup>88</sup> 2005 1 S.C. 281 at 304 per Lord Hamilton.

<sup>89</sup> *Maclaine v Gatty* 1921 S.C. (H.L.) 1.

state of facts existed at the same time'.<sup>90</sup> Following this analysis, the two principal aspects that make up personal bar are (i) inconsistent conduct and (ii) unfairness towards the claimant, with the latter typically requiring him to have acted in reliance on the behaviour of the right-holder.<sup>91</sup> It has, however, been noted that 'it is questionable whether absence of reliance may always be regarded as decisive', since personal bar includes fact patterns like those of acquiescence, where the inconsistency consists of a lack of objection rather than any active misrepresentation.<sup>92</sup>

(i) *Inconsistent conduct*

Personal bar is pled to prevent the other party from enforcing their rights in court if doing so would unfairly contradict what they said or did earlier. For acquiescence, this is understood to be the case due to the initial representation of the landowner. If the proprietor raised no objections while works in support of a servitude were ongoing, then it would be inconsistent for him to now challenge the acts in judicial proceedings. This was, for example, the case in *Muirhead*<sup>93</sup> where the party stood by and watched the works while living there as a tenant and was thus barred from challenge.

This conceptualisation of acquiescence as personal bar, and the corresponding presence of inconsistent conduct, is less obvious in cases involving singular successors. In order for a singular successor's conduct to be inconsistent, it may be argued that this should require something to be constructed to which the singular successor has himself failed to object. But this does not happen at the time of the sale. It follows that the claimant has not incurred any new costs since the sale and will not therefore be prejudiced by the successor's inconsistent conduct as such. However, the lack of action on the claimant's side can probably be cured by the fact that the successor has acquired the land despite knowing of the existing installations and requiring the claimant to remove them would lead to the loss of the benefit which costs had previously been expended upon. It follows that there is inconsistent conduct in a sense and that acquiescence therefore fits into the factual scenario in which personal bar can be active.

Considerations of what makes silence inconsistent again emphasise the significance of knowledge on part of the landowner, since delayed objections would not be inconsistent if he only learned of the acts at a later point. The inaction only amounts to relevant conduct if the landowner had the opportunity to react.<sup>94</sup> Even if that is the case, and although there are instances where the law declines to protect those sleeping in relation to their rights (*vigilantibus non dormiens iura subvenient*), silence alone is not seen as sufficiently blameworthy to limit the landowner's rights.<sup>95</sup> Further aspects of the case need to show that it would be unfair for him to now assert his rights.

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<sup>90</sup> 1921 S.C. (H.L.) 1 per the Lord Chancellor at 7, as cited in J W G Blackie, 'Good Faith and the Doctrine of Personal Bar' in A D M Forte (ed), *Good Faith in Contract and Property* (1999) at para. 2-10.

<sup>91</sup> *William Grant & Sons Ltd v Glen Catrine Ltd* 2001 S.C. 901 at 917. Lord President Rodger relies on the relevant paragraphs in the *Principles* to conclude that 'Bell's analysis does not support [the defender's] theory that acquiescence can give rise to personal bar even without reliance'.

<sup>92</sup> E C Reid 'Personal Bar: Three Cases' (2006) 10 Edin LR 437 at 441.

<sup>93</sup> (1864) 2 M. 420.

<sup>94</sup> See Part C (iii) above.

<sup>95</sup> (1830) 8 S. 841 at 843 per Lord Gillies.

(ii) *Unfairness without reliance?*

Personal bar is relied on as an equitable doctrine where the law would otherwise lead to unjust decisions. This is made clear, for example, in *McIntyre*<sup>96</sup> when the court compared the relative blameworthiness of both parties. It was concluded that the abstraction of the water should be allowed to continue on grounds of acquiescence because ‘the equity and the good faith of the proceeding is all on [the claimant’s] side’.<sup>97</sup> It seems that personal bar is relevant only where enforcing the landowner’s ownership rights would be unfair. At least in the traditional conception put forward by Bell and statements in leading cases, this unfairness element is of two cumulative factors: that the claimant has acted in reliance on the silence and that asserting the right now would be prejudicial to him.<sup>98</sup> However, acquiescence might not perfectly align with this definition. While prejudice is given through the cost or permanency element and the fact that the claimant would have to remove his installations, the cases tend to show no reliance on his part.

