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The Positive Prescription of Servitudes in Scots Law

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Abstract

This thesis examines the establishment of servitudes by positive prescription in Scots law, with particular reference to the doctrine's conceptual development and the nature of possession required under section 3 of the Prescription and Limitation (Scotland) Act 1973. The thesis is divided into three main parts.

The first provides a historical account of the law of positive prescription as applied to servitudes from the 17th century to the 20th century, culminating in its statutory expression in section 3(1) and (2) of the 1973 Act. The second considers what the 1973 Act means when it says that a servitude must be "possessed" for the prescriptive period. While jurists in Scotland have traditionally thought that a right cannot be possessed as such, since it lacks a physical *corpus*, they have tended to view the apparent exercise of a right as equivalent to the detention of a corporeal object and concluded that servitudes can be "possessed" (or "quasi-possessed") by analogy. An alternative approach is to say that, while possession denotes a comprehensive factual control of an object for one's own benefit, certain lesser degrees of factual control are also protected by the law. On this view, the (apparent) exercise of a servitude constitutes a limited "possession" of the land itself and is protected accordingly. Part two argues that this alternative approach is the more coherent and provides helpful analytical tools for understanding what is really going on when a servitude is "possessed" for the purposes of prescription. The third part of the thesis consists of a detailed analysis of the nature of the possession required to establish a servitude by positive prescription. In particular, possession "as if of right" is shown to consist of two "steps": firstly, the prescriptive claimant must show sufficient possession to indicate that a servitude is being asserted; and, secondly, the possession must not be "by right", i.e. referable to another right already held by the claimant. After this, the statutory requirements of openness and peaceableness are considered in detail.

Lay Summary

In Scots property law, a servitude is a right which entitles the owner of one piece of land, known as the “dominant tenement”, to do something on, or take something from, a piece of land belonging to someone else, known as the “servient tenement”. Common examples include rights of access, grazing and (more recently) parking. One way in which such rights can be created is by “positive prescription”, i.e. where the dominant proprietor has acted for twenty years as if the servitude already exists.

The first part of the thesis provides a historical account of the way in which the establishment of servitudes by positive prescription has been understood in Scots law from the 17th century through to the 20th century. Essentially, Scots law has moved from viewing prescription as clarifying what was included in the title deeds of the dominant tenement to viewing it as a distinct doctrine where the apparent exercise of a servitude for twenty years amounts to conclusive proof of its existence.

The second part of the thesis considers whether it is correct to say that someone who has acted for twenty years as if exercising a servitude can be said to have “possessed” that servitude. It is argued that it is more correct to see the person’s behaviour as a limited “possession” of the servient tenement in the same way that someone who has comprehensive control of a piece of land – as an owner would – is seen to have full possession of that land.

The third part of the thesis consists of a detailed analysis of the modern law, as set out in section 3 of the Prescription and Limitation (Scotland) Act 1973. This section states that a servitude can only be established by positive prescription when it has been “possessed for a continuous period of twenty years openly, peaceably and without judicial interruption”. In addition, the law requires that the servitude be exercised “as if of right”. This last requirement comprises two “steps”: firstly, the owner of the allegedly-dominant tenement must show sufficient possession to indicate to the owner of the servient tenement that a servitude is being asserted over his land; and, secondly, the possession must not already be “by right”, i.e. referable to another right already held by the owner of the allegedly-dominant tenement.

Declaration

I, Alasdair Stewart Sholto Peterson, declare that I have composed this thesis, that the work contained in it is my own, and that it has not been submitted for any other degree or professional qualification.

Alasdair SS Peterson
Edinburgh
August 2016

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Abbreviations

1973 Act	Prescription and Limitation (Scotland) Act 1973
<i>ABGB</i>	<i>Allgemeines bürgerliches Gesetzbuch</i>
AcP	<i>Archiv für die civilistische Praxis</i>
<i>ALR</i>	<i>Allgemeines Landrecht für die Preußischen Staaten</i>
ALSP	Advocates Library Session Papers
Aubry & Rau	C Aubry and C Rau, <i>Cours de Droit Civil Français</i> , vol 2 (7 th edn by P Esmein, 1961; transl Jaro Mayda, 1966)
Badenhorst et al, <i>Silberberg & Schoeman</i>	PJ Badenhorst, JM Pienaar and H Mostert, <i>Silberberg and Schoeman's The Law of Property</i> (5th edn, 2006)
Balfour, <i>Practicks</i>	Sir James Balfour of Pittendreich, <i>The Practicks of Sir James Balfour of Pittendreich</i> (1754, reprinted PGB McNeill (ed), Stair Society, vol 21-22, 1962-63)

Bankton	Andrew McDouall, Lord Bankton, <i>An Institute of the Law of Scotland in Civil Rights</i> (1751-53, reprinted Stair Society, vols 41-43, 1993-95)
<i>Beaumont Papers</i>	<i>Beaumont v Lord Glenlyon</i> , ALSP, General Collection, July, 11, 1843, No 238
Beerman	C Beermann, <i>Besitzschutz bei beschränkten dinglichen Rechten</i> (2000)
Bell, <i>Principles</i>	George Joseph Bell, <i>Principles of the Law of Scotland</i> (4 th edn, 1839, reprinted 2010)
<i>BGB</i>	<i>Bürgerliches Gesetzbuch</i>
Bruns, <i>Recht des Besitzes</i>	CG Bruns, <i>Das Recht des Besitzes im Mittelalter und in der Gegenwart</i> (1848)
Buckland, <i>Textbook</i>	WW Buckland, <i>A Textbook of Roman Law from Augustus to Justinian</i> (3rd edn, revised by P Stein, 1963)
Buckland & MacNair, <i>Comparison</i>	WW Buckland and ADM MacNair, <i>Roman Law and Common Law: A Comparison in Outline</i> (2 nd edn by F Lawson, 1952)
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- Forbes, *Institutes* W Forbes, *Institutes of the Law of Scotland*, vol 1 (1722, reprinted 2012)

Gaunt & Morgan, <i>Gale on Easements</i>	JR Gaunt and P Morgan, <i>Gale on Easements</i> (19 th edn, 2012)
Gierke, <i>Deutsches Privatrecht</i>	O von Gierke, <i>Deutsches Privatrecht</i> , 2. Bd (Sachenrecht) (1905, reprinted 2000)
Gordley, <i>Foundations</i>	J Gordley, <i>Foundations of Private Law</i> (2006)
Gordon, <i>Land Law</i>	WM Gordon, <i>Scottish Land Law</i> (2 nd edn, 1999)
Gordon & Wortley, <i>Land Law</i>	WM Gordon and S Wortley, <i>Scottish Land Law</i> (3 rd edn, 2009), vol 1
Gray & Gray, <i>Elements</i>	K Gray and S Gray, <i>Elements of Land Law</i> (5 th edn, 2008)
Gretton & Steven, <i>PTS</i>	GL Gretton and AJM Steven, <i>Property, Trusts and Succession</i> (2 nd edn, 2012)
Grotius, <i>Inleiding</i>	Grotius, <i>Inleiding tot de Hollandsche Rechts-geleertheyd</i> (2 nd edn, 1631; transl as <i>The Jurisprudence of Holland</i> , RW Lee, 1926)
Huebner, <i>Germanic Private Law</i>	R Huebner, <i>A History of Germanic Private Law</i> (1918, transl FS Philbrick)
Hope, <i>Major Practicks</i>	Sir Thomas Hope, <i>Hope's Major Practicks</i> (1608-1633, reprinted JA Clyde, Lord

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Partsch, <i>LTP</i>	D Partsch, <i>Die Longi Temporis Praescriptio im Klassischen Römischen Rechte</i> (1906)
Peterson, “Keeping up Appearances”	ASS Peterson, “Keeping up Appearances: Prescriptive Possession of Servitudes” (2013) 2(1) Edin SLR 1
Planiol with Ripert	M Planiol with G Ripert, <i>Treatise on the Civil Law</i> , vol 1, part 2 (12 th edn, 1939; transl, Louisiana State Law Institute 1959)
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Stair	James Dalrymple, Viscount Stair, <i>The Institutions of the Law of Scotland</i> (6 th edn, DM Walker (ed), 1981)
Thomas, <i>Textbook</i>	JAC Thomas, <i>Textbook of Roman Law</i> (1976)
Van der Merwe, <i>Sakereg</i>	CG van der Merwe, <i>Sakereg</i> (2 nd edn, 1989)
Van der Merwe, <i>Things</i>	CG van der Merwe, <i>The Law of Things</i> (1987)
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Van Erp & Akkermans, <i>Casebook</i>	JHM van Erp and B Akkermans, <i>Cases, Materials and Text on National</i> ,

	<i>Supranational and International Property Law</i> (2012)
Voet	J Voet, <i>Commentarius ad Pandectas</i> (1698-1704; transl as <i>The Selective Voet</i> , P Gane, 1955-58)
Windscheid, <i>Lehrbuch</i>	BT Windscheid, <i>Lehrbuch des Pandektenrechts</i> (9th edn by T Kipp, 1906)
WSSP	Session Papers (Signet Library)
ZSS(RA)	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung</i>

General Introduction

In general terms, the establishment of servitudes by positive prescription is relatively simple: where the owner of one piece of land has acted for twenty years as if he were exercising a servitude over land belonging to someone else, then – provided certain other requirements have been met – the law will exempt the existence of that servitude from challenge. In Scotland, the applicable law is found in section 3(1) and (2) of the Prescription and Limitation (Scotland) Act 1973:¹

(1) If in the case of a positive servitude over land—

(a) the servitude has been possessed for a continuous period of twenty years openly, peaceably and without any judicial interruption, and

(b) the possession was founded on, and followed the execution of, a deed which is sufficient in respect of its terms (whether expressly or by implication) to constitute the servitude,

then, as from the expiration of the said period, the validity of the servitude as so constituted shall be exempt from challenge except on the ground that the deed is invalid *ex facie* or was forged.

(2) If a positive servitude over land has been possessed for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude as so possessed shall be exempt from challenge.

This thesis seeks to do three things: firstly, to examine the historical origins and conceptual development of this doctrine in Scots law; secondly, to determine whether it is more appropriate to conceptualise the apparent exercise of a servitude as “possession” of that servitude or as a limited possession of the land over which that servitude is apparently exercised; and, thirdly, to provide a detailed analysis of the nature of possession required under the 1973 Act to establish a servitude by positive prescription.

¹ Prescription and Limitation (Scotland) Act 1973, s3(1) and s3(2)

A. Terminology

Before embarking on these three tasks, it is helpful to set out the terminology which will be adopted in this thesis. Although recent legislation has used the terms “benefited” and “burdened” to refer to those properties which are, respectively, benefited and burdened by a servitude, this thesis will use the more traditional terminology of “dominant tenement” and “servient tenement”.² Where a servitude’s existence has not yet been established, the properties will be referred to as the “allegedly-dominant tenement”, the “allegedly-servient tenement” or, more simply, the “land”.

A number of terms could be used to refer to the owners of the allegedly-dominant and allegedly-servient tenements during the prescriptive period. Though terms such as “putative dominant proprietor” or “quasi-dominant proprietor” are accurate, they are also cumbersome. For this reason, the person claiming to have established a servitude by prescription will be referred to as the “claimant” and the owner of the land over which the servitude is being claimed will be referred to as the “landowner”.³

B. Policy Justification⁴

Why does Scots law allow someone to establish a servitude simply by acting for a certain period as if he already has one? Though there is little discussion in Scottish sources of the particular policy justifications for allowing the establishment of

² See Title Conditions (Scotland) Act 2003, ss75-81. For the traditional Scottish terminology, see 1973 Act, s3(4); AGM Duncan in Reid, *Property*, para 443; Gordon, *Land Law*, para 24-01. The terminology of servient and dominant tenements corresponds to that used in Roman law (Buckland, *Textbook*, 258-264), English law (Gray & Gray, *Elements*, para 5.1.4), and South African law (Van der Merwe & De Waal, “Servitudes”, paras 545-546).

³ This usage of “claimant” is consistent with the recent use of “prescriptive claimant” in Land Registration etc (Scotland) Act 2012, ss43-45.

⁴ Cf. Peterson, “Keeping up Appearances” at 2-3.

servitudes by positive prescription, helpful reference can be made to discussions concerning the doctrine of positive prescription more generally.

According to Stair, the general doctrine of prescription is “founded upon utility more than equity”.⁵ In other words, prescription is recognised in Scots law because it fulfils a practical purpose.⁶ Stair goes on to note two grounds or reasons for prescription: firstly, that it serves public utility by providing legal certainty; and, secondly, that the law views an owner’s failure to pursue a thing as a “dereliction of the owner’s rights”.⁷ These justifications for prescription were not unique to Stair but appear to have been accepted throughout Europe and further afield.⁸ In a South African context, for example, Ernst Marais refers to them as the “legal certainty” justification and the “punishment” justification.⁹ Other justifications have, more recently, been advanced from a more philosophical or law and economics perspective but these are of more normative than descriptive interest.¹⁰

Though the “legal certainty” and “punishment” justifications relate primarily to the establishment of ownership by positive prescription, they are equally applicable to the establishment of servitudes. In this context, they resolve themselves into two

⁵ Stair, 2.12.9; though Stair goes on to describe prescription as “odious”, 2.12.14, Napier argued that this alluded to prescription generally being *in odium negligentis* – a complement to which is positive prescription’s more particular operation *in favorem possidentis*, Napier, 15-16; cf. Johnston, *Prescription*, paras 1.45-1.47.

⁶ I.e., “even if it is not just, it satisfies practical demands,” Johnston, *Prescription*, para 1.31.

⁷ Stair, 2.12. 10; cf. Erskine, *Institute*, 3.7.1.

⁸ Johnston, *Prescription*, paras 1.31-1.63; Gordley, *Foundations*, 140-142. Cf. *R v Oxfordshire CC, ex p Sunningwell PC* [2000] 1 AC 335 at 349 per Lord Hoffmann: “Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment”.

⁹ From his accounts of Roman-Dutch, South African, Dutch and French law, Marais concludes that “the traditional grounds for prescription are that it promotes legal certainty by affording *de iure* status to long-existing *de facto* situations, that it punishes neglectful owners for not looking after their interests and that it prevents the *probatio diabolica* (devil’s burden) when having to prove ownership”, E Marais, “The Justifications for Acquisitive Prescription”, in B Akkermans and E Ramaekers (eds), *Property Law Perspectives* (2012), 66-67; for the research which grounds this conclusion, see Marais, “Acquisitive Prescription”, paras 4.1 – 4.2.4.

¹⁰ Marais, for example, suggests that the traditional justifications are insufficient in themselves and that they should be supplemented by justifications based on John Locke’s labour theory, MJ Radin’s personality theory, and law and economics theory, Marais, “Justifications”, *ibid*, paras 2.1-2.4; cf. Marais, “Acquisitive Prescription”, paras 4.4.1 – 4.6. Beginning from the opposite perspective, S Gardner and E Mackenzie, *An Introduction to Land Law* (4th ed, 2015), para 7.3.2, point out that utilitarian justifications are insufficient in themselves and must be coupled with an “element of consent” (our second justification), since they tend, on their own, to prove too much: for example, prescription can in some cases maximise utility through protecting efficient exploitation of land but it only does so where such exploitation already takes place.

more particular justifications: firstly, that the long-enjoyed apparent exercise of a servitude should be legally protected; and, secondly, that a landowner who has failed to object to such behaviour has, in some sense, acquiesced in the burdening of his right of ownership. The historical plausibility of the first justification is supported by the fact that all positive servitudes can, as regards deeds executed before 28th November 2004, be created by a grant or reservation creating personal rights and subsequent possession without ever entering the public registers.¹¹ Indeed, this remains the case for service media servitudes even if created in deeds executed after that date.¹² In theory, it was therefore possible for a servitude to be validly created but for any written evidence of that creation to be mislaid or disappear – a possibility which would prove significant in the doctrine’s later development.¹³

Johnston notes that the legal certainty justification has today achieved primacy in Scots law and that “punishment for the negligence of dilatory proprietors... survives only in the notion that the competing interests of the parties must be weighed.”¹⁴ In the context of servitudes, this means that the primary objective of prescription is to provide legal certainty for those who have appeared to exercise a servitude for the prescriptive period. Any unfairness arising from this objective is, however, mitigated by the fact that the landowner has been given sufficient opportunity to object and, having not done so, is held in some sense to have accepted the burdening of his right.¹⁵

¹¹ Compare Title Conditions (Scotland) Act 2003, ss 75(1) and 119(8). For the “appointed day”, see Abolition of Feudal Tenure etc (Scotland) Act 2000 (Commencement No 2) (Appointed Day) Order 2003/456 (Scottish SI).

¹² Cf. Title Conditions (Scotland) Act 2003, ss 75(3) and 77. Service media servitudes entitle their holder “to lead a pipe, cable, wire or other such enclosed unit over or under land for any purpose”.

¹³ See below at 54-56.

¹⁴ Johnston, *Prescription*, para 1.61. This is apparently also true of Dutch, French and South African law: Marais, “Justifications” (n 9), 66-67; D L Carey Miller, *The Acquisition and Protection of Ownership* (1986), 63: “The principal justification, in modern law, for the acquisition of real rights by long prescription is to afford de jure status to the de facto circumstances of the claimant’s possession... [the owner’s inactivity] is essentially a negative factor because the non-assertion of his title... confirms the status quo in which the claimant acts and appears as the entitled party.... In modern law, the true rationale is the positive entitlement of the claimant following very long possession.”

¹⁵ See Reid & Gretton, *Conveyancing 2006*, 122.

C. Overview of Thesis

Like Caesar's Gaul and any good sermon, this thesis is divided into three parts. The first consists of chapters 1 to 4 and provides a historical account of the doctrine's origins and development from the 17th century through to the present day. The second contains only chapter 5 and discusses whether it is actually appropriate to say that someone who has acted as if exercising a servitude for the prescriptive period has "possessed" that servitude or whether it is more appropriate to conceptualise this as a limited form of possessing the allegedly-servient tenement. The third, and final, part consists of chapters 6 to 11 and contains a more in-depth analysis of the modern law governing the establishment of servitudes by positive prescription. Given the restrictions imposed by the thesis format, it has not been possible to deal comprehensively with every issue presented by the modern law. As a result, the final part of this thesis begins with a general overview of the law in practice and a brief introduction to the relevant issues. The remainder of the part (chapters 7 to 11) focus exclusively on three of the most prominent elements of prescriptive possession: possession "as if of right", open possession and peaceable possession.

Chapter 1

Roman Law and Later European Developments

A. Introduction

B. Roman Law

- (1) Overview of the general Roman law(s) of prescription
- (2) The *usucapio* of servitudes in pre-classical Roman law
- (3) The protection of long-enjoyed servitudes in classical and post-classical Roman law

C. Later European developments

- (1) The reception of Roman law in Europe
- (2) The establishment of servitudes by prescription in Roman-Dutch law
- (3) The European Codifications

D. Summary

A. Introduction

Though the next chapter of this thesis will demonstrate that the establishment of servitudes by positive prescription is essentially of indigenous and statutory origin in Scots law, a background understanding of the corresponding Roman law is helpful for at least two reasons: firstly, because the Scots doctrine has been influenced by its Roman predecessor at a technical level – this is hardly surprising given the substantially Roman nature of the Scots law of servitudes¹ and is most clearly seen in the fact that the nature of possession required to establish a servitude by prescription in Scots law (openly, peaceably and ‘as if of right’) is, at least to some extent, modelled on that which was required under the later Roman law (*nec vi nec clam nec precario*); and, secondly, because knowledge of the corresponding Roman law enables one to place the Scots doctrine in its proper historical and comparative context – in particular, to explain why the law in Scotland should be so similar to the equivalent law in England and South Africa, both of which have different conceptual

¹ On the history of the Scots law of servitudes, see MJ de Waal, “Servitudes”, in Reid and Zimmermann, *History*, vol 1; TA Ross, *Servitudes in the Law of Scotland* (1933), especially Ch 1.

bases but have been similarly influenced by later Roman law.² An overview of the doctrine's later European history is also helpful and demonstrates how the law relating to prescriptive servitudes on the Continent has diverged from the tradition to which Scots law still belongs.

B. Roman law

To speak of *the* Roman law when one speaks of the establishment of servitudes by prescription is, of course, somewhat imprecise. For, as with the general law of prescription, and indeed Roman law as a whole, the law governing the prescriptive acquisition of servitudes underwent radical changes between the time of the Twelve Tables (c.449 BC) and the compilation of the *Corpus Iuris Civilis* (c.529 AD).

