

An inquiry into the history and recognition of recreational servitudes in Scotland and their future in light of *Re Ellenborough Park* and *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*

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A. INTRODUCTION

‘What shall be deemed a servitude of a regular and definite kind is a secondary question, as to which the only description that can be given generally seems to be, that it shall be such a use or restraint as by law or custom is known to be likely and incident to the property in question, and to which the attention of a prudent purchaser will, in the circumstances, naturally be called’:

Bell, *Principles*, § 979

What Bell is describing here is one of the requirements to form a servitude, known as an easement in England and Wales: the *utilitas* principle. Servitudes require a burdened and a benefited property; the *utilitas* principle requires that the right over the burdened property in question must provide a peculiar benefit to the benefited property in question and not merely a personal benefit to the person exercising the right. It is under this principle that recreational servitudes may be argued to have no place in the law of Scotland. ‘Recreational’ here refers to a broad class of rights that exist to provide leisure or enjoyment to a person, such as a right to play golf, to swim, or to walk for relaxation and pleasure. Nevertheless, in 2017, the Supreme Court in an English case recognised a right to use a leisure complex by neighbouring owners as an easement.¹ This built upon a previous case where the Court of Appeal recognised a right to walk for pleasure as an easement.² The focus of this paper is to reexamine the law of Scotland relating to servitudes, in light of the law of England and Wales, to see whether recreational servitudes do have any place in the law of Scotland.

The first section of this paper will briefly highlight the origins of servitudes and the *utilitas* principle in Roman law. The second section will lay out the law as related to recreational easements in England and Wales, focusing on the cases of *Re Ellenborough Park*³ and *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*.⁴ The third section will describe the law as related to recreational servitudes in Scotland, as treated by the institutional writers and by the courts. Finally, this paper will highlight the common and contentious ground and between Scots law and English law and suggest a way forward.

B. ROMAN LAW AS A COMMON ANCESTOR

The word ‘servitude’ can be traced to the Latin term *servitus*. It is derived from the verb *servire*, which means ‘to be of service’.⁵ Buckland defines praedial servitudes in classical Roman law as: ‘rights vested in a person as owner of one piece of land over another, effective not only against its owner, but against all: they were *iura in rem*’.⁶ It is the attachment of the right and burden of a servitude to the land itself that gives the servitude its real character and distinguishes it from a personal agreement giving rights to and binding two people as persons.⁷

¹ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553.

² *Re Ellenborough Park* [1956] Ch. 131.

³ *Ibid.*

⁴ [2019] A.C. 553.

⁵ Waal, M. J. De, ‘Servitudes’, *A History of Private Law in Scotland* (Oxford, 2000; online edn, Oxford Academic, 22 Mar. 2012).

⁶ W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (1921) 261.

⁷ *Ibid* 259.

The XII Tables list four rustic servitudes: passage on foot or horseback (*iter*), passage of livestock (*actus*), passage of carts (*via*), and the passage of surface water (*aquaeductus*). These servitudes were regarded as involving some form of ownership over the servient property. This is evidenced by these servitudes being *res Mancipi* and being transferred by *manipatio* and therefore must be considered a corporeal thing.⁸ In time, all servitudes were considered incorporeal.⁹ Post-classical law understood servitudes to be either praedial or personal. This distinction is not of importance in this paper, as it has long been abandoned in Scots law.¹⁰

An important principle here is the *utilitas* principle. This is the requirement that a particular servitude be of direct utility to the dominant tenement. Paul. D. 8, 1, 9 pro is the principal statement of this rule in Roman law: 'A servitude cannot be created to the effect that a man shall be at liberty to pluck apples, or to walk about, or to dine on another man's ground.'¹¹ This blanket prohibition on these rights as servitudes must be understood as being formulated in an ancient agricultural age, where the establishment of servitudes was for the exploitation of the dominant tenement as an agricultural unit.¹² As society urbanised, the *utilitas* principle was relaxed to incorporate as servitudes rights that increase the utility, or usefulness, of the dominant tenement in accordance with the tenement's economic, industrial, or professional purpose. However, an activity peripheral to the property's purpose could not be the subject of a servitude, even if the activity relied on the existence of a servitude to be performed¹³. As such, the original four servitudes in the XII Tables of passage on foot or horseback (*iter*), passable of livestock (*actus*), passage of carts (*via*), and the passage of surface water (*aquaeductus*) eventually expanded to several servitudes.¹⁴ The requirements of a servitude, such as *utilitas*, remained, but they were viewed within the needs of society.

In Roman Britain, the law of the Empire took deep root with Papinian and Severus, both renowned jurists, calling Britain their home for some time.¹⁵ However, after the Empire withdrew, this law was lost. In Scotland, the land was divided between tribes with their own rules that fought between themselves as well as with England. It is unlikely that Roman ideas survived this, or at least cannot be traced. It is only with the reign of David I in the twelfth century that Scotland's constitutional features began to take shape. However, it is also around this time that Scotland's commercial and political relationships with France would likely allow some Roman ideas to return.¹⁶ As we shall see when discussing English case law, the Roman law of servitudes was taken up in England to provide a legal framework for the needs of the nineteenth century, as the previous native framework was not suited for the economic needs of

⁸ A. Watson, *The Law of Property in the Later Roman Republic* (1968) 184.

⁹ G. 2. 17.

¹⁰ Bell, *Principles*, § 981.

¹¹ C. H. Monro, *Translation of the Digest of Justinian* (1909), vol. 2).

¹² Waal, M. J. De, 'Servitudes', *A History of Private Law in Scotland* (Oxford, 2000; online edn, Oxford Academic, 22 Mar. 2012),

¹³ D. L. Carey Miller, *Property*, in E. Mertzger (eds), *A Companion to Justinian's Institutes* (1998) 42 at 68.

¹⁴ A. Watson, *The Law of Property in the Later Roman Republic* (1968) 176.

¹⁵ T. A. Ross, *Servitudes in the Law of Scotland*, (1933) 10.

¹⁶ *Ibid* at 10-12.

post-seventeenth-century England.¹⁷ It is here that we find the law of servitudes in Scotland and easements in England become separate, as well as the English case-law we will now discuss.

C. RECREATIONAL SERVITUDES IN ENGLAND

(1) *Re Ellenborough Park*

*Re Ellenborough Park*¹⁸ was a case heard in the England and Wales Court of Appeal, with the judgment handed down in November 1955. This case is of importance due to the Court's acceptance of what could be considered a recreational easement. Further, the judgment consolidated the case law regarding the creation of easements into a four-part test. Therefore, it is essential to have an understanding of *Ellenborough Park* before the later *Regency Villas* case can be fully discussed.

(a) *The facts*

Ellenborough Park is a 7.5-acre estate in Weston-super-Mare, split by a minor road. In 1855, the part of the land relevant to the case was owned by two equal tenants in common (similar to common ownership in Scotland) who then sold and conveyed part of the land on the border of the estate to one John Porter for housing development. Part of that conveyance was the following:

*"Together with the messuage or dwelling-house outbuildings and premises which are now in course of erection by the said John Porter on the said plot of land ... which are intended ... to form No. 21 of the said row called Ellenborough Crescent ... Together with all ways paths passages easements rights and appurtenances to the said plot of land ... belonging or appertaining and particularly the use and enjoyment at all times hereafter in common with the other persons to whom such easements may be granted of the roads called the 'Crescent Road' and the 'Walliscote Road' and of all other roads ways and footpaths and of all drains ... which shall be made on the said White Cross Estate ... And also the full enjoyment ... at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land ... in the centre of the square called Ellenborough Park which said pleasure ground is divided by the said Walliscote Road but subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground."*¹⁹

Then, after construction of the houses, the sellers for themselves and their successors in title covenanted with the purchaser and his successor in title that:

"and all other persons to whom the right of enjoyment of the pleasure ground ... may be granted at all times hereafter (to) keep as an ornamental pleasure ground the plot of ground

¹⁷ W. Holdworth, *A Historical Introduction to the Land Law*, (1927) 265.

¹⁸ [1956] Ch. 131.

