SHERIFF APPEAL COURT

[2024] SAC (Civ) 41
INV-A101-20

Sheriff Principal D C W Pyle
Appeal Sheriff T McCartney
Appeal Sheriff W Sheehan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL DEREK C W PYLE

in appeal by

AC & IC FRASER & SON LIMITED

Pursuer, First Appellant and Respondent

against

GORDON MUNRO

Defender, Respondent and Second Appellant

Pursuer, First Appellant, Respondent: Mure KC, Sanders; Swarbrick Law
Defender, Respondent and Second Appellant: McLean KC; Murchison Law Limited

16 August 2024

Introduction

[1] In 1996, Roderick Munro, the owner of a plot of ground in Contin, Ross-shire, sold the part of it which was a filling station adjacent to the main A835 road. He continued to live at Smithy Croft which formed the remainder of the plot. In the disposition, he reserved a servitude right of vehicular and pedestrian access over the far southern end of the filling station ground. The route of the servitude right was clearly set out in a plan annexed to the

disposition and was from the land of Smithy Croft to the A835. But despite that, the defender from a date between April 2009 and May 2011 drove vehicles and walked over a route which began at the same point within Smithy Croft but which proceeded along a different route to the A835. After the sale had been completed, Roderick Munro asked that he and his wife be allowed pedestrian access across the forecourt of the filling station. The new owner agreed to that. Roderick Munro passed on Smithy Croft to his son, the defender in this action, in 2011. He died 3 years later.

[2] There are two issues which arise in this appeal: first, whether the defender has a servitude right of access over the different route from what was contained in the disposition; secondly, whether the permission for pedestrian access across the forecourt created a servitude right in favour of Roderick Munro's successors in title, the present one being the defender.

[3] After proof, the sheriff decided on the first issue that the defender did not have the servitude right and on the second that he did. Both parties have appealed to this court.

Sheriff's findings in fact

[4] The critical findings in fact are as follows:

> "4 That in or about 1993, following a fire, the… filling station was redeveloped by Roderick Munro.
>
> 5 That in 1995 Roderick Munro entered into negotiations to sell the filling station to Alastair Campbell Fraser, now a director of the pursuers...
>
> 6 That in 1996, by way of letter dated 28 February 1996, Alastair Fraser, together with other family members and business partners, Iris Campbell Fraser and Allan Campbell Fraser, offered to purchase the Filling Station from Roderick Munro for £55,000.
>
> 7 That the said offer was accepted by Roderick Munro by way of qualified acceptance dated 8 March 1996.

8 That contained within the said… offer and acceptance, as well as the subsequent disposition between parties, there was reserved to Roderick Munro and his immediate successors a heritable and irredeemable servitude right of vehicle and pedestrian right of [*sic*] access from Smithy Croft and through the Contin Filling Station to the main A835 road, all as conforming to the terms of the disposition and the plan attached to it, and as recorded in the General Register of Sasines dated 8 April 1996.

9 That following entry to the said subjects Mr Fraser carried out work and created a car parking area to the east side of the filling station.

10 That prior to the sale of the said subjects, Roderick Munro, as owner of both properties, had installed a path and a set of stone steps which ran in a vertical line from Smithy Croft to the back of the filling station for pedestrian access from the house.

11 That prior to the sale of the said subjects there was a separate vehicular access entrance to Smithy Croft via Coull Road, Contin, which runs to the main A835 road.

12 That following the purchase of the filling station Mr Fraser permitted Roderick Munro and his family to continue to use the said pathway and steps which remain in situ and have continued to be used by the defender, his family and others.

13 That in or about August 2000, on the instructions of the Filling Station [*sic*], Jack Glennie, architect, produced a series of plans with a view to possible further development of the business and site.

14 That from a date between April 2009 and May 2011 the defender created a gravelled vehicular access track from Smithy Croft to the Filling Station which differed from the servitude access route as set out in the said disposition and plan.

15 That the pursuer did not permit or agree to the change of said access track from that as described and shown in the said disposition and plan.

16 That by letter dated 16 February 2010 the defender, acting as attorney for Roderick Munro, wrote to the [*sic*] Alastair Fraser requesting, *inter alia*, confirmation that the line of the said access track as shown in an attached plan was correct and not as shown in the title deeds.

17 That Roderick Munro died in 2014. Prior to his death the property at Smithy Croft passed to his son, Gordon Munro, the defender.

18 That by disposition dated 30 March 2017 title to Contin Filling Station was transferred to the pursuers from the said Alastair Fraser, Iris Fraser and Allan Fraser, as partners of the business.

19 That in or about October 2020 the defender's son, Robbie Munro, asked Louise Urquhart, an employee of the pursuers, to move her car as it was blocking the diverted access track created by the defender."