(1) Overview of the general Roman law(s) of prescription

From its earliest period onwards, Roman law was comfortable with the idea that rights (or, rather, things) could be acquired by good-faith possession over a certain period.³ Essentially, the history of acquisitive prescription in Roman law is the history of this idea's adaption and application to changing societal circumstances brought about by Rome's territorial expansion – in particular, the practical challenges which emerged when provincial land and non-citizens were brought within the ambit of the Roman legal system but without recourse to the *ius civile*.

This history consisted of three successive and complementary stages, culminating in a final reorganisation by Justinian: firstly, the civil law doctrine of *usucapio*, already present by the time of the Twelve Tables, which allowed a possessor to acquire *dominium* by good-faith possession of one or two years on the basis of a just cause;

² For an overview of how the development of English easements was influenced by the Roman – and later civilian – tradition, see Buckland & MacNair, *Comparison*, 131-142; Simpson, *History*, 261-269; Seebo, *Servitus und Easement*, *passim*.

³ For more detailed accounts of the Roman law of prescription, see Buckland, *Textbook*, 241-252; D Nörr, "Time and the Acquisition of Ownership in the law of the Roman Empire" (1968) 3 *Irish Jurist* 352; Kaser, *rPR 1*, §34, §101; Kaser, *rPR 2*, §243. A briefer account can be found in the English translation of Kaser's student textbook, *Römisches Privatrecht* (6th edn, 1968): M Kaser, *Roman Private Law* (2nd edn, transl R Dannenbring, 1968), §25. For a Scottish perspective, see Johnston, *Prescription*, paras 1.13-1.19; Napier, 18-33.

secondly, the doctrine of *longi temporis praescriptio*, which developed in the high classical period to ensure the protection of rights in provincial land – to which *usucapio* did not extend – and which required, alongside good faith and a just cause, ten years’ possession where the previous owner lived in the same province and twenty years where he lived in another province; and, finally, the doctrine of *longissimi temporis praescriptio*, introduced under Constantine or one of his sons, which cut off all objections after thirty – in some cases forty – years’ possession, even in the absence of good faith or a just cause.⁴ Strictly speaking, the last of these modes of prescription was not an acquisitive prescription, as such, but would qualify as a form of positive prescription according to Scots terminology.⁵ Finally, under Justinian, the doctrines of *usucapio* and *longi temporis praescriptio* were merged, resulting in a unified doctrine of prescription where good-faith possession on the basis of a just cause conferred title after three years for moveables (*usucapio*) and ten or twenty years – depending again on whether the previous owner was *inter praesentes* or *inter absentes* – for land (*longi temporis praescriptio*). Justinian also developed a form of *longissimi temporis praescriptio* which did, in fact, operate as a mode of *acquisitive* prescription after thirty or forty years’ good-faith possession but without any requirement of *iusta causa*.⁶

(2) The *usucapio* of servitudes in pre-classical Roman law

From the earliest period of Roman law, and certainly by the time of the Twelve Tables, servitudes were capable of being acquired by *usucapio* in much the same way as land.⁷ This statement is, however, less far-reaching than it first appears, since

⁴ There is some debate as to whether the *longissimi temporis praescriptio* required good faith or not: compare Kaser, *rPR 1*, 285; Kaser (Dannenbring), *ibid*, 108; Buckland, *ibid*, 251; Johnston, *ibid*, para 1.16.

⁵ See Napier, 15-18 and Ch 3, who claims – like Johnston, *Prescription*, paras 16.03-16.16 – that the distinction between positive and negative prescription in Scots law is not the same as that between acquisitive and extinctive prescription. While the latter pair of terms focus on whether a right has been acquired or lost, the former pair focus on whether the prescription was *in favorem possidentis* or *in odium negligentis* – i.e., on whether the prescription is in favour of a possessor or against one who delayed in pressing their rights. In practice, the difference between these conceptualisations is slim and effectively disappeared when s5(1) of the Prescription and Limitation (Scotland) Act 1973 was amended by the Land Registration etc (Scotland) Act 2012, sch 5, para 18.

⁶ Kaser, *rPR 2*, 287.

⁷ Kaser *rPR 1*, 444-445; Möller, *Servituten*, 185-192.

only four servitudes existed at this point: *via*, *iter*, *actus*, and *aquaeductus*.⁸ Furthermore, the reason these servitudes were capable of being acquired by *usucapio* lay primarily in the fact that they were conceptualised as corporeal objects and could therefore be possessed in the same manner as land.⁹ Their “prescriptibility”¹⁰ therefore stemmed from their corporeality, not from their categorisation as servitudes.

As the pre-classical conception of servitudes expanded to include other rustic – and later urban – servitudes, it appears that the new types of servitude were also capable of being acquired by *usucapio*.¹¹ These civil law servitudes were further supplemented by a separate class of servitude-like relationships between tenements, termed “*usus*” and protected under the *ius gentium* rather than the *ius civile*. These relationships came into being once a way, aqueduct, or watering place had been used non-vitiously (i.e. *nec vi nec clam nec precario*) for one year and entitled their user to interdictal protection. It appears that the boundary between the class of *usus* and the class of true servitudes was porous and, so long as the requirement of praediality was also satisfied, a *usus* under the *ius gentium* could be upgraded to a servitude under the *ius civile* once exercised non-vitiously for two years.¹² Indeed, according to Professor Cosima Möller, this interpretation of the Twelve Tables’ provisions on *usus* contributed to the creation in pre-classical jurisprudence of a general law of acquisitive prescription within the framework of the *ius civile*: in the case of land, good-faith possession as owner was required; for servitudes, it was good-faith exercise (*Gebrauchbesitz*) of a *usus* which was required.¹³

⁸ Möller, *Servituten*, 16.

⁹ *Ibid.* This is also reflected in the fact that all four were classified as *res mancipi* alongside land, slaves, and cattle. Cf. M Kaser, *Eigentum und Besitz im älteren römischen Recht* (2nd edn, 1956), §3.

¹⁰ *Ibid.*, 347: *Ersitzbarkeit*.

¹¹ *Ibid.*, 185-192. As Möller notes, 190 fn 568, there is some debate among Romanists as to whether *usucapio* was available for all these servitudes. Kaser, for example, is only willing to confirm that *usucapio* was at least (*mindestens*) possible for the older rustic servitudes, provided they were conceptualised as *res corporales*, Kaser, *rPR I*, 444.

¹² Möller, *ibid.*, 17-18. The nature of possession required for protection under the possessory interdicts was possession *nec vi nec clam nec precario*. On the concept of “vices” of possession and its relevance for the establishment of servitudes in modern Scots law, see below at 148-150.

¹³ Möller, *ibid.*, 185-186.

(3) The protection of long-enjoyed servitudes in classical and post-classical Roman law

In stark contrast to the situation which had prevailed in pre-classical Roman law, the acquisition of servitudes by *usucapio* was effectively impossible in classical and post-classical Roman law. The most obvious reason for this was the passing of a *lex Scribonia* around 50 BC. This law prohibited the *usucapio* of servitudes, apparently in order to protect land from becoming too heavily burdened.¹⁴ According to Möller, however, the *lex Scribonia* was simply a restatement of the contemporary doctrinal position. In classical jurisprudence, servitudes had been reconceptualised as *res incorporales* and, as a result, were no longer capable of being “possessed” as such – a development which ruled out the possibility of *usucapio*.¹⁵ In any event, the outright prohibition of *usucapio servitutis* does not tell the whole story, since it was in the classical and late-classical period of Roman law that a doctrine of prescriptive acquisition of servitudes emerged which was much closer to that now recognised in modern Scots law.

Whether a provincial *longi temporis praescriptio* of servitudes survived the *lex Scribonia* is unclear.¹⁶ In the capital, however, methods soon emerged to regularise the long-enjoyed *de-facto* exercise of servitudes.¹⁷ Initially, this was accomplished through the idea that a servitude exercised since time immemorial should be treated as if regularly created, even though its creation could no longer be proved.¹⁸ While there are definite similarities between this doctrine and the *longi temporis praescriptio*, it seems that the two institutions had an independent history. In particular, while the *longi temporis praescriptio* did not actually confer title until late

¹⁴ Kaser, *rPR 1*, 444-445; See also R Yaron, “Reflections on Usucapio” (1967) 35 *Tijdschrift voor Rechtsgeschiedenis* 191 at 225-229.

¹⁵ Möller, *Servituten*, 242-243; Cf. D.8.1.14.pr; D.41.1.43.1. Though see A Watson, *The Law of Property in the Later Roman Republic* (1968), 23-24; Yaron, *ibid* and authorities cited there.

¹⁶ Kaser, for example, suggests such an idea is plausible (*glaubhaft*), *rPR 1*, 445.

¹⁷ Kaser, *ibid*; Möller, *Servituten*, 347-352; Partsch, *LTP*, 96-100.

¹⁸ Kaser, *ibid*, cf. Kaser, *rPR 2*, 301; Buckland, *Textbook*, 266; Thomas, *Textbook*, 200-201; Buckland and MacNair, *Comparison*, 132-133. As Buckland and MacNair point out, this is similar to the oldest English law relating to the establishment of easements by immemorial possession, a fact suggestive of a similar evolution rather than direct borrowing. On the adoption of such reasoning in Scots law, see below at 53-58.

in its history, the establishment of servitudes by long enjoyment was acquisitive from the beginning and entitled the claimant to an *actio utilis* against anyone who sought to obstruct the exercise of the servitude.¹⁹ Further, while the *longi temporis praescriptio* adopted the requirements of *bona fides* and *iusta causa* from *usucapio*, it appears that the nature of possession required for servitudes was simply interdicial possession (i.e. possession *nec vi nec clam nec precario*).²⁰ Finally, whereas *longi temporis praescriptio* required possession of ten or twenty years, depending on whether the servient proprietor was resident in the same province or not, it was apparently up to the *iudex* to decide how long a servitude had to have been enjoyed before it became eligible for protection.²¹ For these reasons, it seems clear that the establishment of servitudes by *longa (quasi) possessio* was distinguishable from the institution of *longi temporis praescriptio*.²²

By the late classical period, however, the distinctions between the two institutions had begun to disappear and the conceptual difference became blurred.²³ Under Caracalla, for example, the ten and twenty year periods of *longi temporis praescriptio* were also applied to the establishment of servitudes by long possession.²⁴ This convergence was further encouraged by developments in the post-classical jurisprudence of the Eastern Empire and eventually confirmed by Justinian, who fused the two doctrines together under the banner of *longi temporis praescriptio*.²⁵ Even after this, however, the nature of possession required to establish a servitude by prescription remained possession *nec vi nec clam nec precario* and was free from the more demanding requirements that the possession also be acquired in good faith and *ex iusta causa*.²⁶

¹⁹ WW Buckland, *Main institutions of Roman Private Law* (1931), 158; cf. D 8.5.10.pr.

²⁰ Buckland, *ibid*; Partsch, *LTP*, 98.

²¹ Buckland, *ibid*.

²² *Ibid*; Partsch, *LTP*, 96-100; Nörr, *Entstehung der ltp*, 54-57.

²³ Kaser, *rPR 1*, 445; *rPR 2*, 301.

²⁴ Partsch, *LTP*, 99-100.

²⁵ C.7.33.12.4. See Buckland, *Textbook*, 266; E Levy, *WRVL (Property)*, 200.

²⁶ Buckland, *Main institutions* (n 19), 158.

C. Later European developments

(1) The Reception of Roman law in Europe

After the revival of interest in Roman law towards the end of the twelfth century, the possibility of acquiring servitudes by prescription was accepted by the Glossators.²⁷ However, rather than directly adopting the *longi temporis praescriptio* of servitudes which had been introduced under Justinian, the Glossators appear to have confounded the concepts of *usucapio* and *longa (quasi) possessio* and grounded their theory of prescriptive acquisition of servitudes on a text of Paulus' (D.8.1.14.pr). This text accepted the classical rule that servitudes could not be acquired by *usucapio* because of their incorporeality but also offered as a second reason that "the nature of these [rustic praedial] servitudes is such as not to engender clear and continuous possession."²⁸ Drawing on this second justification, which related specifically to *usucapio* at a time when Roman doctrine did not allow for the "possession" of servitudes or incorporeal rights more generally, the Glossators resorted to a new distinction which would prove influential across the continent: the distinction between continuous and discontinuous servitudes – i.e. between those servitudes which do not require human intervention to be exercised (e.g. aqueduct) and those which do (e.g. rights of way or pasturage).²⁹ According to the Glossators, positive continuous servitudes could be acquired by ten or twenty years' usage, even without *iustus titulus*, likewise negative servitudes from the moment that the claimant prohibited his neighbour from acting contrary to the right. As for discontinuous servitudes, these could be acquired after ten or twenty years where the

²⁷ L Bossel, "Ueber die Lehre von der Erwerbung der Servituten durch Verjährung, nach römischen und gemeinen deutschen Recht" (1830) 13 AcP 380 at 425-427.

²⁸ D.8.1.14.pr, T Mommsen and P Kreuger (eds), *The Digest of Justinian* (1985, transl and edited AJ Watson). The text continues, "...For no one can make use of a right of way in so continuous and uninterrupted a manner that his possession of it will be held to be unbroken. The same rule applies to urban praedial servitudes as well."

²⁹ According to Bossel (1830) 13 AcP 380 at 381, this distinction was unknown to Roman law itself. Planiol and Ripert agree that the distinction has only been drawn in French law since the 16th century, Planiol with Ripert, No 2949.

claimant could show *iustus titulus* but only by immemorial possession where such a title was lacking.³⁰

In those parts of Europe which had received the Roman law, the Glossators' distinction was widely accepted until the 16th century and beyond.³¹ Unsurprisingly for such a large geographical area, the precise requirements for each category did, however, differ from place to place. Nevertheless, Coing suggests that continuous servitudes could generally be acquired under the *ius commune* by the general rules of *longi temporis praescriptio* (ten or twenty years' possession with title) and by thirty years' possession where a title was lacking. By contrast, discontinuous servitudes could only be acquired where they had been possessed immemorially.³² Under the influence of canon law, good faith was apparently required in each of these cases.³³

The extent to which the positive laws of various territories adhered to the model of the *ius commune* differed. In France, for example, reception of the Roman and *ius commune* position was confined almost entirely to the *pays du droit écrit*, where thirty years' possession sufficed for continuous servitudes and immemorial possession was required for discontinuous servitudes if no title could be produced.³⁴ A similar distinction was also adopted in Spain under *Las Siete Partidas*.³⁵ By contrast, the *pays du droit coutumier* tended to follow pre-reception Germanic customary law and to exclude the acquisition of servitudes by prescription

³⁰ Bossel, *ibid* at 426-427. Bossel also notes that some, following certain texts from the Digest, also required immemorial possession for *aquaeductus*.

³¹ Indeed, according to Ludwig Bossel, *ibid*, the Glossators' reputation was so great that even those jurists who disagreed with the accepted view warned against departing from it.

³² Compare H Coing, *Europäische Privatrecht* (1985) vol 1, 316; O Gierke, *Deutsches Privatrecht* (1905), vol 2, 644-646; Bossel, *ibid* at 427-429. Coing notes that it was a contentious question as to whether a title was required for the *longi temporis praescriptio* in relation to servitudes, while Gierke, 645, states that a title was not required. Coing also notes that it was disputed whether the separate treatment of discontinuous servitudes was justified, while Gierke, 646, only notes that their prescription was occasionally excluded or made difficult.

³³ *Ibid*. See also Windscheid, *Lehrbuch*, §213, 3, who notes that while good faith was required the burden of proof rested on the landowner to show the absence of good faith.

³⁴ Bossel, *ibid* at 429-430; J Kohler, "Beiträge zum Servitutenrecht" (1897) 87 AcP 157 at 253-256.

³⁵ *Las Siete Partidas*, 3,31,15 translated in RI Burns SJ (ed), *Las Siete Partidas*, vol 3: *Medieval Law: Lawyers and their Work* (2001, transl SP Scott, 1931), 859. See also O Schoenrich, "Acquisition of Rights of Way by Prescription" (1938) 12 Tul LR 226 at 228; JS White, "Acquisitive Prescription of Servitudes" (1955) 15 Louisiana LR 777 at 779-781.

altogether, except by immemorial possession.³⁶ Indeed, the *Coutumes de Paris* excluded even prescription by immemorial possession and held firmly to the principle *nulle servitude sans titre*.³⁷ This diversity of opinion amongst the various French regimes would prove influential in the eventual drafting of the Code Civil.³⁸ By contrast, the principle of acquiring servitudes by prescription was accepted by most of the state laws (*Partikularrechten*) which existed in Germany following the reception of Roman law, though not always in the same form.³⁹

(2) The establishment of servitudes by prescription in Roman-Dutch law

The example of 17th-century Roman-Dutch law is particularly interesting from a Scots perspective. Unlike most of their contemporaries in the wider *ius commune*, Roman-Dutch scholars did not accept the distinction between continuous and discontinuous servitudes, nor did they require good faith as a requirement for establishing servitudes by prescription.⁴⁰ Grotius, for example, explicitly rejected “the subtle distinctions which the jurists make in this matter”.⁴¹ Voet likewise confirmed that servitudes could be acquired by prescription in the Netherlands

³⁶ Bossel (1830) 13 AcP 380 at 429-430; Kohler (1897) 87 AcP 157 at 247-253. On Germanic customary law’s restriction of the prescription of servitudes to immemorial possession, see Huebner, *Germanic Private Law*, 352-353; O Gierke, *Deutsches Privatrecht*, 644. Kohler is particularly scathing about the consequences which the Romanistic concept of acquiring servitudes by prescription could pose for good-neighbourliness.

³⁷ Planiol with Ripert, No 2943, citing Art 186 of the *Coutume de Paris*. This absolute prohibition was adopted in Jersey from 1625 (or 1771 at the latest), in accordance with the Reformed Custom, and seems to have been deemed sensible in light of the adoption of a Land Register for the whole island in 1602, RF MacLeod, “Property Law in Jersey” (PhD thesis, University of Edinburgh, 2011), 169-176. According to MacLeod, a form of “quasi-prescription” of servitudes is now available where long usage is “accompanied by other appropriate circumstances”, 173-176, discussing *Baudains v Simon* (1971) 1 JJ 1949 (Court of Appeal) and noting the possibility of English influences in the court’s reasoning in that case.

³⁸ See below at 17-18.

³⁹ Huebner, *Germanic Private Law*, 352-353. According to JQ Whitman, *The Legacy of Roman Law in the German Romantic Era* (1990), 166ff, the possibility of acquiring and losing servitudes by prescription led to controversy from the late 16th century onwards as, coupled with a “servitude analysis” of feudal obligations, it had obvious repercussions for any landowners who had permitted their serfs to commute services into monetary payments. From the late-18th to mid-19th century, the issue was particularly associated with the question of *Bauernbefreiung* (emancipation of the serfs). See R Johow, *Die Vorentwürfe der Redaktoren zum BGB -Sachenrecht, Band 2* (1880), 1170-1172 for a survey of the German *Partikularrechten* at the time of the drafting of the BGB.

⁴⁰ RW Lee, *An Introduction to Roman-Dutch Law* (5th edn, 1953), 140-144, 170-172 for an overview of Roman-Dutch law in this area.

⁴¹ Grotius, *Inleiding*, II. xxxvi.3.

“without any distinction between continuous and discontinuous servitudes”.⁴² Huber gives a similar account of Frisian law, stating that, after ten year’s possession without “violence, sufferance, or concealment”, the claimant is no longer “obliged to prove that he had from the beginning a good title or good faith”.⁴³ Rather, like their Scots contemporaries, Roman-Dutch law developed a doctrine of establishing servitudes by prescription similar to that found in the later Roman law itself, namely, the protection from challenge of servitudes which have been enjoyed *nec vi nec clam nec precario* for, more generally, “a third of a century”.⁴⁴

Though none of these Dutch writers is cited by the Scots institutional writers in their passages on the establishment of servitudes by prescription, the writers in question would have been well known in Scotland. Furthermore, the similarities between Roman-Dutch law and Scots law in this area are still reflected in the modern day similarities between the equivalent Scots and South African law.⁴⁵

(3) The European Codifications

In contrast to Roman-Dutch law and Scots law, the next couple of centuries would see the Continental systems diverge further from the late Roman model as they moved towards codification. On the whole, early codifications, such as the *Codex Maximilianeus bavaricus civilis* (1756)⁴⁶ and the *Allgemeines Landrecht für die Preußischen Staaten* (1794),⁴⁷ had allowed any servitude to be acquired after ten or twenty years’ possession with a title and thirty years without a title.⁴⁸ By contrast,

⁴² Voet, vol 2, VIII.4.6.

⁴³ U Huber, *Heedensdaegse Rechtsgeleertheyt* (5th edn, 1768; transl as *The Jurisprudence of my Time*, P Gane, 1939), paras 44.4-5; cf. Lee (n 40), 142.

