IUS SPATIANDI—A VALID EASEMENT
RE ELLENBOROUGH PARK[1]

"The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind", observed Lord St. Leonards, L.C. in *Dyce* v. *Lady Hay*,[2] and no clearer example of this principle need be sought than in the detailed and authoritative judgment of the Court of Appeal delivered by Evershed, M.R. in *Re Ellenborough Park*,[3] affirming the decision of Danckwerts, J. in which it was established that a right to the "full enjoyment" of a pleasure ground may constitute in English law a valid easement appurtenant to neighbouring houses.

This right had been granted in 1855-1864 to purchasers of building plots surrounding the Park in conveyances in a common form, in the following terms:

> 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.

The vendors covenanted with each of the purchasers, his heirs, executors, administrators and assigns and all others to whom the right of enjoyment of Ellenborough Park might be granted to keep the Park an ornamental pleasure ground.

Upon the death of the successor in title to the original vendors the Park had become vested upon statutory trusts for sale in the plaintiff trustees, who sought by summons a declaration respecting the rights of the successors in title to the original purchasers, as owners of the surrounding properties, to use the Park as a pleasure ground. The question as to entitlement to certain moneys paid to the trustees by the War Office as compensation for wartime use and dilapidations was also decided by Danckwerts, J. in the court below, but was not argued on appeal, the parties having agreed as to application of the moneys subject to the determination of the main issue.

The court held that, on the construction of the deed, the grant of "full enjoyment of the pleasure ground" was intended to create a valid legal easement and contemplated the use of the Park "in its physical state" as an ornamental garden and pleasure ground, such use and enjoyment being "a common and clearly understood conception". The judgment expresses strong doubt that the right to use the Park as a garden in the way in which gardens are commonly used can with accuracy be said to constitute a mere *ius spatiandi*, the existence of which in English law as a valid easement had been denied by Counsel for the plaintiffs, citing Dr. G. R. Y. Radcliffe's quotation from the Roman jurist Paulus "*ut spatiari et ut coenare in alieno possimus, servitus imponi non potest*": (Digest 8.1.8.)[4]—and *dicta* of Farwell, J. in *Attorney-General* v.

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[1] (1956) Ch. 131.
[2] (1852) 1 Macq. 305.
[3] (1956) Ch. 131.
[4] *Real Property Law* (2 ed. 1938) 148. It should be noted that in the full text the quotation is preceded by the words "*ut pomum decerpere liceat*". The whole translated reads: "A praedial servitude cannot be created so as to give me permission to pick an apple, to wander about or to picnic on another's land." Now it is submitted that this text illustrated the rule that a praedial servitude (like an easement) cannot be in gross; it should be noted also that the Romans included profits (which in English law can be in gross) under the heading "praedial servitude", and thus prevented them from being in gross. The full Roman text, therefore, means that the trivialities mentioned ordinarily give rise to a personal benefit merely (note the singular "apple"): this is not to say that they would have been excluded in Roman law had they been shown (as in the English

Antrobus[5] and *International Tea Stores* v. *Hobbs*.[6]

The court considered these two cases and declined to follow the *dicta* of the learned judge as in neither case were his observations necessary to the judgment, and in the former the claim to a prescriptive public right of access to Stonehenge was far removed from the right being considered in the present case, an express grant to a specific class of property owners, of an easement appurtenant to those properties.

In reviewing the nature of easements in English law, the Master of the Rolls, following Danckwerts, J. adopted the four characteristics of a valid easement prescribed by Dr. Cheshire in his *Modern Real Property*,[7] that:

1. There must be a dominant and servient tenement.
2. The easement must "accommodate" the dominant tenement.
3. Dominant and servient owners must be different persons.
4. A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

Accepting the first and third of these propositions as undoubtedly applying in the instant case, the court considered at length whether the right in question conformed to requirements (2) and (4), the questions arising out of (4) being threefold:

(a) Whether the right conferred is too wide or too vague;
(b) Whether it is inconsistent with the proprietorship or possession of the servient owners; and
(c) Whether it is a mere right of recreation without utility or benefit.