[5] Senior counsel for both parties were critical of these findings in fact, but to varying degrees. However, they did agree the following proposed amendments:

(a) Delete finding in fact 4 and substitute therefor:

> "That the defender's father also owned a garage on the opposite (west) side of the road to the filling station. In or about 1992 that garage was destroyed by fire and redeveloped thereafter by the defender's father. The garage continued to be operated by the defender's father until 2002. He also owned properties known as The Smiddy and associated land and Holly Cottage lying [to] the north of the garage"

b) In finding in fact 8, delete the word "immediate"; delete the words "right of" after the word "pedestrian"; and add at the end: "The reserved access route was yet to be made up. The stone retaining wall and difference in ground level remain as they did in 1996."

c) In finding in fact 9, delete the word "east" and substitute "south" and add at the end:

> "The proprietors of the filling station thereafter allowed the western end of the reserved access route, inside the stone retaining wall, to be used for the parking of cars."

d) In finding in fact 10, delete the word "vertical" and substitute "generally westerly"; and add at the end "and thereafter allowed pedestrian access across the filling station forecourt to the public road, the garage, The Smiddy and Holly Cottage."

e) In finding in fact 13, add at the end:

> "The plans showed the existence of the said pathway and steps and also the route of a track on Smithy Croft intended to link up with the eastern end of the vehicular access reserved in 1996 to the defender's father."

f) In finding in fact 14, delete from "which differed…" to the end and substitute "to link up to the eastern end of the right of vehicular access route reserved in 1996 and allow vehicular access to be taken thereby."

g) In finding in fact 16, insert before "the defender" the words "Messrs Drever & Heddle, agents for"; delete the word "the" before the words "Alastair Fraser"; and add at the end:

> "The attached plan, 6/2/1 of Process, showed an access route leaving Smithy Croft at the point designated in the reservation in 1996 and leaving the forecourt to the main road via the said existing southern exit from the forecourt. The pursuer acknowledged safe receipt of that letter but took no further action in that regard. The proprietors of the filling station continued to use the western end of the access route reserved in 1996 for the parking of cars."

h) In finding in fact 17, add at the end: "It so passed in 2011. In 2014, title to The Smiddy and related subjects was passed to the defender from his father's executry."

The 1996 servitude

[6] The 1996 disposition provided as follows:

> "There is reserved to me and my successors as proprietors of the adjoining subjects retained by me….a heritable and irredeemable servitude right of access for pedestrian and vehicular traffic of all kinds to provide access to and egress from the said adjoining subjects by way of the access route shown delineated and hatched in green on the said Plan annexed and signed as relative hereto… BUT DECLARING ALWAYS (a) that the said access route when formed will be no more than ten feet in width and shall be used solely for access to and egress from the dwellinghouse belonging to me and situated on the said adjoining subjects and for no other purpose whatsoever; and (b) all costs incurred in the formation and future maintenance of

> the said access route shall be borne by me and my successors as proprietors of the said adjoining subjects".

[7] On the evidence, the sheriff held that a diverted or alternative vehicular access route was created by the defender at some indeterminate date between April 2009 and May 2011, likely to be before 16 February 2010, the date of the letter from the defender's solicitors to Mr Fraser. On this basis he concluded that positive prescription was not established. He did not consider that the doctrine of acquiescence applied to this diverted route, the doctrine being one of last resort. For it to apply the court must look at all the relevant facts and circumstances surrounding the route and its usage. Under reference to *Moncrieff* v *Jamieson* 2005 1 SC 281, the sheriff said that there must also be significant or extensive cost attaching to any works that have been involved in the creation of such a route, which cannot then be undone. In the present case, he concluded, there had been no evidence of any particular costs incurred by the defender in the creation of the route.

[8] Senior counsel for the defender criticised the sheriff's approach. The route contained in the disposition from that date to the present date was incapable of being used by the dominant proprietor along the totality of its length for vehicular access because it was blocked at its western end at all times by the presence of a stone retaining wall more than a metre high alongside the pavement of the A835 road. Any right that the defender as proprietor of Smithy Croft may have had to use the extreme western end of said access route for vehicular access had expired by reason of prescription, it being *pars judicis* to notice this (section 8 of the Prescription and Limitation (Scotland) Act 1973; Macphail, *Sheriff Court Practice*, 4th ed., para [2.15]). The dominant proprietor had from at least 2010/2011, with the knowledge and acquiescence of the servient proprietor, used the diverted route to take vehicular and pedestrian access between Smithy Croft and the A835 from the eastern

starting point of the route in the 1996 disposition but diverted so as to avoid damaging the pursuer's stone wall at the western end of that route and to permit the ongoing use of that part of the route for parking of cars, by exiting via the existing southern access to the A835 from the filling station forecourt. Accordingly, the sheriff should have held that there had been a period of acquiescence falling short of 20 years which nonetheless should, in all the circumstances, have been taken to be sufficient in fact and law to set up a variation of the expressly reserved vehicular access right. While it may take quite significant effort and expense to set up an entirely new servitude of access by acquiescence (*Moncrieff* v *Jamieson*), it should logically be much easier simply to vary the route of one that is accepted to exist, if for example the variation is mutually accepted for a decade. This should be particularly so where fair notice was given by the dominant proprietor that that is what was proposed - as was done by the letter from Drever & Heddle in 2010. That letter was acknowledged on behalf of the pursuer but led to no objection being raised in relation to what the defender stated that he intended to do and then did for a decade - that should be taken as implied acquiescence that the diverted route would be used in substitution for the disposition route. (Cusine & Paisley, *Servitudes and Rights of Way*, paras [11.37]-[11.45]; *Hozier* v *Hawthorne* (1884) 11 R 766, at p 773; *Robertson* v *Hossack* 1995 SLT 291; *Norman* v *Lovie*, Sheriff FJ Keane, Stirling Sheriff Court, 18 February 1998, 1998 GWD 26-1337). In addition to the block created by the stone retaining wall and the difference in ground level, the servient proprietor has also obstructed the western end of the hatched route by allowing it routinely to be used for the parking of cars. Reference was made to Cusine & Paisley, op cit, para [12.84]; *Davidson* v *Thomson* (1890) 17R 287; *Fraser* v *Bruce*, Stonehaven Sheriff Court, 16 December 1987 and 27 January 1988, [unreported]; and *Douglas* v *Crossflags (Motors) Ltd* 1989 GWD 22-941. The establishment by acquiescence of a new servitude right is more

