

**OPINIONS**  
**OF THE LORDS OF APPEAL**  
**FOR JUDGMENT IN THE CAUSE**

**Moncrieff and another (Respondents)**

**v.**

**Jamieson and others (Appellants) (Scotland)**

**Appellate Committee**

**Lord Hope of Craighead**

**Lord Scott of Foscote**

**Lord Rodger of Earlsferry**

**Lord Mance**

**Lord Neuberger of Abbotsbury**

**Counsel**

*Appellants:*

Andrew Hajducki QC

Gordon Junor

(Instructed by Anderson & Goodlad)

*Respondents:*

Iain Mitchell QC

Nicholas Holroyd

(Instructed by Inksters)

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**ON**  
**WEDNESDAY 17 OCTOBER 2007**



**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT  
IN THE CAUSE**

**Moncrieff and another (Respondents) v. Jamieson and others  
(Appellants) (Scotland)**

**[2007] UKHL 42**

**LORD HOPE OF CRAIGHEAD**

My Lords,

1. The pursuers are husband and wife and live with their three children in subjects known as “Da Store”, Sandsound, Shetland, of which they are the heritable proprietors. At the time when these proceedings began the first defender was the heritable proprietor of a nearby dwellinghouse known as “The Storehouse” where he lived with his wife, who is the second defender. The third defender is the father of the first defender. He is the heritable proprietor of lands surrounding The Storehouse lying between Da Store and the Sandsound public road. Da Store is bounded on the west by an arm of the sea known as Sandsound Voe and on its east and south sides by lands owned by the third defender. It is bounded on the north side by lands which are in separate ownership.

2. Da Store previously formed part of the lands now owned by the third defender. It was separated from those lands by a disposition by Mitchell George Alexander Georgeson in favour of Mrs Margaret Stuart which was recorded in the Division of the General Register of Sasines applicable to the Counties of Orkney and Zetland on 3 September 1973. The situation of “Da Store” is such that it has no direct access to the system of public roads that serves the community in that part of Shetland. So among the rights conveyed by the disposition, to be enjoyed together with the lands on which the subjects are situated, was the following: “(Fourth) a right of access from the branch public road through Sandsound.” The branch public road is the road referred to as the Sandsound public road in the previous paragraph.

3. Da Store lies at the foot of a steep escarpment close to its boundary with the lands owned by the third defender. The buildings are situated between the foot of the escarpment and the foreshore. They are not accessible from the lands which lie to the north side of the property. They are accessible from the lands belonging to the third defender on the east side. But this is possible on foot only, by means of a gate and a stairway. Vehicles cannot be driven onto any part of the land on which Da Store is situated. It is common ground that the effect of clause (Fourth) was to confer a servitude right of access to "Da Store" from the Sandsound public road for both pedestrian and vehicular traffic. It is also common ground that accessory to the right of vehicular access is a right to stop vehicles on the servient tenement in order to turn, load and unload goods from them and set down and pick up passengers: contrast *Baird v Ross* (1836) 14 S 528, in which it was held that the dominant proprietor was not entitled to load or unload or turn carts unless he could do so on the cart way. The dispute which has given rise to this litigation is whether there is also an accessory right to park vehicles on the servient tenement.

4. It should be noted that there has recently been a significant change in the situation on the ground. The Storehouse has been sold and the first and second defenders have left the subjects which are now occupied by the new proprietors. They have indicated that they wish to take no part in these proceedings and that they will abide by whatever decision is reached by your Lordships. But, subject to a small adjustment to the boundaries surrounding The Storehouse, the third defender retains his ownership of the servient tenement.

#### *The proceedings*

5. The pursuers raised their action in the sheriff court at Lerwick on 15 September 1998. On 7 July 2003 after many callings, 10 days of evidence and 4 days of submissions by counsel, and after having visited the site himself, Sheriff Scott Mackenzie pronounced an interlocutor in which, among other things, he granted declarator that the pursuers were entitled to park vehicles on the servient tenement in the exercise of rights accessory to the servitude right of access. He also pronounced permanent interdict against the defenders from interfering with the reasonable exercise by the pursuers of their servitude right of access and the accessory rights.

6. The defenders appealed to the Court of Session. On 4 February 2005 an Extra Division (Lords Marnoch, Hamilton and Philip, Lord Hamilton dissenting) refused the appeal: 2005 SLT 225. Counsel were agreed that the sheriff's interlocutor was in some respects unsatisfactory. The Court of Session allowed the craves which were before the sheriff to be amended to reflect the submissions by the pursuers' counsel which, as Lord Marnoch observed in para 30, were based on the concept that the measure of any implied or ancillary right was what was necessary to the reasonable enjoyment of the express right of access. It granted declarator in terms of an amended crave which stated, among other things, that:

“the said right of access has, as an incident thereof, accessory rights over the servient tenement in favour of the dominant tenement (i) to park, on the servient tenement, such vehicles as are reasonably incidental to the enjoyment of said access to the dominant tenement and (ii) to stop, turn, load and unload goods and to set down and pick up passengers on the servient tenement.”

The court also granted declarator that these accessory rights were presently exercised in an area of the servient tenement shaded pink on a plan which had been lodged in process marked as Bardell Plan 2. It adhered to the sheriff's decision to grant permanent interdict against the defenders from interfering with the reasonable exercise by the pursuers of their servitude right of access and its accessory rights.

### *The facts*

#### *(a) at the time of the grant*

7. Consideration of the extent of a servitude right of access and of any rights that are accessory to it must begin, in the case of an express grant, with the terms of the grant itself. In the present case the grant confines itself to a few words only: “a right of access from the branch public road through Sandsound.” The meaning and effect of those words must be determined by examining the facts which were observable on the ground at the time of the grant. Account may also be taken of the use to which the dominant tenement might then reasonably have been expected to be put in the future. The sheriff's findings,

together with various plans and photographs that were lodged in process, provide the relevant information.

8. The buildings known as Da Store form part of a former merchant's house and shop. They date from the mid-nineteenth century or possibly earlier. The shop formed a principal retail outlet for the Sandsound area until about 1927 when the shop was closed. The buildings then fell into multiple occupation by up to four families until they became semi-derelict. That was their condition when they were purchased in 1973 by Mrs Stuart. They were still semi-derelict when the first pursuer's parents purchased the subjects in 1975. They were gradually brought back into a habitable condition over the next twelve years. In 1984 they were disposed by his parents to the first pursuer. In 1995 the first pursuer disposed the subjects to himself and the second pursuer in joint names. By 1998 when these proceedings were raised the pursuers were occupying Da Store as their home. When the sheriff pronounced his interlocutor they were living there together with their three children, who were then aged 4, 2 and six months.

9. The main access to the subjects when they were in use as a shop appears have been by sea. A public ferry which operated in the vicinity connected Sandsound with communities on the other side of Sandsound Voe until the 1940s. On the landward side between 1850 and 1900 a system of public roads was constructed. There is some evidence that as early as 1872 goods were from time to time transported to Da Store overland for up to ten miles. Between 1899 and 1902 the local authority constructed a lower branch public road, suitable for vehicular traffic, which led from the Sandsound public road to the gate on the eastern boundary of Da Store. It ran in a line which the sheriff described as slightly boomerang-shaped down a fairly steep slope from the main public road. It was about 150 yards long and was of hardcore and mortar construction. It was bordered on the north side by a fence. The lands to the south were left unfenced. The lower branch public road was used by pedestrians and possibly by horse-drawn carts making deliveries to and collecting goods from the shop. In 1927 a new shop was erected at the top of the slope where the lower branch public road joined the Sandsound public road.

10. The sheriff found that it was not possible for any vehicle to gain access beyond the gate onto Da Store by reason of the steep escarpment. Nor was it possible for bulky goods or numerous items to be carried directly from a vehicle into the property. They had to be off-loaded and carried down by hand, piece by piece or bag by bag. Horse-drawn

vehicles might, when necessary, turn at the bottom of the road in their own length. But the lower branch public road was not wide enough to permit motor vehicles to turn on it. They had to be driven to some convenient place where they could manoeuvre for this purpose on the servient tenement. It was not possible for the driver of a motor vehicle who wished to enter the dominant tenement from the branch public road to do so without parking his vehicle elsewhere. Parking of vehicles could take place, and had taken place, at the top of the lower branch public road. But a driver who chose to do this would have to make what the sheriff described as a significantly steep pedestrian descent and climb back up again in open and exposed country. Parking of vehicles had also taken place on the lower branch public road itself or on unfenced land bordering the lower branch public road belonging to the servient tenement.

11. Use of the lower branch public road by the general public decreased between 1927 and 1973, and it had ceased to be maintained by the local authority. Its surface was gradually grassed over and obliterated. As a result it became less suitable for vehicular traffic, which became progressively more apt to slip on the grassy surface. When the first pursuer's parents purchased the property in 1975 they used an ad hoc rope and pulley system and fish boxes to slide materials back and forth between the Sandsound public road and the property. Nevertheless the route of the lower branch public road was still clearly visible and it could still be used with care by motor vehicles.

12. The grant was silent as to the route by which access was to be obtained to Da Store from the Sandsound public road. As Cusine and Paisley, *Servitudes and Rights of Way* (1998), para 12.131 point out, there is institutional authority to the effect that where a grant of servitude is indefinite as to the exact route, the dominant proprietor may choose the route over which the servitude is exercisable "in any place most commodious for him, but not invidiously to the other's detriment": Bankton, *An Institute of the Laws of Scotland* (1752), II, vii, 18. In the present case however it can be assumed that it was the intention of both parties that it was to be obtained by means of the lower branch public road, which was still clearly visible on the ground and available.

*(b) subsequent actings*

13. In about 1983 the third defender removed the fence which ran along the north side of the lower branch public road. As a result the

whole of the way over the servient tenement was now unfenced. In about 1984 the first pursuer started to use vehicles to gain access to his property. He often turned his vehicle on land belonging to the servient tenement. On occasions he parked his vehicle at the western end of the lower branch public road close to the gate leading into his property. On 24 December 1987 he took up residence in Da Store. From that day onwards he used his vehicle daily, except in icy and very wet conditions, to gain access from the Sandsound public road. He also used the servient tenement for stopping, parking, loading and unloading and the turning of vehicles. He did this without seeking permission from the third defender. The third defender was aware that he was doing so. It was not until much later that the defenders objected to this use of his property.

14. In the autumn of 1988 the first pursuer engaged a contractor to improve the surface of the lower branch public road by scraping its top surface and resurfacing it with hardcore. He also asked the contractor to create a small hardcore turning point adjacent to the northern edge of the lower branch public road about 5 metres from the gate leading into his property. He had already been using this area, which was unfenced, for stopping, parking, loading and unloading and turning his vehicle. The third defender saw what was being done and did not object to it. The cost of these improvements, which was borne by the first pursuer, was £1,012. The first pursuer continued to use this area of the servient tenement without objection until 1993.

15. From about 1988 the first defender began to use the lower branch public road to visit and carry out works to The Storehouse. In the summer of 1989 he erected a wooden fence to keep sheep out of a garden area which he was in the course of creating near his property. This fence ran from the boundary of The Storehouse in a westerly direction along the north edge of the lower branch public road following the line of the previous fence until it reached a point close to where the first pursuer was regularly turning his vehicle. At that point it turned north and then west to exclude the area which had been surfaced with hardcore together with a larger area of rough grass and area which was partially obstructed by an old hydro-electric pole. This the area which is shaded pink on Bardell Plan 2 mentioned in the declarator referred to in the Extra Division's interlocutor.

16. In 1993 the first defender, with the agreement of the third defender, asked the first pursuer to agree to a diversion of the access route from that of the lower branch public road to lessen its slope. He

proposed angling the route a short distance after it left the Sandsound public road and creating a new road running in a south-easterly direction and then west until it joined the lower branch public road east, or uphill, of where he intended to erect a new garage south of The Storehouse for use with that property. The first pursuer agreed to the change of route on condition that the first defender extended the area of hardcore on the pink area to enable the second pursuer, who had been reluctant to drive her car down the access road due to its steepness, to park her car there alongside the vehicle parked by the first pursuer. The first defender agreed to this, and the work was done with the help of the third defender at an overall cost of £3,500.

17. In 1994 the first defender removed the old hydro-electric pole and filled the hole with hardcore. This increased the utility of the pink area for parking and turning vehicles. In January 1994 the first defender sought and obtained from the first pursuer a financial contribution of £600 towards the cost of the 1993 access improvements. In August 1994 the first defender, with the agreement of the third defender, sought the consent of the first pursuer to a further diversion of the access route to bring it back to join the lower branch public road to the west, or downhill, of the proposed garage and to improve the gradients. The first pursuer agreed to this further diversion on condition that a small triangle was added to the route to make it easier for him to turn downhill towards Da Store.

18. The first and second pursuers, their visitors and tradesmen continued to use the pink area for parking their vehicles and an area in front of The Storehouse for reversing into when turning them without objection by any of the defenders until August 1998 when the first defender proposed replacing the wooden fence which he had erected in 1989 with a stone wall. On 25 August 1998 the pursuers' vehicles were removed from the pink area to a place some distance away on other land belonging to the third defender. A large consignment of stone was deposited in the pink area. This prevented the pursuers from parking there. Meetings were held between the pursuers and the first and second defenders in an attempt to resolve the matter, but without success. The pursuers refused to agree to any part of the pink area being enclosed, while the defenders wanted to enclose the greater part of it for inclusion in the garden area. By September 1998, when the proceedings began, the parties were communicating only through their solicitors.

## *The issues*

19. The issues in this unfortunate case have narrowed since the case was before the sheriff. The defenders do not, as has been said, dispute that the servitude right of access which was constituted by the express grant is a right of both pedestrian and vehicular access from the Sandsound public road to the dominant tenement. Before any evidence was led they conceded that it included rights to turn vehicles and to load and unload both goods and passengers from them on land belonging to the third defender adjacent to the dominant tenement. But they continue to dispute the pursuers' right to park vehicles on the servient tenement and the necessity for a permanent interdict. The pursuers, for their part, no longer insist on their alternative case that they acquired a right to park vehicles on the third defender's land as a real right by acquiescence.

20. The first issue is whether a right to park is ever capable of being constituted as ancillary to an admitted servitude of vehicular access. The second issue is whether such a right was constituted in the particular circumstances of this case. Subsidiary issues are raised about the application to this case of the principle that any use made of land belonging to the servient tenement must be *civiliter*, as to the necessity for a permanent interdict and as to whether the Extra Division's interlocutor was sufficiently clear to give the defenders notice of the rights that were exercisable by the owners of the dominant tenement.

