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may seem anomalous; if they were reclassified as subordinate real rights – involving, as servitudes do, a correlative position – they would become so open.[27]

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Accessory Rights in Servitudes

When, in 1998, neighbours in Shetland quarrelled over parking rights, they cannot have imagined that the dispute would finish up, almost a decade later, in the House of Lords. In one sense, therefore, it is correct to characterise *Moncrieff v Jamieson*[1] as an "unfortunate case" with a "prolonged and highly regrettable history".[2] But the case is also an example of "the life blood of the common law"[3] because it raises, and largely settles, the question of how accessory rights arise in the context of servitudes. Along the way, important things are said about the fixed list of servitudes, the rule that a servitude must not be repugnant with ownership, and the long-disputed question as to whether a servitude of parking is recognised in Scots (and English) law. Only the issue of accessory rights can be considered in this short note.[4]

Moncrieff v Jamieson concerned a house owned by the pursuers which adjoined the sea and could be reached from the landward side only by a private road running through the third defenders' land.[5] At one time both properties had belonged to the same person, but the pursuers' property was broken off by a disposition in 1973. This conferred "a right of access from the branch public road through Sandsound". Due to a steep fall in the land, it was not possible to take a car from the private road, over which access rights had been conferred, on to the pursuers' property, and the road was too narrow for a vehicle to turn. Accordingly, the pursuers' long-standing practice was to use part of the defenders' land for turning and parking. It was the defenders' challenge to that practice which sparked the current litigation, in which the pursuers sought declarator and interdict.

27 Credit for this observation – not made in the context of *Peart* – is due to Professor George Gretton.

1 [2007] UKHL 42, 2008 SC (HL) 1.

2 Paras 19, 42 per Lord Hope.

3 Para 66 per Lord Rodger.

4 For commentary on the case, see: D Bartos, "Advance to free parking? – *Moncrieff v Jamieson*" (2007) 75 SLG 203; R Paisley, "Clear view" (2007) 52 JLSS Dec/50; K G C Reid and G L Gretton, *Conveyancing 2007* (2008) 106; A Goymour, "Easements, servitudes and the right to park" (2008) 67 CLJ 20; M Hanley, " *Moncrieff v Jamieson*: easements, exclusionary use and elusive principles" [2008] Conv 144.

5 However, since the case was before the sheriff a new public road has in fact been built to within metres of the pursuers' property, with a turning circle at its terminus.

In the end, the dispute between the parties was a narrow one. It was accepted that the pursuers had a servitude of way over the road. It was further accepted that such a servitude was capable of carrying, by implication, certain accessory rights, and that those rights included, in the present case, a right to use the defenders' land to load and unload and to turn. But what was disputed was whether there was also an accessory right to park. At first instance, the sheriff held that there was such a right and granted decree in favour of the pursuers,[6] and in 2005 this was affirmed by an Extra Division of the Court of Session (Lord Hamilton dissenting).[7] Now the House of Lords has come to the same conclusion, although with more hesitation than might be indicated by a decision which, in the end, was reached unanimously.[8]

A. DOCTRINAL ATTRIBUTION

In deciding whether parking was included within the bare grant of a "right of access", the House of Lords had first to determine the basis on which accessory rights can be implied – a subject on which previous authority was sparse and inconclusive.[9] With the exception of Lord Rodger, who favoured a more stringent test,[10] their Lordships were in agreement that an accessory right would be recognised if it was reasonably necessary for the use and enjoyment of the servitude.[11] As for doctrinal attribution, the court seems to have viewed the right as an implied term of the original grant of servitude. Lord Neuberger indeed is explicit on this point,[12] treating the rule as an example 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.

Although a natural approach to take, this was not, however, an inevitable one. The fact that a right is "implied" does not require that it be implied *as a term of a contract*. The law can also imply rights by way of freestanding rules. The difference matters. In the context of accessory rights in servitudes, a freestanding rule asks what, today, is reasonably necessary for the use and enjoyment of the servitude, whereas a rule tied

6 2004 SCLR 135, discussed in K G C Reid and G L Gretton, *Conveyancing 2003* (2004) 68.

