EASEMENTS, SERVITUDES AND HUMAN FLOURISHING THEORY

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Professor Alexander's final monograph is an exploration of what he has termed "human flourishing theory." Human flourishing theory holds that the ownership of private property carries with it obligations to foster human flourishing—whether of individual neighbours or local communities.[1] This Article examines two cases in the British law of easements and servitudes, where the judiciary expanded the scope of doctrines of land law so as to uphold the legal right of neighbours to use private land. In the case of *Regency Villas Title Ltd. v. Diamond Resorts (Europe) Ltd.* (hereinafter, "*Regency Villas*"),[2] the UK Supreme Court (UKSC) upheld an easement held by timeshare owners to use the recreational facilities of the country club established in the grounds of the estate where they had purchased residences.[3] Thus, for the first time in English law, the court recognized and upheld a pure easement of recreation.[4] In the case of *Home v Young* ("*Eyemouth*"), the Scots Court

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1 GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING xix (2018).

2 Regency Villas Title Ltd. v. Diamond Resorts Ltd. [2018] UKSC 57, 1 WLR 1603.

3 *Id.* at 29–30.

4 *Id.* at 2, 29–30. See Chris Bevan, *Opening Pandora's Box? Recreation Pure and Simple: Easements in the Supreme Court*, 2019 CONV. & PROP. LAW. 55, 62–63 (2019).

of Session upheld the right of the inhabitants of the burgh of Eyemouth to use the well and drying green on the land of George Home.[5] In doing so, the court broke free of the doctrine of servitudes that had for many years hindered the recognition of the rights of burgh inhabitants over private land and created a new doctrine—that of community rights.[6]

This Article argues that key developments in the doctrines of easements and servitudes occurred in these cases because the judges applied legal reasoning that exemplifies Professor Alexander's human flourishing theory. In both the English case of *Regency Villas* and the Scots case of *Eyemouth*, the judges shifted the focus of their enquiry from the land itself to the people living on the land, their needs and the uses to which they put the land to fulfill those needs. This shift of judicial focus to human need and the role of property in fulfilling those needs resulted in common law developments that in Scotland broadened the category of people who could claim rights of use over a neighbour's land under a new doctrine of 'community right' and in England broadened the nature of rights that can be claimed as an easement. The 'human flourishing reasoning' employed by the judges in these cases ennabled these developments.

Land in the United Kingdom is often viewed by Americans as remarklably open for recreational use. There is a national system of footpaths and bridleways,[7] communities have protected green spaces on which to play (or, famously, dance around a Maypole),[8] and neighbours take short-cuts across each other's gardens to reach public and community recreation grounds.[9] Comparatively speaking, there is far more public, community, and neighbourly use of privately held land in the UK than in the United States.[10] This is because the common law, under a variety of doctrines, gives rights of access to privately held land to neighbours, defined communities, and the public at large.[11] Morevoer, these doctrines

[5] Home v. Young, 9 D. 286 (Scot.).

[6] *Id.*; Andrea Loux Jarman, *Customary Rights in Scots Law: Test Cases on Access to Land in the Nineteenth Century*, 28 J. LEGAL HIST. 207, 223 (2007).

[7] Law & Your Environment, *Public Rights of Way* (2017), http://www.environmentlaw.org.uk/rte.asp?id=207.

[8] One of Carole Rose's favorite cases involved the successful claim of English villagers to dance around a maypole in the case *Hall v. Nottingham*, (1875-76) 1 Exch. Div. 1; Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI L. REV. 711, 776 (1986); Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 WM. & MARY BILL RTS. J. 1015,1019 (2011).

[9] Such easements are known as a private right of way. Land Registry Title Deeds Online**,** *Private Rights of Way* (2014), https://www.landregistry-titledeeds.co.uk/frequently-asked-questions/information/private-rights-of-way.asp.

[10] Lynton K. Caldwell, *Rights of Ownership or Rights of Use? – The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759, 761–68 (1974).

[11] Nicola Laver, *Public Rights of Access to Private Land*, https://www.inbrief.co.uk/land-law/right-to-roam/ (last visited Oct. 27, 2019).

have also been subject to significant legislative change and enlargement.[12]

The nature of the rights of use that could be claimed over private land, by whom and on whose behalf lie at the heart of access to land litigation both historically and today.[13] The cases explored in this Article involve the use of private land by neighbours under the distinct but related doctrines of easements and servitudes. In England, such uses of private land fall under the common law doctrine of easements.[14] In Scotland, similar uses are recognised under the law of servitudes.[15] These doctrines are from two different jurisdictions and are distinct; nevertheless, they share the same Roman law origins.[16] Moreover, the law of servitudes is one area of Scots law that has interpenetrated English law[17] and, through England and Scotland's shared final court of appeal, can be said, at times, to have dominated the English law of easements.[18] Although Scots' UKSC decisions (formerly, House of Lords decisions)[19] are only persuasive authority in English courts, Scots servitude cases have heavily influenced the development of the English doctrine of easements—both historically and in contemporary English law.[20]

Easements and servitudes differ from both customary rights and public rights. Those categories of rights of use over private land are held by any inhabitant of a community or member of the public in whose name

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[12] *See, e.g.*, Commons Act 2006 (Eng.) (under which town greens are registered) and Land Reform (Scotland) Act 2003.

[13] *See, e.g.*, Andrea C. Loux, *The Great Rabbit Massacre – A "Comedy of the Commons"? Custom, Community and Rights of Public Access to the Links of St. Andrews*, 22 LIVERPOOL L. REV. 123, 123–45 (2000) (detailing the case evolution of customary rights as well as public and private rights of use); Dempster v. Cleghorn (1813) 3 Eng. Rep. 40, 42–48 (Scot.) (creating a contentious but influential precedent of customary rights to public land); R v. Oxfordshire CC (*Ex parte* Sunningwell Par. Council) [1999] UKHL 28, [2000] 1 AC (HL) 335 (appeal taken from Eng.) (discussing the evolution of private and public rights of way).