readily recognised when the right in question is regarded as a substitute for one previously constituted. If the burdened proprietor obstructs the original line of a right of way, but allows the benefitted proprietor to use an alternative route, a relatively short period of acquiescence may have the effect of constituting a right to a new route (Reid & Blackie, *Personal Bar*, paras [6.56]-[6.64]). A party to a servitude cannot, generally, unilaterally vary the route of that servitude (*Hill* v *McLaren* (1879) 6R 1363, at p 1366 per the Lord Justice Clerk; *Moyes* v *McDiarmid* (1900) 2 F 918 at pp 920-922, per Lord President Balfour; *Pollock & Others* v *Drogo Developments Ltd* [2017] CSOH 64, paras [23] to [24]). However, in the present case the variation of the access route has been mutual - ever since 2010 the pursuer has plainly known that the defender would be using the existing southern exit point onto the main road rather than insisting on the removal of the parked cars and the demolition of the stone retaining wall. This diverted route was then used by the defender and his family and visitors without objection or obstruction until 2020, when its use by the tenants of The Smiddy/Coffee Bothy seems to have triggered the present dispute. There was mutual acquiescence. It suited everybody.

[9] Senior counsel for the pursuer submitted that the following key propositions emerge from the authorities on acquiescence as a means of constitution of a servitude right:

1 It is a long-established presumption of Scots law that land is free from burdens (*praesumptio pro libertate*) (*Robson* v *Chalmers Property Investment Company* 1965 SLT 381, p 385, per Lord Kissen; *Soulsby* v *Jones* 2021 SLT 1259, para [25], per Lord President Carloway). Constitution of a servitude by acquiescence has been described as a "last resort": Cusine & Paisley, op cit, para [11.37]. Acquiescence means only that "the burdened proprietor is barred from objecting to the benefited proprietor's exercise of the right in question": Reid & Blackie, op cit,

para [6-57]. The servient proprietor must have full knowledge of and have failed to object to the assertion by the benefited proprietor of a specific right against the servient tenement. The works carried out by the dominant proprietor on the servient tenement must have been serious, involved great cost, and been carried out with the knowledge of one having a right to interdict them (*Bell's Principles,* 10th ed §946; *Robson* v *Chalmers Property Investment Company Limited*, per Lord Kissen at page 387; Reid & Blackie, op cit, para [6-60]). The knowledge must include that the works were being carried out in reliance on the servient proprietor's acquiescence (*Macgregor* v *Balfour* (1899) 2 F 345 per Lord President Balfour at p 351). It must be a proper inference from the facts that the servient proprietor was agreeing to a permanent right as to the future, and not merely "an accommodation removable at pleasure" (*Robson* v *Chalmers Property Investment Company Limited*, per Lord Kissen at p 387; *Macgregor* v *Balfour*, per Lord President Balfour at p 351.)

2 "Acquiescence is personal to the original parties and does not transmit to successors." (Reid & Blackie, op cit, at paras [5-03] and [6-63]; *Moncrieff* v *Jamieson*, per Lord Marnoch at para [27]). Acquiescence may apply where the servient proprietor has erected an obstruction in the line of a servitude of access previously constituted but allows the dominant proprietor to use an alternative line (Reid & Blackie, op cit, at para [6-63]).

3 The very limited scope of this method of constitution was emphasised by Lord Marnoch in *Moncrieff* v *Jamieson*, at para [27]; and in the same case by Lord Hamilton at paras [82]-[83]. These passages were approved by the First Division in *Soulsby* v *Jones* 2021 SLT 1259 per Lord President Carloway at

para [27]. Based as it is on equitable considerations, the application of acquiescence to the constitution of, for example, use by a dominant proprietor of a diverted route, is used where the acts of the servient proprietor have rendered the original route impassable.

4 Where a servitude is constituted, the law will imply such ancillary rights as are necessary to make the right effectual, including the erection or removal of structures on the servient tenement: Cusine & Paisley paras [3.01] and [12.124]; *Moncrieff* v *Jamieson*).

[10] In the present case, senior counsel submitted that the evidence of Mr Fraser was clear that the access route could not be located at the south end of the site because of the location of a petrol tank installed below ground by Roderick Munro and referred to in the disposition. Mr Fraser's evidence was that the 4700 litre tank remains in the same location today, along with an oil spillage interceptor. Storage of petroleum is subject to statutory regulation - The Petroleum (Consolidation) Regulations 2014 (SI 2014 No 1637). It was clear from the disposition and appended plan that the servient proprietor would require to undertake works on the servient tenement to form the said access route, including the removal of a section of the wall. As servient proprietors, the pursuer and its predecessor in title have not created any obstruction preventing the formation by the defender of the access route. In the 14-15 years before about 2010/2011, neither Roderick Munro nor the defender undertook any works on the servient tenement to form the access route. Such works as were then carried out by Roderick Munro in about 2010 were formed on the dominant tenement and were not therefore works undertaken in forming the access route hatched on the 1996 disposition plan. The clear evidence of that plan and from Mr Fraser shows that damage to the wall was of no concern to the pursuer or its predecessor in title. The

servitude route on the plan includes the location of that section of wall. Rather, the pursuer and its predecessor have throughout been concerned to avoid what is now termed the diverted route owing to the presence below ground of a petrol storage tank which is subject to statutory regulation as a licensed petroleum site: see Mr Fraser's evidence at Appendix page 357-358. The existence of a servitude right across that area would be prejudicial to the pursuer's commercial interests as operator of a licensed petroleum site. It was for that reason that the specific servitude route was agreed in 1996 and clearly marked on the 1996 plan. The evidence supported only limited use of the diverted route, particularly in the context of access to Smithy Croft being available by way of Coull Road and the use of part of the route for parking of vehicles.