¹⁹ *Ibid* at 134.

hereinbefore referred to and situate in front of and partly encircled by the said Ellenborough Crescent,"

and that they would not at any time:

"erect or permit to be erected any dwelling-house and other building (except any grotto, bower, summer-house, flower-stand, fountain, music-stand, or other ornamental erection) within or on any part of the said pleasure ground ... but that the same shall at all times remain as an ornamental garden or pleasure ground."²⁰

The unsold land was purchased in 1879 by William Henry Davies, who then died in 1890 with Ellenborough Park being undistributed in his will. The administration of the park was undertaken by the trustees of the will until 1924, when a committee of those persons who contributed to the maintenance of the park (called by the somewhat misleading name of "ratepayers") was formed to undertake the administration. During World War II, the War Office made use of the pleasure ground. Under the Compensation Defence Act 1939, section 2(1), the neighbours of the pleasure ground could claim compensation for such use if they could correctly allege a proprietary interest, such as an easement.

The trustees of the will, as the plaintiffs, argued that the rights conferred in these respects by the conveyances were no longer operative or enforceable against the owners of the park because they did not conform to the essential qualities of an easement, and they amounted to a *ius spatiandi*, which is not known to English law.

The case was heard at first instance in the Chancery Division of the High Court,²¹ where Mr Justice Danckwerts found for the neighbours of the pleasure ground, concluding that they did have a right of use, as an easement, over the pleasure ground.

(b) The judgement

The judgment in the Court of Appeal was given by the Master of the Rolls, Lord Evershed and concurred in by Lord Justices Birkett and Romer. The court held both that, on construction of the deed, 'full enjoyment of the pleasure ground' was intended to grant a valid easement.

Lord Evershed began with the history of the law of easements in England. As part of this analysis, he cited Sir William Holdsworth's *Historical Introduction to the Land Law*²²: '...The law, as thus developed, sufficed for the needs of the country in the eighteenth century. But, as it was no longer sufficient for the new economic needs of the nineteenth century, an expansion and an elaboration of this branch of the law became necessary. It was expanded and elaborated partly on the basis of the old rules...'²³.

In other words, the Roman law was used to supplement the underdeveloped common law. It is here that Paulus' prohibition of *ius spatiandi* was adopted into English law. The court did not find Paulus' statement authoritative, with Lord Evershed stating '[i]t by no means follows that the kind of right which is here in question, arising out of a method of urban development that would

²⁰ *Ibid.*

²¹ [1955] 3 W.L.R. 91

²² W Holdsworth *Historical Introduction to the Land Law* (1927) 265.

²³ *Ibid* at 162-163.

not have been known to Roman lawyers, can in any case be said to fall within its scope. And, in any event, its validity must depend, in our judgment, upon a consideration of the qualities which must now be attributed to all easements by the law relating to easements as it has now developed in England.’²⁴

The court, in line with both parties’ submissions, adopted a four-part test to establish an easement laid down in Dr. Cheshire's *Modern Real Property*²⁵ : ‘(1) there must be a dominant and a servient tenement: (2) an easement must "accommodate" the dominant tenement: (3) the dominant and servient owners must be different persons, and (4) a right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant.’²⁶. Accepting the first and third of these criteria as undoubtedly applying to the facts before them, the court considered at length whether the right in question conformed to requirements (2) and (4).

In relation to the second requirement, Lord Evershed stated that it must be shown that the easement is ‘connected with the normal enjoyment of that property’, and that ‘[i]t appears to us that the question whether or not this connexion exists is primarily one of fact, and depends largely on the nature of the alleged dominant tenement and the nature of the right granted.’²⁷

He expanded on the fourth requirement, stating that it asks; ‘whether the rights purported to be given are expressed in terms of too wide and vague a character; whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the park owners of proprietorship or legal possession; whether, if and so far as effective, such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot quality as easements.’²⁸. Here we find an important starting point: a pure right of recreation cannot be a servitude.

Lord Evershed highlighted two cases that seemed to recognise the prohibition of a *ius spatiandi*: *International Tea Stores Co. v. Hobbs*²⁹ and *Attorney-General v. Antrobus*.³⁰ The relevant comments in both cases were *dicta* by Farwell J. The court refused to follow either because ‘more weight should be attached to that which was necessary for the decision of the case than to that which was merely obiter’³¹ and, in the latter case, the facts concerned a claim to a prescriptive public right of access to Stonehenge, so it could not be said that any of Farwell J.’s comments had an easement between two properties in mind.³²

The Master of the Rolls also referred to two cases that seemed to support the establishment of the easement in question: *Keith v. Twentieth Century Club*³³ and *Duncan v. Louch*, a judgment

²⁴ *Ibid* at 163.

²⁵ G C Cheshire *Modern Real Property* (1954) 456.

²⁶ *Ibid*.

²⁷ *Ibid* at 173.

²⁸ *Ibid*.

²⁹ [1903] 2 Ch. 165.

³⁰ [1905] 2 Ch. 198; 21 T.L.R. 471.

³¹ *Ellenborough Park Re* [1956] Ch. 131 at 181.

³² *Ibid* at 183.

³³ (1904) 73 L.J.Ch. 545; 20 T.L.R. 462; 90 L.T. 775.

from the King's Bench.³⁴ The court concluded that the former was of little relevance.³⁵ This was because the questions before the judge had been formulated by another judge of the Chancery Division, and did not involve the validity of the easement in that case.³⁶ The latter, however, was of assistance. This case concerned the obstruction of what the plaintiff presented as a right of way. It was argued on the defendant's part that the easement in question was not a right of way from terminus to terminus but a right of pleasure, that is, to pass and repass over every part of the close. The comments made in the judgement do not seem to address the question through the lens of *ius spatiandi* directly: the Lord Chief Justice, Lord Denman stated, 'there is no doubt in this case. Taking the right, as Mr. Peacock suggests, to be like the right of the inhabitants of a square to walk in the square for their pleasure ... I cannot doubt that, if a stranger were to put a padlock on the gate and exclude one of the inhabitants, he might complain of the obstruction.'³⁷ Mr Justice Patteson stated, 'I do not understand the distinction that has been contended for between a right to walk, pass and repass forwards and backwards over every part of a close, and a right of way from one part of the close to another. What is a right of way but a right to go forwards and backwards from one place to another?'³⁸ Mr Justice Coleridge, in his judgment, described the right as an "easement."³⁹ Lord Evershed stated that '[t]he reasoning of the decision and the circumstances of the case, no less than the language used, particularly by Lord Denman C.J., involve acceptance as an easement of a right such as that with which, according to our interpretation of the effect of the relevant deeds, we are here concerned.'⁴⁰

The Court of Appeal distinguished *Hill v Tupper*⁴¹ as the point of law there was that "it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it to constitute a property in the grantee."⁴² This did not contradict the court's position that the servitude in question could be a servitude if it fulfilled the conditions set out above as a right that was unconnected to the use and enjoyment of the land would fail to accommodate the dominant tenement.

It was argued on the part of the plaintiff that the easement would amount to an 'ouster' or, in other words, a joint occupation with the owners to exclude their proprietorship or possession. The plaintiffs relied on *Copeland v Greenhalf*.⁴³ However, Lord Evershed held that 'the facts of *Copeland v. Greenhalf* bear any real relation to the present case, and Upjohn J.'s judgment constitutes no authority relevant to our decision.'⁴⁴

As such, the appeal was dismissed.

(c) Significance

³⁴ (1845) 6 Q.B. 904.

³⁵ See the discussion at [1956] Ch. 131 at 183.

³⁶ *Ibid* at 187.

³⁷ *Duncan v. Louch* (1845) 6 Q.B. 904 at 913.

³⁸ *Ibid*.

³⁹ *Ibid* at 914.

⁴⁰ *Re Ellenborough Park* [1956] Ch. 131 at 185.

⁴¹ (1863) 2 H. & C. 121.

⁴² *Ibid* at 127.

⁴³ [1952] Ch. 488.

⁴⁴ *Re Ellenborough Park* [1956] Ch. 131 at 177.

Taking that the court is correct in its application of *Duncan v Louch*, this case did not extend the law of easements. However, it did provide a concise restatement of an obscure area of law. Further, it confirmed that the courts recognise a native English law of easements, removed from the Roman law that preceded it. Despite this, as noted above, the court did not depart fully from Paulus' prohibition of *ius spatiandi*, as mere recreation that provides no utility or benefit to the dominant property is rejected by the court. Regardless, *Re Ellenborough Park* represents English law taking a more nuanced and fact-driven approach to the *utilitas* principle. Taken in its historical context of post-WW2 suburbanisation, there is clear policy reason to extend easements to cover rights that provide utility in the form of comfort and enjoyment of one's home. The question then becomes how the law may apply to different contexts, and it is with this in mind that we consider the case of *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*.