[14] Regency Villas Title Ltd. v. Diamond Resorts (Europe) Ltd. [2018] UKSC 57, [2] (appeal taken from Eng.).

[15] Jarman, *supra* note 6, at 212.

[16] *See* John A. Lovett, *Meditations on* Strathclyde*: Controlling Private Land Use Restrictions at the Crossroads of Legal Systems*, 36 SYRACUSE J. INT'L L. & COM. 1, 7–9; *In re* Ellenborough Park [1956] Ch 131, 162–63.

[17] *See* C.G. van der Merwe, *Interpenetration of Common Law and Civil Law as Experienced in the South African and Scottish Law of Property*, 78 TUL. L. REV. 257, 274–81 (2003).

[18] *See, e.g.*, Moncrieff v. Jamieson [2007] UKHL 42, [2008] All ER 752, [36], [63], [111] (upholding a servitude of parking). This is the only decision from the final appellate court on this contentious issue.

[19] The House of Lords (Judicial) was replaced by the Supreme Court of the United Kingdom under the terms of the Constitutional Reform Act 2005, c. 4 (UK).

[20] *See* Moncrieff v. Jamieson [2007] UKHL 42, [2008] All ER 752, at [11], [45], [111].

the right has been found to exist, irrespective of whether they own land.[21] Easements and servitudes can only exist between parcels of land—a dominant tenement, the land that is benefitted by the use of another's land—and the servient tenement, the burdened land over which the use is exercised.[22]

An easement or servitude can benefit a single landowner or a community of landowners, so long as there is a parcel of land or "dominant tenement" in which the easement or servitude can be claimed. In *Regency Villas*, the subject of the first case study of human flourishing reasoning, the claimants were all owners of timeshares who had been individually granted an easement to use recreational facilities as part of the land they had purchased.[23] In the second human flourishing case explored in this Article, *Home v. Young*, the inhabitants of the burgh of Eyemouth claimed a servitude of access to a well and drying green in the name of the incorporated burgh as the dominant tenement.[24] The first requirement of an easment in English law or a servitude in Scots law is that there exists both a dominant and servient tenement.[25]

I. HUMAN FLOURISHING THEORY AND THE LAW OF EASEMENTS: *REGENCY VILLAS* AND THE EASEMENT OF RECREATION

The case of *Regency Villas* involved the claim of an easement by owners of time share properties situated on the country estate of Broome Park, which is located near Canterbury in Kent.[26] The key to this timeshare scheme was that the owners of the timeshares and their guests would get free membership to the country club and use of the recreational facilities.[27] Thus, with their freehold, the following rights were transferred:

> the right for the Transferee its successors in title its lessees and the occupiers from time to time of the property to use the swimming pool, golf course, squash courts, tennis courts, the ground and basement floor of the Broome Park Mansion House, gardens and any other sporting or recreational facilities (hereafter called 'the facilities') on the Transferor's adjoining estate.[28]

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21 *See* Jarman, *supra* note 6, at 207 n.1, 215–16.

22 *Id.* at 212–13; *see also In re* Ellenborough Park, [1956] Ch 131, 154.

23 Regency Villas Title Ltd. v. Diamond Resorts (Europe) Ltd. [2018] UKSC 57, [2], [16] (appeal taken from Eng.).

24 *See* Home v. Young [1846] 9 D 286, 286–89 (Scot.).

25 *See id.* at 292 n.*. *See also Regency Villas*, [2018] UKSC 57 at [35].

26 *Regency Villas*, [2018] UKSC 57 at [3].

27 *Id.* at [6].

28 *Id.* at [8].

The question to be answered in *Regency Villas* was whether this "facilities grant," as the court termed it, was "capable in law of amounting to one or more easements."[29]

The sheet-anchor case concerning easements in English law is the case of *Re Ellenborough Park* (hereinafter, *Ellenborough Park*), and the UK Supreme Court in *Regency Villas* accepted the four-part test of an easement set out in that case.[30] In order for an easement to exist, firstly, as discussed above, there must be a dominant and a servient tenement.[31] Secondly, "an easement must 'accommodate' the dominant tenement." [32] Thirdly, "the dominant and servient owners must be different persons."[33] Fourthly, "a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant."[34]

English courts have traditionally strictly adhered to these legal requirements for recognizing an easment for two reasons. Firstly, easements are proprietary rights, capable of registration on the land register, which 'run with the land' from owner to owner.[35] In short, easements are lasting property rights that are not easily discharged, and so courts stricly adhere to the common law rules governing their recognition.[36] Another reason for strict common law limits on the recognition of legal easements is that in addition to those easements that are expressly granted, such as the facilities grant in *Regency Villas*, easements can arise both by implication and prescription.[37] Easements that arise through implication or prescription bind subsequent owners even though they do not appear on the land register.[38]

Easements by implication—that is, eassements that the court will imply into the deed of transfer—can arise in four ways under both common law and stautory rules.[39] By way of example, the simplest implied easement is one that arises by necessity.[40] Where a house would be landlocked because without an easement there would be no ingress or egress or, as in a recent case, would lack the basic utilities needed to be

29 *Id.* at [21].

30 *In re* Ellenborough Park [1956] Ch 131, 140.

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 Regency Villas Title Ltd v. Diamond Resorts Ltd., (2019) AC 553, 563.

36 *See id*. at 573, 582, 586.

37 *See generally*, 2 Cal. Real Est. Digest 3d Easements and Licenses § 3 (discussing creation of easements) [hereinafter Easements and Licenses].

38 Legal easements are interests that override under Schedule 1 of the Land Registration Act 2002.

39 *See generally* Easements and Licenses, *supra* note 37.