On the question whether the right "accommodated" the dominant tenement, that is, whether it had the necessary connection therewith and was reasonably necessary for the better enjoyment of that tenement, it was held that the use of this communal garden "amply satisfied . . . the requirement of connection with the dominant tenements", in that it was sufficiently associated with the enjoyment of those properties,[8] thus the fact that the servient tenement could be enjoyed by persons other than those entitled to the rights under the grants, namely the general public who had access to the Park, a point advanced in the argument in reliance on *Bailey* v. *Stephens*,[9] did not affect the validity of the right as an easement.

In distinguishing *Hill* v. *Tupper*,[10] a case in which the owner of land adjoining a canal claimed as an easement the exclusive right to let out boats for hire on the canal, the court regarded the right there claimed, as had Pollock, C.B., as in the nature of a personal right ancillary to the claimant's business and unconnected with the ordinary enjoyment of his land. That authority cannot be taken to exclude from the categories of valid easements all rights over land acquired for merely commercial benefit, provided such rights satisfy the "normal enjoyment" test[11] and it may well be that, following Gale

case under discussion) to be properly incident to the enjoyment of the land. It should be remembered, on the one hand, that the Romans allowed a right to a view as a servitude and that this is as vague *qua* a right to light as *"spatiari"* is vague *qua* a right of way, and, on the other hand, that the Romans had in the personal servitude "usufruct" an institution of greater legal force than all but the rarest types of English "licence", so that, for the Roman lawyers, the ordinary apple-gatherer, garden-potterer, and picnicker could be better protected than his English licensee counterpart. For a case of variation of an easement from the usual form see *Digest* 38.3.17.1, from exactly the same book (Paulus 15 *ad* Plautium) as *Digest* 8.1.8.

A point of merely academic interest concerns two *communes errores* of Latin. Gale (12 ed. 1950) 19 has *"aliena"* (accepted by the Court of Appeal in all the reports); Dr. Radcliffe has *"possumus"* (accepted by Danckwerts, J. in all the reports). Whether such *communes errores* can make *jus* will, luckily, never be in issue.

[5] (1905) 2 Ch. 188, 198.

[6] (1903) 2 Ch. 165, 172.

[7] (7 ed. 1954) 456.

[8] *Cf. Ackroyd* v. *Smith* (1850) 10 C.B. 154.

[9] (1862) C.B.N.S. 91.

[10] (1863) 2 H. & C. 121.

[11] (1915) A.C. 599; and see *Wright* v. *Macadam* (1949) 2 K.B. 744.

on *Easements*[12] and such pronouncements as that of Lord St. Leonards[13] and of Goddard, L.J. in *Paine & Co.* v. *St. Neots. Gas & Coke Co.*[14] various rights in the nature of easements annexing for mere commercial advantage to property may be upheld in the future. Two important recent decisions in this field are *Wright* v. *Macadam*,[15] where the right to use of a coal shed was recognised as an easement by the Court of Appeal, and *Miller* v. *Emcer Products Ltd.*,[16] in which the Court of Appeal held that the right to use lavatory accommodation in common with other persons and access thereto could be an easement created at law—following *Heywood* v. *Mallalieu.*[17]

Adverting to the first of the points raised in consideration of Dr. Cheshire's fourth characteristic, the Court of Appeal found that the express right conferred in the deed was "both well defined and commonly understood" and "in these essential respects . . . distinct from the indefinite and unregulated privilege" to be understood from the term "*ius spatiandi*". Here, obviously, lies the actual ratio of the case, differentiating the express right claimed from the vague and over-wide types of claims made and rejected in *A.G.* v. *Antrobus*,[18] by Farwell, J., and in *Dyce* v. *Lady Hay*,[19] in both of which an undefined right in the nature of the Roman "*ius spatiandi*" was claimed by prescription on behalf of a large and ill-defined number of persons or the public generally. It is submitted accordingly that it is inaccurate and misleading to adopt this Latin tag to describe the type of easement here accorded judicial recognition.

In *Re Ellenborough Park* an additional specific type of easement has been recognised as applying in English law, but the Court of Appeal has by no means approved generally the enjoyment as an easement of an undefined right to wander about and use at will another's land. The case suggests that, provided the right claimed is so sufficiently defined that it can be interpreted by the court, and provided it fulfils the accepted conditions of a legal easement, an express grant of virtually any type of purported easement will receive favourable judicial recognition and be enforceable at law.