### *Parking as a right ancillary to a right of access*

21. It has yet to be decided whether a right to park vehicles can be said in Scots law to exist as a servitude in its own right. In *Murrayfield Ice Rink Ltd v Scottish Rugby Union Trustees*, 1973 SC 21, 31, Lord Justice Clerk Grant referred to a clause in the feu charter which described a right of use of an area of ground as a car park as a servitude right as "a mere servitude right." But the question whether the express grant of a right to park in a feu grant was properly described as a servitude was not in issue in that case. It is important to bear in mind that feudal conditions are fundamentally different from servitudes, as also are real burdens in dispositions: *Stair Memorial Encyclopaedia*, vol 18, Property, para 381. I would not attach any weight, at least in the present context, to the fact that servitudes are generally regarded as restricted to certain known types. As Lord Ivory observed *Harvey v Lindsay* (1853) 15 D 768, 775, new servitudes may arise as alterations

take place in the progress of society. But there is no escape from the fact that servitudes require a neighbouring piece of land to act as a dominant tenement. It is hard to envisage a situation, other than where the right is constituted expressly by a feuing condition or as a real burden, where it would be necessary to rely on a servitude right to park on someone else's land which was not ancillary to a right of access over it in favour of the dominant tenement. In *Nationwide Building Society v Walter D Allan Ltd* (OH) 4 August 2004, unreported (2004 GWD 25-539), para 26 Lady Smith said that she could not conclude that Scots law recognises, in principle, a servitude right of parking independent of any right of access: see also Cusine and Paisley, *Servitudes and Rights of Way*, paras 3.45 to 3.52, where a similar conclusion is reached after a survey of the authorities. This question, then, has not been resolved hitherto one way or the other by authority.

22. I doubt whether it is necessary for the purposes of this case to decide whether a right simply to park vehicles on someone else's land can be said to constitute a servitude in its own right, independently of a servitude right of way over that land by means of vehicles. So I would prefer to reserve my opinion on this point. While they did not seek to argue positively that such a servitude right could exist, the pursuers were unwilling to accept the converse proposition for which the defenders contended that it was not possible in the law of Scotland for there to be a servitude of parking. This point does indeed need to be addressed because, as my noble and learned friend Lord Neuberger of Abbotsbury points out, a right to park as an ancillary to a servitude of access would be difficult to accept if a right to park as a servitude in its own right was in principle unacceptable. It is on the objection in principle, therefore, on which a decision certainly is required in this case, that I wish to concentrate.

23. In his title on Servitudes in the *Stair Memorial Encyclopaedia*, Vol 18, para 487, A G M Duncan said that authority for the view that a drove road or similar right of passage may include stances where animals may be pastured prompts the question whether, under modern conditions, a right to park vehicles might qualify as a servitude. In my opinion there is much force in this analogy. When droving was commonplace in Scotland, prior to the development of roads and later railways which enabled sheep and cattle to be transported in vehicles, it involved the passage on foot of very large numbers of animals. Stances used by drovers had the inevitable effect of excluding the servient proprietor, at least partially, from pasturing his own animals on those areas. Pasturage is, in itself, a well-recognised servitude: *Ferguson v Tennant*, 1978 SC (HL) 19, 65-66, per Lord Fraser of Tullybelton.

Having analysed the authorities, the Lord Ordinary, Lord Grieve, said at p 25 that the number of stock that may be put on the lands of the servient tenement must be “proper to the dominant tenement” but that this may be such as to require all the grasses on the servient, so that the servient owner may not use any of them. It “sometimes reacheth to the full benefit of the grass”: Stair, *Institutions of the Law of Scotland* (1693), 2.7.14. Huts or shielings in which the shepherds might shelter were commonplace where animals were put on the ground for pasturage in high or remote areas.

24. These examples tend to show, as in the case of aqueduct or drainage and the decision of Maecianus to which my noble and learned friend Lord Rodger of Earlsferry refers, that the fact that the servient proprietor is excluded from part of his property is not necessarily inimical to the existence of a servitude. I am not aware of any authority in Scotland which indicates the contrary. In principle therefore there seems to me to be no fundamental objection to the right which the pursuers seek to establish. I am fortified in this view by Lord Neuberger’s valuable analysis of the English authorities.

25. The express grant in this case made no mention of any servitude right other than a right of access. In *Cronin v Sutherland* (1899) 2 F 217, where the issue was whether a servitude right of passage which had been limited to the use of the road by carts drawn by horses and laden with fuel or manure could be used by the owners of the dominant tenement as a means of egress from their property for vehicles containing the contents of an ashpit, Lord Trayner said at p 220 that the servitude right was the subject of a positive grant and must be strictly construed. That will be so where the servitude is constituted for particular purposes. At p 219 Lord Justice Clerk Macdonald said that there must be a strict interpretation of the document produced, so as not to make the burden upon the servient tenement more heavy than is the necessary consequence of the grant. It is obviously not possible to spell out of the words of the express grant in this case a self-standing servitude right to park vehicles on land belonging to the owner of the servient tenement.

26. The proposition for which the pursuers contend, that a right of parking may be constituted as a right ancillary to an undoubted right of vehicular access, is easier to accommodate within established principles. The essence of a servitude is that it exists for the reasonable and comfortable enjoyment of the dominant tenement. Whether it originates in writing by means of an express grant or is to be inferred from other

provisions not expressly creating a servitude, practical considerations may indicate that it will carry with it other rights which, although they would not qualify on their own as servitudes, are necessary if the dominant proprietor is to make reasonable and comfortable use of the property in favour of which it was granted. This is the principle to which the defenders have given effect by their acknowledgement of the right to turn and to load and unload vehicles on the servient tenement. The question is whether that principle can accommodate a right to park such vehicles there also.

27. In *Ewart v Cochrane* (1861) 4 Macq 117, 122-123, Lord Campbell LC said;

“My Lords, I consider the law of Scotland as well as the law of England to be, that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used, and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant, if there are the usual words in the conveyance....When I say it was necessary, I do not mean that it was so essentially necessary that the property could have no value whatever without this easement, but I mean that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant.”

The defenders rely on this passage for the proposition that the test for creation of both servitude and ancillary rights by implied grant must relate to the circumstances before the time of the severance, which in this case are the circumstances that existed before 1973. But in my opinion that reads too much into what Lord Campbell LC was saying in that case.

28. There are three points that may be made. The first is that, while this case too was one of severance of one part of the property of the same owner from the other, the servitude right of access on which the pursuers rely does not depend on the doctrine of implied grant. In *Ewart v Cochrane* the question was whether a servitude right to drain water by means of a drain from a tanyard into a garden could be implied when the tanyard and the garden came into separate ownership. In this case a right of access to the severed property by the route that then existed

would have been implied in any event. Otherwise Da Store would have been left landlocked: *McLaren v City of Glasgow Union Railway Co* (1878) 5 R 1042, 1047, per Lord Justice Clerk Moncreiff. But it was the subject of an express grant.

29. The second point, which follows from the first, is that the issue as to what rights may be claimed as ancillary or accessory to the servitude right did not arise in *Ewart v Cochrane*. It requires only a slight modification to the words of Lord Campbell LC to identify the test that is to be applied in the case of ancillary rights, where there is an express grant and the question is what ancillary rights are necessary for the convenient and comfortable use and enjoyment of the servitude. In *Jones v Pritchard* [1908] 1 Ch 630, 638 Parker J said that the grant of an easement is prima facie also the grant of such ancillary rights as are reasonably necessary to its exercise and enjoyment. Cusine and Paisley, *Servitudes and Rights of Way* (1998), para 12.124 accept this observation as a statement of the position in Scots law too. As they put it in the same paragraph, “Not only does a servitude permit activity falling squarely within its scope but also activities which are ancillary to the primary activity.” In *Kennedy v Macdonald*, 14 November 1988, unreported (1988 GWD 40-1653) Sheriff Principal Caplan said that activities which are reasonably incidental to the enjoyment of the access may be incorporated in the right. It is preferable, however, not to risk diluting the test by expressing it in these terms. The question is whether the ancillary right is necessary for the comfortable use and enjoyment of the servitude. The use of the words “necessary” and “comfortable” strikes the right balance between the interests of the servient and the dominant proprietors.

30. The third point is that, while the express grant must be construed in the light of the circumstances that existed in 1973, it is not necessary for it to be shown that all the rights that are later claimed as necessary for the comfortable use and enjoyment of the servitude were actually in use at that date. It is sufficient that they may be considered to have been in contemplation at the time of the grant, having regard to what the dominant proprietor might reasonably be expected to do in the exercise of his right to convenient and comfortable use of the property. In *Pwllbach Colliery Company Ltd v Woodman* [1915] AC 634, 643 Lord Atkinson said that what must be implied is what is necessary for the use or enjoyment, in the way contemplated by the parties, of the thing or right granted. Activities that may reasonably be expected to take place in the future may be taken into account as well as those that were taking place at the time of the grant. So the fact that very little, if any, use was being made of the servient tenement at that time for the parking of

vehicles cannot be taken as an indication that the need to park vehicles there when Da Store became habitable cannot have been in contemplation.

*What was in contemplation in 1973?*

31. The situation that existed on the ground in 1973 was very different from that which existed some 25 years later when the dispute arose. Da Store was still semi-derelict. The lower branch public road was no longer being maintained by the local authority. It had become grassed over through lack of use. Nevertheless it can be assumed from the terms of the express grant that it was anticipated that the disponee and her successors in title would need to obtain access to the subjects from the Sandsound public road in connection with the use that they would make of them. As for the use that they would make of them, it must have been in contemplation that once the buildings had been renovated Da Store would be used not as a shop as it had been in the past, but for ordinary domestic purposes. The size of the property indicates that it could reasonably be expected that a family would live there. Among its members might be very young children who could not responsibly be left in the house alone and unsupervised.

32. The defenders accept that some ancillary rights have to be implied, having regard to the use that might reasonably have expected to be made of the servitude right of access for the convenient and comfortable use of the property. Rights to stop and turn a vehicle and to load and unload goods and passengers from it on the servient tenement are all conceded as being obviously necessary. But the defenders insist that the driver has no right to park his vehicle on the servient tenement. This is unlikely to cause any problems for tradesmen or other visitors who have no intention of remaining for any length of time on the dominant tenement. The position is otherwise in the case of drivers of a vehicle who happen also to be owners of the dominant tenement. If the defenders are right, they must leave the servient tenement after dropping off any goods or passengers and park their vehicle elsewhere. They must then walk down to Da Store from its parking place and back up again when they want to resume use of the vehicle.

33. Could this have been what was contemplated in 1973 when the right of vehicular access was granted? There was no question then, any more than it is now, of it being possible to park a vehicle anywhere on the dominant tenement. It is this highly unusual feature that has created

the difficulty. The nearest point where a vehicle could be parked, then as now, was on the Sandsound public road at its junction with the lower branch public road. The effect of the defenders' argument is that, in the circumstances as they were known to be at the time of the grant, the right of vehicular access could be enjoyed by tradesmen and other persons who were invited by its owners to visit the dominant tenement, but not by the owners of the dominant tenement themselves in right of the servitude access to their property when using their own vehicles.

34. For the owners, use of their own vehicles would involve walking a distance of about 150 yards, in all weathers and in times of darkness as well as in daylight, over what the sheriff has described as a significantly steep descent or climb in open and exposed country. In the case of a mother with very young children, for example, this would mean leaving them unattended and unsupervised in the house while parking or collecting her vehicle, or alternatively taking her children with her on foot in such conditions to and from the place where she had to park her vehicle. Owners who had no difficulty in driving but found walking difficult because they were disabled or elderly would have to do this too, as the restriction on parking for which the defenders argue applies to everyone. The situation in this case, it need hardly be said, is far removed from the urban situation to which Lord Rodger refers where people who buy flats or houses without adjacent car parking just have to put up with it. In my opinion it is impossible to reconcile such hardships with the use that might reasonably have been expected to be made of the servitude right of vehicular access for the convenient and comfortable use of the property. It would mean, as Lord Philip said in the Extra Division, para 90, that the proprietor's right of vehicular access would effectively be defeated. While a servitude right must be construed in such a way as to minimise the burden on the servient proprietor, it must not be construed so strictly as to defeat the right granted to the dominant proprietor.

35. In *Kennedy v Macdonald* Sheriff Principal Caplan drew a distinction between a right of vehicular access which embraced a right to stop on a lane in the servient tenement to set down persons and goods and parking vehicles there for extended periods. To park vehicles for extended periods on the defenders' land would be to deviate from the normal and reasonable incidents of access. The situation in that case was that, as in the present case, it was not possible for a vehicle to be parked on the dominant tenement. This was because the presence of a bounding wall made it impossible for a vehicle to be driven onto the subjects from the access lane. But I agree with Lord Marnoch in the Extra Division, para 20, that what may not be regarded as normal and

reasonable in one set of circumstances may be regarded as normal and reasonable in another, quite different, set of circumstances. The sheriff in this case, who heard all the evidence and made an accompanied visit to the property, held in his 4<sup>th</sup> finding in fact and law that the dominant tenement was not reasonably capable of comfortable enjoyment without there being a right to park vehicles on the servient tenement adjacent to the dominant tenement. I would distinguish it from *Kennedy v Macdonald* on those grounds.

36. For these reasons I would hold that in this case, in view of its particular and unusual circumstances, the rights ancillary to the express grant of a right of access in favour of the dominant tenement include a right to park vehicles on the servient tenement, in so far as this is reasonably incidental to the enjoyment of the dominant tenement.

#### *Abuse of the right to park vehicles*

37. It was suggested in the course of the hearing before your Lordships that a decision that there was an accessory right to park vehicles on the servient tenement could mean that very large numbers of vehicles belonging to all manner of people would be parked there, perhaps for long periods, resulting in an unacceptable burden on the servient tenement. There are however three reasons for discounting such an abuse of the right as a realistic possibility.

38. The first reason is that the right of access over the servient tenement is granted in favour only of the owner of the dominant tenement and her successors in title, not in favour of the public generally. Of course, as Lord Clyde said in *Hogg v Campbell*, 2 April 1993, unreported (1993 GWD 27-1712) in a passage quoted by Cusine and Paisley, *Servitudes and Rights of Way*, para 1.60, the proposition that the dominant proprietors are the only person interested cannot be taken too strictly. The right extends to the proprietors' guests, visitors, employees and others who come there for the purposes to which the land is being put. But, as he also pointed out, that use must be within the intended scope of the servitude and it must not impose an undue burden on the servient tenement. The servitude right of pasturage provides a useful analogy for the determination of the extent of the servitude. As Lord Grieve explained in *Ferguson v Tennant*, 1978 SC (HL) 19, 25, the number of cattle that may be put on the lands of the servient tenement must not exceed that which is "proper to the dominant" – that,

is, that the number that the proprietor of the dominant tenement can support from his own resources.