40 R v. Oxfordshire CC. ex p Sunningwell Parish Council [2000] 1 AC 335, 349.

habitable,[41] the court will deem that an easement has arisen by necessity, and the property right will be implied into the deeds of both the dominant and servient land owners.[42]

Easments and servitudes can also arise through prescription or long, peaceable use. The servitude claimed in *Eyemouth*, discussed below, arose through prescription.[43] In England, where the owner or owners of a freehold can show that they have used neighbouring private land for a particular use or uses that are in the nature of an easment for the requisite period of time (today 20 years) without force, without secrecy and without permission, the land registry or court may recognise that a legal easement has been created through use and passage of time.[44] The easement could arise at common law by alleged use since beyond the time of legal memory (1189), or under the theory of lost modern grant.[45]Finally, such an easement can also be recognised under the terms of the Prescription Act.[46]

The permanence of easements, combined with the variety of ways in which they can be created and recognized by a court, accounts for both the plethora of common law rules governing their creation and recognition that have developed over the years and the strictness with which courts have traditionally adhered to those rules. The court's view in *Regency Villas* was that the granted easement, as one to use recreational facilities, potentially fell afoul of two of the four legal requirements of easements set out in the case of *Ellenborough Park*.[47] Firstly, and in the court's view most importantly, the court had to decide whether or not the easement claimed could be said to 'accommodate a dominant tenement.' [48] Secondly, the court had to assess whether the easement claimed was one that could form the subject matter of a grant.[49]

II. ACCOMMODATE THE DOMINANT TENAMENT—IS THE FACILITIES

41 Donovan v. Rana [2014] EWCA 99.

42 *Necessity and Permissive Easements,* FINDLAW, https://realestate.findlaw.com/land-use-laws/necessity-and-permissive-easements.html (last visited Oct. 27, 2019).

43 *See* Home v. Young, 9 D. 286, 286-89 (Scot.).

44 Lyria Bennett Moses & Cathy Sherry, *Unregistered Access: Wheeldon v. Burrows Easements and Easements by Prescription Over Torrens Land,* 81 AUSTRALIAN L.J. 498 (2007).

45 *Id.* Lost modern grant is a legal fiction employed by the common law, which holds that upon 20 years' use the court will presume that the easement arose by grant, now lost, of the servient owner.

46 *Prescription Act* 1832, § 2 (Eng.).

47 Regency Villas Title Ltd v. Diamond Resorts Ltd., [2019] AC 553, 558.

48 *See id.* at 557.

49 *See id.* at 554.

GRANT A PERSONAL OR PROPREITARY RIGHT?

The question of whether the easement or "facilities grant" could be said to accommodate the dominant tenement was, from the court's point of view, the most important of the two questions posed on appeal about the nature of the easement claimed in *Regency Villas*.[50] Easements are proprietary rights and thus must not be of mere personal advantage to the owner but must be of benefit to the land to which they are appurtenant.[51] This is what is meant by the phrase "accommodate the dominant tenement." In order for a type of use to be a right of easement, it must benefit the land to which it is attached (and of which it forms a part).[52]

Most traditional easements are closely associated with the physical land of the dominant tenement. They facilitate access to it or ensure that utilities can service it.[53] Indeed, a traditional test of whether or not an easement sufficiently "accomodates a dominant tenement" is to ask whether the absence of such a right in a deed could give rise to an implied easement by necessity.[54]

Eaements of recreation and sport are more attenuated from the land itself. The potential objection to an easement of recreation is that it could not be said to benefit the land of the dominant tenement.[55] The enjoyment of recreation and sporting rights "may fairly be described as an end in itself, rather than a means to an end (i.e., to the more enjoyable or full use of the dominant tenement)."[56] Traditionally such rights were dismissed as ones of mere "recreation and amusement" that could not amount to an easement.[57]

The easement of peramubulation in the gardens of Ellenborough Park potentially violated this rule, and the easement in that case was challenged upon the same grounds of that in *Regency Villas*.[58] Ultimately, the easment to walk in the gardens and take advantage of any of the recreational facilities in Ellenborough Park had been held to accommodate the dominant tenements of the houses fronting and in close vicinity of the park.[59] The houses were part of a planned community with the park

50 *See id.* at 571.

51 *See id.* at 563.

52 *See id.* at 557.

53 *See id.* at 572–73.

54 *See, e.g.,* Donovan v. Rana [2014] EWCA 99, where easement rights for utilities were implied into the deed of sale between the complainant neighbours and the owners to the dominant tenement "of necessity."

55 *See Regency Villas*, [2018] UKSC at [44].

56 *Id.*

57 *See id.* at [59].

58 *See id.* at [1].

59 *See Ellenborough Park*, [1956] Ch. 131, 131 (CA).

forming the houses' (admittedly communal) garden, a common-enough amenity to land.[60] Moreover, the court held that use of the land made by the householders in that case was not one of "mere recreation and amusement,"[61] but rather a "beneficial attribute of residence in a house as ordinarily understood."[62] The court was at pains to say that the homeowners' use of the park was not merely for recreation but also for ordinary domestic purposes. One example, was the "taking out small children in permambulators."[63] Whilst today that sounds no different from a recreational stroll, the child-rearing advice of 1950's England was that babies should be placed outside in their prams at the bottom of the garden for hours at a time.