[11] The defender's note of appeal suggests for the first time that any servitude right of vehicular access over the extreme western end of the access route has expired by reason of prescription. At proof, neither party suggested to the sheriff that he should make any finding in respect of extinction of the servitude right by the long negative prescriptive period. On registration of the pursuer's heritable proprietorship of the filling station in June 2017, the Keeper of the Land Register of Scotland indicated the original servitude on the cadastral map and recorded the servitude as a burden. In any event, it is not *pars judicis* for the court to notice such an argument and choose to make a finding in such regard. The defender stated no counterclaim founding upon the servitude reserved in the disposition. He did not found upon that servitude as a defence to the action. In any event, the servitude right granted in the 1996 disposition was not the right founded upon in respect of the form of proceedings or the remedy sought (*Cabot Financial UK Ltd* v *McGregor* 2018 SC (SAC) 47, paras [33]-[35]). *Esto* the express grant of servitude has expired, that is the result solely of

the failure by the defender and his predecessor in title to take the steps necessary to enable their enforceable servitude right to be exercised over a period of 20 years.

[12] In our opinion, the submissions of the pursuer fall to be preferred.

[13] The genesis of the role of acquiescence in respect of servitude rights is a passage from *Bell's Principles*:

> "946 The principle seems to be, that mere acquiescence may, as *rei interventus*, make an agreement to grant a servitude, or to transfer property, binding, or may bar one from challenging a judicial sentence; but that where there is neither previous contract nor judicial proceeding, there must be something more than mere acquiescence, something capable of being construed as an implied contract or permission, followed by *rei interventus*. Where great cost is incurred by operations carried on under the eye of one having a right to stop them, or where, under the eye and with the knowledge of him who has the adverse right, something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right. . . .
>
> 947 Although it is rightly said that mere acquiescence cannot confer a right of property, it may confer a right of use of property or servitude."

The language used by the professor is hesitant. But the passage was expressly approved by the Lord Chancellor in *Wark* v *Bargaddie Coal Co* (1859) 3 Macq 467 at 480:

> "Now, as I understand this passage, the acquiescence which will support and give validity to a previous parol agreement is something less than the facts and circumstances which will be required to enable you to presume an agreement. It is clear that with regard to the facts and circumstances from which the agreement is to be presumed, there must be great costs incurred by the operations, something allowed to be done which manifestly cannot be undone; and under those circumstances the law will presume an agreement or conventional permission."

And indeed was also approved by the Inner House in *Cowan, &c.* v *Ld. Kinnaird* (1865) 4 M 236.

[14] The chapter under which the passage sits is concerning the right to exclusive use and occupation of land by a proprietor. Indeed, the preceding paragraph begins with the statement: "The exercise of the exclusive right may be barred by acquiescence." It is therefore not in the context of the creation of a servitude by acquiescence alone. Indeed, the

authorities to which Professor Bell refers are to do with the interference with rights, rather than their establishment. Nor do they for the most part refer to rights which apply to singular successors. Indeed, in *Muirhead* v *Glasgow Highland Society* (1864) 2 Macph 420, the court, while accepting that a singular successor of the proprietor of the dominant tenement was prevented from enforcing the servitude in respect of previous building works, held that this did not mean that the servitude ceased to exist. The same point was made in *Moir* v *Alloa Coal Co* (1849) 12D 77. The distinction between rights arising between the original parties and actings by the parties being binding on singular successors is an important one. The authorities footnoted by Professor Bell in the passage do not of themselves establish a definite rule of law for such successors. For example, *Moir* v *Alloa Coal Co* involved the original parties, as did *Stirling* v *Haldane* (1829) 8S 131 and moreover was about a lease - as were *Ewen* v *Turnbull's Trs* (1857) 19D 513 and *Wark* v *Bargaddie Coal Co* (Inner House reported at (1856) 18D 772). *Scott* v *Fothringham* (1859) 21D 737 concerned a heritable creditor and the application of rents.

[15] Modern discussion of the role of acquiescence in the law of servitudes is contained in *Moncrieff* v *Jamieson*. The majority of the court, Lord Hamilton dissenting, decided the appeal on an implied right to parking ancillary to a right to pedestrian and vehicular access, but all three members of the court were agreed on acquiescence. Lord Marnoch made the following observations, having considered various authorities which included some of those footnoted by Professor Bell, (para [27]):

> "… none [of the authorities] go so far as to suggest that parties' actings can of themselves set up for the future a real right of praedial servitude. On the contrary, with the possible exception of *Munro v Jervey*, the decisions or dicta relied upon are, in my opinion, referable to the principle well encapsulated by the Lord Ordinary in *Melville v Douglas' Trs* ((1828), p188), namely, 'that the extension of rights of servitude or the like may not be challenged, if the party entitled to object has suffered that extension to be made, and operations attended with expense to be carried on, with

> his knowledge and approbation, without question.' I might add that in every such case the expense incurred was very considerable and in both cases at the instance of Viscount Melville the Inner House cautioned against any further extension of the doctrine in question. Indeed, in *Macgregor v Balfour* (p 352) Lord President Balfour appears to suggest that, in order to affect singular successors, the works in question must not only be substantial but also remain 'visible and obvious'. So far as the case of *Munro v Jervey* is concerned, the report is brief in the extreme and I consider that the decision may well have rested on an implication of personal contract between the two parties to the action."