(2) *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*

(a) *The Facts*

The dispute in *Regency Villas* involved the recreational facilities of a country estate in Kent called Broome Park. Within this estate were the Mansion House and Eltham House. Included in the recreational facilities were an outdoor swimming pool, three squash courts, two tennis courts, an 18-hole golf course, a putting green, and a croquet lawn. Further, within the Mansion House, there was a billiard room, restaurant, bar, gym, a TV room, and a sunbed and sauna later converted into an indoor swimming pool.

Broome Park was owned by Gulf Investments Ltd, which transformed the top two storeys of Mansion House into 18 timeshare apartments. Then, in 1980, Gulf Investments re-acquired Eltham House (which it had previously sold in 1967) and transformed it into a further 26 timeshare apartments to be known as Regency Villas. In 1981, Gulf Investments transferred Eltham House to an associated company with a grant of rights as follows:

*"... the Transferee, its successors in title, its lessees and the occupiers from time to time of the property [have a right] to use the swimming pool, golf course, squash courts, tennis courts, the ground and basement floors of the sporting or recreational facilities ... on the Transferor's adjoining estate."*⁴⁵

Over time, the facilities deteriorated, and the outdoor swimming pool was filled in, and the putting green and croquet lawn were closed. In 2012, Diamond Resorts (Europe) Ltd, who were now the owners of the adjoining estate, began to charge the villa timeshare owners to use some of the leisure complex facilities. The freehold owner of Eltham House and the individual timeshare owners claimed a declaration that the 1981 transfer had created easements in their favour. They contended that they had a right to free use of the facilities and that they should be granted an injunction against Diamond Resorts (Europe) Ltd to prevent future interference as well as the return of the intermittent sums they had paid for use of the facilities, along with damages for interference with the easements.

⁴⁵ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553 at 565.

In the High Court,⁴⁶ HH Judge Purle QC found that the grant of rights did constitute an easement to use all leisure facilities on the adjoining land, including ones not in existence at the time of the grant. Diamond Resorts appealed to the Court of Appeal,⁴⁷ where they argued that, they were under no positive duty to maintain them and could withdraw the facilities at any time, the rights could not amount to easements. The Court of Appeal rejected this argument.⁴⁸ However, the court did find that Judge Purle had construed the grant too widely by including all facilities constructed after the grant.⁴⁹ Diamond Resorts appealed to the Supreme Court seeking dismissal of all claims that the 1981 transfer granted easement rights over any of the facilities in Broome Park. The owners of Eltham Park cross-appealed the Court of Appeal's finding that the easement rights did not include any future facilities not present or contemplated at the time of creation.

(b) The majority

By a majority of 4-1, the Supreme Court dismissed the appeal and allowed the cross-appeal. Lord Briggs (with whom Lady Hale, Lord Kerr, and Lord Sumption agreed) delivered the majority judgement.

The first point Lord Briggs dealt with was the construction of the facilities grant, where he contended the 'true construction' of the grant would answer, *inter alia*, the issue raised in the cross-appeal as to the extent of the rights over new facilities.⁵⁰ On the 'true construction' of the grant, he came to three conclusions. First, the parties intended to grant an easement. Second, the grant was over a comprehensive right to a complex of facilities put into operation as part of the leisure complex, including facilities made after the time of the grant. Third, there was no express, or implied by way of necessity, provision requiring the grantee or its successors or timeshare owners to contribute to the cost of operating, maintaining, renewing, and replacing facilities.⁵¹

The rest of the judgment dealt with the issue of law regarding whether it was competent to create the easement intended to be created. Both parties recognised that *Re Ellenborough Park* was the 'sheet anchor' for any questions regarding the establishment of recreational easements.⁵² Lord Briggs drew particular attention to the requirement that the easement must accommodate the dominant property. Like *Re Ellenborough Park*, Lord Briggs cited the work of Dr. Cheshire, where he stated that the easement 'must have some natural connection with the estate as being for its benefit'⁵³. Lord Briggs also cited the Law Commission's comment that '[t]he requirement is that the right must be of some practical importance to the benefited land, rather than just to the right-holder as an individual: it must be 'reasonably necessary for the better enjoyment' of that land'.⁵⁴

⁴⁶ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch).

⁴⁷ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [2].

⁴⁸ *Ibid* at [59], [62].

⁴⁹ *Ibid* at [40].

⁵⁰ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553 at 567.

⁵¹ *Ibid* at 569-570.

⁵² *Ibid* at 571.

⁵³ Cheshire *Property* 457

⁵⁴ *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) (Law Com No 327), para 2.25.

Following this, Lord Briggs identified the main controversy as being whether a recreational right could accommodate a dominant tenement. After consideration of the case law, he concluded that *Re Ellenborough Park* should be decisive of the issue, namely that the fact that a right is recreational does not prevent it from being an easement so long as it can be determined to accommodate the dominant property.⁵⁵ Lord Briggs concluded that a right to use an immediately adjacent leisure facility does accommodate a group of timeshare units that are typically used for holidays by people seeking leisure.⁵⁶ It was argued on the part of the plaintiffs that the right to use the leisure facilities was not accessory to the timeshare units in the same way a garden is accessory to a house, but rather the timeshare units were accessory to the right to use the leisure facilities. This argument relied on *Hill v Tupper*⁵⁷ as authority for the requirement that a right has to be accessory to the dominant property to qualify an easement. Lord Briggs distinguished *Hill v Tupper* as not concerning easements, but rather a *profit à prendre*, which is a right to take something from someone else's land, such as fish, or other game or crops.⁵⁸ Although similar to easements, profits have no invariable requirement to accommodate the neighbouring land. Accordingly, that issue was not argued before the court, and the decision relied on the conclusion that the right in question could not form a proprietary right by its very nature, regardless of whether it accommodated the neighbouring land or not.⁵⁹

Turning to the fourth requirement in *Re Ellenborough Park* (that the right must be capable of forming the subject-matter of a grant), Lord Briggs found the grant to be sufficiently clear and precise.⁶⁰ On the issue of 'ouster', where the easement rights would effectively deprive the servient owner of their possession or ownership, he noted the controversy surrounding this point of law.⁶¹ Lord Briggs found that there was nothing in the grant nor the facts established and analysed by the trial judge or the Court of Appeal that would deprive the plaintiffs of possession or control of the Park.⁶² Further, as a point of law, he found that the question of ouster should be by reference to what may be supposed to have been the ordinary expectations of the parties, at the time of the grant, as to who, as between dominant and servient owners, was expected to undertake the management, control and maintenance of the servient tenement. In the present case, there was a mutual and plain expectation that the Park would be managed, controlled, and maintained by the owners. Concerning what rights the dominant owners did have to step in and maintain the servient property so they can enjoy the easement rights, Lord Briggs stated that 'step-in rights are, by definition, rights to reasonable access for maintenance of the servient tenement, sufficient, but no more than sufficient, to enable the rights granted to be used' so that so long as 'the recreational and sporting facilities in the park could be used by the RVOC timeshare owners without taking control of the park, then no question of ouster arises'.⁶³

⁵⁵ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553 at 573.

⁵⁶ *Ibid* at 575.

⁵⁷ (1863) 2 H. & C. 121.

⁵⁸ Cooke, Elizabeth, 'Appurtenant Rights', *Land Law*, 3rd edn, Clarendon Law Series (Oxford, 2020; online edn, Oxford Academic, 22 Oct. 2020).

⁵⁹ *Ibid* at 575-576.

⁶⁰ *Ibid* at 576.

⁶¹ *Ibid* at 577.

⁶² *Ibid*.

⁶³ *Ibid* at 578.

In relation to the question of passivity, Lord Briggs noted that '[i]t is well settled that (subject to irrelevant exceptions) an easement does not require anything more than mere passivity on the part of the servient owner'.⁶⁴ However, he stated that this does not prevent easements with structures, fixtures, or chattels where it is expected that the servient owner will maintain them so long as they are not legally obligated to do so.⁶⁵ For example, an easement of access over a bridge would likely come with an non-binding expectation that the servient owner would maintain the bridge for his own use. In this case, it would be expected that Diamond Resorts would maintain their leisure facilities that they offer to paying members of the public. However, Lord Briggs did note that there may be 'recreational facilities which do depend upon the active and continuous management and operation by the servient owner, which no exercise of step-in rights by the dominant owners would make useable, even for a short period.'⁶⁶ However, the facts of the present case did not fall into such a category.