There was no such judicial massaging of the nature of the use in *Regency Villas*. The "facilities grant" was an easement to use recreational facilities. The court, however, did not doubt the utility of sport and recreation or that recreation and sport constituted a real benefit to human beings:

> [T]he advantages to be gained from recreational and sporting activities are now so universally regarded as being of real utility and benefit to human beings that the pejorative expression "mere right of recreation and amusement, possessing no quality of utility or benefit" has become a contradiction in terms . . . Recreation, including sport, and the amusement which comes with it, does confer utility and benefit on those who undertake it.[64]

But could such a benefit be said to "accommodate the dominant tenement" such that it could be granted as a right of easement? Lord Briggs dismissed any notion that it could not. He pointed out that all easements:

> [s]ave only for easements of support (which may be said to benefit the land itself), [] generally serve or accommodate the use and enjoyment of the dominant tenement by human beings. Thus, a right of way makes the dominant tenement more accessible. Service easements enable the occupiers of the dominant tenement to receive water, gas and electricity. A drainage easement enables rainwater and sewage to be removed from land, in circumstances where its use would otherwise be

60 *See id.* at 133.
61 *See id.* at 179.
62 *Id.*
63 *See id.*
64 *Regency Villas*, [2018] UKSC at [59].

inhibited by flooding.[65]

Once the focus of inquiry was shifted from the physical land itself to the enjoyment of the land by the people on it, the court could see no impediment to the granted easement of access to recreational facilities being recognized as one that accommodates the dominant tenement.[66]

According to the majority, the decision in *Ellenborough Park* was dispositive of the question whether a right of recreation and engaging in sport over a servient tenement could be held as an easement that "accommodates the dominant tenement" and was also held to support the court's decision as to whether a "mere right of recreation and amusement" could be claimed as an easement (although, as noted, the *Ellenbourgh Park* Court, itself, had held the easement there not to be one of mere recreation).[67] According to the majority, where "as here, the accommodation test is satisfied, then the fact that it may be a right to use recreational or sporting facilities does not, as the *Ellenborough Park* case makes clear, disable it from being an easement."[68]

The court held that whether the use alleged could be recognised as an easement was fundamentally a question of fact. "The question, in every such case is whether the particular recreational or sporting rights granted accommodate the dominant tenement."[69] Under the rule that an easement must "accommodate the dominant tenement," easements must be connected to the land such that they facilitate the normal enjoyment of the land and its development. Here, where the properties were holiday time shares, the granted rights of recreation unarguably facilitated the normal use of the land by the people on it and their guests. Indeed, the free use of the adjacent leisure development was key to the time shares' advertisement and sale.

In the majority's view, where suitable factual circumstances are demonstrated (and in this case they could not be doubted), the enjoyment of a right of recreation and sporting can form the basis of a proprietary right in the same way as traditional easements facilitate the enjoyment of owners and occupiers of houses.[70]

There was a lone dissenter in *Regency Villas*, Lord Carnwath. He disagreed with the decision of the majority on the ground that the so-called right of easement, in order to exist, required positive action by the owner of the servient tenement.[71]

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65 *Id.* at [39].
66 *See id.* at [59].
67 *See id.*
68 *Id.* at [59].
69 *Id.* at [48].
70 *See id.* at [81].
71 *See id.* at [94]–[95].

Although he agreed with the majority that the merits of the case all went one way—in favour of the owners of the timeshares—this did not mean that the court should "distort the correct understanding of a well-established legal concept."[72] Indeed, he saw no need to do so given that the business model for the timeshares on Broome Park had failed so badly that it would be very unlikely ever to be repeated.[73] In his view, "[n]either 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."[74]

There is much merit in the dissent of Lord Carnwath, and it is at least arguable that the majority in *Regency Villas* went beyond recognising an easement that entailed a "novel use" and instead recognised a "wholly new form of property right."[75] If this is the case, it is interesting to consider why the majority chose this case to declare that an easement of recreation could exist.

It appears fairly clear that the majority was keen to announce that an easement of recreation could exist in English law. It had been stated earlier that *Ellenborough Park* potentially stood for the proposition that an easement of recreation could be claimed in English law.[76] But why choose this case in which to do so, when as Lord Carnwath points out, such facts are unlikely to arise again in future?

The clue lies in the 'fact centred' nature of the court's inquiry. Lord Briggs begins the judgment by telling us that "whether a particular grant of, or claim to, rights is capable of having the enduring proprietary quality of an easement is usually (as here) fact intensive."[77] Whatever may be said about the rights claimed in *Regency Villas*, there is no doubt that as rights attached to timeshares, it is impossible to argue that they do not facilitate the purposes and enjoyment of the people who are utilising the dominant land. Thus, whilst not affecting the physical land of dominant tenement itself, the use of the recreational facilities can nevertheless be said to be so intrinsic to the ownership and use of the dominant land that the facilities grant 'accommodates the dominant tenement.'[78]

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72 *Id.* at [94].
73 *See id.*
74 *Id.* at [96].
75 *Id.*
76 *See* R v. East Sussex County Council, [2015] UKSC 7, [43].
77 *Regency Villas*, [2018] UKSC at [2].
78 *See id.* at [59].

III. *REGENCY VILLAS* AND HUMAN FLOURISHING THEORY

The majority in *Regency Villas* adopted a fact-centred, people-focused approach to the question of whether the grant at issue had given rise to a proprietary right of easement. By focusing on the needs of the people who own, lease or even visit the land,[79] and the purposes for which they do so, a broader range of rights that are more attenuated from the physical land itself was recognised as supporting an easement. Moreover, the focus on the people on the land when judging whether the easement 'accommodates the dominant tenement' confirms *Regency Villas* as an example of the judicial application of human flourishing theory.

Human flourishing theory is a theory of land, land use, and land ownership that is grounded in the needs of people. It holds that it is a duty of those who own land to contribute to the fulfilment of human needs and the development of human capabilities so as to enable one's neighbours and community members to flourish.[80] The decision point in *Regency Villas* was when Lord Briggs acknowledged that despite the many definitions of the term "accommodate the dominant tenement," which spoke only of "land," and a "benefit to land," "easements generally serve or accommodate the use and enjoyment of the dominant tenement by human beings."[81] The contribution of recreation and sport to human flourishing was, in the court's view, beyond dispute. *Regency Villas* ensured that an obligation to allow one's private land to be used for recreation by other land owners and their guests could be a proprietary right—and thus truly an obligation of land ownership.