39. The second reason for discounting the possibility of abuse is to be found in the principle that, in Bankton's words, the servitude right must not be used "invidiously to the other's detriment": II, vii, 18. As Lord Marnoch said in the Extra Division, para 24, questions of how and precisely where the right to park is to be exercised are questions that ought to be capable of being resolved by the parties acting sensibly but can, if necessary, be decided under reference to the rule that the servitude right must be used civiliter. This point has been recognised by the terms of the declarator, which refers to the right to park "such vehicles as are reasonably incidental to the enjoyment of said access to the dominant tenement." The right is not to store or warehouse vehicles on the servient tenement. It is a right which is ancillary to the right of access to the dominant tenement. It is available only for the parking of vehicles which are intended to be used in the exercise of that right. I would not limit the phrase to the determination of where the right of parking may be exercised, although it is of course relevant to that issue. It covers all questions that may arise as to how the right to park may be exercised, including the number of vehicles that may be parked on the servient tenement.

40. The third reason is that it has not been suggested that an abuse of the kind suggested occurred at any time between 1984 when the first pursuer first began to use the right of access to Da Store by means of vehicles and 1998 when the defenders first disputed the right to park vehicles on the servient tenement. The dispute arose not out of the presence of an excessive number of parked vehicles on the servient tenement. It arose because the first defender wanted to reclaim the pink area as part of the ground for his garden. The experience of all these years indicates that it is reasonable to assume that in practice a decision that there is an ancillary right to park vehicles will not create an undue burden on the servient tenement. So I do not think that it is necessary for the court, at least at this stage, to set a precise limit on the number of vehicles that may be parked there.

#### *The permanent interdict*

41. Mr Hajducki submitted that a permanent interdict was unnecessary in this case, and that in any event its terms were too uncertain to enable the defenders to know what was prohibited by it. He

referred to Lord Hamilton's observations in his dissenting opinion in the Extra Division, para 87, that, while there had been an earlier infringement of the pursuers' legitimate rights, there was no justification in the circumstances that now existed for granting a permanent interdict in relation to such activities and that its terms involved unsatisfactory features of uncertainty which were more likely to promote rather than to avoid future conflict. The particular features which, it was submitted, created uncertainty was the absence of any definition in the declarator of what was reasonably incidental to the exercise of the servitude, such as the number of vehicles that could be parked on the pink area, the time they could remain there and so on. It was submitted also that the effect of the interdict was to deprive the owner of the servient tenement of the use of the pink area for anything at all, even though it was not being used for access to the dominant tenement.

42. In my opinion the prolonged and highly regrettable history of this case justifies the granting of interdict. As Burn-Murdoch, *Interdict in the Law of Scotland* (1933), para 116, explains, the general rule is clear. Where operations complained of have been found to be illegal by court in a final judgment, the pursuer has a right to interdict. It is otherwise where a nuisance or other evil complained of has been removed or where the defender is a responsible authority whom the court can trust to comply with its finding. But that is not the position in this case, in view of the relentless way in which the issues have been litigated. The first and second defenders are no longer resident in The Storehouse, but Mr Hajducki did not ask that interdict should not be pronounced in their case on this ground.

43. I also agree with the majority in the Extra Division that there ought in practice to be no real difficulty in giving effect to the declarator or, should it be necessary to do this, in the enforcement of the interdict. Mr Hajducki's complaint in essence was that the details of a right to park ought to have been the subject of an express grant in which all the relevant details were set out. In the circumstances of this case however I would regard any attempt to achieve this by means of a court order as both undesirable and unnecessary. The details, within the limits indicated by what is reasonably incidental to the enjoyment of the access to the dominant tenement, will inevitably vary from time to time. They ought to be capable of being worked out by the parties themselves, given reasonable co-operation on both sides.

## *Conclusion*

44. For these reasons, and for substantially the same reasons as those given by Lord Neuberger, I would dismiss the appeal and adhere to the Extra Division's interlocutor.

## **LORD SCOTT OF FOSCOTE**

My Lords,

45. This is an interesting case raising some very basic questions about the nature of easements/servitudes – and there seems to me no difference relevant to any issue that arises in this case between the common law in England and Wales relating to easements and the common law in Scotland relating to servitudes. This case is also a very sad one for it evidences a regrettable and surely unnecessary falling out between neighbours who had lived as neighbours in apparent amity for very many years, sorting out questions of mutual concern regarding the respondents' access to their property, Da Store, by sensible arrangements without recourse to the law. The problems that have led to the falling out, to the commencement and conduct of expensive litigation and to their presence now before your Lordships as litigants relate to the right of way over the appellants' land to which the respondents are entitled in order to obtain access to Da Store from the Sandsound public road. The respondents' right of way, the existence of which has never been in dispute, has over the years since 1973 when the right was first granted required arrangements to be settled regarding the manner of its exercise. These are matters that neighbours, having due regard for one another's reasonable requirements and interests, ought to be able to sort out for themselves. But if, for whatever reason, they cannot or do not do so, the law must do so for them and, where the exercise of servitudes, or easements, is in question, will do so by reference to those reasonable requirements and interests. The principle of *civiliter*, a Scottish law principle which regulates the manner in which a servitude may be exercised (see para 95 of the opinion of my noble and learned friend Lord Rodger of Earlsferry) is, if I have understood the principle correctly, equally applicable, although not so named, under English law and requires the dominant owner, the owner entitled to exercise a servitudinal right over the land of his neighbour, to exercise the right reasonably and without undue interference with the servient owner's enjoyment of his own land. The converse of this principle is

that an interference by the servient owner with the dominant owner's exercise of the servitude will not be an actionable interference unless it prevents the dominant owner from making a reasonable use of the servitude. Thus, for example, the erection by the servient owner of a building that encroached by, say, one foot on to a ten foot wide domestic driveway would not constitute an actionable interference with a right of way over the driveway (see *Petty v Parsons* [1914] 2 Ch 653 and *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 204). These principles are well exemplified by the English case of *Saint v Jenner* [1973] Ch 275, where a dominant owner had been exercising his vehicular right of way over a domestic drive by driving at excessive speeds. This unreasonable use, a use not consistent with the principle of *civiliter*, entitled the servient owner to erect speed bumps along the drive but did not justify the erection of speed bumps of such severity that a motor car moving at, say, 10 to 15 mph would be unable to cross the bumps without the bumps striking the car's undercarriage. So the servient owner was held to be entitled to erect speed bumps but was required to reduce slightly the severity of the bumps he had erected. As in *Saint v Jenner*, both the manner of exercise by the respondents of their rights over the servient land and the steps that could lawfully be taken by the appellants that might appear to interfere with those rights are subject to the principle of *civiliter*, a principle that, as it seems to me, limits the respondents' use of the servient land to a reasonable use but enables the appellants, subject only to an obligation not to interfere with that reasonable use, to make whatever use they wish of their servient land.

46. The most important issue in the present case is whether the respondents' admitted right of vehicular access to their land over the appellants' land entitles them and their licensees to park on the appellants' land, at or near to the entrance to the respondents' land, the vehicles by means of which the right is exercised. It is not in dispute that an express grant of a vehicular right of way does not necessarily, or even usually, carry with it a right to park vehicles on the servient land. Whether it does so in this case depends upon two sub-issues: first, whether a servitudal right to park is recognised in law; and, secondly, if such a servitude can in law exist, whether, on the facts of this case, the grant of the express right of way in 1973 carried with it the right to park. Two points need to be made clear at the outset. First, a right to park can always be created by contract. But a contractual right, being a right *in personam* and not a right *in rem*, is not a servitude and cannot usually be enforced against a successor in title to the servient land. Second, a servitudal right *in rem* can be created not only by a grant but also by sufficiently long prescriptive use, or by the servient owner's acquiescence in the dominant owner's use accompanied by some form

of associated detriment, usually expenditure, incurred by the dominant owner to the knowledge of the servient owner. There was some indication of an acquiescence based claim when the present case was before the Sheriff. But by the time the case had reached your Lordships' House it had been accepted by the respondents that their claim to a right to park on the appellants' servient land depended on that right having been created in 1973 when the right of access was granted.

### *The right to park as a servitude*

47. It is convenient to start with the question whether a servitudinal right to park appurtenant to some identifiable dominant land, ie a right *in rem* and not simply a contractual right, is recognised by law. In my opinion there should be no doubt that it is and, if there is any such doubt, that doubt should be now dispelled. I can see no reason in principle, subject to a few qualifications, why any right of limited use of the land of a neighbour that is of its nature of benefit to the dominant land and its owners from time to time should not be capable of being created as a servitudinal right *in rem* appurtenant to the dominant land (see Gale on Easements 17th Ed para 1-35). An essential qualification of the above stated proposition, a qualification that I would derive from the all-important *civiliter* principle, is that the right must be such that a reasonable use thereof by the owner of the dominant land would not be inconsistent with the beneficial ownership of the servient land by the servient owner. I must later examine the so-called "ouster" principle, the principle which, it is said, prevents the creation of a servitude if the servitude contended for would prevent any reasonable use being made of the servient land, and some of the authorities relating to that principle. To the extent, however, that the "ouster" principle is asserting that a servitude must not be inconsistent with the continued beneficial ownership of the servient land by the servient owner, I would unreservedly accept it. If, for example, the nature of the purported servitude were to place the dominant owner in such occupation of the servient land as to bar the servient owner from possession or control of the land I would find it very difficult to accept that the right could constitute a servitude. An express grant of such a right might be construed as a grant of the fee simple (see Lopes LJ in *Reilly v Booth* (1890) 44 Ch D 12 at 26) or might be construed as the grant of a contractual licence, but I do not as at present advised see how it could be the grant of a servitude. A second necessary qualification to the proposition afore-stated would be that the grant of a right that required some positive action to be undertaken by the owner of the servient land in order to enable the right to be enjoyed by the grantee could not, in my opinion, be a servitude. Thus the grant of a right of way over a

driveway cannot place on the servient owner the obligation to keep the driveway in repair (see *Jones v Pritchard* [1908] 1 Ch 630 at 637). The dominant owner would be entitled, although not obliged, as a right ancillary to his right of way to do such repairs to the driveway as were necessary or desirable. On the other hand I doubt whether the grant of a right to use a neighbour's swimming pool could ever qualify as a servitude. The grantor, the swimming pool owner, would be under no obligation to keep the pool full of water and the grantee would be in no position to fill it if the grantor chose not to do so. The right to use the pool would be no more than an *in personam* contractual right at best. There may be other qualifications than the two I have mentioned but I can think of none that could oppose the recognition as an acceptable servitude of a right to park in convenient proximity to the dominant land. An examination of the applicability of the "ouster" principle to the right to park claimed in this case must await a summary of the relevant facts.

### *The facts*

48. The geography of the dominant land and the servient land is in the present case all-important. The respondents' land, the dominant land, is a small piece of land at Sandsound on the island of Shetland. Its location seems to me likely to be unique. It is bordered on the west by the sea and on the east by a cliff, so the land is sandwiched between the sea and the cliff. A jetty constructed on the land enables access to or egress from it to be obtained by boat. The only access or egress that can be obtained by land is via a stairway that leads to a gate at the top of the cliff. The land is known as "Da Store", a name derived from the retail shop use to which in times past one of the buildings on the land had been put. The buildings on the land included a dwelling and outbuildings. The land at the top of the cliff, pasture land used for the grazing of sheep, rises fairly steeply for about 150 yards to a public road running roughly north/south to Sandsound (I shall refer to this as the Sandsound public road). Between 1899 and 1902 the Zetland County Council, the then local authority, constructed a new public road (which I shall refer to as the "Da Store branch road") leading from the Sandsound public road down to the gate at the top of the Da Store stairway. The purpose of this was no doubt to allow members of the public wishing to make purchases at or deliveries to Da Store to have a land access route as an alternative to the sea access route. The Da Store branch road took a fairly direct, and consequently a fairly steep, line. It was regularly used by customers both with and without vehicles. However in 1927 a new store was built at the junction where the Da Store branch road met

the Sandsound public road, the shop business at Da Store faded away and in time the buildings fell into disrepair and became derelict.

49. Da Store and the pasture land at the top of the cliff were for many years in common ownership and in 1973 were owned by a Mr Georgeson. The Da Store branch road ran, therefore, through his land. By a Disposition dated 31 August 1973 and duly registered on 3 September 1973 Mr Georgeson sold Da Store to a Mrs Margaret Stuart. The parcels clause described the property sold as “bounded on the East and South by other subjects belonging to me, on the West by the sea and on the North by the croft ... belonging to Captain Andrew Thomson ...” and as including “(Fourth) a right of access from the branch public road through Sandsound ...” There are some odd features of this express grant that it is convenient to draw attention to at once. First, the route of the right of access was not specified. But since there was in existence at the time of the grant an existing roadway, the Da Store branch road, providing access from the Sandsound public road to the Da Store gate, it is in my opinion a compelling and irresistible inference that the intended route for the right of way granted by the 1973 Disposition was along the Da Store branch road. I would so construe the grant. Second, the Da Store branch road was a public road. The grant of a private servitude to the owners of Da Store was not necessary in order to give them the right to use that road for access to Da Store. So what could be the explanation for the grant of the servitude? There seem to me to be two possibilities. One, somewhat improbable, is that the lawyers who had drawn up and approved the Disposition did not know, or had forgotten, that the Da Store branch road was a public road. The other is that the parties wanted to fortify Mrs Stuart’s rights of access to Da Store by giving her a private law servitude as an addition to her public law right to use the public road. I must return later to consider the implications of this possibility. It is accepted, although the grant itself is silent on the point, that this 1973 grant of a right of way created a servitude of vehicular access, as well as pedestrian access, to Da Store.

50. After 1973 both the dominant land, Da Store, and the servient land passed into different ownership. The parents of the first respondent, Mr James Moncrieff, purchased Da Store in 1975 and disposed the property to him in 1984. In 1995 he placed Da Store in the joint names of himself and his wife, the second respondent. By 1975 the dwelling at Da Store had become semi-derelict but was over a period of twelve years or so after 1975 renovated so that it became once more a habitable dwelling. The respondents live there with their three young children.