⁴⁴ Cf. Grotius (n 41); S van Leeuwen, *Commentaries on Roman-Dutch Law* (1644; transl JG Kotze, 1921); Huber, *ibid*; Voet (n 42).

⁴⁵ The similarities can be seen from the treatments given in the relevant sections of the leading South African textbooks, all of which are likely to be comfortably familiar to Scots lawyers, e.g. Van der Merwe & De Waal, “Servitudes”, para 614; “Acquisitive Prescription” in WA Joubert et al (eds), *The Law of South Africa* (2nd edn, 2010), vol 21, paras 110-117; Badenhorst et al, *Silberberg & Schoeman*, para 14.3.5; H Mostert et al, *The Principles of The Law of Property in South Africa* (2010) paras 7.2.6.1 – 7.2.6.2. and 9.3.1.

⁴⁶ *Codex Maximilianeus Bavaricus*, II. 9 §2

⁴⁷ ALR I.22 §§ 13 ff; See also K Luig, “Das Privatrecht im „Allgemeinen Landrecht“” (1994) 194 AcP 521 at 539-540; K Luig, “Historische Betrachtungen über die Ersitzung des Wegerechts nach dem ALR und dem BGB”, in *Festschrift der Rechtswissenschaft Fakultät zur 600-Jahr-Feier der Universität zu Köln* (1988).

⁴⁸ See Johow (n 39), 1171.

the codifications promulgated over the course of the 19th century tended to depart from this model in one of two directions. One group followed the French *Code civil* (1804) and restricted the type of servitudes which could be acquired by prescription to continuous and apparent servitudes (or variations thereon). A second group began to view the off-register acquisition of servitudes by prescription as an unacceptable violation of an increasingly strict understanding of the registration principle (*Eintragungsprinzip*). This second group is most consistently represented by the German *Bürgerliches Gesetzbuch* (1900).

According to Planiol and Ripert, the decision by the drafters of the *Code civil* to restrict prescription to continuous and apparent servitudes represented an attempt to compromise between two extremes.⁴⁹ At one end of the spectrum was the complete exclusion of prescription by the *Coutume de Paris*; at the other end was the more permissive approach of the *Pays de droit écrit* and one or two Customs, such as Auvergne and Boulemois. The drafters therefore adopted a compromise found in certain regions as early as the 16th century.⁵⁰ For the avoidance of doubt, they also expressly rejected the possibility of acquiring discontinuous servitudes by immemorial possession.⁵¹

In terms of its practical application, it is important to emphasise that the *Code civil*'s requirements of continuousness and apparence go beyond the Roman and Scots requirements that possession of a servitude be continuous and open. Rather, continuousness refers back to the Glossators' concept of a servitude which does not require human intervention to be exercised⁵² and, under the *Code civil*, a servitude can only be "apparent" if it is evidenced by some form of exterior work on the servient tenement.⁵³ Examples of servitudes which would satisfy both requirements are the servitudes of view and aqueduct or the servitude to grow a tree within the

⁴⁹ Planiol with Ripert, Noc 2949; See also Schoenrich, "Acquisition of Rights of Way by Prescription" (1938) 12 Tul LR 226 and White, "Acquisitive Prescription of Servitudes" (1955) 15 Louisiana LR 777 at 782-783.

⁵⁰ *Code civil* art 690; Planiol with Ripert, No 2949

⁵¹ *Code civil* art 691; Planiol with Ripert, No 2946.

⁵² Planiol with Ripert, Nos 2894-2896.

⁵³ Planiol with Ripert, Nos 2897-2898.

normally prohibited zone near a border with a neighbour.⁵⁴ In light of these extra requirements, it is perhaps unsurprising that the French case law tends to concern itself with different questions from those which arise in the equivalent Scots, English and South African law.⁵⁵ Although the *Code civil* has two modes of acquisitive prescription for ownership, one of ten years' good-faith possession on the basis of a title and one of thirty years' possession regardless of good faith or title, only a thirty year prescription exists for servitudes and this does not require good faith or title.⁵⁶

As the influence of the *Code civil* spread, so too did its approach to the establishment of servitudes by prescription.⁵⁷ The requirements of continuousness and apparence were adopted wholesale by the Italian *Codice Civile* of 1865,⁵⁸ the Spanish *Codigo Civil* of 1890,⁵⁹ the Dutch Code of 1838⁶⁰ and the Louisiana Civil Code of 1870.⁶¹ By contrast, the other major codified mixed legal system, Quebec, following the *Coutume de Paris*, rejected the acquisition of servitudes by prescription entirely.⁶² Since then, Louisiana and Italy have relaxed their requirements so as to only require that the servitude be apparent⁶³ and, in 1992, the Netherlands abolished both requirements.⁶⁴ According to Van Vliet, however, the requirements for acquiring a servitude by prescription in the Netherlands remain "very severe" in practice.⁶⁵

⁵⁴ See, e.g., L van Vliet "Acquisition of a Servitude by Prescription", in Van Erp and Akkermans, *Casebook*, IV.B.1 (French Law).

⁵⁵ Indeed, the strictness of the *Code civil* has been heavily criticised by Planiol with Ripert, Nos 2949-2950, who note that, in practice, these requirements will often be circumvented by allowing a person claiming a putative discontinuous or non-apparent servitude (e.g. a right of way) to acquire co-ownership or full ownership of the track instead; See also Van Vliet, *ibid*, 748.

⁵⁶ Van Vliet, *ibid*, 745.

⁵⁷ See Schoenrich, "Acquisition of Rights of Way by Prescription" (1938) 12 Tul LR 226 at 228 and White, "Acquisitive Prescription of Servitudes" (1955) 15 Louisiana LR 777 at 779-781.

⁵⁸ Art 630.

⁵⁹ Arts 537-540.

⁶⁰ Cf. Arts 593, 724, 744, and 746.

⁶¹ Arts 765 and 3504.

⁶² Art 1181: "A servitude is established by contract, by will, by destination of the owner or by operation of law. It may not be established without title, and possession, even immemorial, is insufficient for this purpose."

⁶³ White, "Acquisitive Prescription of Servitudes" (1955) 15 Louisiana LR 777, citing the *Codice Civile* (1942), arts 1061 and 1159; Louisiana Civil Code, art 740 (revised in 1977).

⁶⁴ See L van Vliet, "Acquisition of a Servitude by Prescription in Dutch Law" in S van Erp and B Akkermans, *Towards a Unified System of Land Burdens* (2006), 53-57.

⁶⁵ *Ibid*.

On turning one's attention to the second group of 19th century codes, it can be seen that a stronger adherence to the *Eintragungsprinzip* is already evident in the *Allgemeines bürgerliches Gesetzbuch* of Austria (1811). According to the *ABGB*'s express wording, it continued to be possible to acquire servitudes by prescription but only in those areas where no land register yet existed; elsewhere, prescription operated only as a *Titel*, or ground, for the necessary registration.⁶⁶ Over the past two hundred years, however, this stance has softened in Austria and it now appears that registration is not necessary for the constitution of prescriptive servitudes but only to bind third parties who are relying on the register in good faith – such third parties taking the land unencumbered by any unregistered servitudes which are not “obvious”.⁶⁷

Though it remained possible to establish servitudes by prescription in most German particular laws throughout the 19th century, the *BGB* completely excluded the possibility of acquiring servitudes by prescription on the basis that a comprehensive Land Register (*Grundbuch*) meant that servitudes could no longer be expressly created off-register anyway and there was therefore no need to protect the apparent exercise of such servitudes.⁶⁸ A *Buchersitzung* (“book prescription”), or *Tabularersatzung*, was retained for servitudes which had already entered the register but not been validly created due to a defect in their creation.⁶⁹ Though the differences between modern German law and Scots law mean that no immediate lesson can be drawn for Scots law, the reasoning behind the decision to exclude off-register acquisition of servitudes from the *BGB* provides an interesting contrast to the

⁶⁶ *ABGB*, §481(1).

⁶⁷ M Hinteregger, “Servitudes – the Austrian Concept” in Van Erp and Akkermans (n 64), 23. For criticism of this “clear violation of the *Eintragungsprinzip*”, see M Schwimann (ed), *Praxiskommentar zum ABGB, Band 2* (1998), §481, nn 4 – 10.

⁶⁸ See Johow (n 39), “Rechtfertigung der Ausschließung der Ersitzung von Dienstbarkeiten an Grundstücken”, 1174-1175; This reasoning was contested by Gierke who believed it overlooked the “social meaning of the question”, Gierke, *Deutsches Privatrecht*, 646 n 31; O von Gierke, *Der Entwurf eines Bürgerlichen Gesetzbuchs und das Deutsche Recht* (1899), 293ff. Compare Luig, “Historische Betrachtungen” (n 47) and L Kuhlenbeck, *Von den Pandekten zum Bürgerlichen Gesetzbuch* (1899), 582-583.

⁶⁹ *BGB* §900.

Scottish position, where prescription continues as a mode of constitution after the introduction of a registration requirement for the express constitution of servitudes.⁷⁰

D. Summary

While the establishment of servitudes by some form of prescription has been recognised since at least the time of classical Roman law, the precise form which this has taken has varied over time and depended on a number of factors – e.g., the way in which servitudes were conceptualised in a particular system, influence from non-Roman sources, and the particular system’s approach to land registration. In Roman law, the abolition of acquisitive prescription for servitudes was driven by the reconceptualisation of servitudes as incorporeal rights, but was overcome as the practical benefits of legitimising long-enjoyed apparent exercise was recognised. Legal practice thus appears to have developed new solutions in order to overcome restrictions imposed by the doctrine’s own conceptual foundations.⁷¹ While the doctrine’s later history among Continental legal systems – Roman-Dutch law excepted – is of less immediate practical relevance for Scots law, much can be learned from the policy decisions which led to their divergence from the pattern followed by Roman law.

As with other countries, so with Scotland, the precise form taken by the modern law can best be understood when seen against its historical background. With this in mind, the next chapter will investigate the historical origin of the Scots doctrine and its conceptual foundations.

⁷⁰ See Title Conditions (Scotland) Act 2003, s75(1). See below at 78-79 for a brief discussion of the interaction between the prescriptive establishment of servitudes and the Land Registration (Scotland) Act 1979 and Land Registration etc (Scotland) Act 2012.

⁷¹ For a similar occurrence in 19th century Scots law, see below at 53-58.

Chapter 2

Origin and Conceptual Foundations: 1617-1800

A. Introduction

B. Servitudes, the 1617 Act and Immemorial Possession

- (1) The “interpretative approach”: servitudes as parts and pertinents
- (2) The “acquisitive approach”: servitudes as objects in their own right
- (3) Independent of the 1617 Act: established by immemorial possession
- (4) Independent of the 1617 Act: possession as evidence of a previous grant

C. Conclusion

A. Introduction

Though Scots law has recognised the possibility of establishing servitudes by positive prescription for at least four hundred years, the doctrine’s historical origin and conceptual foundations are surprisingly obscure. The main reason for this is that, while there is a general consensus that the prescription of heritable rights was unknown in Scotland prior to the 1617 Act “anent prescription of heritable rights”, the relationship between this Act and the establishment of servitudes by prescription is not immediately apparent.¹ In particular, while the Act is clear in its requirement that a person relying on its provisions must possess by virtue of heritable infefment, it has always been recognised that servitudes can be established by prescription

¹ Though the 1617 Act was preceded by another Prescription Act of 1594, c.218 (12mo edition), the earlier Act was much more limited in scope and essentially excused those who had possessed land from having to produce any procuratories, instruments of resignation, precepts of *clare constat* or other deeds which were mentioned in their charters. See Napier, ch 2 and 115; Johnston, *Prescription*, paras 1.24-1.30. See also Hope, *Major Practicks*, 6.43.4: “Found *quod in regno Scotiae non currit praescriptio nisi in obligationibus ex actu parliamenti: 13 Maii 1575, C.394*”. Balfour mentions a form of short prescription, which protected those buying land within a burgh and possessing it peaceably for a year and a day, *Practicks*, 159. This institution is found in many systems which have been influenced by Germanic and French customary law and appears to have little direct relationship with those forms of prescription influenced by Roman sources: compare Grotius, *Inleydinge*, II.7.7; Huebner, *Germanic Private Law*, 200-203, 439-440; FW Maitland, “Possession for year and day” (1889) 5 LQR 253. Though Craig mentions prescription in the context of the general Feudal law, he also remarks that, “[i]n Scotland, however, prescription is but little recognised: which many people think a pity... and my countrymen have not so far been able to regard the prescription of feudal estate as consistent with the dictates of conscience, nor to follow the principles of the Civil and Feudal laws.” Craig, 2.1.8.

without requiring a deed of servitude or express mention of the servitude in the wording of the claimant's title. There is, furthermore, little direct discussion of the doctrine's origins and conceptual foundations among the institutional writers and many cases from the 16th and 17th centuries appear to have been decided without reference to the Act at all. This chapter will therefore seek to answer two questions: firstly, what is the proper relationship between the establishment of servitudes by positive prescription and the Prescription Act 1617; and, secondly, can the establishment of servitudes be traced decisively to a single source?

B. Servitudes, the 1617 Act and Immemorial Possession

Before one can reach a conclusion on the relationship between the establishment of servitudes by positive prescription and the 1617 Act, however, it is first necessary to familiarise oneself with the Act and its two main clauses. The first deals with the positive prescription of heritable rights and exempts a landowner's rights from challenge where that landowner has possessed land for forty years on the basis of an infertment; the second deals with negative prescription of any heritable action which is not pursued within forty years.² The exact wording of the positive clause is as follows:³

... that whatsoever his majesties leigis, thair predicessoures and authoures hath brukit heirtofore, or salhappin to bruke in tyme cuming by thame selfis, thair tennentis and utheris haveing thair rightis, thair landis, baronyes, annuelrentis and uther heretage by vertew of thair heretable infertmentis maid to thame by his majestie, or utheris thair superioures and authoures for the space off fourtye yearis, continewallie and togidder following and insewing the date of thair saidis infertmentis, and that peciablie without anye lauchfull interruptioun made to thame thairin during the said space of fourtie yeiris, that suche persounes, thair heiris and successoures sall nevir be trublit, persewed nor inquyeted in the heretable right and propertie of thair saidis landis and heretages foirsaidis by his majestie or utheris thair superioures and authoures, thair heiris and successoures, nor by anye uther

² The relationship between the two clauses is examined in detail by Napier, who claims, 61-65, that the first case to use "the distinctive nomenclature" of "positive" and "negative" was *Innes v Innes of Auchluncart* (31 Dec, 1695). Before this, prescription was apparently pled solely on the basis of one or the other of the two statutory clauses, e.g. Stair's report of *Younger v Johnstouns* (28 Nov, 1665), quoted at Napier, 63, fn1. See also Napier, additional note II, 918-921.

³ 1617 Act, c.12, "Anent prescriptioun of heretable rightis" – see www.rps.ac.uk for full text and translation into modern English.

persoun pretending right to the same by vertew of prior infeftmentis, publict or private, nor upone no uther ground, reasoun or argument competent of law, except for falshoid, prowying they be able to schaw and produce a chartoure of the saidis landis and utheris foirsaidis grantit to thame or thair predicessoures by thair saidis superioures and authouris preceding the entrie of the saidis fourtie yeiris ...

As Lord Kames points out in his *Elucidations*, the statute is framed in a specific manner to achieve a particular purpose.⁴ Prior to the Act's passing, the only way for a vassal to prove his title was to show a progression of charters linking back, eventually, to the Crown. Unsurprisingly, this became more difficult over time and could lead to serious hardship if a family which had possessed land for centuries happened to lose a single link in their title.⁵ The 1617 Act was intended to settle this uncertainty by ensuring that any vassal who had possessed land for forty years need only produce a progression of charters stretching back to the beginning of the prescriptive period. The Act operated *in favorem possidentis*, exempting the claimant's rights from challenge rather than conferring a right as a mode of original acquisition – though, in practice, the result would sometimes be functionally equivalent.⁶ According to Kames, the primary purpose of the 1617 Act – and the relatively limited Act of 1594 which preceded it – was “the security of land property”.⁷ Accordingly,⁸

... in neither of the acts is there the slightest hint of depriving a man of his property by neglect, and of transferring it to another by peaceable possession. They are founded on the most liberal principles of justice: they secure property, after long possession, against the loss of ancient title-deeds; and they secure it against latent claims that may justly be presumed ill-founded when suffered to lie long dormant.

Given so specific a purpose, the fact that the prescription of servitudes is generally acknowledged to be possible “without any title in writing from the owner of the servient tenement”, as if purely on account of long possession, raises questions about

⁴ Lord Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (1777), Art 33 (263).

⁵ The Act gives as examples of circumstances in which such a loss could take place, “not onlie by the abstracting, corrupting and conceilling of thair trew evidentis in thair minoritie and les aige and by the omiission thair of, by the injurie of tyme, throche warre, plauge, fyir or suche lyik occasiounes, bot also by the counterfutteing and forgeing of fals evidentis and wreatis and concealling of the same to suche a tyme that all meanis of improving thair of is takin away”. Cf., Craig, 2.1.8.

⁶ See Napier, 15-17 and ch 3 *passim*. See also Johnston, *Prescription*, paras 16.09-16.16.16.

⁷ On the 1594 Act, see above at n 1.

⁸ Kames, *Elucidations* (n 4), 263.

the doctrine's relationship to the 1617 Act.⁹ As will become clear, there were essentially two possible approaches to explaining how servitudes could be brought under the Act's protection. The first possibility, most clearly articulated by Stair, is that the establishment of servitudes by prescription occurs through direct application of the statute, long-enjoyed servitudes being read into a general clause of parts and pertinents in the claimant's title and protected as one of the "other heritages" which the claimant has by virtue of infeftment. The second possibility, adopted by Mackenzie and Erskine, is that the prescription of servitudes occurs through applying the 1617 Act to servitudes by analogy, infeftment being required only to satisfy the requirement of praediality but without any need to read the resultant servitude back into an express or implied clause in the claimant's title. The first resulted in an "interpretative" approach which required infeftment on the basis of an exegetically plausible title; the second resulted in an "acquisitive" approach which required infeftment alone.

A third possibility also exists; namely, that the establishment of servitudes by prescription has developed independently from the 1617 Act and traces its roots to some other conceptual foundation, whether a pre-existing doctrine of immemorial possession or a nascent form of "presumed grant" theory. While a number of cases throughout the 17th and 18th centuries seem to be consistent with such an approach, it will be seen below that any such extra-statutory doctrine soon became functionally equivalent to those approaches which linked prescription to the 1617 Act and, in time, would be assimilated into a single doctrine.

(1) The "Interpretative approach": servitudes as parts and pertinents

The 17th-century authorities generally support the view that the prescription of servitudes is a direct consequence of the Act's general operation. Stair, for example, is clear in his opinion that, despite an apparent lack of title, the establishment of servitudes by positive prescription actually depends on the claimant's infeftment in

⁹ Bankton, *Institute*, 2.7.2. See also Forbes, *Institutes*, 154; Erskine, *Institute*, 2.9.3.

the dominant tenement and is founded in a general or, as the case may be, specific clause of pertinents:¹⁰

It must be adverted, that when such servitudes are said to be constitute by sole prescription, without writ, it is understood, without writ from the proprietor of the servient tenement; for ordinarily there is much title in writ for these servitudes, that the party having right thereto is infeft in the tenement with the pertinents, under which servitudes are comprehended; or with common pasturage, by which he hath not only such pasturage as he hath been long in possession of, upon the lands of his superior or author; but forty years possession therewith is sufficient against any other, who can be said in no case to have done any deed for the constituting of the servitude.

Similarly, in his discussion of the Act itself, Stair notes that it is “extended... generally to all servitudes, though there be no more antecedent title, but part and pertinent of the dominant tenement, either exprest or implied”.¹¹ In other words, though the prescription of servitudes does not require evidence of an express grant from the owner of the servient tenement, it does require that the claimant be infeft in the dominant tenement with a clause of parts and pertinents habile to include the servitude, either express or implied. If the clause is implied, or express but undefined, apparent exercise of a servitude gives specific content to the general clause and this putative content is then exempted from challenge after forty years.¹² In essence, this is exactly the same process by which another piece of land is proven to be a pertinent of the dominant title.¹³

Such an analysis is a tidy solution to the problem of explaining how servitudes are established despite an apparent lack of writ. Far from the Act’s application to servitudes being an “incautious extension” of a statute introduced to protect feudal rights, as one 19th-century judgement was to warn,¹⁴ it is a direct application of the statute, servitudes being easily comprehended under the dominant proprietor’s “other

¹⁰ Stair, 2.12.24. See also 2.7.14 and 2.3.73.

¹¹ Stair, 2. 7. 2, citing *Grant v Grant* (1677) Mor 10877.