It was on these grounds that the majority dismissed the appeal.

(c) The dissent

Lord Carnwath was the sole dissenter and focused on the issue of passivity. He stated that '[a]n easement is a right to do something, or to prevent something, on another's land; not to have something done' and that this should preclude rights where 'the doing of something by the servient owner is an intrinsic part of the right claimed':⁶⁷

*'Neither principle, nor any of the 70 or so authorities which have been cited to us, ranging over 350 years, and from several common law jurisdictions, come near to supporting the submission that a right of that kind can take effect as an easement.'*⁶⁸

Lord Carnwath cited *Moncrieff v. Jamieson*,⁶⁹ where Lord Scott distinguished a situation where the servient owner may maintain the property in question, without being obligated to do so, but the dominant owner can make good any failure to do so by way of an ancillary step-in right and a situation where active participation by the servient owner is an intrinsic part of the intended right. In that case, no ancillary rights of the dominant owner can make good the failure of the servient owner to maintain the property in question.⁷⁰ Lord Carnwath took issue with Lord Briggs' argument that the facts as identified and analysed by the trial judge and Court of Appeal that the servient owners could maintain the property to make 'less attractive but still worthwhile use' of the facilities.⁷¹ Lord Carnwath argued that the lower courts had at most identified the costs of the maintenance actually carried out by the estate, but identified nothing as to what might have realistically been done by the timeshare owners in the absence of the centralised maintenance the plaintiffs provided. The timeshare owners would have to '[take] over the organisation and management of a "leisure complex"'.⁷² Sir Geoffrey Vos C's reliance on *Dowty*

⁶⁴ *Ibid.*

⁶⁵ *Ibid* at 580.

⁶⁶ *Ibid.*

⁶⁷ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553 at 586.

⁶⁸ *Ibid.*

⁶⁹ *Moncrieff v. Jamieson* [2007] 1 WLR 2620 at [67].

⁷⁰ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553 at 588.

⁷¹ *Ibid* at 580.

⁷² *Ibid* at 589.

*Boulton Paul Ltd v Wolverhampton Corpn (No 2)*⁷³ was erroneous as that case involved simply the maintenance of a disused airfield, namely just mowing, and ‘tells one nothing about the view that would have been reached if the right had been claimed over an operational, commercial airfield.’⁷⁴

Lord Carnwath also took issue with the ‘element of choice’, especially concerning the golf course.⁷⁵ The servient owners had full choice over the location of the bunkers, holes, fairway, green, and rough. Unlike *Re Ellenborough Park*, where the layout of the garden was merely incidental to the enjoyment of the garden as a place for walking, the layout of the golf course is ‘essential to the purpose of the grant.’⁷⁶

The dissent is certainly strong. With the problem of passivity, the majority’s reliance on the findings of the lower courts leaves Lord Carnwath’s analysis and criticism of their findings a convincing argument against the majority’s overall findings. The majority’s premise that step-in rights are by definition ‘rights to reasonable access for maintenance of the servient tenement, sufficient, but no more than sufficient, to enable the rights granted to be used’⁷⁷ and, therefore, so long as the facilities could be used by the timeshare owners without ousting the Park owners then no question of ouster arises is undermined by the question raised by Lord Carnwath as to what happens if there is no ‘reasonable’ access for maintenance that is sufficient to enable the easement rights to be used. In such a case, the majority’s reliance on an expectation of maintenance provides no answer to what happens when that expectation falls through and there is no legal obligation, by the nature of easements, to maintain the facilities, nor any reasonable step-in rights for the dominant owners to maintain them. On the other hand, Lord Carnwath’s objection based on the element of choice seems less convincing. It is contentious that the layout of the golf course is ‘essential to the purpose of the grant’ when it seems established that the purpose of the grant is leisure in the form of a ‘comprehensive right to use a complex of facilities’⁷⁸. When we reject the analysis that the rights in question are separate,⁷⁹ it does not seem plausible to argue that the alteration of the golf course would take away from the leisure rights provided by the full complex of facilities.

With the substance of the judgement dealt with, we now move on to its scope and significance.

(d) Comparison with Re Ellenborough Park

Lord Briggs was aware that the recognition of the rights granted in the present case as easements was ‘breaking new ground’.⁸⁰ This was in three aspects:

First, the rights in question were much more extensive than in *Re Ellenborough Park*. There, the right to walk over the pleasure ground was analogous to the right an owner of a house with a garden would have over their garden. However, the rights in *Re Ellenborough Park* were even

⁷³ [1976] Ch 13.

⁷⁴ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553 at 589.

⁷⁵ *Ibid* at 590.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* at 578.

⁷⁸ *Ibid* at 568.

⁷⁹ *Ibid* at 583-585.

⁸⁰ *Ibid* at 581.

more limited to walking and not, say, a right to have a barbecue or grow plants as the owner of a garden could. As stated before, *Re Ellenborough Park* was decided in a period of suburban expansion that justified an extension of the view of utility to include comfort and enjoyment of one's home. In *Regency Villas*, the rights claimed allowed for the use of an entire leisure complex that is also in commercial use, expanding on the residential nature of *Re Ellenborough Park*. Secondly, the right to use the property was held by a broader group of people, namely three different groups of timeshare holders by easement as well as paying members of the public by contract. Thirdly, the cost of managing and maintaining Ellenborough Park was shared among the dominant owners, whereas in Broome Park, it was at least expected to be undertaken by the servient owners. Additionally, the rights in question were recreational, pure and simple. This contrast with what can be interpreted as Lord Evershed M.R.'s opposition to such a right being recognised as an easement.⁸¹ However, it could be argued that his opposition was not to purely recreational rights but purely recreational rights that 'possess[ed] no quality of utility or benefit'⁸². In the present case, the rights did provide utility and benefit to the timeshare units as sources of leisure for the property occupied to seek leisure. Where *Re Ellenborough Park* could be seen as a careful expansion of the law of easements, *Regency Villas* presents a broad evolution with potential consequences that require their own section to address.⁸³

(e) Scope and consequences

The majority acknowledged that their judgment broke new ground. Whilst it may be argued that the reliance on *Duncan v Lough* in *Re Ellenborough Park* meant that the law was not extended in theory, it is undeniable that the law was consolidated in a way to remove much of the uncertainty that remained, whilst also recognising that the law of easements in England was no longer reliant on the Roman law that preceded it. However, this did not amount to a recognition of sports or broad 'fun' as being a competent subject of an easement. Before *Regency Villas*, Gray and Gray noted that 'there can, in short, be no easement merely to have fun'.⁸⁴ As noted by Bevan, whilst there is still a requirement for utility and benefit to the dominant property, '[a]ny prospect going forward of raising an argument that a right cannot give rise to an easement because it is purely recreational or sporting in nature has been thoroughly shut down...'.⁸⁵

Such broad recognition of potential easements marks a departure from prior conservatism within the courts in recognising new types of easements.⁸⁶ This follows a notable increase in the recognition of new easements or known easements operating in new contexts; *Mulvaney v Gough*⁸⁷ involving the use of a communal garden; *Moncrieff v Jamieson*⁸⁸ involving an ancillary

⁸¹ *Re Ellenborough Park* [1956] Ch. 131 at 173.

⁸² *Ibid.*

⁸³ See C Bevan 'Opening Pandora's box?: recreation pure and simple: easements in the Supreme Court: *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*' (2019) 83 *Conveyancer and Property Lawyer* at 50-51.

⁸⁴ K. Gray and S. Gray, *Elements of Land Law*, 5th edn (2009) 611.

⁸⁵ C Bevan 'Opening Pandora's box?' at 53.

⁸⁶ J Bray, 'More than just a walk in the Park: a new view on recreational easements' (2017) 6 *Conveyancer and Property Lawyer* at 420-423.

⁸⁷ [2002] EWCA Civ 1078; [2003] 1 W.L.R. 360.