51. The third appellant, Mr Bruce Jamieson, has been since 1983 and is the owner of the pasture land through which the Da Store branch road passes and from 1989 to 2006 his son and daughter-in-law, the first and second appellants, occupied a house and garden on the farm known, rather confusingly, as The Storehouse. Which of the three appellants was or were the owner or owners of The Storehouse, and from when, is not entirely clear to me but does not much matter. It suffices that in 2006 The Storehouse with its garden was sold to purchasers who, very sensibly, want nothing to do with this litigation and that from 1983 onwards arrangements about the manner of the exercise of the Da Store right of access over the third appellant's land were made between the Moncrieffs and the Jamiesons, or one or other of them. These arrangements involved two matters. There were agreed variations to the route of access in order to reduce the severity of the slope up or down which vehicles had to travel. And there were arrangements about the parking of vehicles in the vicinity of the Da Store gate. Details about these arrangements are to be found in paragraphs 13 to 18 of the opinion prepared by my noble and learned friend Lord Hope of Craighead which I have had the advantage of reading in advance. I gratefully adopt and need not repeat those details but would add that very recently the local authority has constructed a new public road over the third appellant's land in place of the Da Store branch road, and it is this new road that the respondents now use, and, as I would infer, that has become, by implied agreement between the parties, the route now subject to the respondents' private law servitude of access to Da Store. I can now come to the issues in the case.

*Did the express grant of a right of access carry with it a right to park?*

52. The respondents' claim that the express grant did carry with it a right to park has been, in the discussion before your Lordships, considered on two alternative bases: first, that the right to park is a necessary ancillary to the servitudal right of access although not a servitude in its own right; secondly, that the express grant of the servitudal right of access carried with it an implied grant of a servitudal right to park. My Lords, I regard the distinction between these two ways of promoting the respondents' claim to a right to park as, in a case such as the present, illusory. If it is reasonably necessary to the enjoyment of the respondents' vehicular right of access that there should be a right to park at or near to the Da Store gate the vehicles whereby access is obtained, i.e. if the suggested test for the acquisition of a parking right ancillary to the servitudal right of access is satisfied, then, for the same reason, the express grant of that servitudal right would in my opinion justify the implication of a servitudal right to park. Once it

is accepted, as it has been throughout, that the 1973 express grant of a right of access to Da Store is to be read as a grant of a vehicular right of access as well as a pedestrian one, it is obvious from the geography that the vehicular right of access cannot be enjoyed without the right to park on the servient land at or near the Da Store gate. It is not that it would be difficult to take a vehicle on to the Da Store land; it would simply not be possible. The appellants have accepted that it is permissible for vehicles to park temporarily on the servient land for the purpose of unloading goods or allowing passengers to alight, or, vice versa, for the purpose of loading vehicles or allowing passengers to enter the vehicles. But a vehicle driver who lives at Da Store is not entitled, it is insisted, to leave the vehicle at or around the Da Store gate but, instead, after unloading any goods and/or passengers at the Da Store gate, must drive back to the Sandsound branch road, leave the vehicle there and walk back to Da Store. If he or she is accompanied by small children who cannot be left alone, they must perforce accompany the driver. If that is what the driver has to do, it cannot be said that he is exercising a right of vehicular access. It seems to me, with all respect to the arguments addressed to your Lordships by counsel for the appellants, plain that the grant of a right to have vehicular access to Da Store must have contemplated that the vehicles by means of which access was obtained by those living at Da Store would have to be left parked at or near the Da Store gate until they were next needed and, accordingly, that a right of parking must accompany the right of vehicular access. Authority for this conclusion is to be found both in Scottish and in English case law (see the cases cited by my noble and learned friend Lord Neuberger of Abbotsbury in paragraphs 108 and 110 of his opinion) but the conclusion is one that, in the absence of any previous authority, would anyway be impelled by the obvious answer to what the parties must, if they had thought about it, have had in mind as to the manner of exercise of a vehicular right of access to dominant land used, or intended for use, for domestic, residential purposes but on to which it would be impossible to take a vehicle.

### *Where to park?*

53. The parking right, as originally granted, would have been a right to park in the vicinity of the Da Store gate. But, as Lord Hope has explained, the parties sensibly agreed that a small portion of land, very close to the Da Store gate and shown coloured pink on some of the plans in evidence (“the pink land”), would be a suitable parking spot for one or two Da Store vehicles. The first respondent, in consequence of this agreement, spent a certain amount of money in rendering the surface of the pink land suitable for the parking of motor vehicles. Arrangements

consensually made as to the manner of exercise of servitudes can, of course, be consensually varied, but once made, and particularly if the dominant owner has incurred expenditure pursuant to the arrangements, ought not, in my opinion, to be capable of unilateral variation by the servient owner. In my opinion, therefore, the pink land should be regarded as the primary location for the parking of the Da Store vehicles. But I do not regard this conclusion as necessarily barring the servient owners from parking from time to time one of their own vehicles on the pink land nor from barring the dominant owners or their licensees, if there is no space on the pink land, from parking their vehicles elsewhere on the servient land in the vicinity of the Da Store gate. The principle of *civiliter* restricts the use that the dominant owners or their licensees can make of the servient land for parking their cars to a reasonable use for the purposes of Da Store as a domestic dwelling. In my opinion, the counterpart of that principle enables the servient owners to use their land, including the pink land, for their own purposes provided they do not interfere with the reasonable exercise by the dominant owners of their rights of access and parking. No one has suggested that the parking of two Da Store cars on the pink land is not a reasonable exercise of the parking right.

*“Deprivation of ownership”*

54. It has been argued that the rights of parking claimed by the respondents in respect of the pink land deprive the appellants of any reasonable use of that land, are therefore inconsistent with their ownership of the pink land and should not be recognised as servitudinal rights *in rem* that can bind them and their successors-in-title. This is the so-called “ouster” principle to which I have already referred. There are conflicting decisions and dicta regarding the “ouster” principle. In *Dyce v Hay* (1852) 1 Macq 305 a prescriptive right for the public at large to use a strip of land for the purpose of recreation was claimed. The case was a Scottish one that reached this House where Lord St Leonards LC said that the right claimed was one that “cannot be maintained” and “ought not to be maintained”. The sidenote to the report records that

“There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected.”

However, the right claimed was a public right not a servitude. But in any event, in my opinion, the proposition stated by the sidenote is unhelpful.

Every servitude or easement will bar some ordinary use of the servient land. For example, a right of way prevents all manner of ordinary uses of the land over which the road passes. The servient owner cannot plough up the road. He cannot grow cabbages on it or use it for basketball practice. A viaduct carrying water across the servient land to the dominant land will prevent the same things. Every servitude prevents any use of the servient land, whether ordinary or otherwise, that would interfere with the reasonable exercise of the servitude. There will always be some such use that is prevented. Bearing in mind that any servitude that can be granted can be acquired by prescription and that *Dyce v Hay* was a case about public rights, not about private law servitudes, the proposition as stated in the sidenote tells us nothing about the essential nature of servitudes. In *A G of Southern Nigeria v. John Holt & Company (Liverpool) Limited* [1915] AC 599, a case in which the right to use servient land for the purpose of storage was claimed, Lord Shaw of Dunfermline, giving the judgment of the Privy Council, said, at 617, that:

“ ... there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such.”

55. In *Wright v. Macadam* [1949] 2 KB 744 the Court of Appeal had to consider whether the right to use a coal shed could exist as an easement and held that it could (see Jenkins LJ at 752). It has been suggested that the case may have turned on whether the claimant had sole use of the coal shed, but it is difficult to see any difference in principle between a case in which the dominant owner has sole use of a patch of ground for storage purposes, e.g. a coal shed, and a case in which the dominant owner is the only user of a strip of road for access purposes or of a viaduct for the passage of water. Sole user, as a concept, is quite different from, and fundamentally inferior to, exclusive possession. Sole use of a coal shed for the storage of coal does not prevent the servient owner from using the shed for any purposes of his own that do not interfere with the dominant owner's reasonable use for the storage of coal. The dominant owner entitled to a servitude of way or for the passage of water along a viaduct does not have possession of the land over which the road or the viaduct passes. If the coal shed door had been locked with only the dominant owner possessing a key and entry by the servient owner barred, so that the dominant owner would have been in possession and control of the shed, I would have regarded it as arguable that the right granted was inconsistent with the servient owner's ownership and inconsistent with the nature of a servitude or an easement. But sole use for a limited purpose is not, in my opinion,

inconsistent with the servient owner's retention of possession and control or inconsistent with the nature of an easement. This conclusion is supported by Lord Evershed MR's remarks in *In re Ellenborough Park* [1956] Ch 131 at 176 where the issue was whether the right to use a communal garden could take effect as an easement. He said that:

“ ... the right conferred no more amounts to a joint occupation of the park with its owners, no more excludes the proprietorship or possession of the latter, than a right of way granted through a passage, or than the use by the public of the gardens of Lincoln's Inn Fields ... amount to joint occupation of that garden with the London County Council, or involve an inconsistency with the possession or proprietorship of the council as lessees.”

56. *Copeland v Greenhalf* [1952] Ch 488, a case that goes the other way, was a case in which a prescriptive easement to use a strip of land by the side of a private roadway for depositing vehicles and for other purposes connected with a wheelwright's business had been claimed. Upjohn J rejected the claim on the ground that:

“Practically, the defendant is claiming the whole beneficial user of the strip of land ... It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner ... ”

There may be arguments as to whether the facts of the case justified those remarks but, for my part, I would accept that if they did Upjohn J was right to reject the easement claim and to require the defendant, if he was to succeed in resisting the plaintiff's claim to remove him from the land, to establish a title by adverse possession.

57. It has often been commented that *Wright v. Macadam* was not cited to Upjohn J and the possible inconsistency between the two cases was addressed by Judge Paul Baker QC in *London & Blenheim Estates Limited v. Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278 where a right of parking had been claimed. He commented (at 1286) that the question whether the right to park that had been claimed was consistent with the nature of an easement was one of degree:

“A small coal shed in a large property is one thing. The exclusive use of a large part of the alleged servient tenement is another.”

I think, with respect, that this attempt to reconcile the two authorities was addressing the wrong point. The servient land in relation to a servitude or easement is surely the land over which the servitude or easement is enjoyed, not the totality of the surrounding land of which the servient owner happens to be the owner. If there is an easement of way over a 100 yard roadway on a 1,000 acre estate, or an easement to use for storage a small shed on the estate access to which is gained via the 100 yard roadway, it would be fairly meaningless in relation to either easement to speak of the whole estate as the servient land. Would the right of way and the storage right fail to qualify as easements if the whole estate bar the actual land over which the roadway ran and on which the shed stood, with or without a narrow surrounding strip, were sold? How could it be open to the servient owner to destroy easements by such a stratagem? In my opinion such a stratagem would fail. It would fail because the servient land was never the whole estate but was the land over which the roadway ran and on which the shed stood. Provided the servient land was land of which the servient owner was in possession, the rights of way and of storage would continue, in my opinion, to qualify as easements.

58. As to the right to park and the “ouster” objection, Megarry V-C in *Newman v Jones*, an unreported case in 1982 concerning the right of lessees of a block of 14 flats to park in the grounds of the block, said:

“I feel no hesitation in holding that a right for a landowner to park a car anywhere in a defined area is capable of existing as an easement.”

But Judge Paul Baker in the *London & Blenheim Estates* case formulated, and the Court of Appeal in *Batchelor v Marlow* [2003] 1 WLR 764 applied, a test that disqualified the right to park from existing as an easement if, per Judge Paul Baker:

“ ... the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else ...”

In *Batchelor v Marlow* Tuckey LJ posed the question at 768:

“Does an exclusive right to park six cars for 9½ hours every day of the working week leave the plaintiff without any reasonable use of his land, whether for parking or anything else?”

and gave the answer that:

“[The plaintiff’s] right to use his land is curtailed altogether for intermittent periods throughout the week. Such a restriction would, I think, make his ownership of the land illusory.”

For that reason the Court of Appeal rejected the claim to a prescriptive easement to park the six cars for the period mentioned.

59. In my respectful opinion the test formulated in the *London & Blenheim Estates* case and applied by the Court of Appeal in *Batchelor v Marlow*, a test that would reject the claim to an easement if its exercise would leave the servient owner with no “reasonable use” to which he could put the servient land, needs some qualification. It is impossible to assert that there would be no use that could be made by an owner of land over which he had granted parking rights. He could, for example, build above or under the parking area. He could place advertising hoardings on the walls. Other possible uses can be conjured up. And by what yardstick is it to be decided whether the residual uses of the servient land available to its owner are “reasonable” or sufficient to save his ownership from being “illusory”? It is not the uncertainty of the test that, in my opinion, is the main problem. It is the test itself. I do not see why a landowner should not grant rights of a servitudinal character over his land to any extent that he wishes. The claim in *Batchelor v Marlow* for an easement to park cars was a prescriptive claim based on over 20 years of that use of the strip of land. There is no difference between the characteristics of an easement that can be acquired by grant and the characteristics of an easement that can be acquired by prescription. If an easement can be created by grant it can be acquired by prescription and I can think of no reason why, if an area of land can accommodate 9 cars, the owner of the land should not grant an easement to park 9 cars on the land. The servient owner would remain the owner of the land and in possession and control of it. The dominant owner would have the right

to station up to 9 cars there and, of course, to have access to his 9 cars. How could it be said that the law would recognise an easement allowing the dominant owner to park 5 cars or 6 or 7 or 8 but not 9? I would, for my part, reject the test that asks whether the servient owner is left with any reasonable use of his land, and substitute for it a test which asks whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land.

60. If, which as at present advised I regard as doubtful, *Batchelor v Marlow* was correctly decided, I can see some force in the appellants' arguments regarding the pink land. The use that the servient owner can still make of the pink land, if two cars are parked there, is very limited. But it is the servient owner, not the respondents, who is in possession and control of the pink land and entitled to remain so. The respondents are entitled to do nothing with the pink land other than park vehicles on it, while the appellants are entitled to do what they like with the pink land provided they do not interfere with the respondents' right to park two cars there. For the reasons I have given I regard the "ouster" principle as inapplicable to this case.

61. The views I have expressed regarding the ouster principle owe a great deal to Alexander Hill-Smith's article "Rights of Parking and the Ouster Principle after *Batchelor v Marlow*" published in the *Conveyancer*, May-June 2007, at 223. I am in agreement with the conclusions expressed by Mr Hill-Smith at 231 to 234 and must record my indebtedness to him.