¹² Whether the explicative effect of long possession is a function of prescription itself or a discrete doctrine which prescription renders unchallengeable is an open question, see Napier, 369-373; Rankine, *Landownership*, 30 and 200; Johnston, *Prescription*, 255.

¹³ E.g. *Young v Carmichael* (1671) Mor 9636; *Countess of Moray v Wemyss* (1675) Mor 9636. Indeed, one 18th-century case would appear to suggest that the only difference between establishing a servitude by prescription and acquiring title to land as a pertinent is the extent or nature of the possession concerned, *Robert Johnston, James Beveridge and John Gibb v The Duke of Hamilton* (1768) Mor 2481.

¹⁴ *Maule v Maule*, (1829) 7 S 527 at (Appendix) 9 per Lord Balgray.

heritages” and possessed “by vertue of their heritable infeftments”. Furthermore, corroboration of this position is not difficult to find in contemporary and later case law.¹⁵ A particularly good example is seen in *Grant v Grant* (1677) where the defender’s counsel viewed the entire question of prescriptive servitude as depending on whether the asserted servitude could be supported by a clause of parts and pertinents in his charter. The counsel successfully argued that,¹⁶

it is unquestionable that servitudes of pasturage may be acquired by 40 years uninterrupted possession, under the general title of pertinents... the general act of prescription 1617 is expressly introduced to secure all rights, and to cut off all pleas, whereupon the defender is sufficiently founded, both as to the point of title, viz. his infeftment of Dalvey for 40 years, and 40 years’ peaceable possession of this pertinent as pasturage thereof.

Indeed, the fact that similar arguments were accepted in several cases throughout the 17th and 18th centuries would suggest that Stair’s analysis was widely shared.

Though many of these cases involved general clauses *cum communi pastura* and the like, the sufficiency of a simple clause of parts and pertinents to found the prescription of servitudes was confirmed in *Earl of Breadalbane v Menzies of Culdares*¹⁷ and *William Borthwick v Lord Borthwick*.¹⁸ In the first case, the court rejected the Earl’s argument that Culdares had “no sufficient title for such prescription, being only infeft in part and pertinent, whereas, a title for prescribing a servitude must be more explicit and particular”; in fact, the Lords were “all of the opinion that part and pertinent was sufficient for the prescription of a servitude”. Similarly, in *Borthwick*, since the proprietor of land had enjoyed pasturage on adjoining lands for forty years before agreeing to sell it, the buyer was entitled to have his disposition include this servitude expressly, even though the minute of sale bore only to carry a disposition of the lands with parts, pendicles and pertinents. The Lords accepted the buyer’s claim, finding that the pasturage was indeed a pertinent

¹⁵ *Nicolson v Lairds of Bightie and Babirnie* (1662) Mor 11291 and, sub nom *Nicolson v Balfour of Babirnie* at B Supp II 706; *Kinnaird v Fenzies* (1662) Mor 14502; *HMA v Heritors near to Dunfermline Muir* (1668) Mor 10776; *Haining v Selkirk* (1668) Mor 2459; *Sir Robert Dalzell v The Laird of Tinwall* (1673) B Supp II 182; *Brigadier Prestoun v Colonel Erskine* (1714) Mor 10919 at 10921.

¹⁶ *Grant v Grant* (1677) Mor 10877. Cf., Stair, 2. 7. 2.

¹⁷ *Earl of Breadalbane v Menzies of Culdares* (1740) B Supp V 700.

¹⁸ *William Borthwick v Lord Borthwick* (1668) Mor 9032.

of the land and that the minute ought therefore to have been extended expressly. As will be seen below, those authorities which appear to suggest that servitudes could be established by immemorial possession prior to 1617 are also consistent with an interpretative approach and it may therefore be the case that such an approach would already have been familiar to Scots lawyers as they sought to make sense of the relationship between the 1617 Act and servitudes.¹⁹

Against the background of Stair's straightforward exposition of the way that servitudes are brought under the protection of the 1617 Act and the regularity with which the issue is referred to in 17th- and 18th-century cases, it is noticeable that other writers of this period make little attempt to develop this theory. Two passages consistent with Stair's analysis are, however, found in the works of Forbes and Bankton, both passages apparently confirming that title for establishing servitudes by prescription is somehow linked with the 1617 Act's general application to infeftment in a property.²⁰ Though these passages do not articulate the part and pertinent analysis as clearly as Stair does, they do suggest a legal environment in which the link between the title for establishing servitudes by prescription and the wording of the claimant's infeftment in the dominant tenement is recognised. In the words of Mark Napier, to whom we will return in next chapter, there appears to have been a recognition that,

¹⁹ See below at 33-37.

²⁰ Though his discussion of prescriptive servitudes in the *Institutes* neglects to discuss the title of the dominant tenement, a passage in Forbes's unpublished *Great Body of the Law of Scotland* (available at: <http://www.forbes.gla.ac.uk/contents/>), vol 1, 691, is more thorough, noting that, "[though] real or predial services are acquired tacitly by prescription... without any title in writ from the owner of the Land or Tenement subject to the service... those who acquire a real service by prescription must be infeft in Lands and Pertinents comprehending services". Likewise, though Bankton does not expressly ground the prescription of servitudes in a clause of parts and pertinents, he does confirm that the Act applies to more than the ownership of the land concerned, stating that, "the positive prescription, by the statute, secures all lands, annual-rents, and other heritages whatsoever, which is extended by the court of session to all privileges possessed therewith... it extends to servitudes and all real burdens", Bankton, 2.12.8. That it should be these two writers who provide corroboration is perhaps surprising given their otherwise enthusiastic tendency to depart from exegesis of the 1617 Act in favour of a more abstract understanding of positive prescription as the acquisition of a right by possession, with or without title as the right allows; compare Forbes, *Institutes*, 309-310 and Bankton, 2.12.1.

Charter and sasine, then, in the dominant subject, is the proper title in *positive* prescription of a servitude; and the doctrine of parts and pertinents renders the application of the feudal clause of the act 1617 to such a case inevitable.

How persuasive is Stair's interpretative approach and its contention that the prescription of servitudes occurs simply by the direct application of the 1617 Act to a clause of parts and pertinents in the title to the dominant tenement? In the end, it is difficult to reach a conclusion on the basis of the 17th- and 18th-century authorities alone, since – as has already been acknowledged – the recognition of implied clauses of parts and pertinent as sufficient title for prescription means that the theoretical importance of such clauses is hard to falsify, unless the claimant's title were to be actually inconsistent with the conferral of a servitude. Indeed, it would not be until the mid-19th century that such a scenario arose with the question of establishing a servitude on the basis of a title containing a bounding description.²¹

(2) The “acquisitive approach”: servitudes as objects in their own right

Having examined Stair's “interpretative approach” and its contention that servitudes can only be established by prescription where the claimant is able to produce an exegetically plausible title (even if the necessary clause of parts and pertinents is implied rather than express), we may now turn our attention to its main alternative: the “acquisitive approach”, as advocated by Mackenzie and Erskine. This approach differed from the interpretative approach in so far as it viewed infestment alone as the necessary title for the establishment of servitudes by prescription and did not see prescription as dependant on an express or implied clause of parts and pertinents in the claimant's title. Conceptually, the approach differed from Stair's in so far as it viewed the establishment of servitudes by prescription not as a particular application of the 1617 Act's general provisions but as an extension of the Act by analogy – servitudes were viewed as subjects capable of prescription in their own right and not simply as pertinents of the dominant tenement. It is worth considering the differences between the approaches at both a practical and a conceptual level

²¹ See below at 42-49, 52-58.

Unusually, the ostensible practical difference between the two approaches can be best illustrated by looking at different editions of the same work: Mackenzie's *Institutions of the Law of Scotland*. While Mackenzie appears to have adopted an interpretative approach in the first edition of 1684, he had changed his mind before the publication of the second edition in 1688. The first edition states that,²²

[servitudes] may be likewise established by prescription without any write, from him who has the servient Tenement; though he who is to acquire the servitude by prescription, must have some right in his person, either of a special concession or else must prescribe [sic] it, as part and pertinent of his land.

By contrast, the second edition simply states that the claimant must have “a real right in his persons of the Lands to which he prescribes [sic] the servitude”²³ A similar, though more detailed, account is given by Erskine:²⁴

A servitude constituted by prescription, or by the uninterrupted exercise of it for forty years, may be acquired without any deed or title in writing, other than a charter and sesin of the land to which the servitude is claimed to be due; for the long acquiescence of the owner of the lands burdened, fully supplies the want of a written declaration constituting the servitude.

Thus expressed, the acquisitive approach appears more straightforward than the interpretative approach: all that is needed is infetment in the dominant tenement and exercise of the servitude for the prescriptive period. In fact, as has already been noted above, there was in all likelihood little practical difference between the two approaches. For, just as the interpretative approach's acceptance of implied clauses of parts and pertinents as sufficient title meant that most charters would provide an exegetically plausible basis for prescription, so the acquisitive approach's sole requirement that the claimant be infet in the allegedly-dominant tenement would lead to the same result. Again, as with the interpretative approach, it is difficult to determine solely on the basis of 17th- and 18th-century authorities whether the acquisitive approach was correct as a statement of the law.

²² G Mackenzie of Rosehaugh, *Institutions of the Law of Scotland* (1st edn, 1684), 2.9.

²³ Mackenzie, *Institutions* (2nd edn, 1688), 2.9. In his *Observations*, Mackenzie simply notes with reference to the 1617 Act that it “is also extended to Heretable Offices, as to Patronages, Pensions, and all Servitudes, though not expressly mention'd”, Mackenzie, *Observations*, 346.

²⁴ Erskine, *Institute*, 2.9.3

By contrast, the distinction between the conceptual frameworks undergirding each approach is marked. While the interpretative approach saw the establishment of servitudes by prescription as a direct application of the 1617 Act, the acquisitive approach relied on a theory of application-by-analogy. This can be seen in the following statement by Erskine:²⁵

though the statute mentions in general terms seisin as necessary to prescription; yet rights admitting no seisin, or which may be perfected without it, if they be heritable as tacks, servitudes, etc., have been by repeated decisions adjudged to fall under the statute as subjects capable of prescription; for actual seisin cannot with propriety be required as a title of prescription in rights which either do not admit seisin, or are complete without it.

In other words, since servitudes differ from ownership in not requiring sasine for their constitution by grant, sasine ought not to be required for their establishment by prescription either. The main attraction of such an analysis lies in its apparently sound logic and uncontroversial starting proposition: sasine was indeed necessary for the acquisition of title to land but not for the acquisition of rights of servitude, since a contract clad by possession sufficed.²⁶ Accordingly, while a written title was required for the prescription of ownership out of deference to its feudal nature, it ought to be possible to establish servitudes by prescription without any such requirement, so long as the claimant was infeft in the dominant tenement and thus satisfied the requirement of praediality. There are, however, a number of problems with such an analysis of the establishment of servitudes by prescription.

Firstly, as Erskine himself recognised, the idea that rights not requiring infeftment could “fall under the statute as subjects capable of prescription” is hard to reconcile with the 1617 Act’s express requirement of charter and sasine. Secondly, such an extension also seems inconsistent with the Act’s underlying purpose, which – as was noted above – was not primarily to facilitate the acquisition of individual real rights or to cure defective ones but, rather, to provide a cut-off point after which landowners could rest assured that the rights they had been enjoying “by virtue of their heritable infeftments” were now protected by an irrebuttable presumption of

²⁵ Erskine, *Institute*, 3.7.3.

²⁶ Stair, 2.7.1; Bankton, 2.7.1; Erskine, *Institute*, 2.9.3.

validity.²⁷ Though the practical result of this might be functionally equivalent to the result given by acquisitive prescription, the primary focus of the Act remained on easing the burden of connecting title with the Crown. Accordingly, infeftment under the 1617 Act was not so much a requirement of prescription, which could be dispensed with when appropriate, as the actual object which the statute was seeking to protect. Thirdly, there is little support for Erskine’s analysis among the writers and Institutional works of the 18th century. Though other institutional writers do speak of the Act’s analogous application to non-feudal rights, such as tacks or heritable offices, prescription in such cases was still founded on some form of title.²⁸ Indeed, the only example of an abstract system of positive prescription which dispensed with the requirement of title in certain cases was advanced by Forbes in his *Institutes*.²⁹ As was seen above, however, Forbes clarified in his *Great Body* that the title which was being dispensed with was an express grant from the servient landowner, not the underlying requirement that the claimant be infeft with pertinents habile to include the claimed servitudes.³⁰ Indeed, even Erskine seems to require a title of parts and pertinents for certain servitudes such as pasturage.³¹

Perhaps the biggest problem with the application-by-analogy approach, however, is one pointed out by Napier in the mid-19th century; namely, that it appears to have viewed a deed of servitude as analogous to infeftment in the dominant tenement. Drawing on a survey of the Roman law of prescription, Napier points out that a deed of servitude (or equivalent, e.g. a contract) is better thought of as the *iustus titulus* of a servitude than as analogous to feudal title.³² Bearing in mind that servitudes could be constituted in the 18th century by a mere personal contract followed by possession, a written “title” to a servitude could be thought of as more similar to a concluded obligation preceding infeftment than infeftment itself. This accords with

²⁷ As Erskine notes elsewhere, “Positive prescription is generally defined by our lawyers, as the Romans did usucapion, the acquisition of property by the continued possession of the acquirer... but it ought rather to have been defined, the establishing or securing to the possessor his right against all future challenge”, Erskine, *Institute*, 3.7.2

²⁸ E.g. Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted 2013) vol 2, 117-119; Bankton 2.12.2. Cf. Bell, §2003 & §2014.

²⁹ Forbes, *Institutes*, 309 generally and 136 particularly with reference to servitudes.

³⁰ Forbes, *Great Body* (n 20), 691.

³¹ Erskine, *Institute*, 2.9.16.

³² Napier, 356.

the direct application of the statute and helps to explain why a deed of servitude could be superseded by prescription while the foundation charter itself could not: provided forty years' possession of the putative servitude has occurred on the basis of a clause of parts and pertinents, the deed is no longer relevant as it merely provides the reason for the servitude's incorporation into the general clause of parts and pertinents. Again, this makes sense if the Act's purpose is focused less on the acquisition and protection of individual rights and more concerned with protecting the totality of a vassal's holdings from the dangers of lost titles and forgery.

While there appears to have been little practical difference between the acquisitive and interpretative approaches during the 17th and 18th centuries, it seems that the interpretative approach's underlying conceptual framework was more plausible.

(3) Independent of the 1617 Act: established by immemorial possession

On the basis of the previous two sections, it would therefore appear that a good case can be made for viewing the establishment of servitudes by positive prescription as occurring through a direct application of the 1617 Act's general principles. If so, however, a number of historical loose-ends must be tied up. In particular, and despite the general consensus that the doctrine of prescription is a creature of statute in Scotland,³³ there are a number of early-17th century cases which suggest that some of the functions now associated with the doctrine of prescription were already present in the common law. There are, for example, suggestions that a doctrine of establishing certain rights by immemorial possession was already well-established in the years immediately following the 1617 Act's introduction – indeed, Balfour appears to have viewed immemorial usage as good title for thirlage from the mid-16th century onwards.³⁴ Could it be, as Stair seems to suggest, that there is 16th-century authority for immemorial usage providing a means to establish at least some servitudes in the absence of written grant? What is clear is that, even though the

³³ See n1.

³⁴ Balfour, *Practicks*, 495; cf., Napier, 363-369. Though Balfour also invoked immemorial possession in his discussion of rights of mill and multures (*Practicks*, 493-494), it appears that this was in the context of possessory remedies, J Robbie, *Private Water Rights* (2015), para 5-19. Robbie goes on to discuss the role of immemorial possession in establishing water rights from the 17th century onwards, para 5-20 to 5-22

concept of immemorial possession is not used within the 1617 Act, it was invoked in many cases relating to the establishment of servitudes in the 17th and 18th centuries and well into the 19th century. Is it possible that, rather than emerging from the 1617 Act, the establishment of servitudes by positive prescription grew out of some pre-existing common law institution of proof by immemorial possession? Was JH Millar, perhaps, right to suggest that, “it might plausibly be contended that the prescription of servitudes in general is independent of statute”?³⁵

Unfortunately, the scarcity of easily accessible and relevant sources renders it difficult to ascertain the 16th-century position with any certainty. In addition to this, it seems unlikely that the only case which is generally given as authority for the establishment of servitudes by prescription before 1617 is actually a case concerning servitudes at all. That case is *Laird of Knockdolian v Tenants of Parthick* decided in July 1583 and cited by Stair as authority for the proposition that a servitude of common pasturage can be established on the basis of a bare clause of parts and pertinents.³⁶ In the case itself, tenants of the wood of Parthick successfully resisted an action to flit and remove by arguing that they had “their beasts pastured ay in the wood at their pleasure”³⁷. Rejecting the pursuer’s argument that the tenants could only succeed by proving the wood to be wholly part and pertinent of their lands, the Lords admitted the exception, agreeing that the “servitude of pasturage” was a pertinent of the rented lands. However, as Napier notes in the appendix to his *Commentaries*, the context suggests that the case is more likely to have concerned the extent of the tenants’ rental right than to have concerned a praedial servitude as such.³⁸

That this view of *Knockdolian* is more likely to be correct is also suggested by a brief consideration of the most accessible contemporary sources. First of these is a

³⁵ JH Millar, *Handbook of Prescription* (1893), 73. According to Rankine, “It is needless to inquire whether positive prescription as to servitudes sprang from or was older than the first part of 1617, c12, for the rules of that Act are strictly followed”, *Landownership*, 429. Cf. Napier, 357-361, 376-378.

³⁶ *Laird of Knockdolian v Tenants of Parthick* (1583) Mor 14540; cf. Stair, 2.7.14.

³⁷ *Ibid*, Colvil report at 14541.

³⁸ Napier, 927. Napier had earlier cited the case as an example of pre-1617 prescription by immemorial possession, 360-361.

case decided exactly two years later in July 1585: *Laird of Dundas v Elphingston*.³⁹ In that case, Mr Elphingston was infeft in the pendicles of Arnestoun *cum communi pastura* and claimed that, since he and his predecessors had been in possession of pasturage “in all time bygone”, this was as good as being infeft with a special title. On that occasion, however, the Lords repelled Elphingston’s exception, agreeing with Dundas that the clause of common pasturage was ineffective unless it was expressed *in verbis dispositivis*, specifying a certain muir, wood or part of ground. The Institutional Writer nearest in time to *Dundas*, Craig, took a similar view in his *Jus Feudale* (written c. 1605) in relation to the difficult question of what effect an unspecified grant of common pasturage has when no other rights of common pasturage yet exist over the superior’s lands.⁴⁰ Noting that the clause is mere “surplusage” if it refers to the right to graze freely on a vassal’s own lands, Craig nevertheless agrees with *Dundas* that the clause is inept unless it specifies what part of the superior’s land is meant. Two things should be noted: firstly, Craig’s comment occurs strictly within the context of interpreting a clause of common pasturage where no other common pasturage yet exists on the superior’s lands; and, secondly, Craig notes that the ineffectiveness of such a clause was a relatively recent development in a law which had previously thought immemorial possession sufficient to explain any clause of pasturage and, indeed, good proof in all questions of servitudes.⁴¹ Nevertheless, as Craig, in the expansive translation of Lord Clyde, notes:⁴²

<i>Sed posteriora derogant prioribus.</i>	“the law must follow the course of decision whatever legal notions may have prevailed at an earlier date”.
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The combined weight of *Dundas* and Craig would tend therefore to suggest that Stair (or the reporters, Spottiswoode and Colvil) had misinterpreted *Knockdolian* and that, rather than relating to the establishment of a servitude by prescription, the case was

³⁹ *Laird of Dundas v Elphingston* (1585) Mor 2255.

⁴⁰ Craig, 2.8.34.

⁴¹ *Ibid*, 2.8.34 (at 538-539): “[b]efore that decision the law was generally thought to be otherwise, on the ground that immemorial possession in such a case was enough, and that the Civil Law maintained the force of prescriptive possession in all questions of servitude.” Cf. Napier, 361 n1.