Lord Carnwath may be correct that a whole new category of proprietary right was recognised by the majority in order to achieve this. But in doing so, the majority paved the way for other private law claims of easement rights to land for recreation and not only ones that have arisen by express grant but also those that might have arisen by prescription or an implied grant.[82]

If it is surprising that English law did not, before *Regency Villas*, recognise a pure easement of recreation, it is even more surprising that there is no decided English common law position to support people using the beach for swimming and recreation.[83] It might be the case that in the future, one way to make such a claim will be on the basis of an easement of recreation that has arisen by virtue of an implied grant or through long

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79 Bevan, *supra* note 4, at 67.

80 *See* Gregory S. Alexander, *Ownership and Obligations: The Human Flourishing Theory of Property*, 43 HONG KONG L.J. 451, 451 (2013).

81 *Regency Villas*, [2018] UKSC at [39].

82 *See id.* at [96].

83 *See East Sussex County Council*, [2015] UKSC at [43].

use by prescription. If so, it might prove useful that *Regency Villas* also stands for the proposition that an assertion of an easement that by its nature and extent resembles a public right will not be defeated on this ground.[84]

IV. COMMUNITY RIGHTS IN SCOTS LAW AND HUMAN FLOURISHING THEORY

In Scots law, unlike English law, rights over land for community use could not be claimed by unincorporated localities. There was no analogous doctrine to that of "custom" under which local inhabitants could make claims over land by virtue of long or "immemorial" use.[85] Also, unlike in England, in Scotland common land had been enclosed by a single, public parliamentary act rather than by piecemeal private statutes, so common land did not exist in Scotland in the way it did in England in the eighteenth and nineteenth centuries.[86]

Where something akin to common land established by custom did exist was in the incorporated burghs. Burgh inhabitant rights over burgh land or land outwith the burgh were litigated as servitudes.[87] At the time the case of *Eyemouth* was brought in the mid-1840s, a servitude could be established by prescription upon proof of forty years' use.[88] There were two ways for a landowner to resist a community's claim that the inhabitants had a legal right to use land for particular purposes. Firstly, servitudes required a dominant and servient tenement, so the status of those who were claiming rights of servitude as holders of a dominant tenement was subject to challenge.[89] Secondly, the use claimed must have been one that the courts were willing to recognize as a servitude.[90] In *Eyemouth,* the focus was on whether the defenders, as mere tenants of land, could claim a servitude where their landlords, who owned the dominant tenements, had disclaimed any such right.[91]

In Scots law, royal burghs can hold servitudes, because the corporation holds or is "infeft" with the land of the burgh.[92] Thus, a royal burgh, quá a corporation, holds a dominant tenement on behalf of all of its inhabitants.[93] The accepted view was that a burgh of barony, like the burgh

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84 *See Regency Villas*, [2018] UKSC at [52].

85 *See* Andrea C. Loux, *The Persistence of the Ancient Regime: Custom, Utility and the Common Law in Nineteenth-Century England*, 79 CORNELL L. REV. 183, 183 (1993).

86 *See* Jarman, *supra* note 6, 211–12.

87 *Id.* at 211–12, 214.

88 *Prescription Act*, 1617 (Scot.). *See* Loux, *supra* note 13, at 140.

89 *See* Jarman, *supra* note 6, at 211–12.

90 *Id.* at 213.

91 *Id.*

92 *Id.* at 209, 213.

93 *See* Jarman, *supra* note 6, at 213.

of Eyemouth, could not hold a servitude on behalf of its inhabitants because the corporation does not, itself, hold land. It is merely a corporation. Thus, whether as pursuers or defenders, landowners could attack a burgh of barony's, or its inhabitants, claim of servitude on the ground that the community litigants held no dominant tenement (or otherwise lacked title to pursue).[94]

The test case of *Eyemouth* is worthy of examination in the context of evaluating the development of the law of servitudes and easements in light of the theory of human flourishing. Like *Regency Villas*, the emphasis of the decision in *Eyemouth* was not the land itself but rather the needs of the people who lived on the land. The pursuer had set up the case in such a way so as to almost guarantee that, were the law of servitudes to be applied as it had been in times past, the land would be declared to be free of servitudes by the inhabitants of the burgh.

Eyemouth became a test case—but a test case brought initially not on behalf of the public or a community, but on behalf of the landowner, who sought to circumscribe the rights of the inhabitants of the burgh. The case was brought on behalf of the proprietor and judicial factor of the lands and barony of Eyemouth. Home, in an effort to improve the estate, wanted to prevent members of the community from using a well and the land adjacent to it for washing and bleaching linen.[95]

What made *Eyemouth* a test case was the way in which the pursers went about litigating it. The law regarding community servitudes was in a state of flux in the mid-nineteenth century, and when asked for an opinion on the matter, an advocate had advised Home not to bring the case.[96] Of the two issues—whether the pursers held a dominant tenement and the nature of the use claimed by the defenders by prescription—the use of a well and land for drying and bleaching linen had, after a great deal of confused precedent, been recognized as a type of use that could be held as a servitude.[97] If the defenders were vulnerable, it was with regard to the requirement that a servitude must be constituted between a dominant and servient tenement.

In order to vitiate any claim to a community servitude, Home had contacted the absentee landlords of the named defenders to ensure that the landowners would not resist their action.[98] This meant that the defenders, tenants of those landlords, could not claim a right of servitude attached to

94 *Dempster v Cleghorn*, [1813] 2 Dow 40, 42-43. *See* Loux, *supra* note 13, at 123.

95 Home v. Young, (1846) 9 D. 286, 287.

96 John Rankine, *Home v. Pringle*, The Scots Revised Reports 636 (1841).

97 Andrea Loux Jarman, *Urban Commons: from Customary Use to Community Right on Scotland's Bleaching Greens*, LAW IN THE CITY: PROCEEDINGS OF THE SEVENTEENTH BRITISH LEGAL HISTORY CONFERENCE, DUBLIN, 319, 331 (2005).