#### *The scope of the Da Store parking rights*

62. One of the points made on behalf of the appellants was that there is no apparent limit to the number of vehicles that might, in purported exercise of the Da Store parking rights, come to be parked on the servient land. It must be borne in mind, however, that the parking rights are rights appurtenant to Da Store. The respondents, or their successors in title to Da Store, are the only persons with servitudinal rights of access and of parking. Their rights permit them to allow others, their guests, licensees, tradesmen and the like, to have vehicular access to Da Store. These persons, however, have no rights of access other than such as the dominant owners can grant them. And the dominant owners' ability to authorise others to use the servitudinal rights to which they, the dominant owners, are entitled is limited to authorisations given for the purposes of their ownership of Da Store; their rights are appurtenant to Da Store and

are not rights in gross. The dominant owners' manner of exercise of their servitudal rights is limited also by the civiliter principle. If the exercise of those rights, whether by them or by others under their authority, goes beyond what is reasonable for the purposes of their ownership of Da Store, their exercise of their rights would be excessive, a trespass and amenable to restraint by interdict.

*The issues*

63. The agreed Statement of Facts and Issues identified five issues for your Lordships to consider. My response, shortly stated, to those issues would be as follows:

- (a) A right to park is capable of being constituted as an accessory right incidental to a servitudal right of vehicular access or as a servitude in its own right appurtenant to some identifiable dominant land.
- (b) In the circumstances of the present case such a right appurtenant to Da Store was created by the grant in 1973 of a vehicular right of access.
- (c) The rights of parking sought by the respondents are not inconsistent with the nature of servitudes and were validly created.
- (d) The manner of exercise of the rights of parking to which the respondents as owners of Da Store are entitled is limited by the principle of civiliter. The lower courts were correct to leave matters of detail regarding the exercise of those rights to be determined from time to time in accordance with that principle.
- (e) The terms of the Sheriff's Interlocutor as varied by the Extra Division were, in my opinion, sufficiently specific and clear.

64. Accordingly, and in agreement with the reasons given by my noble and learned friends Lord Hope of Craighead and Lord Neuberger of Abbotsbury for coming to the same conclusion, I would dismiss this appeal.

## LORD RODGER OF EARLSFERRY

My Lords,

65. This appeal raises an important and difficult issue in the law of servitudes. The essential question can be stated very shortly. A, the owner of land, sells off part of the land to B, together with a building that is likely to be used for residential purposes. In the disposition A grants B a servitude of vehicular access to the subjects over the neighbouring land which A retains. Due to the location of the dominant tenement, no car or other vehicle can enter or park on it. It is accepted that B can stop on the servient tenement for a short time near the entrance to the dominant tenement, e.g., to let off or pick up passengers and to load and unload goods. Has B, as the proprietor of the tenement with the servitude of access, the right to park a car or other vehicle on the servient tenement retained by A?

66. My noble and learned friends, Lord Hope of Craighead and Lord Scott of Foscote, have narrated the transactions and events in Shetland which have brought this issue before the courts. Your Lordships have variously described it as an “unfortunate case”, as a “sad one” and as an “unfortunate matter”. The parties are, however, adults and the dispute between them is genuine. Since the point at issue is difficult, it is not surprising that they have been unable to resolve it for themselves. In these circumstances they have simply chosen to exercise their right to have it resolved by the courts. Those on one side have decided to spend their own money on doing so; the Legal Aid Board has financed the other side. As a judge, I would not describe the resulting situation as sad or unfortunate: after all, courts exist and judges are paid to resolve such disputes, which are indeed the life blood of the common law.

67. Nothing suggests that the sale and conveyance of Da Store to Mrs Stuart in 1973 was anything other than an arm’s length commercial transaction. Like anyone else contemplating buying a house, it was up to Mrs Stuart to decide for herself whether Da Store met her requirements. The same applied to the first pursuer’s parents when they in turn bought Da Store from Mrs Stuart in 1975. Some problems with the property must have been obvious: for example, it was at the bottom of what amounts to a cliff, it was therefore impossible to take a car on to it or to park on it, you could only get down to it and back up by a steep flight of steps, you would have to carry all your supplies down the steps. For some, the peace and quiet and the views over Sandsound Voe would

be compensating advantages. But, for many people, either singly or in combination, the problems would make the property unsuitable, whatever the price. So they would not buy it. On the other hand, for those who could manage and were prepared to put up with the problems, the property might be worth buying at a price that would reflect the minuses as well as the pluses. Mrs Stuart and the first pursuer's parents must have thought so. Despite any problems, the pursuers have lived and raised their family there.

68. What matters for present purposes, however, is that, unless by specific agreement, the seller of a house does not warrant that it is suitable for occupation by any particular type of person who he foresees may want to buy the property. If, for instance, he is selling a flat at the top of a four-storey block with no lift, he gives no warranty that it will suit a couple with young children. So parents of young children have only themselves to blame if they buy the flat and then find that they cannot stand the hassle of hauling a baby, a buggy, a fractious older child, a dog and shopping up four flights of stairs. Similarly, an elderly couple cannot complain if they buy a house at the top of a steep hill and then find that they cannot manage the walk up from the bus stop. Houses or flats which are suitable at one stage in our lives may be quite unsuitable at a different stage. If a house turns out to be unsuitable, we cannot blame the seller. It is no business of his. Our only remedy is to move to somewhere that is suitable.

69. So, in the present case, Da Store at the bottom of a small cliff with access by a steep flight of steps might well be utterly unsuitable for a couple whose elderly mother was in the habit of babysitting but had difficulty going up and down stairs. Equally obviously, any couple with young children would see the problems in possibly having to leave them unsupervised in a house at the water's edge, while going up and down the steps to get the shopping or other items from the top. Even if the sellers of Da Store could easily foresee that potential buyers might include couples with elderly parents or young children, who would encounter these problems, they would not be held to have given any warranty that the property would be suitable for them. In practice, the obvious problems would tend to restrict the number of potential purchasers in the market. This in turn would tend to lower the price that a purchaser would have to pay for the property.

70. All this has to be kept in mind when considering the pursuers' claim to a real right to park on the third defender's land. The disposition from Mr Georgeson to Mrs Stuart in 1973 simply granted her "a right of

access from the branch public road through Sandsound.” The defenders accept, however, that the access thus granted included vehicular access from the branch public road to a point on what is now the third defender’s land near where the steps go down to Da Store. The grant did not define the route by which the access was to be taken. Again, the route is not a matter of dispute: it originally followed an old public road, but that was rather inconvenient and, by agreement of all the parties concerned, it was varied in 1993. Even before that, in 1988, with the third defender’s knowledge, the first pursuer, who had acquired Da Store from his parents in 1985, had spent money on creating a small area of hardcore near the gate to Da Store where his car could be turned and parked. In consideration for the first pursuer’s consent to the variation of the route in 1993, the defenders agreed that the area of hardcore on the third defender’s land should be extended to allow the second pursuer to park her car there. Although the pursuers originally had an alternative claim that, as a result of these and subsequent events, they had acquired a real right to park two cars by reason of the defenders’ acquiescence, that claim failed in the courts below and was not renewed before the House. So – perhaps somewhat artificially - the legal issue of the pursuers’ right to park has to be considered by reference to the situation in 1973 without reference to these subsequent events. Nevertheless, those events do form part of the background to the appeal and they show that for many years the defenders were quite prepared to go along with a situation where the pursuers parked two cars on the pink area of ground. The defenders also knew that the pursuers had spent money in reliance on that being the situation. Trouble arose only when the third defender wanted to incorporate that area into his garden.

71. The Court of Session granted a declarator to the effect, inter alia, that the right of access to Da Store over the third defender’s property “has, as an incident thereof, accessory rights over the servient tenement in favour of the dominant tenement (i) to park, on the servient tenement, such vehicles as are reasonably incidental to the enjoyment of said access to the dominant tenement...” In their written case before this House counsel for the pursuers indicated that, while they were content to put their case on the basis that the right to park on the servient tenement was incidental or accessory to their servitude of access, they did not concede that in Scots law a free-standing servitude right to park on a neighbour’s land could not exist.

72. Although, therefore, the House is not asked directly to decide whether a servitude of parking can be recognised in Scots law, I doubt whether the question can be avoided. As I understand the declarator pronounced by the Extra Division, it finds that the pursuers, as

proprietors of the dominant tenement, have a real right to park vehicles on the servient tenement: whoever owns the dominant tenement with its right of access over the servient tenement has an accessory right to park on the servient tenement. That is nothing other than a description of a servitude of parking. If some doctrine of Scots law would prevent such a servitude right to park being granted expressly and independently, I am unable to see how the right could exist as an incident of the servitude of access.

73. While a servitude of parking may seem at first sight to raise issues that relate peculiarly to this day and age, that is scarcely so. In principle, the same point could have arisen with reference to the parking of carriages or wagons under classical and later ancient Roman law, or at any stage between the time of Justinian and today. The problem does not feature in the Digest - but that may just be due to an accident of the compilers' work in reducing the jurists' writings for inclusion in the Digest. Your Lordships were not referred to any later civil law discussion. Certainly, the mere fact that a right equivalent to parking was not recognised as a praedial servitude by Roman law would not, of itself, prevent Scots law from recognising such a servitude, just as it has recognised, for instance, a praedial servitude to take coal and a praedial servitude of fuel, feal and divot, neither of which was recognised by Roman law. Similarly, in regard to bleaching Lord St Leonards LC commented in *Dyce v Hay* (1852) 1 Macq 305, 312-313, that he entirely agreed with the judges of the Court of Session:

“that there is no rule in the law of Scotland which prevents modern inventions and new operations being governed by old and settled legal principles. Thus, when the art of bleaching came into use, there was nothing in its novelty which should exclude it from the benefit of a servitude or easement, if such servitude or easement on other legal grounds was maintainable. The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles.”

74. Even though parking is not a new phenomenon, I would not regard the apparent silence on the matter of the traditional sources of Scots law on servitudes as an indication that such a servitude would be fundamentally alien to Scots law. Ultimately, as with any proposed

development of the law, the position must be determined by applying the relevant principles to the situation in Scotland today.

75. Looking at the question as a matter of principle, like Lord Scott, I see no reason why a servitude of parking should not be recognised in Scots law. Of course, like any other servitude, it would have to benefit the dominant proprietor in his enjoyment of the dominant tenement. One possible example would be a case, like the present, where he enjoys a servitude of vehicular access to his land but has nowhere to park his car there. The proprietor of the servient tenement could grant him a separate servitude right to park which would contribute to the dominant proprietor's enjoyment of his servitude of access. This would be in line with the decision of Maecianus that the dominant proprietor of a servitude right to pasture animals on his neighbour's land can acquire a separate servitude right to erect a hut on the servient land to protect him from the winter weather while he is looking after his animals there: D.8.3.6.1, Paul 15 ad Plautium. A similar right has been recognised in Scots law: Cusine and Paisley, *Servitudes and Rights of Way* (1998), paras 3.47 and 3.53. By contrast, for example, the owner of a house and garden could not acquire a servitude right to park cars on his neighbour's land in connexion with a business which he ran elsewhere since this would have nothing to do with his enjoyment of his house and garden.

76. Of course, a servitude of parking would involve a car being placed on the neighbour's land and this would prevent the neighbour using that part of his land when the car was stationed there. But that cannot, in itself, be a conclusive objection to the existence of such a servitude since many well-known servitudes involve structures being erected or objects being placed on the servient land. The most obvious example, perhaps, is the servitude of aquaehaustus and aquaeductus, where the dominant owner may construct a permanent dam on the servient land at the source and then lead the water from there through pipes permanently laid over the servient tenement. Another example is the right to erect a hut or bothy on land over which there is a servitude of pasturage. Yet another possible example is the right of bleaching, referred to by the Lord Chancellor in *Dyce v Hay*, by virtue of which the cloth would be laid out on the servient land from time to time: Cusine and Paisley, *Servitudes and Rights of Way*, para 3.12. In Roman law Neratius considered that the owner of a quarry could acquire a servitude right to cast rocks and stones on to neighbouring land and to leave them lying there until they could be taken away: D.8.3.3.2, Ulpian 17 ad edictum. Of course, the more the servitude prevents the servient owner from using his land in the normal way, the more he can be expected to

charge in return for granting the servitude and, correspondingly, the lower the price that any purchaser will pay for the land burdened with the servitude.

77. For these reasons I would not reject the pursuers' claim to have a right to park on the third defender's land on the basis that a servitude of parking cannot be recognised by Scots law. Nor would I reject it on the basis that the specific grant of one servitude can never include the implied grant of another. That would be inconsistent, for example, with the decision of this House in *Chalmers Property Investment Co Ltd v Robson* 20 June 1967 unreported.

78. The case concerned a cottage on Mull which had no public water supply. In terms of her title, however, the owner had a right to draw water for domestic purposes from a "spring or well" on neighbouring land, but without any guarantee as to the sufficiency, purity or suitability of the supply for those purposes; "and for the above purpose to lay and maintain at the expense of my said disponent and her foresaids adequate water pipes for the purpose of withdrawing water for the purposes aforesaid." The owner of the cottage employed a firm, carried on by the man behind the company that owned the land on which the source of water lay, to construct a piped water supply from the source to her cottage. The work was not done satisfactorily and the owner terminated her contract with the firm and employed other contractors to complete the necessary works, which included a dam and settling tank. The company then threatened to remove the entire installation, on the ground that, due to a misdescription of the source of the water in the title, the owner of the cottage had no servitude whatever over its land. She brought proceedings to interdict the company from interfering with her water supply.

79. By the time the case reached this House, the contention for the company appears to have been that, even if the misdescription point were rejected – as it was – the settling tank should none the less be removed, on the ground that, in terms of the disposition, the dominant proprietor had no right to do anything more than lay water pipes on its land. Affirming the decision of both the Lord Ordinary (Kissen), 1965 SLT 381, and the First Division (Lord President Clyde, Lord Guthrie and Lord Migdale), 20 May 1966, unreported, the House held unanimously that the company was not entitled to remove the settling tank.

80. The company admitted that some kind of dam was necessary to provide a source from which water would flow into the pipe. Lord Reid continued:

“And if it is equally necessary for the enjoyment of the right to draw a domestic water supply from this point that there should be a settling tank, in my opinion the making of such a tank is equally authorised by the grant. The owner of the dominant tenement must not erect works of a size or character beyond what is necessary for the enjoyment of the right granted. But it must have been the intention of the granter of the servitude should have a right to construct on his land such works as were essential to make the servitude effective, and I find nothing in the wording of the grant to prevent that from being done.”

Pointing out that the evidence showed that, without the settling tank, the pipes became blocked, Lord Guest put the matter in this way:

“If the respondent was entitled to draw water from the stream and she was entitled to collect the water by means of a dam and to take it by means of pipes for domestic purposes, my view is that the servitude comprehended that she would be given an effective water supply system. *Ferguson on The Law of Water*, page 264, states the matter thus: ‘The principle appears to be that that may be done which is essential to the carrying out of the purpose for which the original servitude was granted....’ Without a settling tank the water supply granted by the servitude would be rendered useless as the pipes would be at times blocked. Whether the settling tank be regarded as part of the system of water pipes or as a means of obtaining an effective supply of water, I am clearly of opinion that the appellants cannot object to the presence of the settling tank.”