For unfairness to be shown, the person claiming the bar would have to be prejudiced if the right-holder were to now challenge his conduct. This is quite clearly the case for acquiescence due to the element of expenditure.<sup>99</sup> Having to remove what he built to support his use of the land would mean that he has incurred the costs pointlessly. The argument therefore becomes stronger the greater the expense is, which matches what has been said on the character of the claimant’s act. There may furthermore be cases where the claimant only acquired the land believing that it would benefit from a servitude or did so for a higher price. In *Aytoun v Melville*,<sup>100</sup> for instance, the land was purchased only with the view of erecting the machinery on it. It is a common feature of the acquiescence cases that the other party would be negatively impacted if the landowner was to enforce his rights.

A more controversial issue is whether unfairness also demands a mental element on the part of the claimant. For personal bar to be relevant, he generally needs to have relied on the conduct of the right-holder, assessed objectively from the perspective of the reasonable person. This seems to mean that the claimant can only rely on acquiescence if his actions were induced by the reasonable belief that the landowner would not challenge his act. In *Balfour*,<sup>101</sup> the court regarded it as necessary that the claimant’s predecessor ‘was aware that the pipe in question was being laid in reliance upon [his] assent’, and that this could not be established was a reason why the acquiescence argument failed.<sup>102</sup> The parties’ submissions in some cases also seem to support the need for such a causal connection. For example, in *Earl of Kintore v Pirie*,<sup>103</sup> it was part of the claimant’s argument that he believed himself to be within his rights when undertaking the works. In the recent case of *A C & I C Fraser & Son Ltd v Munro*<sup>104</sup> on the question of vehicular access, the landowner similarly submitted that the necessary knowledge must have included knowledge of the other party’s reliance to be effective.

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<sup>96</sup> (1868) 41 Sc. Jur. 112.

<sup>97</sup> (1868) 41 Sc. Jur. 112 at 120 per Lord Ardmillan.

<sup>98</sup> See, for example, 1921 S.C. (H.L.) 1. and 2001 S.C. 901 above.

<sup>99</sup> See Part C(i) above.

<sup>100</sup> (1801) Mor 8 at 9.

<sup>101</sup> (1900) 2 F. 345.

<sup>102</sup> (1900) 2 F. 345 at 351 per Lord President Balfour.

<sup>103</sup> (1903) 5 F. 818 at 830.

<sup>104</sup> (2024) SAC (Civ) 41 at para. 9 per Sheriff Principal Derek C W Pyle.

However, such a reliance requirement does not seem to be accepted in many decisions. The landowner has no reason to raise objections until the building works on his property commence, and indeed no right to do so. This means that the landowner's silence cannot be categorised as inconsistent conduct until this point. The acts of the claimant must logically occur prior to the (lack of) reaction of the landowner, meaning that it cannot have been reliant upon that. This aspect strongly resembles encroachment cases, where acquiescence precludes the landowner from seeking the removal of the offending buildings. The position is summarised in *Duke of Buccleuch v Magistrates of Edinburgh*,<sup>105</sup> where it is stated that 'if [the landowner] stands looking on without objecting, he will be held to have given a tacit consent to my operations, which will have the same effect as express consent. This is the foundation of the doctrine of acquiescence'.<sup>106</sup> These considerations of knowledge and silence seem identical to what is needed to preclude the challenge of a servitude, which supports the inference that acquiescence should be treated the same in both contexts.

For this reason, it has been argued that reliance is not a strictly necessary condition for personal bar to arise and the doctrine can still work to protect an encroachment or a servitude-like right.<sup>107</sup> This does not, however, amount to the possibility to proceed without any mental element at all. The amount of loss that will be suffered if the landowner insisted on his rights is entirely within the control of the claimant, so there must be some additional safeguard in place to ensure that the benefit of personal bar is limited to parties whose conduct deserves protection against challenge. A central reason why the courts have been hesitant to apply acquiescence was the fear that it might encourage deliberate breaches of others' property rights. In *McIntyre*,<sup>108</sup> acquiescence was called a 'very dangerous doctrine' for this reason.<sup>109</sup> The same concerns are noted in *Melville v Douglas's Trs*<sup>110</sup> where the court declines the claimant's argument, stating that this sort of behaviour was not what 'the law means to countenance, and much less to encourage'.<sup>111</sup> It appears that, even where reliance in the traditional sense is missing, something else is needed in respect of the claimant's intention to establish that it would be just to protect him by means of acquiescence.