Lord Hamilton made the same point (para [83]):

> "Although counsel for the respondents' formulation of the mode of constitution relied by him was (perhaps inevitably) somewhat imprecise, it was essentially, as I understood him, constitution by acquiescence on which he based his alternative case. But the legal basis for the constitution of a real right of servitude by this mode is, in my view, very uncertain. The older cases relied on by counsel appear to have depended either, at least in part, on acquiescence or 'homologation' by the complainer personally or on the fact of infringement being obvious to the successor in title at the time of his acquisition of the property. The observations made by Lord President Balfour in *Macgregor v Balfour* (p 351) were obiter and, in so far as his Lordship contemplates 'a servitude being established or proved by acquiescence inferring a grant and creating a bar against its exercise being challenged . . . even in some cases by [the acquiescer's] singular successor in the lands', that passage is, in light of the cases thereafter mentioned by his Lordship, at least open to interpretation. *Colville v Middleton* was not concerned with a servitude at all but with acquiescence in a nuisance, the complainer having purchased the property in the knowledge that the offending saltwork had long been in operation in the vicinity; it was based, at least in part, on acquiescence on the part of the complainer personally. Likewise *Muirhead v Glasgow Highland Society* was concerned with a complainer who had acquired a property in the knowledge of an established contravention of the servitude thereafter sought to be enforced. Thus, while each of the complainers was in fact a 'singular successor', his complaint was essentially barred by his own conduct. So far as concerns more modern authorities, *Robson v Chalmers Property Investment Co Ltd* was, as regards acquiescence, concerned with an issue between the grantor and the grantee of the right, albeit it may have involved rights which were 'permanent' (that is, irrevocable) as between them. *More v Boyle* involved no determination of the issue; nor did *Buchan v Hunter*."

[16] In our opinion, from the authorities, such as they are, it can be concluded that in extreme circumstances the law allows an exception to the principle that servitudes can be created only by agreement (*Soulsby* v *Jones*, (Lord President Carloway, delivering the opinion of the court, para [24])). As Professor Bell makes clear, the exception allows of

circumstances where the law can create an implied agreement. That the circumstances require to be extreme should be understood in the context that for heritable property the system of public registration requires certainty of right based on what is recorded on the register and in the context that toleration by a proprietor of the use of his land by a neighbour does not of itself create a right enforceable by and against singular successors (unless the latter are put on notice).

[17] But the situation is different where the parties have already entered into a contract, in this case recorded in the public register by way of a disposition. A plea of personal bar by way of acquiescence arises where one party fails to comply with an obligation in the contract and the other party does not object. The inaction by both parties creates in effect a variation of the contract. It follows, therefore, that to succeed the defender required to establish that the contract as contained in the 1996 disposition was varied by the inaction of the pursuer's predecessor in title in the face of the actings of the defender to create and use an alternative access route. Senior counsel for the pursuer preferred to characterise the alternative route as an attempt to create a servitude right *de novo*. We do not agree. It is plain that on the sale of the filling station the granter of the disposition, as the owner of Smithy Croft, wanted to have a right of vehicular and pedestrian access from there to the public road, over and above his right of access along Coull Road. That may have been because of a concern, imagined or real, about the legal status of the latter route or merely for some other convenience or purpose. There is no need to speculate. The alternative route begins at the same place along the Smithy Croft boundary and ends only a few yards along from the terminus where entry to the public road is reached per the disposition. But it does not automatically follow that by way of the operation of acquiescence the contract and therefore the rights and obligations of singular successors as contained in the disposition have been varied.

[18] We agree that on the evidence the proposed amendments to the findings on fact should be made. On those amended findings, it is clear that this is not a case about obstruction of a servitude right by the proprietor of the servient tenement. That is evident from the terms of the disposition itself in which it was plainly in the contemplation of the parties to it that the proprietor of the dominant tenement was to execute the necessary works, including removal of part of the boundary wall. The proprietor of the servient tenement had all the normal rights of a heritable proprietor, including the right to park vehicles on the subjects. Indeed, if the access had been properly formed that right would subsist so long as it did not interfere with the execution of the servitude. There could, for example, be circumstances where the owner of Smithy Croft was known to be absent for a period and that access was not required during that time. There would be nothing to prevent the parking for that period. This should be contrasted with the circumstances which arose in *Davidson* v *Thomson* where the route of the access was held to subsist, but along a different route as there had been other building which impinged on the original access route, and *Hozier* v *Hawthorne* in which a public right of way was varied following the construction of saw mills.

[19] We do not consider that the letter from the defender's solicitor in 2010 assists the defender. That nothing was done by Mr Fraser other than him acknowledging receipt and stating that it was being passed to his solicitor is no more than evidence that he was aware of the diverted route. As senior counsel for the pursuer pointed out, the diverted route had only just been formed by way of a gravel path. That the pursuer tolerated the use for a number of years is not in dispute. The issue is not that; it is whether by acquiescence a variation of a praedial servitude has occurred - a much higher test.