⁴² *Ibid*, cf. *Thomae Cragii, Jus Feudale* (Leipzig, 1716), 354.

concerned solely with the extent of a tenant's right under a lease. In itself, such an interpretation from Stair is, however, interesting and, if nothing else, shows that Stair believed the institution of immemorial possession to have some utility independent of the 1617 Act.⁴³ But what would be the relationship between this more ancient doctrine and the prescription introduced by the 1617 Act? Given that there appears to be little conceptual difference between the two doctrines (the claimant in *Dundas*, for example, taking a clearly "interpretative" approach), it might be supposed that the forty years' prescription introduced by the 1617 Act would simply have replaced the older requirement of immemoriality as pleaders sought a less onerous set of facts to prove.⁴⁴ In reality, counsel in cases from the 17th and 18th century continued to invoke immemorial possession for some time after the passing of the prescription statute.⁴⁵

An early example is *Neilson v Sheriff of Galloway*, where the pursuer sought a declarator of servitude, alleging thirty years' uninterrupted use of a gate and passage to the parish church.⁴⁶ While accepting that a servitude could be inferred from use and possession, the Lords found that "the possession ought to be immemorial and past memory of man, and would not sustain the offer to prove possession for 30 or 40 years."⁴⁷ In *Neilson*, the Lords therefore decided that no period of possession would be sufficient to establish a servitude except that of immemoriality.⁴⁸ On the other hand, in *Forbes v Moneymusk*, decided that same year, though the Lords agreed that a servitude could be established if proved to have been possessed

⁴³ In addition to the assumption that Stair would have been aware of the date of the decision in Knockdolian, Napier also points out that the possession said to be required is "immemorial, or forty years' possession by the act of prescription", thus appearing to link the forty years to the statute but not immemoriality, Napier, 360-361.

⁴⁴ Indeed, Napier claims that this did, in fact take place to some extent, Napier, 376-378.

⁴⁵ Sadly, the Fountainhall Collection of Session Papers, though available in the National Library, appears to be without a readily available index, thus making it difficult to tell whether the 1617 Act was also cited in those 17th century cases.

⁴⁶ *Neilson v Sheriff of Galloway* (1623) Mor 10880; cf. *Sheriff of Cavers v Turnbull* (1629) Mor 10874.

⁴⁷ Or, as Haddington reports the case, "possession would not sustain the summons unless he would libel possession past memory of man."

⁴⁸ Stair, 2.7.2, apparently understood this to mean that forty years was insufficient in itself but enough to prove immemorial possession. Napier, 357-361, doubts this, pointing to the later case of *Fardell v Weymes*, Fountainhall's report of which, B Supp II 706, notes that the Lords in *Neilson* "seem to require more than forty years' possession only, for constituting of a servitude of a gait to a kirk, and to call immemorial some different thing."

peaceably past memory of man,⁴⁹ they departed from *Neilson* in accepting that a servitude of drawing up nets could also be “inferred” from forty years’ possession by prescription.⁵⁰ These cases show real uncertainty over the Act’s application to servitudes and it is instructive to note that the controversy was not over the continued viability of proof by immemorial usage but the acceptance of the forty years prescription in the law of servitudes.

Within half a century, the two methods of establishing a servitude appear to have settled down into a more stable co-existence with some cases throughout the 17th and 18th centuries being decided on the basis of forty years’ prescription⁵¹ and others being decided on the basis of immemorial possession.⁵² That the two doctrines remained conceptually distinct is, however, clear from the fact that the circumstances covered by each did not entirely overlap. Though the forty-year prescription extended protection to situations where possession had begun within memory, there remained instances where it was prudent to plead immemorial possession. The prime example appears to have been those situations where immemorial possession could be proved but no single period of this was uninterrupted for forty years. In such cases, immemorial possession was relied upon to establish the existence of the servitude prior to the interruption’s beginning, thus shifting the burden onto the interrupter who would be required to prove forty years of interruption. For example, in *Borthwick of Pilmoor v The Laird of Kirkland*,⁵³ it was held that, should the Laird succeed in proving his possession to have been immemorial, it could not be elided by interruptions within forty years of the action. The servitude having been established by the Laird’s immemorial possession, forty years’ interruption would be required for it to prescribe negatively. Likewise, in *Nicolson v Lairds of Bightie and*

⁴⁹ *Forbes v Moneymusk* (1623) Mor 10840, Haddington.

⁵⁰ *Ibid*, Kerse, and *Moneymusk v Forbes* (1623) Mor 10873.

⁵¹ *Kinnaird v Fenzies* (1662) Mor 14502; *Dunfermline Muir* (1668) Mor 10776; *Dalzell v The Laird of Tinwall* (1673) B Supp II 182; *Grant v Grant* (1677) Mor 10877

⁵² *Beaton of Bandoch v Ogilvie of Martoun* (1670) Mor 10912; *Borthwick of Pilmoor v The Laird of Kirkland* (1677) B Supp II 215; *Prestoun v Colonel Erskine* (1714) Mor 10919; *Wallace v Morrison* (1761) Mor 14511.

⁵³ *Borthwick*, *ibid*; cf. *Beaton*, *ibid*, where a right to water from a stream, proven by immemorial possession, allowed the right-holder to prohibit another from diverting water though he had done so for thirty-five years but could not allow him to hinder another who had diverted the water from the stream for forty years.

Babirnie,⁵⁴ though only twenty years' possession could be proved prior to the first interruption, the fact that the first interruption was a further fifty years prior to the case rendered the possession immemorial, meaning that the servitude was already established and the burden was now on the interrupter to prove sufficient interruption to extinguish the servitude.

The impression that the plea of immemorial possession was sometimes preferred to that of forty years on pragmatic grounds is reinforced by the decision in *White of Bennoch v Wemyss of Bogie-Bennoch*.⁵⁵ In that case, though only twenty-eight years had passed since the allegedly-dominant and allegedly-servient properties had been divided, Bogie claimed to have established a right of road over White's land. Clearly, such a case could not be brought under the forty years' prescription, twelve years of usage being tainted by the rule *res sua nemini servit*. On policy grounds, however, the Lords determined that a failure to find a servitude in this case would reawaken many pleas where rights had not been reserved but would have been gladly granted at the time of division had they been thought of. The Lords therefore found Bogie to have a right to the road, allowing him to prove immemorial possession by joining his use with that which had gone on before the division of the properties.

As these cases show, rather than simply superseding the doctrine of proof by immemorial possession, the effect of the 1617 Act with regard to servitudes appears to have been to provide an additional method by which long-exercised putative servitudes could be protected. While the forty-year prescription undoubtedly made it easier to establish servitudes in some situations, circumstances remained where it was more attractive to plead the older doctrine. Millar was perhaps overstating the case in suggesting that the entire doctrine of prescriptive servitudes could be explained independently of the 1617 Act but it nevertheless seems impossible to explain the doctrine's first two centuries by statute alone.

⁵⁴ *Nicolson v Lairds of Bightie and Babirnie* (1662) Mor 11291.

⁵⁵ *Robert White of Bennoch v Bogie-Bennoch* (1700) Mor 10881. It is possible that this case represents some nascent form of creation by implied grant.

(4) Independent of the 1617 Act: possession as evidence of a previous grant

That the establishment of servitudes by possession may not be traceable to a single origin or doctrinal foundation is further suggested by a development foreshadowed in 18th-century Session Papers but not fully realised until the mid-19th century. This development was the rise of the “presumed grant” theory. Rather than tracing the prescription of servitudes to the explicative and protective operation of the 1617 Act or immemorial possession on a clause of parts and pertinents, this analysis saw forty years’ possession as evidence that a grant of servitude had previously been made, to which the possession was referable. In England, this is known as the doctrine of lost modern grant, a doctrine introduced by judges to extend the protection of long-established putative easements beyond that allowed for at the time.⁵⁶

While the concept of implied consent is occasionally encountered prior to 1800 as providing a justification for the prescription of servitudes, in only one case does long possession manifest itself as evidence of a previous grant, even there only being used to explain a clause of parts and pertinents.⁵⁷ Indeed, it would appear that the first case to utilise the concept of presumed grant, perhaps unconsciously, is that of *Beaumont v Glenlyon* in 1843.⁵⁸ That case will be investigated more fully in the next chapter and concerned the establishment of a servitude by prescription where the charter of the dominant tenement contained a bounding description. The actual concept of presumed grant was not, however, a new one in 1843, having also been pled, perhaps speculatively, in at least two 18th-century cases, *Dunse v Hay*⁵⁹ and the, eventually settled, appeal to the House of Lords in *Earl of Breadalbane v Menzies of Culdares*.⁶⁰ Given that these cases occur as early as the first half of the 18th century, it seems clear that Scottish jurists were never happy to be constrained to one

⁵⁶ See below at 49-52.

⁵⁷ *Earl of Breadalbane v Menzies of Culdares* (1740) B Supp V 700 per Lord Arniston, who “thought that such an uniform possession for so long a tract of time, presumed a grant from the crown... which, joined with the infeftment in part and pertinent, made a connected title of prescription.

⁵⁸ *Beaumont v Lord Glenlyon* (1843) 5 D 1337; cf. Napier, 374-377.

⁵⁹ *Dunse v Hay* (1732) Mor 1824.

⁶⁰ *Earl of Breadalbane v Menzies of Culdares* (1740) B Supp V 700. The Session Papers for the appeal can be found at *Earl of Breadalbane and HMA v Menzies of Culdares and Macdonald*, WSSP, 1743, 6.68.

conceptual framework when pleading the establishment or proof of servitudes by possession.

C. Conclusion

Two main conclusions can be drawn from the foregoing analysis. Firstly, the establishment of servitudes by what is now known as positive prescription cannot be traced decisively to a single point of origin. In fact, throughout the 17th and 18th centuries, the idea was attributed to least two doctrinal foundations: proof by immemorial usage and prescription under the 1617 Act. Each was regularly relied upon in argument before the Court of Session, generally without reference to the other. Indeed, even beyond these two possible foundations, a nascent form of presumed grant theory can be discerned at points. Secondly, whenever the prescription of servitudes was attributed to the 1617 Act, this was most properly understood to be by direct application of the statute rather than by analogy. According to this view, prescription operated by considering servitudes to be included in express or implied clauses of parts and pertinent in the title to the dominant tenement, explicated by possession and exempted from challenge after forty years. While commentators were correct to say that prescription of servitudes occurred without requiring a “title” or grant from the servient proprietor, this did not mean that no title was required under the 1617 Act. Rather, on this view, the establishment of servitudes by positive prescription was an application of the prescription Act’s more general operation to protect all those rights held by a landowner on the basis of his heritable infefment.

Chapter 3

Conceptual Development: 1800-1914

A. Introduction

B. From interpretation of title to presumed grant

- (1) Before *Beaumont*: prescription of servitudes where the claimant's charter contains a bounding description
- (2) Relevant Developments in England before *Beaumont*
- (3) *Beaumont v Lord Glenlyon* and the adoption of "presumed grant"
- (4) *Beaumont's* immediate aftermath and Napier's *Commentaries*

C. The "presumptive approach": prescriptive possession as proof of an existing right

A. Introduction

Having considered the doctrine's origins and conceptual foundations in the last chapter, it is now possible to trace its continuing development from 1800 to 1914.¹ This period was conceptually significant for two reasons: firstly, because it witnessed a resolution of the differing conceptualisations which had emerged by the end of the 18th century; and, secondly, because this resolution was achieved through the adoption of a new theory of "presumed grant". This theory effectively divorced the possibility of establishing servitudes by prescription from the wording of the claimant's title and led to a practical shift as courts and commentators were freed from exegesis of the claimant's title deeds and enabled to focus more closely on the claimant's behaviour. In turn, this laid the foundations for the possession based

¹ 1914 has been chosen as an appropriate point to conclude this chapter, as the years leading up to 1914 witnessed the publication of three standard accounts of the law on servitudes: the 4th edition of J Rankine, *The Law of Land-Ownership in Scotland*, (4th edn, 1909); the final edition of "Little Erskine", J Erskine, *Principles of the Law of Scotland* (21st edn, Rankine et al (eds), 1911); the revised entry for servitudes in the Encyclopaedia of the Laws of Scotland, J Bartholomew, "Servitudes", in J Chisholm et al (eds), *Green's Encyclopaedia of the Law of Scotland*, vol 11 (2nd edn, 1914).

regime codified in the Prescription and Limitation (Scotland) Act 1973. This chapter will seek to demonstrate how and why this conceptual shift took place.

B. From interpretation of title to presumed grant

It was suggested in the last chapter that two main approaches had emerged by 1800. According to the first (the “interpretative approach”), the establishment of servitudes by positive prescription occurred as a particular application of the 1617 Act’s general principles: the apparent exercise of a servitude for the prescriptive period proved that the servitude in question could be read into a general clause of part and pertinents in the claimant’s title, and so was then exempted from challenge. By contrast, the second approach (the “acquisitive approach”) was less concerned with interpreting the claimant’s title and required only that the claimant be infeft in the dominant tenement in order to satisfy the requirement of praediality. The real difference between the approaches was that the first required infeftment on the basis of an exegetically plausible title, while the second required infeftment alone.

When one looks solely at the 17th and 18th century sources, however, it is difficult to discern any real practical difference between the two approaches. This is especially so since the interpretative approach accepted even implied clauses of parts and pertinents as sufficient title for prescription. In practice, both approaches therefore accepted that servitudes could be established by possession where the claimant’s title was silent.² Indeed, logically, there could only be one scenario in which the two approaches would lead to a different result: namely, where the wording of the claimant’s title was positively inconsistent with the conferral of a servitude – for example, where it expressly excluded the creation of any servitude or purported to give an exhaustive list. As the 19th century progressed, such an inconsistency would in fact manifest itself in relation to a previously overlooked issue: the possibility of

² See above at 28, 29-30; Stair, 2.7.2.

establishing servitudes by prescription where the claimant's title included a strict bounding description.

At first, this issue might appear a narrowly technical one. To understand its significance an analogy with rights of "property" is helpful. By excluding the acquisition of property beyond specified boundaries, bounding descriptions demonstrate that positive prescription depends ultimately on the provisions of the claimant's title and not on possession alone.³ If bounding descriptions were also to exclude the establishment of servitudes by prescription, this would therefore prove that the prescription of servitudes depends on not just the fact of infestment but also on the wording of the relevant deed. Such an outcome would be supportive of the interpretative approach. Conversely, if bounding descriptions were not to exclude the establishment of servitudes by prescription, this would demonstrate one of two things: either that bounding clauses apply only to rights of ownership or that servitudes can be established by prescription even when the claimant's title is not habile to include servitudes. The first possibility would be consistent with either approach, thus confirming their practical equivalence; the second possibility would be inconsistent with the interpretative approach's requirement of an exegetically plausible title, thus indicating that an alternative – or additional – juridical basis is necessary to explain the establishment of servitudes by prescription where the claimant's charter contains a bounding description.

Given this issue's significance, it is perhaps surprising that the first case to discuss it was not until *Hepburn v Duke of Gordon* in 1823.⁴ Even then, the case was one of division of commonty and the issue itself was not decided.⁵ Indeed, the issue would

³ E.g. *Young v Carmichael* (1671) Mor 9636.

⁴ *Hepburn v Duke of Gordon* (1823) 2 S 459 (525 in reprint).

⁵ Though holding the barony of Rickarton under a charter which described his lands and pertinents as "lying within the parish of Fetteresso", Hepburn raised an action to divide the neighbouring commonty, only part of which lay in the parish of Fetteresso. The Duke of Gordon objected on the basis that such a bounding description prevented Hepburn from acquiring common property over the parts of the commonty lying outside Fetteresso. Significantly, it appears that both parties accepted the possibility of servitudes being established beyond the boundaries, the Duke admitting "although he might acquire a right of servitude" and Hepburn's counsel relying on Erskine, *Institute*, 2.9.3 to claim that such a possibility "appears from the nature of servitudes and their modes of constitution", *Hepburn v Duke of Gordon*, ALSP, General Collection, Nov 25, 1823, No 510, 11.

not be expressly addressed until 1843, when *Beaumont v Lord Glenlyon* confirmed that servitudes could indeed be established on the basis of a title containing a bounding description but no express clause of parts and pertinents.⁶ What is most interesting about *Beaumont* is the juridical basis given for this conclusion. For though two of the judges in the First Division were content to state that a bounding description excludes only the prescriptive acquisition of land beyond its boundaries, the other two went further and adopted an alternative – and apparently novel – theory; namely, that the apparent exercise of a servitude for forty years leads to a presumption that the servitude in question had been previously constituted by grant. Despite its novelty, it was this theory of “presumed grant”⁷ which would lay the foundations for the doctrine’s development over the remainder of the century, decisively breaking the relationship between the possibility of prescription in a given situation and the provisions of the claimant’s title. The presumption of an actual grant appears, in turn, to have given way to a looser presumption of legitimate origin as courts focused exclusively on the apparent exercise of a servitude “as of right” as evidence of its previous constitution.

With this background in mind, the remainder of this chapter will consist of four parts: firstly, the law preceding *Beaumont* will be examined to discover why a new theory was thought necessary; secondly, the contemporary situation in the English law of easements will be outlined; thirdly, *Beaumont* itself will be analysed to demonstrate where the notion of presumed grant originated in Scots law; and, finally, it will be shown how, over the remainder of the 19th century, a “presumptive” approach came to replace the interpretative and acquisitive approaches encountered in the 17th and 18th centuries.

⁶ *Beaumont v Lord Glenlyon* (1843) 5 D 1337.

⁷ This term is not found in *Beaumont* itself, where the terminology used by Lords Fullerton and Jeffrey is that possession “implies a grant”, *ibid* at 1342 per Lord Fullerton and 1343 per Lord Jeffrey. This terminology is, however, open to confusion with the later doctrine of implied grant resulting from the division of a tenement, as pioneered in Scots law in *Ewart v Cochrane* (1861) 4 Macq 117.

(1) Before *Beaumont*: prescription of servitudes where the claimant's charter contains a bounding description

To understand why half of the First Division thought it necessary to resort to a new theory it is helpful to reconstruct the background against which the decision in *Beaumont* was reached. On the whole, the first third of the 19th century saw little conceptual consideration of the prescriptive establishment of servitudes. Indeed, even though the years leading up to 1830 had generated a number of cases dealing with public “servitudes” and a considerable number of cases dealing with praedial servitudes and prescription, even to the extent of appeals to the House of Lords, there was only incremental development of the law.⁸ New editions of Stair’s *Institutions* and Erskine’s *Institute* were published but their discussions of the doctrine did not advance beyond the original authors’ analyses: Stair’s editors simply restated his requirement of a clause of parts and pertinents as title for prescription and Erskine’s editors generally restricted themselves to updating citations.⁹ The relevant passages in Baron Hume’s lectures and the first three editions of Bell’s *Principles of the Law of Scotland* likewise offer no innovations, both following Erskine’s requirement of infeftment alone – in other words, a broadly acquisitive approach.¹⁰

⁸ For “public” servitudes, see AL Jarman, “Customary Rights in Scots Law: Test Cases on Access to Land in the Nineteenth Century” (2007) 28 *Journal of Legal History* 207. For the praedial servitude cases see, e.g. *Magistrates of Earlsferry v Malcolm* (1832) 11 S 74 (golf); *Steele v Oliver* (1832) 10 S 857 (eavesdrop); *Earl of Fife’s Trustees v Cumming* (1831) 9 S 336 (pasturage and common); *Thomson v Donald* (1830) 8 S 630 (possessory judgement); *Saunders v Hunter* (1830) 8 S 605, sub nom *Mill’s Trs v Reid* (possessory judgement); *Earl of Fife’s Trustees v Cumming* (1830) 8 S 326 (common and pasturage); *Aikman v Duke of Hamilton* (1829) 8 S 54 (sand and gravel); *Magistrates of Earlsferry v Michael* (1829) 7 S 755 (golf); *Keith v Stonehaven* (1829) 7 S 405 (stone); *Harvie v Rodgers* (1828) 5 Wilson & Shaw 251; (1830) 8 S 611; (1829) 7 S 287; (1827) 5 S 917 (access); *Gunn v Brown* (1827) 7 S 274 (access); *Miller v Blair* (1825) 4 S 214 (access to salmon fishing); *Stuart v Symers*, Court of Session, 6 December 1814, noticed in Hume, *Lectures*, vol 3, 268 (access); *Dempster v Cleghorn* (1813) 2 Dow 40; 3 E.R. 780 (golf); *Earl of Morton v Stuart* (1813) 1 Dow 91; 3 E.R. 633; (1813) 5 Pat App 720 (access); *Wood v Robertson*, 9 Mar 1809 FC (obstruction of express grant of access servitude); *Hill v Ramsay* (1810) 5 Paton’s App 299 (access); *Drury Macdonald v Macdonald* (1801) 4 Paton 237 (sea ware).

⁹ See J Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (4th edn, G Brodie (ed), 1826-1831), 332 note D; J Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (5th edn, JS More (ed), 1832), vol 1, note AA.11 and note W. See also J Erskine, *An Institute of the Law of Scotland* (4th edn, J Gillon (ed), 1805), 2.9.3; J Erskine, *An Institute of the Law of Scotland* (5th edn, WM Morison (ed), 1812), 2.9.3; J Erskine, *An Institute of the Law of Scotland* (6th edn, J Ivory (ed), 1824-28), 2.9.3.

¹⁰ GCH Paton (ed), *Baron David Hume’s Lectures 1786-1822*, vol III (1952), 264-265; GJ Bell, *Principles of the Law of Scotland* (1st edn, 1829; 2nd edn, 1830; 3rd edn, 1833), §993.