7 [2005] CSIH 14, 2005 SC 281, discussed in K G C Reid and G L Gretton, *Conveyancing 2005* (2006) 93.

8 [2007] UKHL 42, 2007 SLT 989.

9 See D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) paras 12.124-12.127.

10 Namely that the right should be essential to the effective operation of the servitude: see paras 82, 86.

11 Para 110 per Lord Neuberger. In different words but to similar effect, Lord Hope said, at para 29, that accessory rights were implied if they are "necessary for the convenient and comfortable use and enjoyment of the servitude".

12 Para 113.

to implied terms asks "what the parties must, if they had thought about it, have had in mind" as being reasonably necessary.[13] The former is a rule rooted in legal policy, the latter in the presumed intention of the parties at the time of the original grant.[14] It is not to be supposed that the House of Lords made a choice between these alternatives, because there is no indication that the possibility of a freestanding rule was canvassed in argument. Nevertheless, there is nothing surprising in the favour shown to an implied terms analysis. It is consistent with the standard view of implied servitudes[15] as an implied term of the disposition which effects the severance of one property from another, and it is consistent too with what has been described in England as a growing judicial tendency "to rest the right to an easement on supposed intention of the parties to the contract".[16]

Yet it is hard not to have misgivings about the result. Whatever its merits in the field of contract law, where it is a familiar presence, the doctrine of implied terms makes an awkward fit with the law of real rights. In the first place, servitudes, unlike contracts, bind third parties and affect successors, both of whom may be remote from the creation of the right. In the case of a servitude granted in, say, 1808, who is to say what circumstances surrounded its creation or what the parties might or might not have intended? And as matter of legal policy, why should it matter?

Secondly, a complicating factor, not present in contracts, is the principle that a granter is not to derogate from his grant. Arguably, its effect must be to restrict or exclude accessory rights in every case where the deed creating a servitude does so by reservation rather than by grant; for non-derogation means that there can be no "intention" to withhold rights from the grantee except by express words. As it happens, the servitude in *Moncrieff* was the subject of an express grant. If, instead, the servitude had been reserved from the 1973 disposition – if, in other words, it had been constituted in favour of the granter of the deed and not the grantee – the result of the case might have been different.

Thirdly, parties can only "intend" something which they can foresee – something which, as Lord Hope put it, "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".[17] But if accessory rights are tied to the intention of the original parties – of the parties of 1808 – they cannot readily encompass changes in the use of the property or in the general neighbourhood, let alone changes in society and in technology. The rights are historically determined.

13 Para 52 per Lord Scott. See also Lord Hope at para 30.

14 See Law Commission, Consultation Paper on *Easements, Covenants and Profits à prendre* (Law Com No 186, 2008) para 4.133.

15 As opposed to implied terms of servitudes otherwise created.

16 J Gaunt and P Morgan, *Gale on Easements*, 17th edn (2002) para 3-120. And see also Law Commission, Consultation Paper on *Easements* (n 14) para 4.123, where the passage from Gale is quoted.

17 Para 30.

Finally, a theory built on the intention of the parties can only apply to servitudes created by juridical act. The question of accessory rights for prescriptive servitudes thus remains unexplained and unexplored.

Each of these difficulties would be avoided if the idea of an implied term were replaced by a freestanding rule. The question would then become what is reasonably necessary for the enjoyment of the servitude and not what the parties are thought to have regarded as being necessary at the time when the servitude was first created. A contemporary test would replace a historical one.

B. LAW FROM OVER THE BORDER

The rule for accessory rights introduced in *Moncrieff* has its origins in English case law.[18] After expounding that case law, Lord Neuberger sought to justify its application to Scotland by an argument which would have been familiar to his Victorian predecessors:[19]

> 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 . . .