[20] We should add that we do not set any store by the issue of the tanks and the relevant regulations. Senior counsel for the pursuer did not invite us to add a finding in fact about it - the sheriff's findings are silent on the issue. While it is true that deeds do not fall to be construed in a vacuum (*Moncrieff* v *Jamieson*, Lord Hamilton, at para [77]), the surrounding circumstances at the time of the grant are irrelevant in the face of a disposition which is clear in its terms. The motivation of the parties in determining the location of the route of the servitude is also irrelevant. The issue is one of construction of the deed to discover the intention of the parties. In similar fashion, the reason for the pursuer seeking to enforce its rights to prevent unlawful passage over the subjects after years of inactivity is also irrelevant. For aught yet seen, the pursuer may in the future wish to develop the ground under the diverted route - or sell it to a third party for it to develop it. Senior counsel for the defender in his oral submissions frequently referred to the diverted route as a "sensible solution". From the defender's perspective that may be so, but it does not follow that it is necessarily sensible for the pursuer. And, in any event, that is not the legal test for effective variation of a praedial servitude.

[21] The question of the extinction of the servitude per the original route by way of prescription is also irrelevant. It was not an issue raised before the sheriff. We do not regard it as *pars judicis*. On the evidence it is plain that if the right has prescribed it is because of the failure of the defender and his predecessor in title to exercise it. It has nothing to do with any action or inaction by the pursuer. In any event, senior counsel for the pursuer indicated that decree was no longer sought in terms of crave 4.

[22] For completeness, we should add that senior counsel for the defender moved that an additional finding in fact be added in the following terms:

Delete finding in fact 15 and substitute:

> "In 2009-2011, the westmost part of the vehicular access route reserved to the defender's father as owner of Smithy Croft could not be used for vehicular access because of the presence of the stone retaining wall blocking the route, the difference in ground level of about a metre as between the forecourt of the filling station and the main road and because that area was consistently used by the proprietors of the filling station for the parking of cars. The defender's family instead took access along a diverted route using the existing southern exit from the forecourt a few yards to the north onto the main road."

This was opposed by senior counsel for the pursuer. The finding in fact proceeds on the basis that we accept the defender's submissions. Accordingly, the motion is refused.

Pedestrian access over the forecourt

[23] The sheriff decided that the pedestrian access running in a vertical line from the house and linked to the filling station by stone steps is an access route that had been in existence since before the sale in 1996 and that the purchasers gave permission for Roderick Munro and his family to use the route and steps, which have remained in place. He held that the Munro family has continued to use this route since the sale. Accordingly, the right has subsisted for a period in excess of the 20 year prescriptive period.

[24] Senior counsel for the pursuer submitted that the sheriff's conclusion was wrong in law and on the evidence. Section 3(4) of the Prescription and Limitation (Scotland) Act 1973 makes clear that the persons whose acts of possession are founded upon to establish positive prescription must be persons in possession of the relative dominant tenement. They may possess by natural or civil possession: section 15(1). And civil possession may include possession by a member of the owner's household or family: *Carstairs* v *Spence* 1924 SC 380, per Lord President Clyde at p 385. However, in order to constitute a servitude by positive prescription, the exercise of possession must be "as of right", which is to be distinguished

from permission granted by the owner of the servient tenement (*Gordon & Wortley*, Scottish Land Law, 3rd ed., Vol II, para [25-55]; Cusine & Paisley, op cit, para [10.19]; *R (Beresford)* v *Sunderland City Council* [2004] 1 AC 889, per Lord Rodger of Earlsferry at paras [57], [65]-[67]; *Fred Neumann* v *Brian Hutchison and Others* 2006 GWD 28-628 (Sheriff Principal Dunlop QC) at paras [35]-[38]). The possession should be with the intention of establishing an adverse right, rather than exercising a right with the agreement of the servient owner (Cusine & Paisley, op cit). Where the claimant has sought and received permission from the landowner, any resulting possession on his part will be precarious (*Peterson*, Prescriptive Servitudes, para [10-02]). Even tacit permission can prevent acquisition of a servitude (*McGregor* v *Crieff Co-operative Society Ltd* 1915 SC (HL) 93, per Lord Sumner at pp 107-108; *McInroy's Trustees* v *Duke of Athole* (1890) 17 R 456, at p 462). Thus, where possession is attributable to permission or tolerance, the landowner may bring the arrangement to an end at any time. Such an arrangement is a personal right only and not therefore capable of founding the constitution of a real right. It is not adverse possession. There is no dispute that the steps were used from 1996 onwards but it is clear from Mr Fraser's accepted evidence that this was only as a matter of permission given to Roderick Munro and his wife out of a sentiment of good neighbourliness (see, eg, Appendix p 469D). Mr Fraser's evidence was that Roderick Munro raised the question of pedestrian access onto and across the forecourt of the filling station only after the sale of the filling station had been completed (Mr Fraser's affidavit at para [4] (Appendix p 359); and evidence at Appendix pp 528E-531E). The unopposed evidence of Mr Fraser was that shortly after the sale in 1996 Roderick Munro asked permission to continue to cross the forecourt from the foot of the steps at Smithy Croft and Mr Fraser agreed that Roderick Munro and his wife could continue to do so. Those parties' good neighbourly relations are evident from Mr Fraser's