The issue can be solved if reliance is reimagined as merely one subcategory of a broader requirement of good faith. As Reid and Blackie put it, 'good faith, or, more specifically, lack of bad faith, is a necessary concomitant of bar in almost all contexts' and often decisive where it is meaningless to look for reliance.<sup>112</sup> It can therefore be conceived as 'a general controlling principle of the law of personal bar'.<sup>113</sup> As a legal term, good faith is rather vague and has slightly different meanings depending on its application. It can be narrowed down usefully by once again drawing an analogy with encroachment. A claimant who argues acquiescence to avoid

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<sup>105</sup> *Duke of Buccleuch v Magistrates of Edinburgh* (1865) 3 M. 528.

<sup>106</sup> (1865) 3 M. 528 at 531 per the Lord Justice Clerk Inglis.

<sup>107</sup> E C Reid and J W G Blackie, *Personal Bar* (n 4) at para. 6-59.

<sup>108</sup> (1868) 41 Sc. Jur. 112.

<sup>109</sup> (1868) 41 Sc. Jur. 112 at 115 per Lord President Inglis.

<sup>110</sup> (1830) 8 S. 841.

<sup>111</sup> (1830) 8 S. 841 at 843 per Lord Gillies.

<sup>112</sup> E C Reid and J W G Blackie, *Personal Bar* (n 4) at para. 2-48.

<sup>113</sup> J W G Blackie 'Good Faith and the Doctrine of Personal Bar', in A D M Forte (ed), *Good Faith in Contract and Property* (n 90) at 152.

having to remove a building from his neighbour's land is required to show good faith in the sense that he believed his actions were unobjectionable. This does not mean that the claimant needs to believe he was within his rights, which would clearly be too onerous of a threshold, but only that the encroachment would not attract objections.<sup>114</sup> Acquiescence may conceivably include a requirement to the same effect, which could help clarifying the conditions of unfairness towards a general test.

(iii) *Legal effects: of swords and shields*

Personal bar does not confer a right to the use of the neighbouring property but merely prevents the other party from disputing that use. In the context of alleged servitudes, this implies that acquiescence can only be relied on as a defence where the right-holder raises proceedings against the claimant's use of the property. A metaphor used to explain this point is that personal bar can operate as a shield but not a sword.<sup>115</sup>

In practice, however, acquiescence is relevant in cases which do not fit within this scenario and appears to assume a more sword-like role. In *Robson v Chalmers Property Investment Co Ltd*, the landowner threatened to remove the installations on his property that were necessary to enjoy the alleged servitude.<sup>116</sup> The case was then brought by the claimant seeking an interdict to prevent him from doing this. A similar argument was raised in *More v Boyle* for an interdict against the closing of a supply pipe,<sup>117</sup> and in *Balfour* against the removal of a drainpipe leading through the right-holder's land.<sup>118</sup> In these cases, acquiescence can be evoked to control the burdened proprietor's actions and actively enforce rights to abstract water. Definitionally, personal bar does not create a right to an act but only that it is not denied in court, so there should not be a servitude that he cannot seek to have enforced.<sup>119</sup>

However, this image of personal bar as a shield is not uncontested and there are other areas of law where it seems to have assumed a more active role. Examples discussed by Blackie include the ostensible authority of an agent and pre-contractual conduct.<sup>120</sup> In the above cited case of *Gatty*, personal bar also operated as the ground of action in this way.<sup>121</sup> If it is accepted that the application of acquiescence to servitudes, despite the lack of reliance, requires some form of good faith as part of the element of unfairness, then this model of personal bar would be able to explain these cases. To protect good faith parties from suffering financial losses or being limited in the enjoyment of their property, it is sometimes necessary that they have the power

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<sup>114</sup> (1865) 3 M. 528 at 531. The court emphasises that acquiescence will not be relevant if the works were undertaken secretly or in the face of protest: 'The facts from which acquiescence is to be inferred must be such as to leave no reasonable doubt as to what was the intention of the parties at the time'.

<sup>115</sup> E C Reid and J W G Blackie, *Personal Bar* (n 4) at paras. 5-21 to 5-25 note this as a difference to the English estoppel, but the fact that there are Scottish cases with similar offensive qualities might suggest that the Scottish position is closer than assumed.

<sup>116</sup> *Robson v Chalmers Property Investment Co Ltd* 1965 SLT 381.

<sup>117</sup> 1967 S.L.T. (Sh. Ct.) 38.

<sup>118</sup> (1900) 2 F. 345.

<sup>119</sup> In *Robson*, there has been found to be a prior grant, but the argument of acquiescence was raised independently from this.

<sup>120</sup> J W G Blackie 'Good Faith and the Doctrine of Personal Bar' in A D M Forte (ed), *Good Faith in Contract and Property* (n 90) at 152.