Some will take issue with the way in which this thought is expressed, but the thought itself seems broadly correct. The law of servitudes is indeed often close to the law of easements, and there is much to be learned in Scotland from the much larger case law generated in England.[20] If the rule on accessory rights applied in *Moncrieff* is law from over the border, as indeed is the law on implied servitudes as a whole,[21] it is none the worse for that. And if the rule is a poor one, as suggested above, it is a poor rule for England as well. The objection concerns quality and not provenance.

Finally, it should be emphasised that, while the law of servitudes is similar to the law of easements, it is by no means identical. For that reason among others it might be expected that a judgment in a Scottish appeal would employ Scottish legal terminology, make use of Scottish case law, and, except where a comparative

18 See in particular *Jones v Pritchard* [1908] 1 Ch 630; *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634. In the second of these cases, Lord Atkinson said (at 643): "From these authorities it is, I think, clear that what must be implied is, not a grant of what is convenient, or what is usual, or what is common in the district, or what is simply reasonable, but what is necessary for the use and enjoyment, in the way contemplated by the parties, of the thing or right granted."

19 Para 111. For those predecessors, see A Dewar Gibb, *Law From Over the Border* (1950) 57 ff; T B Smith, *British Justice: The Scottish Contribution* (1961) 83-89. Dewar Gibb's tart comment (57) is that "The convenience of this device, so economical of inquiry, is obvious."

20 Lord Neuberger's views may be compared with those of Lord Hamilton in the Inner House, who said (2005 SC 281 at para 79) that: "[A]lthough passing reference was made to certain authorities from England, I have not found these cases of assistance in determining the content of Scots law or in applying it to the circumstances of the case."

21 Implied servitudes were introduced to Scotland by the decision of the House of Lords in *Cochrane v Ewart* (1861) 4 Macq 117. This followed *Pyer v Carter* (1857) 1 H & N 916.

point is being made, expound the law of Scotland. Unhappily, that expectation is not sufficiently met in Lord Scott's speech in *Moncrieff*.

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Calling Up Trumps

Trouble is brewing on the Menie Estate. The scenic coastal area is the site of a proposed billion-pound development by the American tycoon and golf enthusiast, Donald Trump.[1] Planning permission for Mr Trump's development initially seemed certain. However, on 29 November 2007 the Aberdeenshire Infrastructure Services Committee (AISC), by the casting vote of its chairman, refused the application. Aberdeenshire residents and councillors who supported the development were voluble in their criticism. Mr Trump, in response, claimed Scotland was closed for business and indicated that he would not be appealing the decision.

Enter the Scottish Government. Alex Salmond, the local MSP as well as the First Minister, met with Mr Trump's development team on 3 December, who then met the Scottish Government's Chief Planner Jim McKinnon on 4 December to discuss options. Immediately following the meeting with Mr Trump's team, Mr McKinnon advised the Cabinet Secretary for Finance and Sustainable Growth, John Swinney, that the application should be called in for his personal consideration as acting Planning Minister.[2] Mr Swinney duly did so.

The decision to call in the application has been the subject of inquiry by the Local Government and Communities Committee (the Committee).[3] Four meetings heard evidence from, among others, Messrs Swinney, Salmond, McKinnon and Mr Trump's team. From the Committee minutes it is clear that the call-in was made for two express reasons: first, that the proposed development raised issues of importance which required scrutiny at a national level, and secondly, to restore confidence and certainty to the planning system. Although not expressly recognised, a third reason appears to be Mr Trump's flat-out refusal to appeal the AISC's decision. The three reasons are discussed in turn.

1 For full details of the development, see *www.trumpgolfscotland.com/html/frameset.html*.

2 The Minister for Transport, Infrastructure and Climate Change, Stewart Stevenson, would ordinarily have dealt with the application. Responsibility was handed to Mr Swinney because Mr Stevenson, as MSP for a neighbouring constituency, could have had conflicting interests.

3 It has also been the subject of numerous freedom of information requests: see *www.scotland.gov.uk/Publications/1997/03/17133808/0*.