decision to leave a gap in the new retaining wall that the pursuer's predecessor in title caused to be erected along part of the eastern boundary with Smithy Croft. Roderick Munro died in 2014, having disponed Smithy Croft to the defender in 2011. Acts of possession during the lifetime of Roderick Munro cannot be founded upon by the defender as Mr Fraser had given permission for him to cross the forecourt to and from the foot of the steps. Until 2011 the defender was not in possession of the alleged dominant tenement. Only in 2011 did the defender obtain title. The sheriff therefore erred in finding that the defender has a right to use the steps established by positive prescription. The defender lived at Smithy Croft only intermittently between 1974 and 2006 and did not possess it: see the defender's affidavit at para [13], Appendix p 374. In light of Mr Fraser's clear evidence, there was no basis for the sheriff's speculation that the absence of an express servitude right of pedestrian access across the forecourt to and from the steps was more likely than not to be a misunderstanding or oversight (sheriff's note at paras [57] and [61]). The defender is not seeking amendment of the sheriff's finding in fact that permission was granted.

[25] Senior counsel for the defender submitted that Mr Fraser's evidence is ambivalent as to exactly what was discussed and agreed with Roderick Munro. Even taking it at its very highest, it should be seen as establishing no more than that there was a conversation between them on the subject of pedestrian access for Roderick Munro and possibly his wife when the filling station was sold in 1996. There was no evidence of Roderick Munro seeking or requiring more general permission for people accessing Smithy Croft via that route, as took place, or of other Munros including the defender, or their visitors of whatever sort, seeking or being granted permission to use the pedestrian access following the sale of the filling station, but rather of the owners of the filling station accepting and facilitating such access to and from Smithy Croft, including by creating the specific gap in the perimeter wall

in 1997 alongside their forecourt shop/kiosk so that the access might continue to be so utilised, and doing nothing to prevent access when the steps were refurbished by the defender around 2009/2010 (according to the defender) or 2012 (according to Mr Fraser) - and indeed in making no further mention of any alleged restricted permission until 2020. On the evidence, the use has all the objective characteristics of being exercised as of right. In the sheriff's finding in fact 12, properly understood, the use of the word "permitted" in relation to what Mr Fraser had done simply indicated that he had facilitated, and not taken any steps to stop, such access. Even if there had been some informal understanding between Mr Fraser and Roderick Munro in 1996, the passage of time and the quantity and quality of use by a large variety of users is capable of constituting a prescriptive right of access, when viewed objectively (*Aberdeen City Council* v *Wanchoo* 2008 SC 278). There was uncontested evidence of intensive use of the access, not just by the Munro family but also guests and visitors (*Carstairs* v *Spence*; *Rome* v *Hope Johnstone* (1884) 11R 653). That counts as prescriptive possession, being civil possession.

[26] In our opinion, the pursuer's submissions should be preferred. The starting point is the sheriff's finding in fact 12:

> "That following the purchase of the filling station Mr Fraser permitted Roderick Munro and his family to continue to use the said pathway and steps which remain in situ and have continued to be used by the defender, his family and others."

In his submissions, senior counsel for the defender in effect sought to put a gloss on this finding, but did not move any amendment to it. It is clear in its terms. The sheriff does not discuss the evidence on the matter of permission in any detail and at the point that he sets out his decision. But at an earlier point he records that Mr Fraser stated that permission was only given to Mr Munro senior and his wife for their use and was never extended to the

defender or his family (para [12] of his note). (That sits uneasily with his decision, but it is tolerably clear that the sheriff was referring to the defender and his family *after* the transfer of title to him, rather than during the period of Roderick Munro's ownership.) He regarded Mr Fraser as a credible and reliable witness (para [61(i)]) - albeit in the context of the evidence about the diverted route. The sheriff sets out his decision at para [62(iii)]:

> "I consider that the pedestrian access as seen in photos D/6/6/2 and 6/4/25, running in a vertical line from the house and linked to the Filling Station by stone steps is an access route that had been in existence since before the sale in 1996 to Mr Fraser. *I am also satisfied that following the sale Mr Fraser gave permission for Roderick Munro and his family to use the route and steps, which have remained in place.* I am satisfied that the Munro family have continued to use this route since the sale. That being the case I am further satisfied that the doctrine of positive prescription does apply as the period of use is clearly well in excess of the 20 year prescriptive period." [italics added]

It is therefore clear that the sheriff decided on the evidence that this was a case of permission being given by the proprietor of the servient tenement to the proprietor of the dominant tenement. If it was maintained that the word 'permission' means a mere facilitation and not taking any steps to stop the access, the defender ought to have moved to amend the finding in fact. Otherwise, we have to proceed on the basis of the plain meaning of the word. On the authorities cited by the pursuer it follows that the sheriff has erred in law in counting the period of that permission - to the date of the conveyance by Roderick Munro to the defender - for the purpose of computation of the period for positive prescription.