<sup>121</sup> 1921 S.C. (H.L.) 1.

to raise an action in reliance on personal bar. As a rather wide doctrine, it thus operates to prevent unjust outcomes of the law.

Acquiescence by neighbours in relation to servitude-like benefits is therefore not entirely consistent with how personal bar is typically conceived. Singular successors who purchase the land are still burdened in at least some cases. This effect may be rationalised in saying that they are taken to be precluded from challenge not by some permanent right but by their own conduct, if the acts of the claimant would be so obvious as to establish constructive knowledge. Acquiescence has not only been relied on as a defence from challenge by the landowner, but to positively enforce the claim and prevent the landowner from acting contrary to it. This effect may require a slight readjustment of the doctrine, which could then also accommodate acquiescence to alleged servitudes.

## F. Constructive grant

While personal bar may be capable of explaining the cases where the acts were acquiesced in, this would likely require some rethinking of its legal effects. As a ground for legal action, the doctrine has been used more actively than the “shielding” effect a bar would usually allow, and the claimants lack the reliance that doctrine calls for in most other circumstances. In light of these issues, the alternative view that a real right of servitude has been created should be given some further consideration.

Considering the frequent judicial references to tacit consent within the case law,<sup>122</sup> saying that the burdened owner has tacitly agreed would make for the most plausible justificatory basis for the conferral of a servitude by acquiescence. The suggestion here is not that acquiescence could fit within the familiar bounds of the rules of implied grant, which require a conveyance which sub-divides land.<sup>123</sup> This would have to be a novel method of creating a servitude and could not be introduced into Scots law other than by legal reform or perhaps significant development of the case law. It is, however, questionable whether such a development would be desirable.

A comparison with the positive prescription of servitudes has been drawn above when discussing what it means to assert a right.<sup>124</sup> If the level of use is not sufficient to establish the assertion of a right, the claimant’s behaviour is typically attributed to the landowner’s “tolerance” in the sense of implied permission, which would preclude prescription from running.<sup>125</sup> By contrast, where the level of use has been sufficient to indicate the assertion of a right, the landowner’s inaction can be arguably be characterised as an implicit acceptance of his land being subjected to a servitude. Such a rationale is adopted, for example, by Erskine in his *Institute*, stating that a landowner can become burdened by virtue of prescription ‘where his consent is presumed, from suffering the party claiming the servitude to continue in the exercise of it for forty years together, without any attempt to interrupt him’.<sup>126</sup> In these cases,

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<sup>122</sup> See Part C(ii) above.

<sup>123</sup> *Cochrane v Ewart* (1861) 23 D. (H.L.) 3

<sup>124</sup> See Part C(i) above.

<sup>125</sup> A Peterson. *Prescriptive Servitudes* (n 33) at para. 8-19.

<sup>126</sup> J Erskine, *An Institute of the Law of Scotland* (n 2) at II.ix.3.



there is nothing between the parties to infer actual consent in any contractual sense, but consent is nonetheless invoked as a rationale to explain the operation of the law.

It would be possible to align the two legal rules by establishing a method of creation by acquiescence in which consent works in a similar manner, for example, that a landowner's inaction in the face of costly or permanent installations is to be construed as consent to the creation of the servitude which those installations envisage. If servitudes could be established in this way, this could be advantageous for prejudiced claimants who should continue to be protected even if their benefit would not be obvious to successors to the landowner. One such situation would be the laying of underground pipes, which might fulfil the requirements to say that a proprietor has acquiesced to them, but might not be discoverable as to bar his successor.

However, there are good reasons not to admit this possibility. When buying land, the purchaser should have the opportunity to discover the servitudes encumbering it. If the encumbrances are not obvious, which would, for example, likely be the case for pipes, then a new method of creation that does not require registration would undermine legal certainty. This may be less problematic where the burdens are discoverable because a visible construction would also constitute sufficiently open possession to fulfil the publicity requirement. But if that is the case, then a new method of creation would add little practical use because the claimant's interests are already sufficiently protected through personal bar. Any visible installations on the burdened property will also be within the (constructive) knowledge of successors and therefore preclude them from raising objections just the same.

A reason to avoid this position is that it might lead to an indefinite chain of successors who are personally barred. If the law operated in that way, this would lead to an uneasy divergence between the legal positions of the parties and their conduct in practice. As long as the constructions remain visible, any successor of the claimant would continue to be benefitted despite having no right thereto. However, the situation can be solved without a need to create servitudes by acquiescence, if it is accepted that positive prescription can operate.