In reaching its decision that the right claimed was not unknown to English law, the court was assisted by the decision of Denman, C.J. and three brother judges in *Duncan* v. *Louch*[20] in which a right of easement "closely comparable to that now in question" was, if not directly established, at least accorded due recognition as a valid easement.

There the plaintiff had proved, under a deed of grant made in 1675 "a right to use Terrace Walk for the purpose of pleasure that is to pass and repass over every part of the close"; a right, as Lord Denman describes it "like a right of the inhabitants of a square to walk in the square for their pleasure".

On the question of whether the right over Ellenborough Park amounted to a joint occupation with the owners so as to exclude their proprietorship or possession, the plaintiffs had relied upon the judgment of Upjohn, J. in *Copeland* v. *Greenhalf*[21] in which the claimant unsuccessfully sought to establish his right to occupy virtually the whole of another's property for the purpose of carrying on his business of waggon repairer. This was claimed as an easement arising out of long-time user and was held to be in the nature of a claim to adverse possession of the servient tenement and, therefore, invalid as an easement.

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[12] (12 ed. 1950) 23-30.
[13] *Dyce* v. *Lady Hay* (1852) 1 Macq. 305.
[14] (1938) 4 All E.R. 592.
[15] (1949) 2 K.B. 744.
[16] (1956) 1 All E.R. 237.
[17] (1883) 25 Ch. D. 357.
[18] (1905) 2 Ch. 188, 198.
[19] (1852) 1 Macq. 305, 313.
[20] (1845) 6 Q.B. 904.
[21] (1952) Ch. 488.

The Court of Appeal in denying that these facts bore any relation to the present case, contended that the owners of Ellenborough Park were not, under the relevant deed, denied proprietorship or possession of the Park and retained for themselves all of the incidents of ownership, including the right to remove wood and other produce.

Theobald's *The Law of the Land*,[22] states that an easement "must be a right of utility and benefit and not one of mere recreation and amusement", relying upon *Mounsey* v. *Ismay*[23] and *Solomon* v. *Vintner's Company*.[24] The former case concerned a claim for the citizens of a town to enter upon a close for the purpose of holding horse races thereon and Martin, B., after considering whether the right claimed could exist as an easement in gross, held that an easement must be a right of utility and benefit analogous to a right of way or of watercourse.

The court, in holding that the statement of Baron Martin and the principle enunciated by Theobald must be restricted to such rights as were then in issue, decided that the right in the present suit, being appurtenant to the surrounding houses, constituted a "beneficial attribute of residence in a house", and, referring to purposes other than mere recreation or amusement, which it might serve, held the right "clearly beneficial to the premises to which it is attached".

The decision is an important contribution to the modern law of easements, if only for its exhaustive definition of this rather obscure section of the law, and its unreserved acceptance of the recognised attributes of easements, as propounded by Dr. Cheshire and other text writers.

In view of *Duncan* v. *Louch*,[25] it cannot be said that the law in this field has been extended, but it does indicate that the courts recognise a native English law of easements, not necessarily conforming to its Roman law ancestry, and freed from much of the uncertainty and obscurity with which it has hitherto been clouded.

The case, however, can be regarded as direct authority only for the enforcement of express grants of easement of this nature, and can in no way be read as supporting the acquisition of such legal rights by prescription or in any event where there is not a specified dominant tenement and definite persons entitled by virtue only of ownership thereof. It is noted, however, that Salmond[26] suggests that such prescriptive rights may be enforceable by way of injunction if they are capable of forming the subject matter of a grant.

On the court's decision that the rights created by the grants over Ellenborough Park are definite and regulated, it would seem that the owners of the dominant tenements could be restrained by injunction from performing within the Park area any acts which it could be established were in excess of such right, upon the analogy of excess of user of a right of way. (See *Todrick* v. *National Omnibus Co.*,[27] *Dand* v. *Kingscot*,[28] *Ackeroyd* v. *Smith*[29]).