81. Although, therefore, the right to construct and maintain a settling tank on the servient land was different from the right to lay pipes on the land, a servitude right to lay pipes could carry with it an implied right to construct a settling tank on the servient land, where the works “were essential to make the servitude effective” (Lord Reid) or were “essential to the carrying out of the purpose for which the original servitude was

granted” or were a “means of obtaining an effective supply of water” (Lord Guest).

82. These passages indicate the approach which should be applied in a case, such as the present, where an express servitude has been granted and the issue is what, by implication, is authorised by that grant. Applying that approach, I am satisfied that, in principle, the express grant of a servitude of access in the pursuers’ title could carry with it an implied right to park on the servient land if this was essential to make the servitude of access effective or to carry out the purpose for which the servitude of access was granted or was a means of obtaining an effective right of access. On that basis, for example, if pedestrian access was to be obtained over many miles of servient land, a right to stop and rest for some time on the servient land might readily be implied. But I see no basis for implying into the grant of a servitude of access, which is effective, further rights simply on the basis that they would be “for the convenient and comfortable use of the property.”

83. In a very real sense, it can be argued that a right of parking is not essential to make the servitude of access effective or to carry out the purpose for which the servitude of access was granted. For instance, visitors to the property in the shape of postmen, meter readers and others obtain access in their vans by virtue of the servitude without needing to stop for any substantial time. Undoubtedly, also, the owner of Da Store exercises his right of vehicular access when he is driven to the top of the steps by a friend or relative, or in a taxi or post-bus or the local equivalent. He also exercises his right of vehicular access quite effectively when he himself drives to the top of the steps and drops off his things or sets down his passengers with their goods and chattels. On one view, that does not cease to be the case simply because, if no one else will do so for him, he must then park the car some 150 yards away and return to the house on foot. The right to park is not needed for the owner to get vehicular access to his property: it is only needed so that he can remain there with his car at hand until he chooses to leave again in his car. On that approach, a right to park is not a necessary incident of a servitude of access any more than a right to lay up a vessel between voyages is a necessary incident of a public right of navigation: *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1976 SC 161, 166, per Lord Dunpark. As I explain below, but for the sheriff’s assessment of the particular circumstances of this case, that is the view which I would favour.

84. One alternative view is that, if the owner were obliged to remove his car to a place beyond the third defender's land and to gain ultimate access to his property on foot, the owner could not gain personal access to his property in a vehicle of a kind permitted by the grant and, in the words of Lord Philip, 2005 1 SC 281, 306, para 90:

“His right of vehicular access would therefore, in my view, effectively be defeated. While it is well settled that a grant of a servitude right falls to be construed strictly in order to minimise the burden on the servient tenement, the grant cannot be construed so strictly as to defeat the right granted. It follows that, even if a more stringent test than that of convenience is applicable, it also would be satisfied in the circumstances of this case.”

Whether or not Lord Philip's reasoning is correct, it is clear-cut and readily applicable: if, because you cannot park on your own land when you get there, you have to go back, park the car off the servient land and then return on foot, your right of vehicular access is effectively defeated. That would apply in all such cases, whatever the nature of the ground between the dominant property and the parking place and whether or not the intervening country was open and exposed or protected and sheltered. An approach, such as the sheriff's, which relies on those features, is therefore fundamentally different.

85. When assessing the rival contentions of the parties, I find it hard to ignore some very ordinary facts of modern life. Especially in cities, there are many flats or houses without any adjacent land on which cars can be parked. That feature is often a significant factor for people when deciding whether to buy the flats or houses and, if so, at what price. Those who own such properties can get to them by car, but are very familiar with the need to drop off their shopping and passengers before trekking off to search for a resident's parking space some streets away. Those with young children and no-one to watch them have to take the children to the parking place and then trail them back home, whether up or down a steep hill, whether through icy rain or in blistering sun. These are simply the inevitable everyday consequences of the owners' decision to buy the house or flat in question. If they find the situation intolerable, they have only themselves to blame. If they can afford to move, they can try to find another suitable house or flat which has parking. Otherwise, they simply have to put up with their predicament.

86. Unlike your Lordships, I am, accordingly, utterly unmoved by the supposedly intolerable sufferings of owners of Da Store who might face that dire modern dilemma of leaving their children unsupervised or taking them on foot, back and forward, up or down a significant slope in open and exposed country. But, in reality, their plight is irrelevant. Even if, when granting the servitude of access to Mrs Stuart back in 1973, Mr Georgeson foresaw the tribulations of future car owners with elderly parents and young children, he was no more obliged to provide an access that would be suitable for them than he was obliged to provide a house that would be suitable for them. Purchasers, who know their own requirements, have to think for themselves. That is why only such rights as are “essential” to its effective operation are to be implied into an express grant of a servitude. In other words, before a right is implied, it must be necessary for the effective enjoyment of the servitude of access by anyone at all. If the purchaser wants more, he must negotiate and pay for it and have an appropriate provision inserted in the disposition.

87. The pursuers’ claim runs up against another significant difficulty. Although the grant of the servitude of access in the first and subsequent dispositions was to the owner or owners, it is accepted that any other residents or lawful visitors to Da Store can use the access. The disposition does not spell out any limit on the numbers of people who can exercise the servitude of access in this way. Usually the absence of any limit on the right causes no difficulty since even a considerable number of cars and other vehicles passing backwards and forwards across the servient land and on to the adjacent subjects at either end will not cause any very great disturbance. So it would be quite normal for members of the family, guests, postmen, tradesmen and others to go backwards and forwards. While postmen and meter readers, for example, will usually pay only a short visit, members of the family and their guests may well stay for a while. Depending on what has to be done, builders, carpenters, electricians and plumbers may also be at the house for days or even weeks. If all these people can park on the dominant land, this traffic still causes no difficulty and can easily be accommodated within the usual right of access.

88. But the position is much more difficult where parking is not available on the dominant tenement. On the hypothesis that the right to park is essential to the effective exercise of the right of access, one would expect that all those who could have access to the dominant property across the servient land would also be able to park on the servient land if they wanted to and if space were available. So all the residents, guests and tradesmen would be able to park on the servient

land for as long as they had a legitimate reason to be in the dominant property. The contrast with the position of urban tradesmen, who routinely have to park streets away, could not be more stark. Alternatively, perhaps, some limit on the number of persons who could claim to park on the servient land would simultaneously limit the number of people who could enjoy the right of access and its necessary ancillary right of parking. But that smacks of the tail wagging the dog. I remain unclear whether either of these approaches or some other approach is said to be correct. It follows that the scope of the implied right remains uncertain.

89. Prima facie the problem is not confined to a situation, such as the present, where there is no parking at all on the dominant land. Suppose that there is room for parking one car there but, quite foreseeably, the family has two cars. By granting the right of vehicular access to such a property, is the servient owner taken to have impliedly granted the dominant proprietors the right to park the second car on the servient land, on the basis that this is reasonably necessary for their enjoyment of the servitude of access and the nearest alternative parking is up a slope some 150 yards away? If the pursuers' submissions are accepted, it is hard to see why not. The same would seem to apply on Lord Philip's approach.

90. The extraordinary result of the pursuers' submissions therefore seems to be that, if you are lucky enough to have a servitude of access to your house which has no parking or only limited parking, you get free parking on the servient owner's land because any other solution, involving parking up a slope some 150 yards away, would be intolerably inconvenient for you, whereas, if you reach the same home via a public road, everyone accepts that you must just gird your loins and traipse off to find a parking space elsewhere.

91. The length of time for which any cars can be parked on the servient land by virtue of this ancillary right is another significant issue. Lord Marnoch considered, 2005 1 SC 281, 289, para 24, that a visitor would be entitled:

“to park his vehicle for the duration of his visit which might extend over hours, nights, weeks or even months. And, once that is accepted, there is, in my opinion, no real distinction between what I have just described and a right on the part of the occupier to park for unlimited periods of

time in connection with the reasonable use of his property.”

For Lord Philip, 2005 1 SC 281, 306, para 90, if the dominant proprietor were prohibited

“from parking his vehicle [near the top of the steps] until he wished to leave again (whenever that might be) he would be obliged to remove it to a place beyond the third defender’s land and to gain ultimate access to his property on foot. In those circumstances he could not gain personal access to his property in a vehicle of a kind permitted by the grant. His right of vehicular access would therefore, in my view, effectively be defeated.”

92. The defenders sought to derive an argument against that approach from the decision, in a rather different area of the law, in *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1976 SC 161. In that case the defenders laid down moorings on the seabed in Fairlie Bay. They argued that the right to lay moorings was a necessary incident of the public right of navigation. The pursuers maintained, however, that the right to anchor was restricted to temporary anchorage in the course of passage and that it did not extend to quasi-permanent anchorage between voyages. Lord Dunpark, at p 166, came to the conclusion

“that the public right of navigation is restricted in the manner for which the pursuers contend. In my opinion, the earliest point of time when navigation begins is when a vessel is being prepared for a voyage, and navigation ends when the ship is left, either unmanned or with a caretaker crew, at the end of a voyage. A ship moored between voyages is not being navigated.... The laying up of a vessel is, in my opinion, an incident of ownership; it cannot properly be regarded as a *necessary* incident of the right of navigation.”

As already indicated, by analogy, it could be said that parking a car in the interval between reaching the dominant property and leaving again was not a necessary incident of a servitude of access.

93. In his submissions on behalf of the defenders, Mr Mitchell QC sought to distinguish the *Fairlie* case by arguing that parking near the dominant tenement could always be seen as an integral part of the exercise of the proprietor's servitude of access, since the car would be sitting there after the proprietor had driven to his property by the access route, in order to be available for him to make the round trip back out by the same route. But that is plainly an unsound argument. An owner who comes home in his own car across the servitude track is under no obligation to go out in the same way. He can walk out if he wishes. In theory at least, in this case he can leave by boat. A friend can pick him up by car to go for a night out. He can be picked up by taxi and taken to the airport to begin a journey of many months. But even though I would reject that particular argument, it does respectfully seem to me that, if the implied right of parking on the servient land is held to be necessary in order to make the right of vehicular access effective, then cars must indeed be able to park for as long as Lord Marnoch and Lord Philip suggest. The impact would probably not be very great in this case where the servient land is relatively extensive, but the position might well be very different in other cases.

94. Various solutions to the difficulties in defining the scope of any accessory right of parking have been suggested. Reference has been made to Bankton's observation in his Institute 2.7.18 that where a right of way is granted at large, or indefinitely, the dominant proprietor "may chuse it in any place most commodious for him, but not invidiously to the other's detriment." But Bankton merely means that the dominant proprietor must not "invidiously", ie, deliberately, choose a route for the right of way which will harm the servient proprietor. His point has nothing to do with the present problem. The idea that questions of how and precisely where the right to park is to be exercised ought to be capable of being resolved by the parties acting sensibly is nothing more than a pious hope in a situation, such as the present, where, for years, the parties have been quite unable to reach any such agreement. I therefore need not explore the issues relating to the effect of any such agreement between the proprietors. It is well defined servitudes that make good neighbours.

95. Finally, it is said that such questions can, if necessary, be decided by reference to the rule that the servitude right must be used civiliter. But, as Lord Hamilton pointed out, 2005 1 SC 281, 301-302, para 73, in part at least, this contention rests on a misunderstanding of that doctrine, which only comes into play once the scope of the servitude has been determined. The civiliter requirement:

“is concerned with the manner of the exercise of a servitude right, not with the prior question of the true extent of it. In *Robson v Chalmers Property Investment Co Ltd* Lord Kissen cited with approval the passage from Rankine on *Landownership* (p 417) where the learned author states: ‘The presumption [for freedom] acts in three ways: first, by demanding certain known modes of constitution; next, after proof of the existence of some right of servitude, by presuming in favour of that degree thereof which shall be least burdensome to the servient tenement; and lastly, when the servitude and its degree have been made out, by directing that it shall be exercised civiliter’. Thus, any question of exercise civiliter arises only after the extent of the right has been identified.”

So, once the servitude right and its scope are established, it “must be rendered as little burdensome to the servient tenement as is consistent with its fair exercise” (*Sutherland v Thomson* (1876) 3 R 485, 495 per Lord Gifford) or it must be exercised “so as to impose the least possible burden on the servient tenement, consistently with the fair enjoyment of this right by the dominant proprietor (*Hill v Maclaren* (1879) 6 R 1363, 1366 per Lord Justice Clerk Moncreiff). For example, where I have a servitude of vehicular access over your land but the route is unspecified, I must take the route which is practicable for me but least burdensome for you, whether that is the shortest route or a longer route that does not cut across your best arable land. But the crucial point is that the civiliter doctrine does not itself determine the extent of the servitude right; it only comes into play in order to regulate how that right is to be exercised.

96. So, in the present case, the civiliter doctrine could not be used to determine how many cars could be parked by reason of any accessory right or to curtail the time for which cars could be parked. These points relate to the extent of the pursuers’ servitude. At most, the civiliter doctrine might be used to help fix where on the servient land any right of parking could be exercised.

97. My Lords, for all these reasons, to judge by the sheriff’s written findings of fact, I should myself have rejected the idea that in the circumstances of this case an implied right to park a car or cars on the servient land was necessary to make the express grant of vehicular access to Da Store effectual. On the other hand, I am conscious that I may have underestimated the disadvantages to the owners or visitors in

having to park at the top of the lower branch public road and walk to and from the house - a trip which would necessarily involve “a significantly steep pedestrian descent or climb in open and exposed country” (finding in fact 16). As his fourth finding in fact and law shows, these disadvantages clearly weighed heavily with the sheriff who had inspected the property. I cannot exclude the possibility that relevant and unusual aspects of the physical situation, which are not fully apparent from the text of finding in fact 16, may have helped to shape his determination that a right to park was, in effect, necessary for the convenient use of the property. While the test the sheriff was applying is not well formulated, I am satisfied that, given his appreciation of the situation, he would equally have considered that an implied right to park on the servient land was necessary to make the express grant of vehicular access effectual. With considerable hesitation, I have accordingly concluded that, although it is open to an appellate court to differ from the sheriff on this kind of finding in fact and law, it would be unsafe to do so in this case.