By 1839, however, the issue of bounding descriptions had emerged and a consensus appears to have arisen among legal writers that such titles would exclude the prescription of servitudes. This consensus is seen most clearly in the 4th edition of Bell's *Principles*, published in 1839,¹¹ and the 7th edition of Erskine's *Institute*, edited by Macallan in 1838.¹² Though previous editions of both works had simply followed Erskine's approach of requiring only infestment, each now clearly stated that the prescription of servitudes would be excluded by a bounding description.¹³ This opinion was shared by Mark Napier, whose primary treatment of prescriptive servitudes was written prior to the decision in *Beaumont* but not published until 1854.¹⁴ This emerging consensus goes some way to explaining why half of the Inner House in *Beaumont* might have felt it necessary to propose an alternative juridical basis for the decision.

Oddly, the consensus appears to have been grounded in very little legal authority. Indeed, both Macallan and Bell cite only one case in support of their position: *Saunders v Hunter*.¹⁵ The reliance on this case is surprising for two reasons: firstly, because *Saunders* had since been doubted by the First Division in *Liston v Galloway*,¹⁶ and, secondly, because *Saunders* was an appeal from a Sheriff Court decision and dealt exclusively with questions of possessory judgement rather than heritable right.¹⁷ These two factors suggest that the approach of Bell and Macallan was informed more by doctrinal extrapolation than by contemporary case law.

¹¹ GJ Bell, *Principles of the Law of Scotland* (4th edn, 1839), §993.

¹² J Erskine, *An Institute of the Law of Scotland* (7th edn, A Macallan (ed), 1838), 2.9.3 (410 n 1).

¹³ “[A] positive servitude may be established, without any grant or other title in writing, except charter in the dominant subject; law presuming a title. But... the servitude must be possessed as accessory to a dominant tenement, *and must not be excluded by a bounding charter*” Bell, *Principles* (4th edn, 1839), §993, italics added; likewise, “there must be title sufficient to admit of the right, such as title with part and pertinent... so where lands were strictly bounded and there was no clause of parts and pertinents... it was held that a servitude of road through adjoining lands could not be constituted by the mere use of it for 40 years without interruption”, Macallan, *ibid*, II.9.3, 410(fn). Bell also states elsewhere that a servitude of pasturage may be “constituted by prescription, grounded on words in the title sufficient to sustain it”, *Principles*, §1013.

¹⁴ Napier, 352-355. Though this section was not published until 1854, it was apparently written prior to the decision in *Beaumont* and “subsequently sent to press as written, the Glenlyon case having escaped the author's observation at the time”, *ibid*, 375, fn1.

¹⁵ *Saunders v Hunter* (1830) 8 S 605, sub nom *Mill's Trs v Reid*.

¹⁶ *Liston v Galloway* (1835) 13 S 97.

¹⁷ Sheriff Courts had no jurisdiction over the questions touching the constitution of servitudes until the Sheriff Courts (Scotland) Act 1838, 1&2 Vict. c.119, s15. Though title was required for both

Saunders and *Liston* appear to be irreconcilable. Both were brought by persons holding land on a title which contained a bounding description and no express clause of parts and pertinents. Both were prompted by the actions of neighbours which excluded the pursuers from ground over which they claimed a servitude of access.¹⁸ And yet, despite these similarities, *Saunders* held that a charter containing a bounding description was not sufficient title for a possessory judgement while *Liston* held that it was. Subsequent attempts to distinguish the two cases were unconvincing¹⁹ and, though the Lord Ordinary in *Liston* was apparently unaware of *Saunders* at the time of judgement, the First Division was not, Lord President Hope even suggesting that *Saunders* be reconsidered.²⁰

In light of this contradiction, it might therefore seem surprising that both Bell and Macallan should cite *Saunders* but not *Liston*. And, in Macallan's case, this omission does seem to stem from ignorance of the latter case.²¹ Bell's omission is, however,

possessory judgements and declarators of servitude, the nature of the title required differed in each case, possessory judgements requiring only that a title be *ex facie* habile to include the right claimed. Accordingly, whether the prescription of servitudes was acquisitive or interpretative in nature could lead to a divergence between the availability of each action in a given situation. This point was acknowledged by Lord Fullerton in *Beaumont* itself: "Here, the point is whether such a title, when combined with a possession of forty years, is sufficient to establish the right. Now, this last point was clearly assumed to be in the affirmative, even in the case of *Saunders*. For that, too was the case of a possessory judgement; and it appears from the opinion of Lord Glenlee, to which the other Judges adhered, that though the limited title was not held in itself to warrant a possessory judgement, it might establish a title, if a forty years' possession were proved," *Beaumont v Lord Glenlyon* (1843) 5 D 1337 at 1343 per Lord Fullerton.

¹⁸ Though the advocator in *Liston* was not infest under her disposition, having only a personal title at the time of action, *Liston* (1835) 13 S 97.

¹⁹ As Lord Fullerton, who was Lord Ordinary in *Liston*, later acknowledged: "it must be admitted that it would be difficult to reconcile the one decision with the other", *Beaumont* (1843) 5 D 1337 at 1343. This did not stop *Beaumont*'s counsel from seeking to distinguish *Saunders* on the basis that a servitude of light had also been claimed and that possessory judgement had only been refused for the right of road since it had to be dealt with alongside the servitude of light, *Beaumont Papers*, 24-25. Earlier, in *Grant v Robertson* (1837) 9 Sc Jur 528, Lord Jeffrey had sought to distinguish *Liston* on the basis that the servitude of road claimed in that case was one of necessity. This was, however, occasioned by a misunderstanding of Lord Gillies' dictum in *Liston* that *Saunders* should be doubted since "free ish and entry is implied in every disposition", Lord Jeffrey believing these words to refer to the facts in *Liston* itself – Lord Gillies' dictum is reported only in Faculty Decisions, *Liston v Galloway*, 3rd Dec. 1835 FC.

²⁰ See *Beaumont* 5 D 1337 at 1343 per Lord Fullerton; *Liston* 13 S 97 at 99 per LP Hope. As to the later history of possessory judgements relating to servitudes, see *Carson etc v Miller* (1863) 1 M 601 and C Anderson, "The protection of possession in Scots law", in Descheemaeker, *Consequences*, 123-125.

²¹ Indeed, Macallan would change his mind two years later, now citing *Liston* as authority for the proposition that servitudes *could* be acquired by prescription without a clause of parts and pertinents,

different. He was aware of both *Saunders* and *Liston*, since he had already summarised them in his *Illustrations from Adjudged Cases of the Principles of the Law of Scotland*.²² He also understood their true nature since those summaries describe each case as concerning a possessory judgement. Why then would he omit to cite *Liston* three years later? A closer inspection of the surrounding footnotes provides the answer: his reference to *Liston* had simply slipped into the next footnote.²³ As such, it seems that Bell did not overlook *Liston* at all but weighed up both decisions and extrapolated from the possessory decision in *Saunders* to his own conclusion that a declarator would have been similarly unsuccessful.²⁴

But do the cases support such an extrapolation? If anything, the court in each case seems to have assumed that servitudes *could* be established beyond a bounding description. In *Saunders*, for example, the sheriff was careful to confine his decision to the question of possessory judgement and expressly reserved to the pursuers the option of seeking declarator in the proper court.²⁵ Likewise, in the Inner House, Lord Glenlee noted that the reason a possessory judgement could not be granted was that *Saunders* “merely had the means of establishing a title” and had not actually done so yet.²⁶ In *Liston*, Lord Fullerton’s dictum in the Outer House, that “a bounding charter, though it may be conclusive against a claim of property beyond its limits is not necessarily exclusive of any of the known rights of servitude”, though obiter, appears to be an express recognition that a declarator of servitude might have been

A Macallan, *Pocket Lawyer* (4th edn, 1840), 28; cf. Macvey Napier, *Lectures on Conveyancing* (1843-1844), 377-378.

²² GJ Bell, *Illustrations from Adjudged Cases of the Principles of the Law of Scotland* (1838), vol II, 129.

²³ See Bell, *Principles*, §993, fn.e, where *Liston* is given as unlikely authority for the proposition that royal burghs can possess as Crown vassals. The error remains in Shaw’s 5th edition (1850) but was corrected in W Guthrie’s 6th edition (1872).

²⁴ An equally nuanced view cannot be attributed to Macallan, whose footnote expressly treats *Saunders* as if it dealt with the actual constitution of a servitude and does not mention the possessory element, Macallan (n 12). This is also true of his later treatment of *Liston*, see n 21 above.

²⁵ *Saunders v Reid*, 26 Feb. 1830 FC at 471.

²⁶ *Saunders* (1830) 8 S 605 at 606 per Lord Glenlee.

granted had it been sought.²⁷ Similar comments in other contemporary cases suggest that this assumption was generally shared by the judiciary.²⁸

Taking these factors into account, it appears that certain conclusions can be drawn from the pre-*Beaumont* case law. Firstly, in the decade leading up to *Beaumont*, a consensus had arisen among legal writers that servitudes could not be established by prescription where the claimant's title included a bounding description; this consensus suggests that an interpretative approach had regained the upper hand among legal writers. Secondly, however, this consensus was not necessarily supported by contemporary case law but was grounded in a failure to distinguish possessory and petitory actions or an unconvincing extrapolation from one to the other. Indeed, as far as the judiciary was concerned, a more acquisitive approach had led them to assume the possibility of acquiring servitudes by prescription provided the claimant was infeft in the dominant tenement. Accordingly, it appears that the approaches of legal writers and judiciary were diverging in the years leading up to *Beaumont*, the former being prepared to restrict the doctrine's availability on the basis of an interpretative approach and the latter being prepared to extend its availability on the basis of an acquisitive approach.

(2) Relevant Developments in England before Beaumont

With this tension in mind, it is helpful to take a brief look at the position in contemporary England. In 1839, a key event occurred for the English law of easements with the publication of the first edition of *Gale on Easements*.²⁹ This work, co-authored by Charles Gale and Thomas Whatley, was the first textbook on the law of easements as a whole and would eventually be seen as the start-point for much of the later law in this area.³⁰ Particularly interesting for our purposes is

²⁷ *Liston* (1835) 13 S 97 at 98 (note) per Lord Ordinary (Fullerton).

²⁸ E.g. *Grant v Robertson* (1837) 9 Sc Jur 528 at 528 per Lord Jeffrey and at 528 per Lord Glenlee; *Spence v Earl of Zetland* (1839) 11 Sc Jur 267. In the latter case, Lord Jeffrey at 271 rejected as a "radical fallacy", Sir Lawrence Dundas's argument that land in Shetland described as "twenty merks land" was as strictly bounded as description by acreage in other parts of the country and that William Spence could therefore only claim a servitude and not a share in the commonty. See also *Hepburn v Duke of Gordon* (1823) 2 S 459 (525 in reprint) and n 5 above.

²⁹ CJ Gale and TD Whately, *Easements* (1st edn, 1839).

³⁰ On the importance of this work for the law of easements, see Gaunt & Morgan, *Gale on Easements*, xx-xii; WS Holdsworth, *History of the English Law* (1922-52), vol 7, 323-324; AWB Simpson, *The*

chapter V on “Title to Easements by Prescription”. As this chapter makes clear, the English doctrine developed in three stages: prescription at common law, prescription by “lost modern grant”, and prescription under the Prescription Act 1832. In effect, the second and third stages each introduced an alternative basis for prescription in order to overcome a perceived practical or conceptual limitation in the one which preceded it. Most interesting for Scots lawyers is the second stage and its introduction of lost modern grant as a mode of prescription. This innovation is interesting for two reasons: firstly, because it provides an example of a legal system responding to intrinsic practical restrictions flowing from a doctrine’s existing juridical basis; and, secondly, because of its similarity to the presumed grant theory which would be invoked in *Beaumont* just four years later. To understand why this new mode of prescription was necessary, it is first important to understand the particular practical restrictions which affected the prescription of easements at common law.

The establishment of easements by long user had been recognised in English law since at least the 13th century.³¹ At first, the period required for prescription was similar to that required under the Scots concept of immemoriality: user beyond the memory of man, or at least to the time of the Conquest.³² After the passing of the Statute of Westminster in 1275 and by analogy with the law of limitation of title, it was decided that the law should instead require user to be proven back to 1189, the year of Richard I’s accession.³³ This remains the prescriptive period for easements at common law and is a valid mode of prescription in modern times.³⁴ Of course, as time passed and 1189 grew ever more distant, the limitations of this basis became apparent. Even when courts began to accept twenty years’ user as presumptive evidence of user beyond legal memory, this could still be overturned by proof that

History of the Land Law (2nd edn, 1986), 262-263. For a specific example of Gale’s influence on the law of easements, see AWB Simpson, “The rule in *Wheeldon v Burrows* and the *Code Civile*” (1967) 83 LQR 240.

³¹ Simpson, *History*, 109-110; Seebo, *Servitus und Easement*, 58, 60-63; Holdsworth, *ibid*, 343-345.

³² *Ibid*; Gale & Whately, *Easements* (n 29), 89; Gaunt & Morgan, *Gale on Easements*, para 4-05.

³³ *Ibid*.

³⁴ E.g. *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, where all three modes of prescription were pleaded alternatively.

user had originated or been interrupted at any point subsequent to 1189.³⁵ During the 18th century, courts therefore attempted to overcome this growing difficulty by introducing a new presumption that proof of user for twenty years would entitle – and later require³⁶ – a jury to presume that the easement in question had been constituted by a deed granted within modern times but subsequently lost before the action was brought.³⁷ In this way, the prescriptive period was effectively shortened to twenty years and any evidence that the user had originated subsequent to 1189 became irrelevant, so long as it predated the beginning of the twenty-year period. Unsurprisingly, this second mode of prescription soon overtook common law prescription in prominence and, for reasons soon to be explained, it remains the easiest way to establish an easement by prescription.³⁸

To a great extent, this presumption of a lost modern grant solved the practical problems which had resulted from doctrinal rigidity. Nevertheless, though this presumption made prescription easier, it also appears to have led to dissatisfaction among the judiciary. In particular, it was felt artificial to require that juries presume a grant where they did not actually believe one had existed – even more so where they were certain it had not.³⁹ Accordingly, in 1832, a third mode of prescription was

³⁵ Gaunt & Morgan, *Gale on Easements*, para 4-06; Megarry & Wade, *Real Property*, para 28-061.

³⁶ *Bryant v Foot* (1867) LR 2 QB 161 at 181 per Cockburn LJ: “Juries were first told that from user, during living memory, or even during 20 years, they might presume a lost grant or deed; next they were recommended to make such presumption; and, lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really existed.”

³⁷ Simpson, *History*, 266-267; Gaunt & Morgan, *Gale on Easements*, para 4-08; WB Stoebuck, “The Fiction of Presumed Grant” (1966) 15 U Kansas LR 17. Though Stoebuck claims at 20, that the presumption’s earliest appearance was in *Bedle v Beard* (1606) 12 Co Rep 4, Simpson distinguishes this case on its facts, contending instead that the earliest recorded decision is *Lewis v Price* from 1761 (2 Wms Saunders 175), Simpson, *History*, 266 n 90. The current authors of *Gale on Easement* concur, Gaunt & Morgan, *ibid*. For a postmodern and deconstructive perspective on lost modern grant, see MA Clawson, “Prescription adrift in a Sea of Servitudes: Postmodernism and the Lost Grant” (1994) 43 Duke LJ 845.

³⁸ See Simpson, *History*, 268-269; Megarry & Wade, *Real Property*, para 28-064: “Although it is said that the doctrine can be invoked only if something excludes common law prescription, in practice the common law claim is regarded as adding nothing in most cases to the claim based on lost modern grant: ‘they stand or fall together’”, citing *Mills v Silver* [1991] Ch 271 at 278 per Dillon LJ.

³⁹ Simpson, *ibid*, 267. Though, as Simpson also notes, “why they should have been more conscience-stricken about this than they were about the equally ludicrous prescription since 1189 has never been clear, if indeed there is any truth to the story.” See also e.g. *Bryant* (1867) LR 2 QB 161 at 181 per Cockburn LJ.

introduced with the Prescription Act 1832.⁴⁰ This Act sought to place on a statutory basis what the presumption of lost grant had already accomplished in practice: namely, the shortening of the prescriptive period to twenty years.⁴¹ However, the Act's obscure drafting⁴² and its requirement that user continue up to the date of action meant that it would never completely replace lost modern grant.⁴³ As such, the presumption of lost modern grant continues in the English law of easements to this day.⁴⁴

In light of what has already been discussed in this chapter, three things should be noted at this point. Firstly, as was the case with Scots servitudes in the late 1830s, the English doctrine of prescription had also encountered practical restrictions due to its doctrinal foundations: in Scotland, this resulted from grounding prescription in the wording of the claimant's title; in England, it resulted from an increasingly impossible prescriptive period as time marched on from a once sensible date. Secondly, the English solution to this problem was to adopt a theory of lost modern grant remarkably similar to that which would be proposed and adopted in *Beaumont* only four years after the publication of Gale and Whatley on *Easements*. Thirdly, as would be the case after *Beaumont*, this theory would be viewed initially as an

⁴⁰ Prescription Act 1832, 2 & 3 Will IV, c71.

⁴¹ Simpson, *History*, 267-268.

⁴² "This act, however, contains enactments much more extensive than would be necessary for this objective merely; and it is certainly to be lamented that its provisions were not more carefully framed, and that a more comprehensive view was not taken of the whole lot of this most important branch of our law. It deserves to share, in common with too many of our statutes, in the reproach, that it is couched in terms so obscure, and that many of the clauses are so carelessly drawn, that it is extremely difficult to understand what was the intention of the legislature", Gale & Whately, *Easements* (n 29), 97.

⁴³ Gaunt & Morgan, *Gale on Easements*, paras 4-20 and 4-67. According to Simpson, *History*, 268, this requirement was the Act's "fatal flaw" and resulted from the draftsman confusing the concepts of prescription and limitation, thus leading the Act to operate more as a bar to the servient owner's right of action than as a statutory replacement for the presumption of lost modern grant as the Real Property Commissioners had intended. Also, Holdsworth (n 30), 351-352.

⁴⁴ Its abolition and replacement with a purely statutory regime has been recommended by the Law Commission in its recent report on easements, Law Commission Report, *Making Land Work: Easements, Covenants and Profits a Prendre* (Law Com No 327) (2011), paras 3.99-3.101 and 3.111-3.112.

alternative to the existing approach to prescription but would, in practice, render the existing approach obsolete in most situations.⁴⁵

(3) *Beaumont v Lord Glenlyon* and the adoption of “presumed grant”

On returning to Scots law, it will be remembered that a divergence had emerged between legal writers and the judiciary by 1839. On the one hand, the judiciary was willing to follow the acquisitive approach and require only infeftment as title for prescription of servitudes. On the other hand, influential writers were returning to a more interpretative approach, requiring not only that the claimant be infeft but also that the claimant have an exegetically plausible title for the servitude claimed. Furthermore, this divergence had essentially narrowed to a single issue: could servitudes be established by prescription beyond the boundaries of a strictly bounded title?

It is against this background that *Beaumont v Lord Glenlyon* must be understood.⁴⁶ The facts, as agreed by the parties, were relatively straightforward. Having claimed to pasture sheep on Lord Glenlyon’s land for forty years, Beaumont sought declarator that he had established a servitude of exclusive pasturage. Like the pursuers in *Saunders* and *Liston*, Beaumont held his land on a strictly bounded title.⁴⁷ Unlike the proxy possessory judgement cases of the 1830s, however, the Court of Session was now in a position to determine whether such a title was sufficient for the prescriptive establishment of a servitude. It also provided the Court with an opportunity to settle the doctrine’s juridical basis: would it, with Bell and Macallan, return to a more interpretative approach and require that Beaumont produce an exegetically plausible title or would it, with the 1830s judiciary, affirm the newer acquisitive approach and require only that Beaumont be infeft in the dominant tenement?

⁴⁵ According to Simpson, *History*, 269: “... the same facts which will base a claim on immemorial user will always suffice to establish a claim by lost modern grant...”.

⁴⁶ *Beaumont v Lord Glenlyon* (1843) 5 D 1337.

⁴⁷ The facts were somewhat complicated by the fact that Beaumont owned two properties, Richael and Glaschorrie, only the latter of which was held on a strictly bounded title, *ibid* at 1339. Richael had been the subject of a disputed arbitration and at least one of the Inner House judges was prepared to accept that the servitude could be founded on this title instead, *ibid* at 1342 per Lord Mackenzie.