⁸⁸ [2007] UKHL 42; [2007] 1 W.L.R. 2620.

right of parking; and *Magrath v Parkside Hotels Ltd*⁸⁹ involving an easement of passage to escape fire or circumstances dangerous to life. However, it may be argued that those cases were more narrow than the broad recognition of new easements in *Regency Villas*. It is here that the primary concern, at least concerning consequence, appears: an opening of the floodgates. At a minimum, *Regency Villas* sets a precedent for recreational easements in relation to timeshare properties. However, it seems that the precedent extends beyond this and rather states that a recreational easement will accommodate any dominant property where the actual or intended use is itself recreational.⁹⁰ Where this expansive approach could be contained under the principle of passivity, this is prevented by the majority's limited analysis of the facts in favour of reliance on the findings of the lower courts and their acceptance of an expectation of maintenance strained to cover for what would otherwise appear to be a breach of the orthodox position stated by Willmer LJ in *Jones v Price* that "... an easement requires no more than sufferance on the part of ... the servient owner".⁹¹

However, it should be noted that Lord Briggs engaged in a comprehensive discussion and analysis of the facts. This played no small part in the majority's conclusion, especially in relation to whether the parties intended to grant a proprietary right in the form of an easement, as well as whether the recreational rights granted provided utility and benefit to the timeshare units. Whilst there no longer exists a rule or presumption that recreational rights cannot form easements, it does not follow that every recreational right can form an easement in favour of any property. Both the majority and Lord Carnwath recognised that some rights would be unable to form the subject of easements.⁹² Future judges would have to pay close attention to the facts and nature of both the rights and property in question to determine whether the relevant rights in context satisfy the requirements in *Re Ellenborough Park* and the, perhaps weakened, passivity requirement. Whilst it may be noted that this would operate to prevent the granting of many alleged recreational easements in court, it may not prevent future litigation. However, it remains open to parties and conveyancing lawyers to draft grants with clarity and care to avoid the unwanted granting of rights as easements. As noted by Bevan, it is likely that a recreational easement would struggle to be created outside of an express grant by prescription due to use by permission.⁹³ This would allow for transparency and scrutiny and independent legal advice that would prevent parties from being unintentionally bound by broad recreational servitudes and, consequently, prevent litigation when parties cannot agree whether they are as such bound.

Summary

This section discussed and analysed two key cases in English law regarding recreational servitudes.

The first case is *Re Ellenborough Park* concerning the recognition of a right of enjoyment over a pleasure ground. The main judgement was delivered by Lord Evershed M.R. who formulated a four-part test for the establishment of an easement. He found that, after considering the

⁸⁹ [2011] EWHC 143 (Ch); [2011] 2 WLUK 130.

⁹⁰ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553 at 582.

⁹¹ *Jones v Price* [1965] 2 Q.B. 618 at 631.

⁹² *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553 at 580 and 590.

⁹³ C Bevan 'Opening Pandora's box?' at 58.

underlying case law, there was no principle recognised in English law that would prevent right of enjoyment over a pleasure ground which fulfils the four-part test from being recognised as an easement.

The second case is *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*. This case concerned the recognition of a right to use a leisure complex as an easement. The judgement of the majority found that the right to use the leisure complex was an easement. In relation to step-in rights to repair and maintain, there was found to be no issue with them being too extensive as to deprive the leisure complex owners of use or possession. On the issue of whether the easement would require the servient owner to act, the court found that there is no issue when the servient owner is expected to act but is not legally bound to do so.

Lord Carnwath, writing the sole dissent, argued that the step-in rights would require the dominant owners to take over full operation and maintenance of an active leisure complex.

With the law surrounding recreational easements in England established and discussed, we now turn to recreational easements in Scotland.

D. RECREATIONAL SERVITUDES IN SCOTS LAW

(1) The *utilitas* principle

(a) The institutional writers

It is important to analyse the treatment of servitudes and the *utilitas* principle at their earliest in Scots law. The definitions and analysis of servitudes by the institutional writers leave no doubt that they were heavily influenced by Roman law. The extent of their analysis, however, differs from writer to writer, and none can be said to have systematised the requirements of servitudes. Despite this, they provide useful insight into the earliest views of the *utilitas* principle in Scots law.

Stair wrote that servitudes ‘cannot be constitute by any personal right... and therefore, though such personal Rights may be sufficient against the granters thereof, by a personal objection, whereby they cannot come against their own deed, yet they are not sufficient against singular successors, neither do they affect the ground.’⁹⁴ Erskine writes that ‘[a]s all servitudes are restraints upon property, they are *stricti iuris*, and so not to be inferred by implication. Neither does the law give them countenance unless they have some tendency to promote the advantage of the dominant tenement.’⁹⁵ This formulation is simple, but carries the basic concept of the *utilitas* principle that the servitude should benefit the dominant tenement rather than solely the proprietor of the dominant tenement. A similar statement is made by Bell, who states ‘the law does not recognise as servitudes affecting singular successors, many burdens or privileges or uses of property which may be made the subject of personal contract’.⁹⁶ He clarifies that the difference between a personal right and a servitude is ‘...such a use or restraint

⁹⁴ Stair, II, 7, 1.

⁹⁵ Erskine, II, 9, 33.

⁹⁶ Bell, *Principles*, § 979.

as by law or custom is known to be likely and incident to the property in question, and to which the attention of a prudent purchaser will, in the circumstances, naturally be called⁹⁷. Here we see a requirement similar to the *utilitas* principle. However, it is important to note that Bell refers specifically to the property ‘in question’. From such a phrasing, one may shy away from broad generalisations of what can and cannot constitute a servitude. We consider now how this principle was applied by the courts.

(b) *Reception and treatment in the courts*

One of the earliest cases that dealt with a recreational servitude was *Cochran v Fairholm*.⁹⁸ This case involved the claim of the right, as a servitude, to walk and play golf over Bruntsfield Links in Edinburgh by the local inhabitants through use for time immemorial. Mr Fairholm tried to enclose the part of the Links feued out to him. This was objected to by Mr Cochran, who argued that he and others had acquired a servitude *spatiandi* over the Links. The claim failed due to there being no dominant tenement. However, it can be presumed that by the reporter’s use of ‘*spatiandi*’ and the fact that the servitude claimed falls directly under Paul. D. 8, 1, 8 pr., this must have been within the court’s contemplation.⁹⁹

The next case is *Dyce v Hay*.¹⁰⁰ This, like *Cochran*, concerned a public right where the pursuer argued for the recognition of a servitude for recreation, walking, ‘taking air’, and exercise. The Lord Justice-Clerk, Lord Hope, argued ‘that the notion of a *jus spatiandi* was disallowed by the highest authorities in the law’....¹⁰¹ The House of Lords¹⁰² confirmed this by stating that ‘[a]ll the servitudes hitherto recognized sanctioned no principle which would entitle a party not merely to walk and recreate over public grounds, but over the enclosed domain of a private gentleman-a right inconsistent with property’.¹⁰³

Neither the House of Lords nor the Court of Session in *Dyce v Hay* justified their position concerning the servitude not benefiting the dominant tenement. We can, however, find a direct reference to this requirement in *Patrick v Napier*.¹⁰⁴ The case concerned a ‘right of angling or rod-fishing’ over lands some distance from the proposed dominant tenement. In the course of his judgement, Lord President Inglis stated ‘I think a predial servitude must be something which constitutes a burden upon one tenement or predium, to create an advantage or benefit to another predium.’¹⁰⁵ This seemed to mean that the right must be one that ‘is peculiarly suitable or convenient for the dominant tenement more than for the possessor or inhabitant of any other tenement in Scotland....’¹⁰⁶. This interpretation is endorsed by Lord Deas who, in relation Erskine, II, 9, 33, states that an advantage to the dominant tenement must be ‘the peculiar advantage of the dominant tenement in contradistinction to that general and slighter advantage

⁹⁷ *Ibid*.

⁹⁸ (1759) Mor 14518.

⁹⁹ This argument is presented by in: Waal, M. J. De, ‘Servitudes’, *A History of Private Law in Scotland* (Oxford, 2000; online edn, Oxford Academic, 22 Mar. 2012) 323.

¹⁰⁰ (1849) 11 D 1266.

¹⁰¹ *Ibid* at 1278.

¹⁰² *Dyce v. Hay* (1852) 15 D (HL) 1.

¹⁰³ *Ibid* at 15-16.

¹⁰⁴ (1867) 5 M. 683.

¹⁰⁵ *Ibid* at 699.