98 *Home v. Young*, Scottish Jurist 109, 110.

their land. The owners of their houses had already disclaimed a servitude, and so the defender-inhabitants held no dominant tenement that could hold a servitude over the servient tenement of the Shore Well and the adjacent land, the Parade or Wellbraes.

But as Home's advocate in his advice not to bring the action had intimated, the issue was not so simple. For years, the courts had wrestled with how rights such as these, when claimed on behalf of burgh inhabitants, should be litigated and recognized.[99] In *Eyemouth*, the focus was not on the rules of land law but rather the needs of the 1100 inhabitants of the burgh and how those needs were being protected in the absence any burgh governors having been elected. Home claimed that the absence of these governors meant that there was, in fact, no corporation that could claim in its corporate name the rights used by the inhabitants.[100] The members of court rejected this claim and went further.

In the absence of elected magistrates, the court held that Home himself, as the burgh superior, was responsible for ensuring that the land of the burgh was used for the purposes for which it was granted by the crown to the baron, "for behoof of the inhabitants."[101] The question of the inhabitants' rights to the land were not a matter of private land law and the law of servitudes; rather, they were protected as a matter of public law and principles of good governance.[102] The court held that the claimed rights, which were exercised on burgh land, were held by the baron on behalf of the inhabitants in a form of public trust.[103] In the words of Lord Jeffrey, "[t]he case in reality, is not within the proper category of a servitude to be established against a stronger third party, but within the category of a mal-administration, or attempted invasion of rights belonging to the community by those who ought to have respected and protected them."[104]

The judges found Home's argument outrageous.[105] Not only had he filed a legal action and then claimed that those he had filed it against had no title to defend it, he had also claimed that by the erection of the burgh, "there was not granted to the burgh any rights at all; no corporation created, no interest called into existence but one in favour of the baron himself."[106] An action brought on the ground of the land being a burgh of barony was, on this view according to Lord Mackenzie, "just an action brought by part of himself against himself, just as if his own leg were to

99 *Id.* at 295–96.
100 *Id.* at 289.
101 9 D 286, 300, per Lord Mackenzie.
102 *See* Jarman, *supra* note 97, at 319, 334.
103 *Home*, 9 D. at 289–90.
104 *Id.* at 304.
105 *Id.* at 303.
106 *Id.* at 299.

bring an action against the rest of him."[107] The judges of the First Division of the Court of Session were unanimous in their view that the use of the well and the land for drying and bleaching linen, so long as it was proved in fact to have existed for forty years, could be claimed by the defenders as inhabitants of the burgh, which was held to be a corporate body.[108]

The judges all thought the rights claimed were something other than a praedial servitude that required a dominant and servient tenement. The Lord President emphasized that the rights claimed were over land that lay within the burgh and argued that the rights resembled an "easement" or right of use.[109] Lord Mackenzie said "I don't consider it necessary to enter into the question of servitude at all; for this is no servitude—it is no more a servitude than the right to the burgh jail. The baron has not the right to destroy the burgh; and, therefore . . . he could not exclude from the use of the air or the water."[110]

Lord Fullerton "admitted that the older cases are not satisfactory; and indeed it is not easy to extract from them any very distinct or intelligible principle."[111] But he sustained the right on the "broad ground of its being a public servitude."[112] "All the difficulty as to what is said in regard to the necessity of a praedium dominans is excluded by the fact that a body corporate has acquired it."[113] Lord Jeffrey agreed that the people of the burgh could no more be excluded from the well and adjacent bleaching green than they could "from the use of the streets, wharfs, or market-places they have enjoyed equally long."[114] For him, "[t]he form is to erect the territory into a free burgh of barony. The territory, no doubt, is the body of the burgh; but the soul, for whose sake it is created, is the living population. It rests, in short, on no system of Legal Materialism, but is truly constituted of the persons resident on the territory, who are recognised and united in a corporation, and expressly vested with certain rights and privileges."[115]

V. THE JUDICIAL APPLICATION OF HUMAN FLOURISHING THEORY: PUTTING PEOPLE FIRST

In jurisprudential terms, the case of *Eyemouth* sits neatly beside the case of *Regency Villas* as one where the judicial reasoning used to

107 *Id.*
108 *Id.* at 290–91.
109 *Id.* at 296.
110 *Id.* at 300.
111 *Id.*, per Lord Fullerton.
112 *Id.* at 301.
113 *Id.* at 301–02.
114 *Id.* at 304, per Lord Jeffrey.
115 *Id.* at 303, per Lord Jeffrey.

vindicate the use rights of a community over land exemplifies human flourishing theory. What links these cases is the emphasis that the respective courts placed on the needs and expectations of the people of the communities involved when coming to their decisions. To quote a ubiquitous English catchphrase, the application of human flourishing theory does "what it says on the tin." It focuses the attention of judges, lawyers, and jurisprudence scholars on the needs of the human beings that live on the land.

In both the test cases of *Regency Villas* and *Eyemouth*, the landowners claimed that the law of easements and servitudes would not support the community's use of their land. In *Regency Villas*, what was at issue was an expressly granted right of easement to a country club and other recreational facilities that was made as part of a sale of timeshares in an exclusive complex.[116] In *Eyemouth*, inhabitants of the burgh of barony who did not own land, claimed that they had the right to a well and the land that beside it for the laying out of clothes and the cottage industry of bleaching of linen.[117] In both of these cases, the merits were on the side of the communities asserting the right to use the land in dispute. Merits aside, however, the question nevertheless remained whether the court could rule in their favour, and if so, on what legal grounds. In both cases, the court found in favor of those asserting the use. In *Regency Villas*, the right of the large number of timeshare owners and their guests to use the country club facilities as they existed from time to time was upheld as a right of easement.[118] The use was held to both "accommodate their dominant tenements" and to be a type of use that is capable of a grant as an easement.[119] In *Eyemouth*, the rights of the inhabitants were also upheld, but as a right in public law rather than as a servitude.[120]

In terms of judicial reasoning, both of these cases stand out because of the courts' focus on the purposes for which the land is held by the people living on it and their needs. The rights asserted are confirmed by the respective courts, albeit under very different legal doctrines, on the grounds that the rights asserted were either necessary or facilitated the enjoyment of the land for the purposes for which the people were living, working or visiting it. Both of these cases changed the law of the land with regard to the proprietary rights of easements and servitudes.[121] *Regency*

116 *Regency Villas Ltd. v. Diamond Resorts (Europe) Ltd.*, (2019) AC 553, 553.