That the tension between these approaches was recognised in the Outer House can be seen from the Lord Ordinary's note and the parties' arguments, recorded in the relevant Session Papers.⁴⁸ Indeed, the Lord Ordinary (Cuninghame) appears to have been well aware of the case's potentially pivotal nature:⁴⁹

[a]s there is no decision (at least of late date) precisely in point, while there is an apparent, if not an intentional contrariety, in the doctrine of our institutional writers on the subject, this has been though a fit case to be reported to the Court. The case is the more entitled to be so disposed of, as the cases now presented for the parties have been drawn with great ability and exhibit very perspicuously the whole authorities bearing on the question.

Unsurprisingly, the Session Papers show that George Patton, counsel for Lord Glenlyon, was strict in his adherence to an interpretative approach, citing both Stair and the 4th edition of Bell's *Principles* as authority.⁵⁰ According to Patton, the law in 1843 was clear: the prescription of servitudes must always be traced to some title, even a mere clause of parts and pertinents.⁵¹ Since Beaumont could produce no such clause and was in fact limited by a boundary, he had no title to support a servitude of grazing and the case ought to be dismissed.⁵²

By contrast, Beaumont's counsel, LB Douglas, was more creative in his view of the applicable law.⁵³ In response to Patton he contended that the only title required for the prescription of servitudes was infestment – or, to phrase this differently, that prescription was possible whenever “the party possessing has simply a real right to the dominant tenement”.⁵⁴ Thus far, Douglas's position was a well-established one and essentially in line with the acquisitive approach adopted in the possessory

⁴⁸ See *Beaumont v Lord Glenlyon*, ALSP, General Collection, July, 11, 1843, No.238.

⁴⁹ *Beaumont* (1843) 5 D 1337 at 1339 (note) per Lord Ordinary (Cuninghame).

⁵⁰ George Patton (1803-1869), later Lord Justice Clerk (Glenalmond) from 1867-1869. See *Beaumont Papers*, 41-46. If nothing else, Patton's argument is evidence that the interpretative approach's revival had filtered through to those practising in the courts. As Macallan, Bell and Napier were themselves practising advocates, this is perhaps unsurprising.

⁵¹ *Beaumont Papers*, 41.

⁵² *Ibid*, 43-46. Patton appears to have overstated his case here and omitted to acknowledge the sufficiency of an implied clause of parts and pertinents.

⁵³ Laurence Brown Douglas (1813-1850), admitted to the bar, 1835, and Sheriff Substitute of Fife at Cuper, 1846-1850, SP Walker, *The Faculty of Advocates 1800-1986* (1987), 45.

⁵⁴ *Beaumont Papers*, 12-17. As well as relying on Erskine, *Institute*, 2.9.3 and the 3rd (rather than 4th) edition of Bell's *Principles*, §993, Douglas also relied on the difference between the 1st and 2nd editions of Mackenzie's *Institutions*, 9.3, discussed at 29 above. This change was also noted by Lord Cuninghame in the Outer House, who described it as a “careful correction of the law as first declared by him”, *Beaumont* (1843) 5 D 1337 at 1339, note.

judgement cases. Upon turning his attention to the fact that Beaumont's title was bounded, however, Douglas proposed an additional argument. Having noted that servitudes differ from rights of property in their modes of constitution, not requiring seisin but constituted simply by writ and possession,⁵⁵ he then pointed out that no one would claim that bounding descriptions should preclude a dominant proprietor from acquiring a servitude by a later express grant followed by "possession very short of the prescriptive period".⁵⁶ If so, he continued, a servitude constituted in this way would have come into existence, even if the constitutive deed were later lost.⁵⁷ Up until this point, Douglas's reasoning is relatively uncontroversial. It was his next step which would give *Beaumont* its true significance, for from this uncontroversial basis Douglas proceeded to argue that the apparent exercise of a servitude for the prescriptive period should give rise to the legal presumption that the landowner's forbearance to interrupt that exercise can only be reconciled with "a previous dereliction of his full and unqualified right of property through some special arrangement, although all traces of it may have been lost." Accordingly,⁵⁸

should the [landowner] attempt to exclude the exercise of the privilege of pasturage on the ground that no written title can be produced to warrant acquisition of the servitude, by prescriptive possession, the law will presume that such a title did once exist and will hold the mere circumstances of prescriptive possession combined with a real right to the dominant tenement sufficient to raise a presumption of an original legal acquisition of the servitude by special grant.

For Douglas, prescriptive possession in itself presumed a previous grant.

It is, perhaps, appropriate to ask at this point where Douglas's inspiration might have come from. Certainly, the argument bears a close resemblance to the English concept of lost modern grant and it may be that Douglas drew inspiration from south of the border. That said, even though Gale & Whatley had been published four years earlier, Douglas does not cite any English authorities in his argument. Native inspiration for Douglas's argument is therefore also plausible. The fact that Roman law had adopted a presumed grant analysis at one stage in its development perhaps

⁵⁵ *Ibid*, 11-12.

⁵⁶ *Ibid*, 20.

⁵⁷ *Ibid*, 20. Whether the existence of such a servitude could be proved without producing the constitutive deed is, of course, another matter.

⁵⁸ *Ibid*, 20-21.

suggests that such an analysis is a natural solution for any system to take when faced by an overly-restrictive doctrine of prescription.⁵⁹ John Shank More had already advanced a similar theory with respect to certain other non-servituted rights in a note to his edition of Stair's *Institutions*⁶⁰ and, as was seen in chapter 2, the concept of long possession presuming a previous grant of servitude had been briefly touched upon by advocates in two early 18th century cases – one of which, *Dunse v Hay*, was cited by Douglas in another part of his argument.⁶¹ In any event, the absence of any citations in the relevant section of his argument means it is unclear whether Douglas was influenced by – or, indeed, aware of – these sources. Indeed, Douglas expressly acknowledged the lack of any directly applicable authority among the institutional writers for this branch of his argument, noting that “it does not appear to have been considered necessary to lay down a proposition so self evident”.⁶²

What is apparent from the Session Papers is that the First Division had been presented with three possible approaches to the establishment of servitudes by positive prescription: an interpretative approach, an acquisitive approach, and the apparently novel theory of presumed grant. For the first time in the doctrine's history, the conceptual tensions which had lurked under the surface from the 1680s through to the 1830s had been exposed. In the Outer House, Lord Cuninghame had shown no hesitation in siding with the acquisitive approach of Erskine and Mackenzie.⁶³ Now, the opportunity to settle the doctrine's basis was put before the

⁵⁹ See Buckland & MacNair, *Comparison*, 131-132 and above at 11-12. On immemorial possession in Scots law, see above at 32-37.

⁶⁰ “The title required for positive prescription, varies according to the nature of the subject in relation to which prescription is applied. In some cases, a written title will be presumed, from the mere length of possession; as in regard to corporations, and their right of extracting customs and duties, where the exercise of their exclusive rights or privileges will be held to afford presumptive evidence of an original written title, which has been lost or mislaid. In other cases, as in regard to servitudes, the mere general title of parts and pertinents will be held sufficient...”, J Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland* (5th edn, JS More (ed), 1832), vol 1, Note AA.11.

⁶¹ See the cases above at 37-38, especially *Dunse v Hay* (1732) Mor 1824 – cited at *Beaumont Papers*, 19 – and argument of Counsel in the eventually settled appeal from *Earl of Breadalbane v Menzies of Culdares* (1740) B Supp V 700 – for which, see *Earl of Breadalbane and HMA v Menzies of Culdares and Macdonald*, WSSP, 1743, 6.68.

⁶² *Beaumont Papers*, 22. Though the term “presuming a title” is found in Stair and Bell, it refers there not to the presumption of a grant but rather to the related question of whether Scots prescription requires a *iustus titulus*, see Stair, 2.7.2; Bell, *Principles*, §993.

⁶³ *Beaumont* (1843) 5 D 1337 at 1339 per Lord Ordinary (Cuninghame)'s note: “There can be no doubt that Lord Stair, in some of the passages in his great work, (particularly B.II.tit.7, sec. 2,) states generally, that a title with parts and pertinents is necessary to support a claim of servitude founded on

Inner House. Though none of the judgements addressed the tension directly, they unanimously agreed that bounding clauses could not exclude the prescriptive establishment of servitudes. When it came to explaining the basis for their decision, however, the Court essentially divided into two groups, each picking up on a different aspect of Douglas's argument.

The first group – consisting of the Lord President (Boyle) and Lord Mackenzie – was content with Douglas's underlying proposition that the only title required to establish a servitude by prescription is infetment. Both judges accepted that bounding descriptions excluded only the acquisition of rights of property and had no effect on servitudes.⁶⁴ The only authority given by either judge is *Liston*, which the Lord President relied on as evidence of a distinction between the law relating to property and that relating to servitudes. In this respect, the two judgements present a direct extrapolation from the tentatively acquisitive approach already assumed by the court in the 1830s.⁶⁵

By contrast, the second group – consisting of Lord Fullerton and Lord Jeffrey – was more receptive to Douglas's presumed grant argument, essentially adopting his analysis if not his terminology.⁶⁶ Like Douglas, both judges grounded their reasoning

prescriptive possession. But the marked difference between the language of Lord Stair and the other elementary writers, both contemporaneous and subsequent, shows their distrust in, if not dissent from, this opinion." Admittedly, the Lord Ordinary still refused to grant declarator, but this stemmed from a belief that such a servitude of "exclusive pasturage" was tantamount to a claim of property and should thus be excluded by the bounding description, *ibid*, at 1341 (note). While Lord Mackenzie appears to have believed that Lord Cuninghame objected to the declarator on the basis that this would lead to a servitude of another servitude, such an objection is not apparent from the Lord Ordinary's note, *ibid* at 1341 per Lord Mackenzie.

⁶⁴ "It has been decided over and over again... that a bounding title without a clause of parts and pertinent, precludes a party from acquiring property beyond by prescription. But I find no such decision with regard to servitudes..." *ibid* at 1341 per LP Boyle; "I cannot say that the bounds in the charter are the bounds of any thing but the property. It does not follow that this property may not have various servitudes," *ibid* at 1342 per Lord Mackenzie.

⁶⁵ LP Boyle, *ibid*, at 1341 speaks expressly of "acquiring property... by prescription", and would presumably view the prescription of servitudes in a similar way. Lord Mackenzie at 1342 likewise speaks of "title... sufficient for acquisition of the servitude".

⁶⁶ Both Lord Fullerton and Lord Jeffrey prefer to speak of a grant being "implied" by the circumstances rather than "presumed" from them: "The essential circumstance is the possession, that being held to imply that there has been originally a grant from the proprietor of the land over which the servitude is constituted", *ibid* at 1342 per Lord Fullerton; similarly, "... I think it is plain that the prescriptive possession of it does presume necessarily all that is requisite to its constitution ... immemorial possession, openly and continuously had, implies a grant", *ibid* at 1343 per Lord Jeffrey.

in the fact that servitudes do not require sasine and need not be expressly mentioned in the title to the dominant tenement. From this, each then reasoned that the “possession” of a servitude for the prescriptive period must imply that the servitude in question had previously been constituted by a later grant from the servient proprietor. They therefore focused less on prescription as a mode of acquisition and more on prescriptive possession as proof that a servitude had already been constituted. Such a focus is not inconsistent with an acquisitive approach; but neither is it inconsistent with an interpretative approach. Rather, the presumed grant theory is a distinct approach capable of supplementing or replacing either of the others. Far from settling the doctrine’s juridical basis, the second group had left the basis for the establishment of servitudes by positive prescription even more uncertain than before.

Where then did the law stand in the immediate aftermath of *Beaumont*? The Court was unanimous in its view that servitudes could be established by prescription where the claimant’s charter contained a bounding description. This agreement, however, rested on two separate – though not incompatible – approaches. Rather than settling the doctrine’s juridical basis, the court had left an even more varied menu of choices for those who would follow.

(4) *Beaumont*’s immediate aftermath and Napier’s *Commentaries*

As far as the practical rule it decided is concerned, *Beaumont*’s influence was immediate and undisputed: after 1843, no one would dispute that servitudes could be established by positive prescription where the claimant’s title contained a bounding description.⁶⁷ Some years would pass, however, before it became clear which of the two bases given for the rule had proved the more compelling.

The first case to acknowledge *Beaumont*’s “presumption of an implied grant” was *Carnegie v MacTier*, just over a year later in 1844.⁶⁸ The decision was by the Second Division and not, as in *Beaumont*, by the First. Of the four judgements, the only one

⁶⁷ For reasons already mentioned above, Napier appears to do so in the first section of his treatment of prescriptive servitudes, Napier, 353. For acceptance of the rule, see *Carnegie v MacTier* (1844) 6 D 1381 at 1397 per LJC Hope and 1400 per Lord Medwyn; also, *Gordon v Grant* (1850) 13 D 1 at 7 and 17 per LJC Hope and 18 per Lord Medwyn.

⁶⁸ *Carnegie v MacTier* (1844) 6 D 1381.

to mention this aspect of *Beaumont* is the Lord Justice Clerk's and, from his description of MacTier's claim as "an attempt to prescribe *against* the title of the party himself", it would appear that the Lord Justice Clerk misunderstood the term and adopted an interpretative approach.⁶⁹ Though the concept of "presumed grant" was subsequently mentioned in *Blantyre v Dunn*⁷⁰ and by counsel in *Harvey v Lindsay*,⁷¹ each reference was incidental and neither case concerned prescriptive servitudes in the strict sense.⁷² More representative of the contemporary approach was *Gordon v Grant*, where *Beaumont* was cited in support of establishing servitudes beyond a boundary but without reference to the rule's conceptual basis.⁷³

Discussion of the rule's basis would, however, be revived in 1854 with the publication of Mark Napier's completed *Commentaries on the Law of Prescription in Scotland*.⁷⁴ The range and depth of this work were praised by Napier's later

⁶⁹ *Carnegie, ibid* at 1397 per LJC Hope, italics in original. Unlike the rest of the court, the LJC appears to have believed that, when a barony is divided and the portion sold is expressly excluded from subsequent dispositions of the retained part, the omission of a clause of parts and pertinents in those subsequent dispositions should be seen as expressly excluding those pertinents from the title. This view is controversial in itself and was rejected by the rest of the Second Division. It is, however, his Lordship's belief that such an exclusion would prevent the prescription of servitudes which demonstrates he had not correctly understood the *dicta* of Lord Fullerton and Lord Jeffrey, for even an express exclusion would not prevent a servitude from being acquired later by grant. *Beaumont* is also mentioned at 1400 per Lord Medwyn and at 1406 per Lord Moncreiff but only to note the rule itself and not its basis.

⁷⁰ *Lord Blantyre v Dunn* (1848) 10 D 509 at 519-520 per LJC Hope. Though not apparent from the report in Dunlop, it appears from the *Scottish Jurist* that a presumed grant argument was also relied upon by Lord Blantyre's counsel, the Lord Advocate (Rutherford) and Dean of Faculty (McNeill), *Lord Blantyre v Dunn* (1848) 20 Sc Jur 154 at 159: "Now, prescriptive possession presumes a grant, and is in law just as effectual. No doubt this is an artificial cut. But there are certain peculiarities here which go far to support the presumption of a grant."

⁷¹ *Harvey v Lindsey* (1853) 15 D 768 at 772 per the respondents: "It was not necessary that there should be a positive grant, as by immemorial possession a grant was presumed.

⁷² Though *Blantyre* was partly argued on the basis that the right in question was a servitude, an argument which was accepted by Lord Ivory in the Outer House, the eventual decision saw the right concerned as more akin to a right of property or common interest. *Harvey* involved a public right and not a praedial servitude.

⁷³ *Gordon v Grant* (1850) 13 D 1 at 5, 7 and 17 per LJC Hope and at 18 per Lord Medwyn.

⁷⁴ M Napier, *Commentaries on the Law of Prescription in Scotland* (full edn, 1854). Mark Napier (1798-1879) appears to have had a strongly contrarian nature. This was remarked upon in his *Scotsman* obituary, which described his historical works as "couched in a style more likely to stir up obstinacy than to make converts; but they are worth perusing as arguments on the unpopular side of many questions in ecclesiastical history and, if not convincing, their vehemence and heat are almost unfailingly amusing...". Obituary, "The Late Sheriff Mark Napier", *Scotsman*, 24 Nov 1879, 4. It went on, however, to note that "though a keen controversialist, and most unsparing in epithets of abuse, Mr Mark Napier was in person and address a genial, polished gentleman of the old school... altogether the expression and countenance of a man who had entertained the very minimum of

abridger and updater, JH Millar, who described the “copious and exhaustive” *Commentaries* as,

a work which must always be valuable as a repository of profound learning and ingenious argument, but which would, perhaps, have possessed greater practical utility had it been somewhat less diffuse.⁷⁵

This assessment seems particularly appropriate for Napier’s treatment of prescriptive servitudes, which, though cited only incidentally in most modern accounts, is highly significant for any study of the doctrine’s conceptual history. There are two main reasons for this: firstly, and most importantly, because Napier’s treatment comprises two sections, one of which was written before the decision in *Beaumont* and one after it;⁷⁶ and, secondly, because the relevant sections are remarkably thorough, still containing the most in-depth discussion of the doctrine’s juridical basis yet to appear in print.⁷⁷ The two-stage composition is particularly significant as it demonstrates the extent of *Beaumont*’s influence on Napier’s thought.

In the first section, Napier consciously adopts a strictly interpretative approach. From the outset, he is keen to distinguish the 1617 Act’s application to servitudes from any notion of analogy, such as that found in Erskine.⁷⁸ Rather, for Napier, the prescription of servitudes is an inevitable result of combining the positive clause of the 1617 Act with the doctrine of parts and pertinents: title for the prescription of servitudes is found in an express or implied clause of parts and pertinents in the claimant’s title, a putative servitude is then imputed to this general clause by force of usage, and finally this servitude is exempted from challenge once it has been

uncharitable thoughts, and who had never plunged into the mire of theological or any other irritating controversy”.

⁷⁵ JH Millar, *A Handbook of Prescription* (1893), preface.

⁷⁶ Though the first section (343-363) was not published until 1854, it was apparently written prior to the decision in *Beaumont* and “subsequently sent to press as written, the Glenlyon case having escaped the author’s observation at the time”, *ibid.*, 375, fn1. The second section (374-398) appears to have been written after judgement had been given by the Lord Ordinary (Cuninghame) in the “very recent” case of *Home v Young* but before the decision of the Inner House had been reported at *Home v Young* (1846) 9 D 286. The Inner House decision is discussed by Napier in an extensive note, no.V, in the appendix, 921-941, 926.

⁷⁷ Indeed, Napier’s treatment of prescriptive servitudes would not be rivalled in length until the appearance of more specialist accounts towards the end of the 20th century. Notably, Johnston, *Prescription*, Ch 19 and Cusine & Paisley, Ch 10.

⁷⁸ Napier, 343 and 347; see also 926.

exercised for the prescriptive period.⁷⁹ In constructing this argument, Napier relies heavily on Stair's own analysis, and the first section is accordingly similar to the traditional interpretative approach described in the last chapter.⁸⁰ Like Bell and Macallan, Napier extrapolates from this approach the conclusion that servitudes cannot be established by prescription where the claimant's title is strictly bounded.⁸¹

But though Napier's approach was thoroughly interpretative, he was also open to the idea that, at least at one time, "the constitution of a servitude by immemorial usage was quite independent of the statute of prescription".⁸² It is this proposition which functions as a bridge between the two sections of his account and allowed Napier to make sense of *Beaumont* once he eventually became aware of it. In fact, it is with such an attempt that the second section begins: namely, with the purpose of determining

whether this case [i.e. *Beaumont*] be another example of a liberal interpretation of the act 1617, where the conditions of the statute have been sacrificed to some notion of expediency, or whether it may not be more intelligibly referred to some doctrine of our law, independent of the great statute of prescription.⁸³

Of these two options, Napier believed the second to be the more likely, and further that the "distinct and independent rule of law" in question was constitution by immemorial usage.⁸⁴ Referring back to his previous discussion of this rule, he sought to demonstrate the similarity between that mode of constitution and the reasoning adopted in *Beaumont*; namely, that both regard immemorial possession as "affording reasonable grounds for the *praesumptio juris et de jure* that the servitude was constituted by regular grant, though not produced."⁸⁵ Contrasting this with the 1617

⁷⁹ Napier, 346-348. In Napier's own words: "Charter and sasine, then, in the dominant subject, is the proper title in *positive* prescription of a servitude; and the doctrine of parts and pertinents renders the application of the feudal clause of the act 1617 to such a case inevitable", 347.

⁸⁰ See above at 24-28.

⁸¹ Napier, 352-353; though Napier does admit that *Saunders* itself is not good authority for such a conclusion.

⁸² *Ibid*, 357-361, citing *Neilson v Sheriff of Galloway* (1623) Mor 10880 and noting Stair's use of *Laird of Knockdolian v Tenants of Parthick* (1583) Mor 14541. Later, in his appendix of additional notes, Napier would note that the latter case more probably concerned lease rights than praedial servitudes, 927.