¹⁰⁶ *Ibid*.

which would equally accrue to any other tenement on which the privilege might be conferred'. Further '[a] right or privilege which does not fall naturally to be attached to the particular tenement to which it is granted, and with which it is unusual to burden the servient tenement, and which is of a nature vexatious to the servient... cannot be made effectual against singular successors, however explicitly it may have been granted in the titles of the dominant tenement.'¹⁰⁷

Lord Deas' formulation is sophisticated, and takes care to note that when considering the *utilitas* principle, it is paramount to look at the advantage to the particular tenement to which the right is granted. Lord Deas was heavily influenced by Bell, with both noting the importance of the specific property and the rights that would be considered normal to be attached to it. If we look at Lord Deas' formulation through the lens of *Re Ellenborough Park* and *Regency Villas*, it is possible to draw similarities between Lord Deas' focus on the particular tenement and the focus on the factual nexus as applied to the four-part test that Lords Evershed and Briggs apply. Following this, it seems erroneous to state that any right can never form a servitude for any property without considering all the particular circumstances of the case. Despite this, Lord Robertson states in *Harper v Flaws*¹⁰⁸ that '[t]he decision in the case of *Patrick v. Napier* ... establishes, in my view, that a right such as is claimed by the defender cannot be supported as a servitude right.'¹⁰⁹ This comment is an oversimplification of *Patrick v Napier*.

The formulations presented by Lord President Inglis and Lord Deas in *Patrick v Napier* match the *ratio* of similar cases around the same time. In *Marquis of Huntly v Nicol*,¹¹⁰ Lord McLaren states that 'I cannot see how it can be represented as an advantage to the estate of Ballogie that its proprietor should have the right of shooting in the Forest of Birse'. Similarly, Lord Benholme observed in *McTaggart v McDouall*¹¹¹ that '[i]n regard to the right of cutting ware for making kelp, that is a mere means of a mercantile advantage. It is not a means of enriching the dominant tenement at all.' As such, we shall take *Patrick v Napier* as the fundamental authority on the *utilitas* principle in Scots law as it stands.

(c) A servitude of golf?

Rankine declared '[t]here can be no such thing as a servitude of golfing, benefit to a benefitted tenement being out of the question'.¹¹² This position is controversial, and a selection of case law appears to contradict it. T.A. Ross appears to oppose it.¹¹³ As a recognition of the servitude of golfing would be of importance to the recognition of recreational servitudes as a whole within Scotland, it is necessary to analyse Ross' claim. Two cases support the recognition of a servitude of golfing.

¹⁰⁷ *Ibid* at 706.

¹⁰⁸ 1940 SLT 150.

¹⁰⁹ *Ibid* at 151.

¹¹⁰ (1896) 23 R. 610 at 616.

¹¹¹ (1867) 5 M. 534 at 547.

¹¹² J. Rankine, *The Law of Landownership in Scotland*, 4th edn (1909, reprinted 1986), 420.

¹¹³ See T. A. Ross, *Servitudes in the Law of Scotland*, (1933) 17-20.

First, *Cleghorn and Ors v Dempster*.¹¹⁴ In 1797, the magistrates and town council of St Andrews feued the links to the Earl of Kellie whilst reserving a right for the local inhabitants to play golf on the land. Lord Kellie then let the land out to a tenant as a rabbit warren. The rabbits multiplied and began to threaten the golf course. The townsmen raised an action for a declarator of their rights over the land and to prevent Lord Kellie from interfering with those rights. The Court of Session recognised the servitude.¹¹⁵ The case was appealed to the House of Lords.¹¹⁶ The case here is difficult to follow as the law report is summarised by J. Gordon Dow rather than being a transcript of the judgment. The outcome of the appeal was that the case was remitted to the Court of Session for reconsideration due to discrepancies between interlocutors.¹¹⁷ That case seems to have come to an end by the rabbits being eradicated and not by a further ruling of the Court of Session. Therefore, there is not much to draw from this case apart from that the Court of Session was willing to recognise a servitude of golfing and the House of Lords did not challenge this.¹¹⁸

The second case is *Magistrates of Earlsferry v Malcolm*.¹¹⁹ In this case, the Court of Session recognised a servitude of golfing and remitted the case back to the Sheriff Court to ‘...to lay out a proper golfing course thereon, sufficient for the due exercise of that amusement, having a due regard to all the circumstances of the case, and to the mutual rights and claims of the parties, and to report the same to the Court, *quam primum*.’¹²⁰

However, before it can be concluded that this is an authority for two private proprietors to establish a servitude right of golfing, it is important to see how cases of this sort have been treated in later cases. In *Dyce v Hay* (above), the Lord Chancellor stated that the right claimed was not ‘the same as a claim of servitude of golfing, claimed over neighbouring ground by a corporation for the inhabitants.’¹²¹ With this distinction, there is no ground to claim that a general servitude of golfing is recognised in Scots law between two private proprietors.¹²²

(2) Ancillary right to repair and maintain

Ancillary rights are rights held by the dominant owner that are subordinate to the primary servitude. The right to repair and maintain property relevant to the exercise of the primary servitude is one of those rights.¹²³ The ancillary right to repair and maintain was of great concern in *Regency Villas* (where it was referred to as a ‘step-in’ right) and formed the most persuasive aspect of Lord Carnwath’s dissent. This section will briefly discuss the law in Scotland as it relates to ancillary rights.

¹¹⁴ (1813) 2 Dow 40; see also A C Loux ‘The Great rabbit Massacre – A “Comedy of the Commons”?’ Custom, Community and Rights of Public Access to the Links of St Andrews’ *Liverpool Law Review* 22: 123–155, 2000.

¹¹⁵ *Cleghorn v. Dempster* (1805) Mor. 16141.

¹¹⁶ *Cleghorn v. Dempster* (1813) 2 Dow 40.

¹¹⁷ *Ibid* at 788–789.

¹¹⁸ (1805) Mor. 16141; (1813) 2 Dow 40.

¹¹⁹ (1829) 7 S 755; (1832) 11 S 74.

¹²⁰ *Ibid* at 75.

¹²¹ *Dyce v. Hay* (1852) 15 D (HL) 14 at 15.

¹²² See Gordon and Wortley *Scottish Land Law* 3rd edn vol 1 (2009) paras 25–26–25–30.

¹²³ D J Cusine and R R M Paisley *Servitudes and Rights of Way* (1998) para 12.129.

(a) *Moncrieff v Jamieson*¹²⁴

Ancillary rights can be constituted by express provision or by implication. The sort of rights that can be expressly constituted goes beyond those that can be implied.¹²⁵ For implied rights, the key case is *Moncrieff v Jamieson*, involving an ancillary right of parking argued to be implied into a constitutive deed for a right of access. This case established a dual requirement for the implied constitution of an ancillary right. The first requirement is ‘reasonable necessity’¹²⁶ and the second asks whether the claimed ancillary rights were within the contemplation of the parties at the time the servitude was created.¹²⁷ The question of reasonable necessity is not whether it is reasonably necessary for the enjoyment of the dominant tenement, but for the servitude itself. When the courts ask what was within the contemplation of the parties at the time the servitude was created, the full question is whether the parties would have regarded the ancillary right as acceptable enough that they would have inserted it into the deed had they considered it.¹²⁸

Lord Scott stated, *obiter*, that a right to use a neighbour’s swimming pool could constitute a servitude in Scotland.¹²⁹ He reasoned that the grantee would be in no position to fill the pool, and the granter could be under no obligation to do so. Paisley commented that Lord Scott’s observation is based on a misunderstanding of ancillary rights, as, so long as the rights are attached to a valid servitude and do not breach the principle of repugnancy, ancillary rights can allow for the installation or use of pre-existing structures on the servient property. Therefore, ancillary rights could allow for the maintenance of the swimming pool without placing a positive obligation on the owner of the servient property.¹³⁰ Paisley draws particular attention to the servitude of *aqueductus*, where in *Critchon v Turnbull*,¹³¹ a servitude to lead water from a pre-existing well to a farm through a pipe was recognised. Further, the Title Conditions (Scotland) Act 2003, s 77 recognises the right to lead a pipe, cable, wire or other such enclosed unit over or under land as a servitude. This argument is similar to Lord Briggs’ in *Regency Villas* where he argues that due to the right of access of a bridge being recognised as a servitude, and the fact that in such a servitude it may be inconceivable that anyone other than the servient owner would maintain the bridge, there is nothing to prevent a servitude being recognised where there is an expectation that the servient owner will maintain the relevant property so long as they are not legally obligated to.¹³² Both Paisley’s and Lord Briggs’ arguments rely on the past recognition of servitudes involving the use of pre-existing structures to justify a servitude to use a swimming pool, with further facilities included in *Regency Villas*. Arguably, this would make it simpler for a court in Scotland to rely on *Regency Villas* to recognise a right to use a swimming pool as a servitude despite the *obiter* comments in *Moncrieff*, as well as other recreational servitudes over pre-existing facilities when ancillary rights would allow for the maintenance of those

¹²⁴ [2007] UKHL 42; 2007 SCLR 790.