117 Home v. Young 9 D 286, 297 (Scot.).

118 Regency Villas Title Ltd. and Others v. Diamond Resorts (Europe) Ltd. [2018] UKSC 57 [81] (appeal taken from Eng.).

119 *Id.* at [81], [92].

120 *Home*, 9 D at 293 (Scot.).

121 Edwin Teong Ying Keat, *Easing the Law onto Unchartered Terrain: Regency Park Villas Title Ltd and Others v Diamond Resorts (Europe) Ltd and Others [2018] UKSC 57*, 2019 SING. COMP. L. REV. 210, 213 (2019).

Villas recognized that a novel use of land could support an easement.[122] *Eyemouth* held that a corporation could, as a matter of public law, hold rights over land on behalf of a burgh's inhabitants.[123] Both of these courts supported the community's claims by changing the prevailing paradigm of proprietary rights as primarily concerning land and directing their inquiry to the purposes and needs of the people living on the land. This change in paradigm was key to the decisions in the cases and to their place in the jurisprudence of human flourishing theory.

In a sense, it is odd, or at the least ironic, that the notion that when deciding disputes over land that the appropriate judicial focus should be on the purposes for which people hold land and the uses that facilitate their enjoyment of it is, somehow, innovative. And yet, that focus in both *Regency Villas* and *Eyemouth* was truly innovative and enabled the respective courts to enlarge the category of uses that could be claimed as an easement and who could claim them.

Arguably, what had prevented the development of the law in the area of easements and servitudes in both the English and Scots courts was the language of proprietary rights. Proprietary rights burden land. Unlike personal rights, they are meant to be lasting and to outlive the ephemeral nature of the people who own or occupy the land.[124] Because such rights can constitute permanent burdens on land, doctrines of land law require that rights over land such as easements and servitudes are established between dominant and servient tenements and that an easement must "accommodate the dominant tenement."[125] The language of the proprietary dominates the doctrinal discussion to such an extent that it is possible to lose very the notion that, ultimately, such rights are about the enjoyment of land by people.

Land lawyers and judges are so familiar with both land law's technical language of dominant and servient tenements and its inherent policy aims of limiting burdens on land so as it make land freely alienable that when taking doctrinal decisions the idea that the "right or utility" benefits the *people* on the dominant tenement can be wholly obscured. Lord Briggs, writing the majority judgment in *Regency Villas*, cut through this jargon of the proprietary to focus on the true beneficiaries of rights of easement—the people who live on the dominant tenement. [126] In *Eyemouth*, the same can be said of the decision of the First Division of the Court of Session. The court held that the right to use the well and bleaching

122 *Regency Villas*, *supra* note 2, at [75]–[76].

123 *Home*, 9 D at 298.

124 Paul P. Ashley, *Personal Rights vs Property Rights*, 20 A.B.A. J. 49, 54 (1934).

125 Teo Keang Sood, *Easement - A Proprietary Interest in the Servient Tenement*, SING. J. LEGAL STUD. 491, 491–492 (2012).

126 *Regency Villas*, [2018] UKSC at [44].

green beside it could be claimed on behalf of all of the burgh's 1100 inhabitants in the name of the corporation.[127] This is because the use was considered to be as intrinsic to the life and work of the people of the burgh as were the streets, the jail, the air, or the water.[128]

In *Regency Villas*, the dissenter, Lord Carnwath, accused the majority of having created a new form of proprietary right.[129] The same charge could have been levelled at the First Division in *Eyemouth*. But the *Eyemouth* court had chosen a different route out of the quandaries presented to it by the combination of a rapacious, selfish owner of land demanding his right to exclude the burgh inhabitants despite their undoubted need to use it and the strictures of the law of servitudes that required there to be a dominant and servient tenement. The court neatly recategorized the question of the title to hold the right of the inhabitants over the land from one of the private law of servitudes to one of the public law of maladministration. Absent magistrates or any other burgh governors, the First Division held that the pursuer, Home himself as burgh superior, was responsible for protecting the right of the burgh inhabitants.[130] Mark Napier, author of a treatise on the law of prescription and "keen controversialist" who was "unsparing in epithets of abuse"[131] was pleased to report, in the appendix to his volume, that the doctrine of servitudes had been saved by the case being "taken out of the category of proper servitudes altogether" and being decided as a matter of community right.[132]

The decision in *Eyemouth* led directly to another test case—*Dyce v. Hay*[133]— where Robert Dyce claimed, on behalf of the inhabitants of Old Aberdeen, the right to a recreation ground on the land of Lady James Hay that lay between the footpath and the river Don. Dyce brought his claim on the basis of the obiter dictum of Lords Fullerton and Jeffrey in *Eyemouth* that a burgh of barony could claim a servitude on land outwith the burgh and on the memorandum or "Note" of the Lord Ordinary that accompanied his report of *Eyemouth* to the full court for decision because of its importance. In that note, Lord Cunninghame claimed that "there had been a great change and enlargement, in modern times, as to the principles on which claims of servitude, or qualified uses of property, ought to

127 *Home*, 9 D at 303.

128 *Id.* at 300 (Lord Mackenzie).