98. In the particular circumstances, I am therefore prepared to yield to the sheriff’s conclusion that a right to park should be implied into the right of access. In reaching that view, I have, of course, had regard to the fact that, in substance, your Lordships share the sheriff’s appreciation of the situation. I emphasise two points, however. First, I am unable to accept Lord Philip’s approach that, in itself, the absence of a right to park on the servient land would effectively defeat any grant of vehicular access to a dominant tenement which had no room for parking. Secondly, I am by no means satisfied that a right to park on the servient land should readily be implied into the grant of a servitude of access simply because there is no possibility of parking on the dominant land and the nearest place to park, apart from the servient land, is up a slope and some 150 yards away.

99. For these reasons I would dismiss the appeal. For the reasons given by Lord Hope, I would also leave the interdict standing.

## **LORD MANCE**

My Lords,

100. I have had the benefit of reading in draft the opinions of all of your Lordships.

101. In agreement with Lord Hope of Craighead and for the reasons he gives, I consider that, in the light of the Sheriff's findings and the unusual topography of the two properties, the express servitude right of vehicular access possessed by the respondents as owners of Da Store over the appellants' land carried with it an ancillary right to park vehicles on the appellants' land in the area near Da Store, available for exercise so far as reasonably necessary for the enjoyment of the servitude. I find compelling the reasons that Lord Hope gives in paragraphs 31 to 36 for reaching this conclusion.

102. Having read what Lord Scott of Foscote and Lord Neuberger of Abbotsbury say on the point, I also see great force in the alternative way in which the respondents put their case, viz, that a right to park vehicles in the relevant area is both capable of existing in law and, in the light of the Sheriff's findings and the topography, to be implied here as a servitude necessary for the convenient and comfortable enjoyment of Da Store in its contemplated use as a residence. If, as I consider, a right to park can exist as impliedly ancillary to an express servitude right of access over property retained, I find it difficult to think that it cannot exist as an independent servitude over the property retained when this is impliedly necessary for the convenient and comfortable enjoyment of the property disposed of. However, it is not I think necessary for me to express a final view on this.

103. I also agree with Lord Hope's reasons for considering a permanent interdict to be appropriate.

104. I too would therefore dismiss the appeal and adhere to the Extra Division's interlocutor.

## LORD NEUBERGER OF ABBOTSBURY

My Lords,

105. I have had the privilege of reading in draft the opinions of my noble and learned friends, Lord Hope of Craighead and Lord Scott of Foscote, both of whom have set the history of this unfortunate matter. I agree with them that this appeal should be dismissed substantially for the reasons they give. However, not least because my mind has changed, I would like to express in my own words the reasons for my conclusion on the central issue. That issue is whether the conveyance of Da Store together with ‘a right of access from the branch public road through Sandsound’ in the disposition of 3 September 1973 (“the Disposition”) carried with it the right in the purchasers to park (by which I mean to leave on a relatively long term basis) motor vehicles on the servient tenement, i.e. on the land retained by the vendors.

106. The reasons advanced on behalf of the appellants as to why the Disposition did not carry with it the right to park appeared to have three strands. First, that the words of the grant cannot expressly, and do not impliedly, carry with them a right to park. Secondly, that no right to park could have been intended because it would be virtually limitless in nature. (In a sense, this point can be said to be an aspect of the first, but it is conveniently considered separately). Thirdly, that, even if the right to park were otherwise to be implied, it could not, as a matter of law, have been included in the grant, at least so as to bind successors of the vendors. I propose to consider those three arguments in turn.

*The first argument: the words of grant do not include a right to park*

107. There is no doubt that the words ‘a right of access’ from a *terminus a quo*, i.e. the beginning of the way, to a *terminus ad quem*, i.e. the end of the way, do not as a matter of ordinary language carry with them a right to park a motor vehicle at or near the latter terminus. However, the fact that a right to park has not been expressly granted does not of itself automatically prevent such a right being claimed by the owner of the dominant tenement. The authorities relied on by the respondents show that such a right could, at least in principle, be claimed on two bases, which are conceptually, if somewhat subtly, different, although, as Lord Scott has pointed out, they may well involve very similar considerations, at least in many cases.

108. The first basis is that explained by Lord Campbell LC in *Ewart v Cochrane* (1861) 4 Macq 117 at 122-123, quoted in paragraph 27 of Lord Hope's speech. It amounts to this, that where the grantor disposes of part of his property, there is to be implied for the benefit of the grantee 'anything which was used, and was necessary for the comfortable enjoyment of that part of the property which is granted'; and, in this connection, necessity is to be judged by reference to what is 'necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant'. In England and Wales, there is a similar principle, namely that, on the sale of part of a piece of land owned by the grantor, 'there will pass to the grantee all those continuous and apparent easements (by which, of course, [is meant] quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted' – see *Wheeldon v Burrows* (1879) 12 Ch D 31 at 49.

109. The fact that the enjoyment of the right or quasi-right may be temporarily suspended at the time of the disposition, because the property in question is vacant, cannot, to my mind, invalidate the application of this principle. If the property has been recently used for a specific purpose (in the present case, as a residence), and it is apparent that the grantee will pretty shortly be putting it to some use (particularly if it is the same or a similar use, as in my view it would have been here), then this principle (whether in Scotland or in England and Wales) would, in my opinion, at least normally apply. It could represent an artificial trap for a grantee, and would be contrary to the good sense of the principle, if it were otherwise.

110. As to the second basis, there is clear authority in English law for the proposition that 'the grant of an easement is *prima facie* also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment' - per Parker J in *Jones v Pritchard* [1908] 1 Ch 630 at 638. Subsequently, in *Pwllbach Colliery Company Ltd v Woodman* [1915] AC 634 at 646 to 647, the same judge, then Lord Parker of Waddington, described the decision in *Jones v Pritchard* as being within a 'class of cases in which easements impliedly may be created', not because of 'the terms of the grant itself', but because of 'the circumstances under which the grant was made'. In para 12.124 of their book, *Servitudes and Rights of Way* (1998), Cusine and Paisley state that 'not only does a servitude permit activity falling squarely within its scope, but also activities which are ancillary to that primary activity',

and they go on to say that Parker J's formulation is also 'a statement of the position in Scots law'.

111. It would be surprising if that were not the law in Scotland. It accords with good sense, and it is a point on which one would not expect Scots and English law to differ. While some aspects of the juridical nature, origin and incidents of servitudes in Scotland are different from those of easements in England and Wales, there are many aspects of similarity, as can be appreciated even from a quick perusal both of Cusine and Paisley and of Gale on *Easements* (17<sup>th</sup> edition, 2002). Servitudes and easements are inherently very similar, and there is very little difference between life-styles and standards north and south of the Cheviots. Further, courts in both jurisdictions have expressly and beneficially relied on each other's analyses and developments in this area of law.

112. Thus, there are cases where a right is implied where it is necessary for 'the comfortable enjoyment' or "the convenient and comfortable enjoyment" of the hereditament which is severed (as in *Ewart*), and there are cases where a right is implied because it is 'reasonably necessary' for the 'exercise or enjoyment' of an expressly granted right (as in *Jones v Pritchard*). In the latter type of case, it seems to me important to focus on the dual nature of the requirement that the alleged implied right be 'reasonably necessary'. Without the necessity, there would be the danger of imposing an uncovenanted burden on the servient owner, based on little more than sympathy for the dominant owner; without the reasonableness, there would be a danger of imposing an unrealistically high hurdle for the dominant owner. In the former type of case, it seems to me that the test is effectively the same: the references to "comfortable enjoyment" and "convenient and comfortable enjoyment" being equivalent to the reasonableness in the latter type of case.

113. In fact, it appears to me that these two types of case are no more than examples of the application of a general and well established principle which applies to contracts, whether relating to grants of land or other arrangements. That principle is that the law will imply a term into a contract, where, in the light of the terms of the contract and the facts known to the parties at the time of the contract, such a term would have been regarded as reasonably necessary or obvious to the parties.

114. The respondents primarily put their case on the second of the two bases identified above, but they also rely on the first. Accordingly, the case was argued on the basis that the questions to be decided were (a)

whether the right to park vehicles on the servient tenement at the end of the way, that is at all near the gate at the top of the stairway referred to in paragraph 3 of Lord Hope's speech, would, at the time of the grant, that is in 1973, have been necessary for the convenient and comfortable enjoyment of the right of access granted by the Disposition, and/or (b) whether such a right would have been necessary for the convenient and comfortable enjoyment of the land granted by the Disposition.

115. These questions raise issues which are primarily to be determined by the first instance tribunal, namely Sheriff Scott Mackenzie. After a full and careful analysis of the evidence, he reached a number of conclusions, of which the following are directly relevant (with emphasis added):

“4. The dominant tenement is not reasonably capable of comfortable enjoyment without there being rights attached thereto to turn, to stop, to load, and unload vehicles and, as part of that unloading process, temporarily to place goods on the servient tenement (but with no right to store goods thereon) *and to park on the servient tenement adjacent to the dominant tenement...such number of vehicles as are reasonably necessary for the use of the dominant tenement.* Accordingly, the said rights were impliedly granted in the said Disposition *as necessary incidents of said right of access.*

5. Further and in any event were it the case that the right to park on the servient tenement had not been granted *as an incident of the right of access such a right being reasonably necessary for the comfortable enjoyment of the dominant tenement* it would fall to be regarded as having been impliedly granted as a separate right in the said disposition”.

116. Subject to one possible point, I consider that, at least on their face, the conclusions reached by the Sheriff in these two paragraphs, namely that the respondents had made out their case both on the second basis and on the first basis, are unexceptionable. He appears to have directed himself by reference to what was ‘reasonably necessary for the comfortable enjoyment’, which is the right test. The only possible criticism is that, at least until the last sentence of para 4, he seems to have directed himself in that paragraph by reference to what was reasonably necessary for the enjoyment of the dominant tenement, namely Da Store, rather than for that of the expressly granted servitude.

However, it is clear from what the Sheriff said in the last sentence of that paragraph, and indeed in the first part of the passage I have emphasised in para 5, that in para 4 he was considering the second basis and correctly directed himself in accordance with the test in *Jones*, whereas in para 5 he was considering the first basis and correctly directed himself in accordance with *Ewart*.

117. Accordingly, it appears to me to follow that the only way in which the appellants can succeed on their first argument in this appeal is if they are able to establish that there was no evidence on which the Sheriff could fairly have concluded that it was reasonably necessary, (a) for the enjoyment of the expressly granted right of way and/or (b) for the enjoyment of the dominant tenement, for the grantee under the Disposition to have the right to park motor vehicles near the gate at the top of the stairway. On this point, the unusual facts of the present case, particularly when taken together, lead me to the conclusion that the Sheriff was indeed entitled to reach the decision that he did, although I would rest the conclusion on a slightly different juridical basis from either of those adopted by the Sheriff.

118. So far as the centrally important facts are concerned, they appear to me to be as follows. First, it must have been clear at the time of the Disposition that the grantee, Mrs Stuart, was purchasing Da Store for a use which would require vehicular access along the way. It seems to me almost certain that that intended use would have been anticipated to be residential, which again was not really challenged by the appellants (although, bearing in mind its previous use, it is just conceivable that it would additionally have been for retail purposes). As is realistically accepted by the appellants, such a use would have undoubtedly required vehicular access (hence the grant of the servitude) along the way.

119. Secondly, the whole of the dominant tenement was on a significantly different level from the servient tenement, and in particular from the way over which the servitude was granted. The only land-based access to the dominant tenement was through the gate and down the stairway to which I have already referred. Accordingly, the parties would have realised that it simply would not have been physically possible for vehicles using the way to obtain access onto, let alone to stop turn or park on, the dominant tenement itself.

120. Thirdly, in the light of the relative narrowness of the way, and assuming that there was no right to park as claimed, the nearest location

where motor vehicles used to gain access to the dominant tenement could have been parked would have been on or near the branch road, i.e. further from the dominant tenement than the *terminus a quo* of the way. In other words, for anyone wishing to spend more than a transitory time in Da Store, the vehicular access along the way would have been largely illusory (at least unless the person concerned was a passenger in a motor vehicle): the vehicle would have to be parked on or near the branch road, so that access to the dominant tenement would have to be achieved by foot along the way.

121. Fourthly, at least as at the date of the Disposition, access to or from the dominant tenement from the branch road would have involved ‘a significantly steep pedestrian descent or climb in open and exposed country’ along the way, a route of around 150 metres, according to primary findings of fact made by the Sheriff. Particularly bearing in mind that the dominant tenement might be occupied by a family with young children, and, indeed, members who were elderly or infirm, this seems to me to be a relevant factor. Admittedly, such people could be dropped off and picked up by the able-bodied adult driver of a vehicle, who could park the vehicle on or near the highway. However, that would be inconvenient (and potentially worse than inconvenient at night or in very inclement weather), and could entail having to leave very young or very infirm people alone for a time.

122. Fifthly, the way in question was actually a public highway at the time of the Disposition. Subject to the possibility that the parties to the Disposition overlooked that fact, it strikes me as suggestive of the notion that the parties intended the grantee of the servitude to enjoy rather more rights than what would be enjoyed by a member of the public. That would tend to support the proposition that a right to park on the servient tenement would have been intended. I rely on this fifth point with some diffidence because it was not the subject of significant argument.

123. Sixthly, effectively as a result of the first four factors I have mentioned, it has been rightly accepted throughout by the appellants that the servitude not only extends to the coming and going of motor vehicles along the way, but also includes the right to turn round such vehicles, and to station such vehicles for the purpose of loading and unloading (people and goods), and even for short term visits (e.g. reading the meters, carrying out work and the like). Because of the relatively narrow width of the way throughout, it would have been impractical to turn a vehicle without going onto the servient tenement beyond the way. Similarly, it might have been impractical (and indeed

unlawful, not least in the light of the fifth factor I have mentioned, to stop a vehicle on the way even for a relatively short period. Accordingly it must have been envisaged that vehicles visiting Da Store would turn, and from time to time be stationed, off the route of the way, on the servient tenement. That renders it much easier to conclude that it must also have been intended that there be a right to park vehicles (i.e. to station them on a longer term basis) near the end of the way, i.e. on the servient tenement.

124. In these circumstances, it appears to me that the unusual facts of the case justified the ultimate conclusion reached by the Sheriff, namely that a right to park vehicles on the servient tenement was included by implication in the Disposition. It is right to emphasise that, essentially in agreement with my noble and learned friend, Lord Rodger of Earlsferry (whose draft opinion I have had the privilege of seeing), I do not consider that any of the above six factors, on their own, would have been enough to justify the Sheriff's conclusion. To hold otherwise would fall foul of the need for necessity or obviousness to which I have referred. It is the combination of all the six factors which persuades me that the Sheriff was at least entitled to reach the conclusion that he did. Having said that, I prefer to base this decision on what may be a slightly different juridical basis from either of the two bases on which the Sheriff rested his conclusion.