¹²⁵ R Paisley *Rights Ancillary to Servitudes* (2020) para 11-001.

¹²⁶ *Ibid* at para 29 per Lord Hope. See also para 112 per Lord Neuberger.

¹²⁷ *Ibid* para 30.

¹²⁸ Paisley, *Ancillary Rights*, para 12-014.

¹²⁹ *Moncrieff v Jamieson* [2007] UKHL 42; 2007 SCLR 790, 805.

¹³⁰ Paisley, *Ancillary Rights*, para 6-036.

¹³¹ 1946 S.C. 52.

¹³² *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553, 579.

facilities. However, any ancillary rights must still not be repugnant to ownership, which requires further discussion.

(b) Repugnancy with ownership

In English law, this principle is often called the ‘ouster’ principle, but it is similar to repugnancy with ownership in Scots law. This principle prevents the recognition of rights that mimic ownership so as to be inconsistent with the unititular nature of ownership.¹³³ This applies to separately to a servitude and then to the individual ancillary rights that accompany it. Paisley argues that any ancillary right that satisfies the dual test in *Moncrieff* is not repugnant with ownership.¹³⁴ This is supported by the application of a similar test to *Moncrieff* in *Regency Villas*, where it was asked whether the ancillary right is both reasonably foreseeable and expected by the parties, and reasonably necessary, with the question of ouster not then being asked separately.¹³⁵ This can be taken to support Paisley’s argument. Indeed, if an ancillary right is repugnant with ownership, then it cannot be said that the parties would have had it within contemplation at the time of granting the deed. The next section of this paper will discuss how this may affect the recognition of recreational servitudes in Scotland.

Summary

This section has been dedicated to describing and analysing the history and current position in Scots law relating to servitudes, with particular focus on the *utilitas* principle and ancillary rights. The institutional writers – namely Stair, Bell, and Erskine - note that not all rights can be the subject of servitudes and are limited to being personal rights. Bell and Erskine both link this to the *utilitas* principle, where the right in question must benefit the particular dominant tenement. In case law, the *utilitas* principle has been indirectly used to justify the rejection of *ius spatiandi* as servitudes. However, in *Patrick v Napier*, the principle was directly referred to, and the benefit being to the particular tenement was again emphasised by Lord Deas. *Patrick v Napier* presents the fundamental authority on the *utilitas* principle. There are a selection of cases that seem to endorse a servitude of golfing. However, these cases involved a right claimed by a corporation for local inhabitants. This distinction was expressly recognised in *Dyce v Hay* and, therefore, it cannot be said that there exists a servitude of golfing in Scots law between two private properties.

Moncrieff v Jamieson is the principal authority for ancillary rights in Scotland. This case established the dual test that the right claimed must be both reasonably necessary and within the contemplation of the parties at the time of the granting of the servitude. This means the right must be acceptable enough that the parties would have included it in the grant had it not skipped their mind. This test is similar to the test used in *Regency Villas* to imply an ancillary right to an easement. The similarity of the test makes *Regency Villas* a strong authority to recognise a servitude in Scotland similar to that in *Regency Villas* where ancillary rights are implied to enable maintenance. However, as part of the test to imply an ancillary right, said right must not be repugnant with ownership.

¹³³ Paisley, *Ancillary Rights*, para 3-059.

¹³⁴ *ibid* para 3-065.

¹³⁵ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553, 577-578.

Now, with the state of recreational easements in both English law and Scots law, we turn to finding the common ground, tensions, and consider how Scots law can develop in light of *Regency Villas*.

E. COMMON GROUND AND CONTROVERSY

(1) Common ground

As discussed above, both English law and Scots law, as they relate to their treatment of recreational servitudes, have a common ancestor in Roman law. Whilst their unique histories create a point of divergence, as far as relates to the *utilitas* principle, it seems the divergence is minor. Whilst England may use the phrase ‘accommodate the dominant tenement’, Lord Evershed’s statement that this means it must be shown that the easement is ‘connected with the normal enjoyment of that property’, and that ‘[i]t appears to us that the question whether or not this connexion exists is primarily one of fact, and depends largely on the nature of the alleged dominant tenement and the nature of the right granted.’¹³⁶ Is notably similar to Bell’s observation that one dividing line between a personal right and a servitude is ‘such a use or restraint as by law or custom is known to be likely and incident to the property in question...’.¹³⁷ As such, we can observe that, even with England’s currently more liberal approach to the recognition of recreational easements (whilst Scotland awaits more case law), a right that is so recreational in the sense of being focussed on benefitting the person that it has no connection to the specific property in question will fail to be recognised as an easement in England or a servitude in Scotland. A right to play the bagpipes in my neighbour’s garden will fail this hurdle in both jurisdictions.

It may be fair to summarise the effect of *Re Ellenborough Park* and *Regency Villas* as moving the approach to easements from one of asking whether the right in question falls within a general prohibition in law of recreational easements to asking whether the right, taken with the specific facts of the case, satisfied the four-part test laid out in *Re Ellenborough Park*. The important distinction here is that it is no longer an entirely accurate statement of English law that any right is unable to constitute an easement in any context. Therefore, whilst the prohibition in Paul. D. 8, 1, 8 pr. may be true in consequence,¹³⁸ its premise would no longer be accurate, as it relies on a blanket prohibition that finds no recognition in English law.

It is the view of the author that this is also an accurate description of the position of Scots law. In *Patrick v Napier*, Lord Deas observed that:¹³⁹ ‘[a] right or privilege which does not fall naturally to be attached to the **particular tenement** to which it is granted...’ (emphasis my own). Bell noted that the servitude must be likely and incident **to the property in question**¹⁴⁰ (emphasis my own). It therefore seems that the correct test for a right to pluck apples would not be whether it falls within some blanket prohibition, but rather whether it provides utility to the particular tenement with consideration of all the context surrounding it. Whilst for plucking apples, the consequence of either test will be the same, it is possible to imagine situations

¹³⁶ *Re Ellenborough Park* [1956] Ch. 131 at 173.

¹³⁷ Bell, *Principles*, § 979.

¹³⁸ See discussion on pg. 23

¹³⁹ (1867) 5 M. 683 at 706.

¹⁴⁰ Bell, *Principles*, § 979.

where the outcome is different. For example, under the formulation that focuses on the particular tenement, it can be envisaged a scenario whereby a hotel would be able to hold a servitude of golfing over a neighbouring golf course. Much like Lord Briggs' observation that a leisure complex would provide utility to a timeshare unit occupied for leisure, a golf course would provide utility for a hotel designed to give guests temporary leisure and luxury.¹⁴¹ On the other hand, it is unlikely a home could hold the same right: a golf course is neither ordinary for a home, nor contributes to the domestic nature of the house.¹⁴² This would explain the servitude of bleaching clothes in *Sinclair v Magistrates and Town-Council of Dysart*.¹⁴³ It is easy to see how bleaching clothes would be beneficial to a particular domestic residence in the eighteenth century, where bleaching clothes was an important part of domestic life. Today, it has lost that importance, but a servitude of bleaching clothes remains through *stare decisis* and is unlikely to be considered again by the courts due to its unimportance (unless it is argued in a future case that the right to dry clothes is analogous to the right to bleach clothes and should therefore be recognised as a servitude).

(2) Controversy

Much of the controversy in this area is between the approach to step-in rights and passivity in *Regency Villas* and the approach in Scots law. As discussed above, the test applied to establish ancillary rights in *Regency Villas* and in *Moncrieff* is whether the ancillary right is reasonably necessary and within the ordinary expectation of the parties at the time the primary servitude was granted. Further, any servitude that satisfies this test will not be repugnant with ownership. In particular, any ancillary right that is repugnant with ownership will not be taken to be within the contemplation of the parties. Due to the application of this test in *Regency Villas* to recognise a servitude right to use a leisure complex, including a swimming pool, Lord Scott's *obiter* comments in *Moncrieff* can no longer be taken to be a correct statement of law.¹⁴⁴ There is no ground to argue that a servitude right to use a swimming pool cannot be recognised because the dominant owner would be in no position to maintain the pool due to the possibility of ancillary rights. However, it was material in *Regency Villas* that the parties expected that the servient owner would maintain the pool, and the exercise of step-in rights by the dominant owners would arise only if the owners of the park gave up the management, control, and maintenance of the recreational and sporting facilities.¹⁴⁵ If this expectation were not present, Lord Carnwath's dissent would be more potent, as the continual management of a functional leisure complex would likely be an ouster and therefore fail to be considered within the parties' contemplation.¹⁴⁶ It would be an overstep to consider *Regency Villas* to be an authority for the acceptance of a right to use a leisure complex, or some other technical leisure facility, as a servitude on the ground that the maintenance of the complex would be possible by ancillary rights without analysing whether the ancillary rights are repugnant with ownership in the circumstances. Despite this, large leisure complexes would likely be owned by businesses as a service open to paying members and, therefore, there would be an expectation that the

¹⁴¹ On commercial interests see: *Cusine and Paisley Servitudes and Rights of Way* para 2.51.