Excess of user of an easement of this nature may ground an action of trespass in the grantors, but, in such action, "the grant will be construed most strongly against the grantor".[30]

The trustees or the Committee in which the Park had been vested would have authority to make by-laws governing use of the Park,[31] and, if challenged

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[22] (2 ed. 1929) 263.
[23] (1865) 3 H. & C. 486, 498.
[24] (1859) 4 H. & N. 585, 593.
[25] (1845) 6 Q.B. 904.
[26] Salmond on *Torts* (11 ed. 1953) 282, note r.
[27] (1934) 1 Ch. 561; *cf. Cannon* v. *Villars* (1878) 8 Ch. D. 415. *Bulstrode* v. *Lambert* (1953) 2 All E.R. 728.
[28] (1840) 6 M. & W. 174.
[29] (1850) 10 C.B. 154; also *Henning* v. *Burnet* (1852) 8 Exch. 187.
[30] *Williams* v. *James* (1867) L.R. 2 C.P. 577, *per* Willes, J.
[31] Open Spaces Act, 1906 (Eng.), 6 Edw. 7, c. 25, s.15(3); Town Gardens Protection Act, 1863 (Eng.), 26 & 27 Vict., c. 13, s.4.

by the grantees or their successors as derogating from the grants, such by-laws no doubt would be held to be binding upon the owners of the dominant tenements, as they would be on the public generally, so long as they were not unreasonable, upon the authority of *Attorney-General* v. *Hodgson*.[32]

A right of action also would lie in the owners of the dominant tenements in the event of disturbance of this easement by the servient owners or by strangers.[33] Most of the authorities dealing with disturbance of incorporeal rights, notably *Fitzgerald* v. *Firbank*[34] and *Nicholls* v. *Ely Sugar Beet Factory*[35] relate to interference with profits à prendre in respect of which it is clearly established that an action in the nature of trespass, not requiring proof of specific damage, is appropriate. However, despite the observations of Lord Wright, M.R. in the latter case,[36] citing Sir Frederick Pollock,[37] it would appear to be well settled[38] that the disturbance of an easement of this nature would be actionable rather in nuisance, requiring proof of specific damage, and of course, proof of the plaintiff's title to the incorporeal right.[39]

In England, where the right to use communal gardens and garden squares vested in owners and occupiers of adjoining properties is a common feature of urban development, the decision has greater significance and application than in Australia, but it would appear that local courts would have no difficulty or hesitation in adopting *Re Ellenborough Park* as authority in any case where a similar express grant of easement is in issue. The registration of an easement of this nature under the Real Property Act or corresponding State Acts, as appurtenant to land under the Act, similarly would appear to present no difficulty.

The definition of the law and establishment of principle in this case, whilst it should not encourage landowners generally "to subject their land to new and strange burdens",[40] should nevertheless pave the way for the creation of such new and at present unrecognised servitudes and easements, as may be required by future social and economic circumstances.

P. H. HUMPHREYS, Case Editor—Third Year Student.

OBJECTIONABLE LITERATURE

TRANSPORT PUBLISHING COMPANY LTD. (AND OTHERS) v. *LITERATURE BOARD OF REVIEW*

During 1953-55 new legislation was enacted in five States to widen the control over undesirable publications.[1] Much of this legislation was in common form, particularly in the widening of the meaning of "obscene" as a term of art. The greatest advance, however, took place in Queensland and Tasmania where Boards of Review were established with the express duty to prevent the distribution of "objectionable" literature. This meant also that a new term of art "objectionable" was created by statute, though its content was expressed in the same language as that found for the wider version of "obscene".

Now the establishment of Boards of Review has on the face of it relieved

[32] (1922) 2 Ch. 429.

[33] As to rights of way, these being the nearest example to the easement in the present case, *Thorpe* v. *Brumfitt* (1873) L.R. 8 Ch. App. 650.

[34] (1897) 2 Ch. 96.

[35] (1931) 2 Ch. 84; (1936) Ch. 343.

[36] *Id.* at 349, 353.

[37] Pollock, *Law of Torts* (13 ed. 1929) 391 (see now 15 ed. 1951) 283; *Harrop* v. *Hirst* (1868) L.R. 4 Ex. 43.

[38] 33 Halsbury (2 ed.) para. 13; *Paine* v. *St. Neots Gas Co.* (1939) 3 All E.R. 813, *per* Luxmoore, L.J. at 823.

[39] *Paine* v. *St. Neots Gas Co.* (1939) 3 All E.R. 813.

[40] Radcliffe, *Real Property Law* (2 ed. 1938) 146.

[1] A short summary may be found in (1956) 2 *Sydney L.R.* 134.