[27] The additional authorities cited by the defender do not assist his submission. In *Aberdeen City Council* v *Wanchoo*, the issue was whether an agreement in principle for a right of access had by the operation of prescription changed from merely a personal right between the parties to a real right enforceable against singular successors. As the court explained (para [19]), the circumstances in that case were not transitory. Instead, by the building of a dual carriageway the existing route used by the owners of the commercial premises was no

longer practicable. The owners had been granted a building warrant by the council which was also the owner of the putative servient tenement. It was in the interests of both parties to find a long term solution to the problem. Accordingly, the period founded upon began with access being taken "as of right", not mere toleration. That is quite different from the present case where there was no need in the interests of the new owners of the filling station to allow the access; nor was there a need for a permanent solution. In *Rome* v *Hope Johnstone*, the court held that there was access as of right because at the time of the permission substantial works were done to create the road and that it was the only means of access to the dominant tenement. *Carstairs* v *Spence* is primarily a case about the parameters of the use of a right of vehicular access. The use of the pedestrian access over the filling station by guests and visitors to Smithy Croft is not a separate right of civil possession; it can be derived only from the possession of the dominant tenement which *ex hypothesi* could only be Roderick Munro.

[28] The overall point is that where, as here, the use derives from an agreement between the two proprietors, the possession of the proprietor of the dominant tenement needs no further legal protection and the proprietor of the servient tenement is entitled to assume that the possession was referable to that other right and that nothing need therefore be done to prevent a servitude from being established. Baron Hume described it thus (*Lectures*, vol Ill, 267):

> "In questions therefore of prescriptive servitude, it is not readily presumed against the other party (that he] intended to submit to any such burden, if his conduct can be explained probably or reasonably on any other supposition."

[29] Senior counsel for the defender moved that finding in fact 12 be amended as follows:

> "Add at the end 'consistently from 1996 to date to access the main road, the garage, The Smiddy and Holly Cottage to and from Smithy Croft, openly, peaceably and without judicial interruption for a period in excess of 20 years along the route

> indicated on the plans 6/3/4, 6/4/26, 6/4/27 and 6/4/28 of Process. That access was of a nature and volume such as to indicate it was taken as of right, without asking or being given permission. Those taking such access included customers of the garage calling at Smithy Cottage in connection with repairs to their cars from 1996 to 2005, the defender and others in relation to the defender's computer business(Momentum IT Solutions) which operated from both The Smiddy and Smithy Croft between the years 2006 and 2011, and visitors, invitees and family members of the Munro family throughout, including the pursuer, his wife, his son Robbie Munro, and members of the defender's sister's family who lived at Holly Cottage. Such use varied over time but often involved daily or almost daily use, several times a day by Gordon Munro and other family members. Such use would have been obvious to filling station staff as the route passed by the kiosk at the filling station. Mr Fraser facilitated that use when he left a gap to permit such access when constructing a boundary wall at the eastern side of the forecourt of the filling 40 station in 1997 and made no objection to works by the defender to improve said pathway and steps in or about 2008-2010. Said works tended to indicate that said route was intended to be permanently available to the proprietors of Smithy Croft and their visitors and invitees. The pursuer was aware of that use and did not object to it or challenge it in any way until 2020. The only persons to whom Mr Fraser ever expressed permission to use said route were Roderick Munro and his wife, in a private conversation with Roderick Munro in about 1996. No proprietor of the filling station ever gave anyone else any permission to use that access route or objected to anyone using that route to access Smithy Croft from 1996 until 2020.'"

The motion was opposed by senior counsel for the pursuer. To a large extent, the proposed amendment proceeds upon the defender's submissions on the law and its application to the evidence, which for the reasons set out we do not accept. In so far as the amendment adds findings on the evidence, particularly on the extent of use, we do not regard it as relevant to the essential issue which is that the access began as an act of permission by the proprietor of the servient tenement to the then proprietor of the dominant one, not as an assertion of a real right enforceable against singular successors. The motion is therefore refused.

[30] Senior counsel for the pursuer moved that the sheriff's finding in fact 12 be amended to the following:

> "12. That following the purchase of the filling station Mr Fraser gave specific permission as a matter of tolerance to the late Roderick Munro and his wife to continue to use the said pathway and steps to access and cross the forecourt of Contin Filling Station to and from Smithy Croft."

We do not regard it as necessary to give effect to our conclusions to allow this amendment, proceeding as we have done on the basis that the reference to permission in the existing finding in fact is sufficiently clear. Indeed, the reference to "tolerance" muddies the waters, in that the term is used in the authorities where there is no agreement and the proprietor of the servient tenement is aware of the use but decides whether out of good neighbourliness or otherwise to tolerate it. That is not the situation here.

Decision

[31] For the foregoing reasons, the pursuer's appeal is allowed and the defender's appeal is refused. There is a curiosity in that while the sheriff produced a judgment he did not produce an interlocutor either within it or separately. Our interlocutor reflects that. The interlocutor was sent in draft to the parties. The defender sought to introduce amendments to the findings in fact, which we had already decided not to allow. The pursuer sought to add a minor amendment to one finding, but we have refused that on the basis that the purpose of sending the draft was not to allow parties to revisit the arguments. The pursuer also sought to expand the craves by use of the interlocutor, on the basis that it would assist the parties and the court to express its decision. That may well be, but if it was thought necessary the craves in the initial writ should have been amended long before now. It is not appropriate at this stage to make such changes by way of an interlocutor.

[32] Senior counsel for the pursuer invited us to reserve the question of expenses to await further submissions. We should expect that expenses will follow success both in the appeal and before the sheriff. But we will reserve expenses and invite parties to lodge written submissions within 14 days. The employment of junior counsel before the sheriff has

already been certified. Parties were agreed - and we also agree - that we should certify the appeal as suitable for the employment of senior counsel.