129 *Regency Villas*, [2018] UKSC at [96].

130 *Home*, 9 D at 295.

131 THE DICTIONARY OF NATIONAL BIOGRAPHY 70 (Sir Leslie Stephen & Sir Sidney Lee, eds., Oxford University Press 1964) (1917) (quoting THE SCOTSMAN, 24 Nov., 1879).

132 MARK NAPIER, COMMENTARIES ON THE LAW OF PRESCRIPTION IN SCOTLAND, 922–23 (T & T Clark 1854).

133 *Home*, 9 D 1266 (Scot.).

receive effect."[134]

Dyce v. Hay was heard by the (co-equal) Second Division of the Court of Session, where the Lord Justice-Clerk thought that the views of the Lord Ordinary had "received no countenance whatever in the Inner House."[135] There is contemporary evidence that the First Division would have viewed the claim of Robert Dyce on behalf of the inhabitants of Old Aberdeen in much the same light as they viewed the claim by the inhabitants of *Eyemouth*. The judges in *Eyemouth* were content that rights such as those claimed in that case could be held by the corporation on behalf of its inhabitants whether they were exercised over land within or without the burgh's boundaries.[136] But for the conservative members of the *Dyce* court, who had argued against the extension of community rights to recreation whilst at the Bar, the *Eyemouth* court's transformation of the rights asserted from private law rights of servitude to ones held at public law as inhabitants of a feudal burgh was the basis upon which Robert Dyce's claim could be dismissed. Cases that involved:

> [t]he relative rights of superior and vassal . . . or of baron and inhabitant of a burgh of barony, or of corporation and burgess—and the cases in which the inhabitants of a burgh of barony are maintaining certain privileges or rights as flowing from, or part of, the grant in the erection of the burgh of barony, or the burgesses or community of a burgh are contending that certain property belonging to the corporation **is** held mainly for the purpose of the public use of the whole community, or in which vassals on large feuing grounds are contending that the common superior had truly devoted part of his ground or wells, or water adjoining, for the benefit of those taking feus from him, so that such privilege came to be a pertinent or adjunct of the feu, or a part of a plan on which they relied in taking their feus . . . plainly involve . . . legal principles which do not apply at all to the ordinary case, such as we have before us.[137]

The claim brought by Robert Dyce on behalf of the inhabitants was, in the view of Lord Justice-Clerk, one made between strangers and amounted to nothing less that the assertion of a public right over the land of an unrelated third party.[138]

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134 *Home*, 9 D at 290 (Lord Cunninghame)
135 Dyce v. Hay 9 D 1266, 1270 (Scot.).
136 *Home*, 9 D at 304.
137 *Dyce*, 9 D. at 1272.
138 *Id.* at 1270.

In *Dyce v. Hay*, after the rhetoric and judicial decision in *Eyemouth*, the "good old right to exclude" was reasserted. In common law systems, progressive decisions are oftentimes followed by reactionary ones, where more conservative judges are keen to reassert more traditional views.[139] But for advocates of "progressive property" and of the human flourishing thesis, the reinterpretation of the law of burgh servitudes in *Eyemouth* and its use in *Dyce v. Hay* may hold different lessons.

The first (and there is some irony in this given my appearance at this symposium) is that however jurisprudentially illuminating, we must be wary of making direct doctrinal comparisons in property law between U.S. state law and the law of the jurisdictions of the United Kingdom. While such comparisons might provide innovative judgments and fleeting rewards, such as those enjoyed by those who access the dry sand beach in Oregon on the basis of English custom, the foundations of English and Scots law in feudal systems of landholding can provide rich fodder for those who wish to oppose such innovations.[140]

The second is that when evaluating the duty of landowners to facilitate human flourishing, we must answer the question "a duty to whom and on what basis?" In *Regency Villas*, the factual analysis of the court took account of the interests of not only owners and occupiers but of invited guests. Chris Bevan has argued that whilst, given the terms of the grant, this is not necessarily surprising, it might very well "mark . . . a departure from the orthodox position and an expansive new approach" that takes into account when evaluating the factual basis of a claim of easement the use not only of those with an interest in a servient tenement, but their invited guests or even the public.[141] His concern is that

> [R]ecreational easements have the potential to be enjoyed by a far wider group of people when compared to more traditionally-recognised easements; people who may have little or no meaningful, lasting connection to the land. We await a test case on this point but there may be legitimate concerns as to the undue burden that recreational easements will impose on the servient land and land owners. Such burdens may be only magnified when the interests and expectations of visitors and guests to the land are, additionally, to be taken into account by the court.[142]

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139 Neal A. Roberts, *The Supreme Court in a Developing Society: Progressive or Reactionary Force? A Study of the Privy Purse Case in India*, 20 AM. J. COMP. L. 79, 79 (1972).

140 State *ex rel*. Thornton v. Hay, 462 P.2d 671, 676–77 (1969).

141 Bevan, *supra* note 4, at 68.

142 *Id.*

The echoes in this warning of conservative (with a small "c") arguments from other cases where claims to proprietary rights demand innovations in order for them to be recognized are unmistakable. Inherent in legal doctrines like that of easements that contain within them the possibility of the recognition of new forms of proprietary rights is the reality that when such judicial decisions are taken, a host of political, sociological and ideological concerns will come to the fore. I have spent my time since leaving Cornell and being taught by Greg Alexander studying such moments of innovation in Britain's land law. The lessons of history, such as those of the century and a half that it took between the decision in *Dyce v. Hay* and the decision in *Regency Villas* to recognize an easement of recreation, demonstrate that we must mind not only our doctrine, but our ideology and especially our theory. Professor Alexander has made a significant and lasting contribution to both legal theory and principles of progressive property. For those contributions, both as a teacher of land law and a scholar of land law and legal theory, I would like to honor and thank him. And thank you for the honour of appearing at this very special Progressive Property Symposium.