125. I have real doubts as to whether the Sheriff was correct to hold that the expressly granted servitude in this case could not reasonably be enjoyed without there being a right to park. It seems to me that there is force in the argument that the servitude could be fully enjoyed without there being such a right: its enjoyment would merely be of more limited value to the owner and occupier of Da Store. In paras 12.124 ff, Cusine and Paisley give examples of the application of the principle in *Jones v Pritchard*, and they are primarily concerned with ancillary rights required to enable a servitude, which has been granted, to be enjoyed (e.g. a right to repair a way over which a right exists, or a right to lay pipes to use a watercourse which has been granted). It appears to me that it would involve a questionable extension of the principle if it were applied to this case.

126. I am also dubious about the alternative argument that the nature of the dominant tenement itself, at least if one ignores the right of way, must carry with it the right to park vehicles on the servient tenement. Thus, if the Disposition had not included a right of way, then (ignoring

the possibility of a right of way being implied as a servitude of necessity) there would have been no right to park implied.

127. However, if one takes the combination of the land and the right of way granted by the Disposition, it appears to me that, when taken together, the six factors which I have identified justify the conclusion that the right to park was included by implication (subject to the two remaining arguments of the appellants). In other words, this is something of a hybrid case, as some of the facts which justify the implication of a right to park relate to the servitude and others relate to the nature of the dominant tenement. The combination of these factors justify the conclusion that the expressly granted right of way carried with it an implied right to park on the servient tenement, and it is on that basis that I would uphold the decision of the Sheriff, subject to the two outstanding points raised by the appellants.

128. If one is entitled to take into account events subsequent to 1973 (and it is unnecessary to express a view as to whether that is permissible), it seems to me that the facts set out in paragraphs 13 to 18 of Lord Hope's speech would serve to reinforce the conclusion reached by the Sheriff.

*The second argument: no limit on the number of parked vehicles*

129. On behalf of the appellants, it was argued that the notion that the parties, and in particular the grantor, under the Disposition, would have intended it to carry with it the right to park must be called severely into question by the apparently unlimited extent of such a right. The terms of the servitude are unlimited, so that, subject to being so intense as to involve some sort of abuse of the servitude, any number of vehicles would, on the face of it, be entitled to use the way as a means of access to the dominant tenement, from which it would follow that any number of motor vehicles would be entitled to be parked near the gate at top of the stairway, if there is indeed a right to park. The right of way could, it is true, only be enjoyed by the owners of the dominant tenement together with their guests, visitors, employees and agents, but, unless somehow impliedly restrained, this could on occasion amount to a substantial number of people, and therefore a very substantial quantity of vehicles being parked on the servient tenement at any one time.

130. In my view, this argument is wrong because it proceeds on the basis that the right to park is simply ancillary to the right of way granted by the Disposition: hence the extent of the vehicular right to park is said

to be co-extensive with the vehicular use of the way, which is unlimited, subject only to its becoming an abuse. However, as I have sought to explain, it seems to me that the right to park was implied into the grant of the dominant tenement coupled with the right of way, and that the implication arises as a matter of necessity as a result of the six factors I have mentioned. The normal principle is that an implied right is limited to a case of necessity (or obviousness), and this principle is itself based on the presumed intention of the parties. On the same principle, it seems to me that the nature and extent of any such implied right is limited to what is necessary (or obvious), taking into account the presumed intention of the parties.

131. On that basis, in the present case, it appears to me, at least on the evidence available, that the parties would have envisaged that the dominant owner would only be able to park two, or at the most, three, motor cars on the servient tenement. More than that would not, as I see it, have been obvious or necessary, for the projected use of Da Store at the time of the Disposition, bearing in mind the natures of the dominant tenement, of the servient tenement, and of the way.

132. First, there is the character and use of the dominant tenement. At the time of the Disposition, it was unoccupied, and therefore no significant use of the way for the benefit of the dominant tenement would have been in the process of being enjoyed. Its anticipated use, in a relatively isolated location by the sea, particularly in the light of its immediately preceding (residential) use, would have been primarily (and probably exclusively) for residential purposes which would not have involved, let alone required, very intensive or frequent parking of motor cars. Secondly, there is the contemporaneous use of the servient tenement in the vicinity of the *terminus ad quem*, namely near the gate at the top of the stairway, which was for residential and agricultural purposes. This indicates that only a relatively limited use and parking of vehicles would have been expected, bearing in mind what would otherwise be a potential interference with the peaceful location of the residence and with the agricultural use, if many vehicles used the way or were parked. Thirdly, there is the nature of the way itself, namely the very steep-incline of the land on which it was constructed, which would have led to the expectation of limited user.

133. In all these circumstances, it seems to me, at least as at present advised, to be pretty unlikely that the parties would have envisaged more than two, or conceivably three, vehicles connected with the dominant tenement being parked on the servient tenement at any one

time, save, conceivably, in unusual circumstances. It does not appear that this was an issue which was addressed in argument or canvassed in the evidence before the Sheriff in any significant detail. It may well be that, if it had been fully addressed and canvassed, there would have been more in the way of evidence and findings. Accordingly, it is difficult to express a concluded view on the topic. Fortunately, it is unnecessary for present purposes to reach such a view on this aspect. As already mentioned, the parties, or at least their respective predecessors, have effectively agreed that the dominant owners should be permitted to park two vehicles in a designated space, with the implication that, at the very least for the time being, that is indeed acceptable to the dominant owners and is acceptable to the servient owners.

*The third argument: the right to park cannot be a servitude*

134. On behalf of the appellants, it was contended that the right to park a motor vehicle cannot, as a matter of law, be a servitude. If that is right, then there is a powerful case for saying that it would defeat the respondents, at any rate on the second basis, and arguably also on the first basis, on which they rest their case - and, I think, on the basis upon which I would find for them. The fundamental point relied on to justify the contention that a right to park cannot, as a matter of law, be a servitude is that it would involve ‘the partial, or total, exclusion of [the servient] proprietor’: see para 3.50 of *Cusine and Paisley*. In my judgement, if a right to park a vehicle cannot, for this reason, be a servitude, then there is considerable force in the contention that, for the same reason, it cannot be claimed as a property (as opposed to a personal) right, whether implied or ancillary to a servitude. In other words, if the principle identified in para 3.50 of *Cusine and Paisley* does indeed prevent a right being a servitude, binding on successors of the grantor, then there is force in the contention that it also would prevent a right from being ancillary to a servitude, binding on such successors. I am prepared to assume in the appellants’ favour, without deciding, that that contention is correct.

135. The decision of Upjohn J in *Copeland v Greenhalf* [1952] 1 Ch. 488 has been relied on in England to support the contention that the right to park cannot be an easement. In that case, Upjohn J held that the right claimed in that case could not be an easement because “[p]ractically, the defendant is claiming the whole beneficial user” of the land in question – see at 498. This is consistent with what Lopes LJ said in *Reilly v Booth* (1890) 44 Ch D 12 at 26, namely that an easement could not give “exclusive and unrestricted use of a piece of land”.

Similarly in *Grigsby v Melville* [1972] 1 WLR 1355, Brightman J intimated that he considered, without having to decide, that an effectively exclusive right to use a cellar for storage could not have been an easement.

136. At least on the basis of the authorities to which we have been referred, the case law of England (which is more fully discussed in paragraphs 54 to 58 of Lord Scott's opinion) and of Scotland seem to me, at least so far, to have marched together on this issue. Not only is *Copeland v Greenhalf* one of the cases cited in this connection by Cusine and Paisley at para 3.50, but in that case Upjohn J relied on a Scottish case, *Dyce v Hay* (1852) 1 Macq 305, to support his conclusion. (However, given the differences between the principles governing land law in the two jurisdictions, and in particular the existence in Scots law of feudal conditions and real burdens, referred to by Lord Hope and unknown in English law, it would not be safe, in my view, to assume that the law on this issue in the two jurisdictions will necessarily be the same in every respect).

137. In my judgment, the grant of a right to park a single vehicle anywhere on a servient tenement which is large enough to hold, say, twenty vehicles, must be capable of being a servitude or an easement. In such a case, there is no specific place where the vehicle is to be parked, so that there is no specific area from which the servient owner can be said to be excluded. In this connection I agree with the view expressed in *Gale* at paras 973 and 974, supported as it is by the unreported decision of Sir Robert Megarry VC in *Newman v Jones* (1982), that provided, of course, there is a dominant tenement to which the right is appurtenant, there is 'no reason in principle why a right to park a car somewhere in the defined area should not be capable of being an easement'.

138. It was on this basis that His Honour Judge Paul Baker QC held that the right to park granted in *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278 was a valid easement. At 1286, he said that '[t]he matter must be one of degree. A small coal shed in a large property is one thing. The exclusive use of a large part of the alleged servient tenement is another'. A somewhat similar test was applied in *Batchelor v Marlow* [2003] 1 WLR 764, where the Court of Appeal held that a right to park vehicles for nine and a half hours a day was not an easement because it left "the servient owner without any reasonable use of his land whether for parking or anything else", and that it thereby rendered "his ownership of the land illusory".

139. Accordingly, it seems to me that, on the respondents' case, a right to park could only be prevented from being a servitude or an easement if it resulted in the servient owner either being effectively excluded from the whole of the land in question or being left without any reasonable use of that land. If the right to park a vehicle in an area that can hold twenty vehicles is capable of being a servitude or an easement, then it would logically follow that the same conclusion should apply to an area that can hold two vehicles. On that basis, it can be said to be somewhat contrary to common sense that the arrangement is debarred from being a servitude or an easement simply because the parties have chosen to identify a precise space in the area, over which the right is to be exercised, and the space is just big enough to hold the vehicle. Also, presumably on the respondents' case, such a right would indeed be capable of being a servitude or an easement if the servient owner had the right to change the location of the precise space within the area from time to time.

140. At least as at present advised, I am not satisfied that a right is prevented from being a servitude or an easement simply because the right granted would involve the servient owner being effectively excluded from the property. In this connection, the Privy Council in *Attorney-General of Southern Nigeria v John Holt & Company (Liverpool) Limited* [1915] AC 599 at 617 appears to have held that a right to store materials on land could be an easement although it involved the dominant owner enjoying an "exclusive" right to enjoy the property concerned. Citing *Dyce v Hay* in support, the Privy Council immediately went on to observe that, in considering arguments as to whether a right could be an easement "[t]he law must adapt itself to the conditions of modern society and trade". Further, the Court of Appeal in *Wright v Macadam* [1949] 2 KB 744 held that an apparently exclusive right to store coal in a small shed was capable of being an easement. Neither case was cited to Upjohn J in *Copeland v Greenhalf*.

141. There are also Australian cases which support the notion that a right could be an easement even if the servient owner was thereby excluded from the land concerned – see for instance *Mercantile General Life Reinsurance Co v Permanent Trustee Australia Ltd* (1988) 4 BPR 9534, and per Handley JA (who described parking as "a form of storage") in *Wilcox v Richardson* (1997) 8 BPR 97652.

142. Further, as Lord Rodger pointed out during argument in this case, a right of aqueduct (or water rights) or a right of drainage is often granted over a specific route, so that that route may often be the full extent of the servient tenement. In such a case, the servient owner is effectively excluded from the whole of his tenement, yet such a right has always been assumed to be capable of constituting a valid servitude or easement - see the discussions at paragraphs 3.80 (aqueduct) and 3.82 (drainage) of *Cusine and Paisley*, and paragraphs 6-49 to 6-57 (drainage) and 6.71 to 6.72 (water rights) of *Gale*.

143. Accordingly, I see considerable force in the views expressed by Lord Scott in paras 57 and 59 of his opinion, to the effect that a right can be an easement notwithstanding that the dominant owner effectively enjoys exclusive occupation, on the basis that the essential requirement is that the servient owner retains possession and control. If that were the right test, then it seems likely that *Batchelor v Marlow* was wrongly decided. However, unless it is necessary to decide the point to dispose of this appeal, I consider that it would be dangerous to try and identify degree of ouster is required to disqualify a right from constituting a servitude or easement, given the very limited argument your Lordships have received on the topic.

144. As I have mentioned, there are a number of cases which can be said to support the approach of the Court of Appeal in *Batchelor v Marlow*, although it may be possible to distinguish them. The point does not appear to be settled in Australia – see the difference of opinion in the recent case of *White v Betalli* [2007] NSWCA 243. I am also concerned that, if we were unconditionally to suggest that exclusion of the servient owner from occupation, as opposed to possession, would not of itself be enough to prevent a right from being an easement, it might lead to unexpected consequences or difficulties which have not been explored in argument in this case. Thus, if the right to park a vehicle in a one-vehicle space can be an easement, it may be hard to justify an effectively exclusive right to store any material not being an easement, which could be said to lead to the logical conclusion that an occupational licence should constitute an interest in land.

145. In the present case, it seems to me that no problem arises in this connection. The position on the ground as at the time of the Disposition, which can be judged by photographs which were in evidence before the Sheriff, indicates that there was open land all around the gate at the top of the stairway leading down to Da Store. Although this land seems to have been used for agricultural purposes, it does not appear that there

would have been any difficulty, or any significant harm to the interests of the servient owner, in the dominant owner parking two or three vehicles in a number of different locations near the top of the steps. In my judgment, therefore, even if (which is open to doubt, but need not be decided on this appeal) a right to park a motor vehicle in a specific space is incapable of being a servitude, that would not present a problem for the appellants in the present case as at 1973, the date of the Disposition: any right to park two or three vehicles near the end of the way would have been over an area significantly larger than that represented by the aggregate area of the spaces needed for those vehicles.

146. Since 1973, as Lord Hope has explained, the respective predecessors in title of the present parties effectively agreed that such a right to park as did exist would be limited to two vehicles at any time, and that it would be exercised in a space which effectively could only take two vehicles. The appellants, realistically to my mind, did not suggest that this agreement resulted in the loss of any servitude because it effectively barred any sensible use by the servient owner of the space. In my judgment, at worst from the point of view of the respondents, the agreement operated as an arrangement between the servient and dominant owners as to how the easement of parking would be enjoyed. If (which I would again leave open) the agreement was not binding on successors on title, then, once the servient or dominant tenement changed hands, the parties, unless they novated the agreement, would be thrown back on their respective rights and obligations prior to the agreement; in other words the right to park implied under the Disposition, free of any subsequent agreement, would revive.

### *Conclusion*

147. As to the permanent interdict, there is nothing I can usefully add to the observations of Lord Hope in paragraphs 41 to 43.

148. For these reasons, I think that the Sheriff was, to put it at its lowest, entitled to reach the decision that he did, and I too would dismiss the appeal and adhere to the Extra Division's interlocutor.