¹⁴² Gordon and Wortley *Scottish Land Law* para 25-23.

¹⁴³ (1779) Mor. 14519.

¹⁴⁴ Paisley, *Ancillary Rights*, para 6-039.

¹⁴⁵ *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553, 578.

¹⁴⁶ K G C Reid and G L Gretton *Conveyancing 2018* (2019) 172.

business would maintain the complex. In such a case, *Regency Villas* presents a convincing authority to the right to use such complexes' acceptance as a servitude.

However, step-in rights must have a limit whereby no factual circumstances could make them exercisable. For example, it could be argued that a servitude to use a rollercoaster could not be valid as there can be no step-in rights to repair the rollercoaster. This could be because it is impossible, or at least requires exceptional effort, for the dominant owner to repair the rollercoaster, and it is, therefore, *de facto* intrinsic to the servitude that the servient owner maintain the rollercoaster. Alternatively, it could be that the step-in rights would always be repugnant with ownership due to the repairs denying the servient owner of any use for a considerable time, so that the dominant owner would have no step-in rights that are necessary to exercise their servitude right. This would be regardless of any expectation that the servient owner would maintain the rollercoaster and that the step-in rights would only be exercised if the servient owner fails to do so.¹⁴⁷

(3) Recreational servitudes in Scotland moving forward

This paper highlights that there should be no blanket prohibition on recognising a recreational right as a servitude on the grounds that it fails to satisfy the *utilitas* principle. The question is rather whether the right falls naturally to be attached to the particular tenement to which it is granted, taking into account all the context of the particular tenement. This approach matches that found in *Re Ellenborough Park* and affirmed in *Regency Villas* where 'so long as a right is connected with the normal enjoyment of that property', it can be recognised as an easement and that 'the question whether or not this connexion exists is primarily one of fact, and depends largely on the nature of the alleged dominant tenement and the nature of the right granted.'¹⁴⁸

Where this reasoning was used to recognise a right in favour of a home for its proprietors to walk on pleasure grounds and a right in favour of timeshare units for its proprietors to use a leisure complex as easements, no principle or rule of law would prevent the Scottish courts from doing the same because the rights do not provide utility to the dominant property.

Cusine and Paisley note that, although fishing and golfing may satisfy the *utilitas* principle, those rights may still be rejected as servitudes may not comply with a recognised class of servitudes.¹⁴⁹ This is not an issue for servitudes created expressly since 28 November 2004 due to the Title Conditions (Scotland) Act 2003 removing this requirement for expressly created servitudes.¹⁵⁰ For implied servitudes, there is dicta to the effect that new servitudes that do not fit into a recognised class may be recognised if they are used and needed.¹⁵¹ This was accepted in *Moncrieff v Jamieson* to allow parking as an ancillary right to a servitude of access.¹⁵² A stand-alone servitude of car parking was later recognised.¹⁵³ With *Regency Villas* as authority, Scottish

¹⁴⁷ See Lord Carnwath's dissent: *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] A.C. 553, 590.

¹⁴⁸ *Re Ellenborough Park* [1956] Ch. 131 at 173.

¹⁴⁹ Cusine and Paisley *Servitudes and Rights of Way* para 2.51.

¹⁵⁰ Title Conditions (Scotland) Act 2003 s 76(1).

¹⁵¹ *Dyce v Hay* (1852) 1 Macq. 305 at 312-313; *Patrick v Napier* (1867) 5 M. 683 at 709.

¹⁵² *Moncrieff v Jamieson* [2007] UKHL 42; 2007 SCLR 790, discussed in K G C Reid and G L Gretton *Conveyancing* 2007 (2008) pp. 106-117.

¹⁵³ *Johnson, Thomas and Thomas v Smith* [2016] SC GLA 50; 2016 G.W.D. 25-456, discussed in K G C Reid and G L Gretton *Conveyancing* 2016 (2017) pp. 141-144.

courts may be willing to recognise an implied, recreational servitude.¹⁵⁴ Therefore, the fact that specific recreational servitudes are not yet known to the law does not disqualify them from later recognition.

It could be asked how there is a praedial benefit from a servitude to take building materials¹⁵⁵ but not from the right to pick apples.¹⁵⁶ Servitudes to take building materials, however, cannot be used for commercial purposes. This was justified in two cases under the rule against increasing the burden on the servient tenement.¹⁵⁷ This logic would also apply to a hypothetical servitude of apple picking, and, therefore, the dominant owner would be unable to have a servitude right to pick apples to sell commercially. This means the likely use of the apples would be for consumption. Whilst using building materials to build on, or maintain, the servient tenement directly benefits it, consuming food provides no direct benefit at all. However, it could be argued that the fruit can be used to plant fruit trees on the dominant tenement. In such a case, it is hard to make a distinction between planting trees with fruits from the servient tenement and taking materials for building. Further, Paul's full statement is that there can be no servitude 'to pick apples, or to walk about, or to eat our dinner, on the land of another.'¹⁵⁸ This statement is more consistent if we interpret 'pick[ing] apples' to refer to picking and eating the apples, rather than any subsequent use of the apple, as then all three scenarios relate to a situation where there is no link between the right and any dominant tenement. If this is true, then the recognition of a servitude to pick fruit to plant in the dominant tenement should not be denied based solely on Paul. D. 8, 1, 8 pr.

Nevertheless, it is important to keep in mind that any ancillary rights to maintain the servient property to allow the exercise of the servitude right must not be repugnant with ownership. In the case of implied ancillary rights, *Regency Villas* presents a strong authority that an expectation that the servient owner will maintain the property, and that any ancillary rights will only be exercised in the event they fail to do so, will be a reason that the ancillary rights are not repugnant with ownership. This expectation will commonly arise when the servient owner is a business and the servient property is open to paying members or customers. It is also the case that said facilities will likely be more complex, so that, in the absence of such an expectation, any ancillary rights would be multiplex enough to be repugnant with ownership.

As Reid and Gretton note,¹⁵⁹ the recognition of recreational servitudes, specifically the right to use a pleasure ground as in *Re Ellenborough Park*, would have the practical benefit of providing a legal right to homeowners in communities with amenity areas that they do not own, whilst also allowing a developer to retain ownership by granting the homeowners an express servitude to use the area.

¹⁵⁴ On the implied constitution of servitudes see: G L Gretton and A J M Stevens *Property, Trusts and Succession* 5th edn (2024) paras 13.24-13.26; Gordon and Wortley *Scottish Land Law* paras 25-29 and 25-40-25-48.

¹⁵⁵ *Murray v. Magistrates of Peebles*, Dec. 8, 1808, F.C.

¹⁵⁶ See also Cusine and Paisley *Servitudes and Rights of Way* para 3.14.

¹⁵⁷ *Murray v. Magistrates of Peebles*, Dec. 8, 1808, F.C.; *Keith v Stonehaven Harbour Commissioners* (1831) 5 W. & S. 234.

¹⁵⁸ Paul. D. 8, 1, 8 pr.

¹⁵⁹ K G C Reid and G L Gretton *Conveyancing* 2018 (2019) 174.

As a summary of the findings of this paper, a right too recreational or too removed from a property's natural purpose so that it provides no benefit to the particular tenement would still fail to be recognised as a servitude. Additionally, a right that involved such complexity that either no reasonable step-in rights could be exercised or no step-in rights would be acceptable enough to be within the contemplation of the parties at the time of granting the servitude would also fail. However, upon analysis of the relevant authorities in Scots law and with the authority of *Regency Villas*, there is no reason that a right that exists between these two points could not be recognised as a servitude, including recreational rights.

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