As a result of being barred, the landowner is precluded from disputing the existence of a servitude. Nevertheless, it remains the case that the use of the land is not referable to his permission as a revocable personal right.<sup>127</sup> It follows that, if the acts of the claimant are sufficiently costly or permanent to constitute acquiescence, they are also likely to be sufficiently adverse to qualify as prescriptive possession under s.3(2) Prescription and Limitation (Scotland) Act 1973. This would be consistent with the reasoning in *Aberdeen City Council v Wanchoo*,<sup>128</sup> although that decision has been criticised on the grounds that the pursuers were personally barred from disputing a personal right rather than a real right of servitude.<sup>129</sup> An analogous argument is put forward by Cusine and Paisley in the context of the court's equitable discretion not to remove encroachments, noting that in 'a broad sense, this amounts to the courts requiring the potential servient proprietor to permit a servitude to be established by prescriptive exercise.'<sup>130</sup> If this analysis is right, there is no apparent reason why prescription

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<sup>127</sup> See Part C(i) above.

<sup>128</sup> *Aberdeen City Council v Wanchoo* 2008 SC 278.

<sup>129</sup> A Peterson, *Prescriptive Servitudes* (n 33), para. 8-15.

<sup>130</sup> Cusine and Paisley (n 15) at para. 11.45, citing *Anderson v Brattisanni's* 1978 SLT (Notes) 42.

should not run in the comparable situation of personal bar. It follows that the relevance of acquiescence would be limited to until the period of 20 years has elapsed.

Many of the alleged servitudes are supported by visible constructions such as dams or tanks, in which case personal bar could afford sufficient protection even for successors of the claimant pending completion of the prescriptive period. There should only be limited possibilities for creating a servitude for non-visible installations because the lack of publicity could potentially create unwanted uncertainty. Therefore, such a new method of creating a servitude would bear more risks than potential benefits, particularly since a permanent right to the use can likely be constituted on the basis of positive prescription anyway. From a doctrinal legal perspective, it also seems preferable to understand acquiescence as a unitary doctrine that consistently has the effect of personal bar. The cases seem conceptually closer to encroachment cases than positive prescription and should be treated alike.

## **G. Conclusion**

This work has examined whether acquiescence is a method of creation of servitudes in Scots law. This possibility is primarily founded on historical and judicial discussions which suggest that, if an act is sufficiently costly or permanent and undertaken with the knowledge of the landowner who remains silent, there is implied consent by that landowner. However, to characterise acquiescence as creating a servitude would sit uneasily with the need for publicity and the discoverability of real rights. The implications for singular successors are especially problematic, as it would risk burdening purchasers with obligations of which they may have had no notice. The case law suggests a consistent judicial reluctance to extend the effects of acquiescence in such a way, particularly where the works are not obviously visible upon inspection of the property.

Instead, a more coherent doctrinal explanation is that acquiescence operates as it does for encroachment, giving rise to personal bar and precluding the landowner from later challenging the works. This would align with broader equitable principles surrounding the protection of good faith parties and the prevention of unjust outcomes, which could also explain the instances where the claimant was able to base an action on the acquiescence. Although this does not fit squarely within the classical definition of personal bar, particularly due to the absence of causal reliance, the doctrine can be understood as a specific manifestation of it, shaped by the unique features of land law and the enduring relevance of fairness. Ultimately, while acquiescence might share some conceptual terrain with positive prescription, it is best understood as a doctrine of fairness operating as a personal right. It does not create servitudes in the strict sense but may nevertheless secure continued enjoyment of a benefit by precluding objection in appropriate circumstances.

## List of cases

*Aberdeen City Council v Wanchoo* 2008 S.C. 278  
*A C & I C Fraser and Son Ltd v Munro* [2024] SAC (Civ) 41  
*Aytoun v Douglas* (1800) M. 7  
*Aytoun v Melville* (1801) Mor 8  
*Bank of Scotland v Stewart* (1891) 18 R. 957  
*Ben Callum Limited v Buchanan* 1955 S.C. 348  
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*Buchanan v Glasgow Corporation* 1923 S.C. 782  
*Cairncross v Lorimer* (1860) 3 Macq. 827  
*Cowan v Kinnaird* (1865) 4 M. 236  
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*Duke of Buccleugh v Magistrates of Edinburgh* (1865) 3 M. 528  
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*Ewart v Cochrane* (1861) 23 D. (H.L.) 3  
*Fraser v Campbell* (1895) 22 R. 558  
*Gatty v. Maclaine* 1920 SC 441 (affd. 1921 SC (HL) 1)  
*Grahame v Swan* (1882) 7 App. Cas. 547  
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