⁸³ Napier, 374.

⁸⁴ *Ibid*, 376.

⁸⁵ *Ibid*, 377.

Act, which always required the production of a written title, Napier concluded that the judges in *Beaumont* must have rested their decision on this older doctrine. While authority therefore existed for the possibility of constituting servitudes by prescription beyond a bounding description, this authority was found in the older doctrine of establishment by immemorial usage and not in the 1617 Act.⁸⁶

Of course, this conclusion raises another question: how does this extra-statutory basis relate to Napier's initial interpretative approach? According to Napier, the answer lies in historical pragmatism: because the 1617 Act extended universal protection to heritable property, lawyers naturally began to refer every heritable plea founded on time and possession to the statute.⁸⁷ And, "generally speaking", they were right to do so where, for example, the claimant's title expressly included the servitude but was *a non domino* in respect of its constitution or the title included a general expression, such as *cum pertinentibus*.⁸⁸ Nevertheless, a strictly bounded title could never have been brought under the 1617 Act, since "there is no heritable infeftment here produced which can be connected, either expressly or constructively, with the heritage claimed".⁸⁹ Even though a strictly bounded title was not necessarily conclusive against a servitude having later been created by grant, its exclusion of pertinents meant that it could never, in itself, provide sufficient title for the 1617 Act to operate. The best way to make sense of the rule in *Beaumont* was therefore by referring it,

not to the act 1617, which appears never to have been alluded to in the judicial discussion, but to the older and more simple doctrine that one heritable proprietor, merely proving his character as such, who has immemorially used a servitude over his neighbour's property, is entitled to the *praesumptio juris et de jure* that the same

⁸⁶ "... there is authority for this doctrine, long prior to the act 1617. But it is not the doctrine of that statute; and if we are now to understand that what is called positive prescription of servitudes, is dependent, like the positive prescription of property, upon the terms of the statute, the observations of the judges in Lord Glenlyon's case would not be so satisfactory", *ibid*.

⁸⁷"Wherever *termini habiles* could be found, or figured, for applying the act 1617 to the particular case, the aid of that legislation was called in, whatever the old law might have sufficed for the case", *ibid*, 378.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*, 379.

was *habilely granted*, without the necessity of producing any further evidence of such grant.⁹⁰

Of the two bases proposed in *Beaumont* for prescription beyond a bounding description, Napier clearly believed that the presumed grant analysis fitted best with the doctrine's historical principles. Adding this to his underlying interpretative approach, Napier was therefore willing to posit two alternative bases for the prescription of servitudes: firstly, the imputation of putative servitudes to general clauses in the claimant's title under the 1617 Act; and, secondly, the presumption of a grant from immemorial usage, "or what is held to be equivalent, possession uninterrupted for forty years".⁹¹ According to Napier, these approaches were not inconsistent but complementary; and, far from heralding the end of the interpretative approach, *Beaumont* simply offered an additional basis to cater for those instances where the interpretative approach was too restrictive for modern requirements. This dual basis approach is reiterated in Napier's Appendix of Additional Notes and appears to have been his settled opinion when his work was finally published in 1854.⁹²

C. The "presumptive approach": prescriptive possession as proof of an existing right

Despite Napier's persuasively argued defence, the interpretative approach's practical redundancy would become clear over the decades which followed. As his successors soon realised, if the presumption of a previous grant renders the prescription of servitudes possible on the basis of infetment alone, there seems little point in paying attention to the actual wording of the claimant's title. Indeed, by its very nature, the presumed grant analysis divorces the possibility of establishing a servitude by prescription from the wording of the claimant's title and only leaves room for an interpretative approach where a servitude is already mentioned there. It is therefore unsurprising that, in the few cases which touched on the prescription of servitudes in

⁹⁰ *Ibid*, italicised in the original. Incidentally, though Napier is correct to note that the 1617 Act was not mentioned judicially, it was mentioned by Douglas in the course of his argument, *Beaumont Papers*, 13.

⁹¹ *Ibid*, 927.

⁹² See Napier, Appendix, additional note V, 926-928.

the 1860s and 1870s, *obiter dicta* all adopt an acquisitive approach⁹³ or resort to the theory of presumed grant.⁹⁴ Indeed, even among legal writers, the only work after Napier to mention that a clause of parts and pertinents or habile title was previously required is John Shank More's posthumously published lectures.⁹⁵

As for the other legal writers, there was little uniformity in approach. On the one hand, later editors of Erskine's *Institute*⁹⁶ and Bell's *Principles*⁹⁷ were content to retain their authors' original remarks, while citing *Beaumont* as additional authority for the fact that prescription was possible where the claimant's charter contained a bounding description. This approach was also adopted by the editors of the 14th to 17th editions of "little Erskine"⁹⁸ and a number of contemporary conveyancing textbooks.⁹⁹ By contrast, those accounts which actually attempted to provide a conceptual basis for the doctrine tended to adopt some form of presumed grant analysis. This is particularly clear in the first edition of Rankine's *The Law of Landownership in Scotland* (1879),¹⁰⁰ but was also seen in Barclay's *Digest of the*

⁹³ E.g. *Provost and Magistrates of Elgin v Robertson* (1862) 24 D 301 at 304 per Lord Wood; *Calder v Adam* (1870) 42 Sc Jur 319 at 321 per Lord Benholme and Lord Neaves; *M'Donald v Dempster* (1871) 10 M 91 at 98 per Lord Neaves: "a bounding charter is no obstacle to acquiring a servitude, which is necessarily something which operates beyond one's own property."

⁹⁴ *Gow's Trs v Mealls* (1875) 2 R 729 at 734 per LJC Moncreiff: "from prescriptive use the law does indeed imply a grant".

⁹⁵ "Although generally, a title with parts and pertinents is required to constitute a servitude by prescription... it is now settled that a servitude beyond the limits of the bounding charter or disposition, and which contains no clause of parts and pertinents, may be acquired by prescription", J McLaren (ed), *Lectures on the Law of Scotland by John Shank More* (1864), 597.

⁹⁶ J Erskine, *An Institute of the Law of Scotland* (8th edn, JB Nicolson (ed), 1871), 2.9.3, note.

⁹⁷ Amazingly, Bell's first posthumous editor only amends Bell's own footnote to insert "see *Beaumont* 1843; 5 D 1337", GJ Bell, *Principles of the Law of Scotland* (5th edn, P Shaw (ed), 1860), §993. Bell's other posthumous editor was more active, moving the citation of *Liston* to the correct footnote and noting that "on the contrary, a boundary charter is a good title to acquire a servitude over neighbouring land", GJ Bell, *Principles of the Law of Scotland* (6th edn, W Guthrie (ed), 1872); indeed, in later editions, Guthrie would amend Bell's actual text from "must not be excluded by a bounding charter" to "will not be excluded by a bounding charter", noting anachronistically that "the word 'must' which stood here in former editions appears to have been a typographical error", GJ Bell, *Principles of the Law of Scotland* (8th edn, W Guthrie (ed), 1885; 9th edn, W Guthrie (ed), 1899), §993.

⁹⁸ J Erskine, *Principles of the Law of Scotland* (14th edn, W Guthrie (ed), 1870; 15th edn, W Guthrie (ed), 1874), 2.9; J Erskine, *Principles of the Law of Scotland* (16th edn, N MacPherson & W Guthrie (eds), 1881; 17th edn, N MacPherson & W Guthrie (eds), 1886), 2.9.

⁹⁹ E.g. AM Bell, *Lectures on Conveyancing* (1st edn, 1867; 3rd edn, 1882), 562/599, respectively; J Craigie, *The Scottish Law of Conveyancing – Heritable Rights* (1st edn, 1890; 3rd edn, 1899), 109-110 and 285, respectively; J Burns, *Conveyancing Practice* (1st edn, 1899), 297.

¹⁰⁰ "Positive servitudes may be acquired or imposed in three different ways: by express grant or agreement; by grant presumed from the positive prescription; and by grant implied from certain

Law of Scotland (3rd edn, 1865)¹⁰¹ and Ferguson's *The Law of Roads, Streets and Rights of Way* (1904).¹⁰² Even in these books, however, the references to presumed grant fulfil a largely rhetorical function, explaining where the doctrine comes from but not really affecting the author's treatment in any practical way.

It would not be until the penultimate decade of the 19th century that a presumptive approach truly established itself as the majority approach in the case law. When it did, it did so in a form slightly modified from the approach taken in *Beaumont* itself. This shift is most clearly seen in a series of cases decided by the Second Division between 1882 and 1891,¹⁰³ though it was foreshadowed in a case appealed to the House of Lords as early as 1855.¹⁰⁴ What is most striking about these cases is that, while the court in general – and Lord Young in particular – still make reference to the presumption of an actual grant,¹⁰⁵ the primary focus is now on answering a single question: has the claimant acted for forty years as if he is exercising a servitude over the servient tenement? Or, to put this another way, has the claimant's possession been “as of right”?¹⁰⁶

This change in focus was, perhaps, inevitable once the possibility of establishing a servitude by prescription had been divorced from the wording of the claimant's title.

special circumstances”, J Rankine, *The Law of Landownership in Scotland* (1st edn, 1879), 331; the account is almost identical in the 4th edition (1909), 427. Interestingly, Rankine goes on to assert that “it is needless to inquire whether positive prescription as to servitudes sprang from or was older than the first part of 1617, c.12, for the rules of that Act are strictly followed,” *ibid*, 333 (429 in 4th edn).
¹⁰¹ “Servitudes... exist by nature, law, contract or prescriptive grant,” H Barclay, *Digest of the Law of Scotland* (4th edn, 1880), 811.

¹⁰² “Implied grant also exists not merely as the deduction to be drawn from prescriptive possession but as a practical inference from facts and circumstances in certain cases”, Ferguson, *Roads*, 26.

¹⁰³ *Grierson v School Board of Sandsting and Aithsting* (1882) 9 R 437; *Rome v Hope Johnstone* (1884) 11 R 653; *Macnab v Munro Ferguson* (1890) 17 R 1890; *Duke of Athole v M'Inroy's Trs* (1890) 17 R 457, aff'd *M'Inroy's Trs v Duke of Athole* (1891) 18 R (HL) 46.

¹⁰⁴ “If a person uses habitually and constantly a right which it must be presumed that the persons against whom it is used knows he is so using, and if he is not interfered with in the exercise of that right... his acquiescence will afford cogent evidence that what the other has done he has done rightfully and not wrongfully,” *Sawers v Russell* (1855) 2 Macq 76 at 77 per LC Cranworth.

¹⁰⁵ See *Grierson v School Board of Sandsting and Aithsting* (1882) 9 R 437 at 442 per Lord Rutherford Clark and per Lord Young; *Rome v Hope Johnstone* (1884) 11 R 653 at 656 (note) per Lord Ordinary (McLaren); *Macnab v Munro Ferguson* (1890) 17 R 397 at 402 per Lord Young; *Duke of Athole v M'Inroy's Trs* (1890) 17 R 457 at 464 per Lord Lee.

¹⁰⁶ See *Sawers* at 77-78 per LC Cranworth; *Grierson* at 441-442 per Lord Rutherford Clark; *Rome* at 656-658 per LJC Moncreiff; *Macnab* at 399-401 per LJC Macdonald and 403 per Lord Young; *Duke of Athole* at 464-463 per LJC Macdonald, 463-464 per Lord Young, and 464-466 per Lord Lee; *M'Inroy* at 47-50 per Lord Watson and 50-51 per Lord Bramwell.

Less inevitable was the reciprocal effect this shift in focus would have on the doctrine's overall conceptualisation, an effect particularly well demonstrated by the first case in the series: *Grierson v School Board of Sandsting and Aithsting*. In this case, following the division of a scattald (i.e. commonty) in Shetland, one of the heritors, in respect of the part which was now his, sought to interdict the parish schoolmaster from cutting peats. Since the case was argued on wider grounds than a mere possessory action, the majority felt entitled to decide the underlying petitory issue: namely, what value should be ascribed to the fact that the schoolmaster had apparent exercised a servitude over the scattald for the prescriptive period?¹⁰⁷

Whereas previously such usage might have led to the servitude being read back into a general clause of the defender's title or justified on the basis of a presumed grant, Lord Rutherford Clark was content with the simpler proposition that such "long continued and uninterrupted use is... to be presumed to be in the exercise of a right, unless there is something either in its origin or otherwise to shew that it must be ascribed to tolerance".¹⁰⁸ Though the prescription of servitudes was still to be seen as presumptive in nature, the subject of that presumption had therefore shifted from the right's origin to its legitimacy: the presumption of an actual grant had effectively given way to a vaguer presumption of lawful origin. This modified approach runs throughout the series of cases and was affirmed by the House of Lords in the 1891 case of *M'Inroy v Duke of Athole*.¹⁰⁹

While Napier's work is not cited at any point in these cases, the move from presumed grant to presumed lawful origin is essentially a simplification of his dual basis approach: if the combination of an interpretative approach with the possibility of presuming a previous grant makes it possible to establish a servitude regardless of the wording of the claimant's title, there seems little point in specifying the particular basis for any specific servitude. It also seems significant that this run of cases coincided with a number of cases which approached the prescriptive establishment

¹⁰⁷ *Grierson* (1882) 9 R 437 at 441 per Lord Rutherford Clark.

¹⁰⁸ *Grierson v School Board of Sandsting and Aithsting* (1882) 9 R 437 at 441 per Lord Rutherford Clark.

¹⁰⁹ See citations at n 105 and 106.

of public rights of way in a similar manner.¹¹⁰ From now on, the main concern of courts in both sets of cases would be to elucidate the meaning of possession “as of right”.¹¹¹ To some extent, this period therefore laid the foundations for the regime now reflected in section 3 of the Prescription and Limitation (Scotland) Act 1973: no longer would courts and legal writers concern themselves with examining the wording of the claimant’s title, instead they would simply recognise that, once a putative servitude had been exercised in an appropriate manner for the appropriate period, “the existence of the servitude as so possessed shall be exempt from challenge”.¹¹²

¹¹⁰ E.g. *Mann v Brodie* (1885) 12 R (HL) 52; *Scottish Rights of Way Society v McPherson* (1887) 14 R 875 aff’d *McPherson v Scottish Rights of Way Society* (1888) 15 R (HL) 68.

¹¹¹ On which, see Chapters 7-9.

¹¹² 1973 Act, s3(2).

Chapter 4

The Modern Statutory Regime: 1914-2016

- A. Introduction**
- B. Retreat from the presumptive analysis**
- C. The road to statutory recognition**
- D. Premature rumours of the doctrine's demise**

A. Introduction

Aside from a shortening of the prescriptive period from forty to twenty years, the past century has not witnessed any significant practical developments in the doctrine's history. Rather, the period's real significance for prescriptive servitudes has come from the passing of two statutes: firstly, the Prescription and Limitation (Scotland) Act 1973, section 3 of which placed the doctrine on an express statutory basis for the first time; and, secondly, the Land Registration (Scotland) Act 1979, the effects of which on conveyancing practice led some to warn, prematurely, of the doctrine's impending irrelevancy. Since the first of these statutes is by far the more relevant for the doctrine's practical application today, this chapter will focus on the historical background to section 3(1) and (2). The chapter will then conclude with a brief account of the concerns raised by some with reference to the doctrine's interaction with the system of title registration introduced by the 1979 Act.

B. Retreat from the presumptive analysis

Though a number of cases were decided in the first three quarters of the 20th century involving the establishment of servitudes by positive prescription, none heralded any significant conceptual developments.¹ Instead, they continued the late-19th-century

¹ The contributions made by these cases were primarily concerned with the doctrine's practical application: e.g. *McGregor v The Crieff Co-operative Society* 1915 SC(HL) 93 is a leading case for understanding the meaning of the term "as of right" (see below at 170-172); *Carstairs v Spence* 1924

trend of focusing almost exclusively on the nature of the claimant's possession and determining whether it was of sufficient quality to qualify as prescriptive: where the possession reached this standard and had endured for the prescriptive period, the servitude was held to have been established; where the quality or duration of possession fell short, the claim to have established a servitude by prescription was dismissed.² That said, while none of these cases turn on the issue of the doctrine's juridical basis, a greater willingness can be discerned among judges to speak of servitudes being "acquired" by prescription – terminology which would have been seen as improper even as late as the end of the 19th century.³ Indeed, in *Carstairs v Spence*, Lord Blackburn even went so far as to suggest that the theory of presumed grant was an English rather than a Scottish concept.⁴ In doing so, his Lordship appears to have relied on the speech of his namesake, Lord Blackburn, in *Mann v Brodie*,⁵ a public rights of way case decided at the same time as the Second Division was enthusiastically adopting an, apparently indigenous, "presumed grant" analysis.⁶

A number of different conceptual and terminological approaches are evident in the literature of the time. For example, the "Dunedin" *Encyclopaedia of the Laws of Scotland* (1932) retains the presumptive approach seen in the two editions of *Green's*

SC 380 is the leading case in relation to *tantum praescriptum quantum possessum*, for which see below at 130-131.

² See, e.g., *McGregor v The Crieff Co-operative Society Limited* 1915 SC(HL) 93; *Carstairs v Spence* 1924 SC 380; *Stevenson v Donaldson* 1935 SC 551; *Kerr v Brown* 1938 SC 140.

³ See, e.g. *McGregor* at 106-108 per Lord Sumner; *Troup v Aberdeen Heritable Securities and Investment Company Limited* 1916 SC 918 at 928-129 per Lord Salvesen; *Carstairs* at 384-385 per LP Clyde; *Stevenson* at 554 per LJC Aitchison.

⁴ 1924 SC 380 at 394 to 395.

⁵ *Mann v Brodie* (1885) 12 R (HL) 52 at 54.

⁶ The later Lord Blackburn's appropriation of *Mann v Brodie* contrasts with the approach taken in a then-recent Outer House case concerning public rights of way, *Rhins District Committee of the County Council of Wigtownshire v Cuninghame* [1917] 2 SLT 169. In that case, the Lord Ordinary (Sands) refused to say that a public right of way had been "acquired", suggesting instead, at 170, that "the appropriate statement of the question is not whether a right-of-way has been *acquired* by forty years' user but whether the existence of a right-of-way has been proved by evidence of forty years' user. The origin of the right the law is content to leave in obscurity". Given the continued focus on the nature of prescriptive possession, it is perhaps unsurprising that the citation of public rights of way cases became increasingly common in the late-19th and 20th centuries. A good example is *McGregor* 1915 SC(HL) 93 at 104 per Lord Dunedin: "The expression "as of right", on the other hand, has... been widely used in cases of this kind. [...] It is true these were cases of public rights of way, not of servitude. In the question of the character of the use, I do not think that makes any difference, except that in the one case it is the public, in the other it is the owner of the dominant tenement that asserts his right".

Encyclopaedia.⁷ Indeed, the new entry by Sheriff NML Walker is more forthright in its adoption of a presumptive approach, remarking that “the existence of a servitude may be proved by prescriptive possession” and clarifying in the accompanying footnote that, “[t]he servitude is not strictly speaking constituted by prescription. The exercise of it as of right for the prescriptive period is evidence that the right exists.”⁸ By contrast, the first seven editions of *Gloag & Henderson* (1st ed, 1927; 7th ed, 1969) adopt uncritically “acquisitive” terminology, with servitudes being “constituted” or “acquired” by prescription – this despite the fact that Andrew Dewar Gibb’s co-editor for the third to sixth editions was the very same NML Walker.⁹ In his *Handbook of Conveyancing* (5th ed, 1938)¹⁰ and *Conveyancing Practice* (4th ed, 1958),¹¹ John Burns confirmed that servitudes could be acquired beyond a bounding description and were still governed by the prescriptive period of forty years but added in the latter book that “the basis [for the establishment of servitudes by prescription] is implied grant”. Implied grant, in this context, almost certainly refers to the theory of presumed grant adopted in *Beaumont v Lord Glenlyon*.¹² While an acquisitive approach was adopted by Professor Walker in his *Principles of Scottish Private Law* (1st edn, 1970; 4th edn 1988), his commentary on the 1973 Act itself refers to servitudes being created “by grant presumed from possession”.¹³ In his A

⁷ Bartholomew in *Green’s Encyclopaedia* (n 1), 22: “A positive servitude may further be said to be acquired by prescription, though it may be more correct to view the prescription as proving the right rather than constituting it.”

⁸ NML Walker, “Servitudes”, in Viscount Dunedin et al (eds), *Encyclopaedia of the Laws of Scotland*, vol 13 (1932), para 1231, fn 3. The footnote goes on to suggest that such an approach escapes the force of Lord Watson’s criticism of the theory of presumed grant in the context of public rights of way, *Mann v Brodie* (1885) 12 R (HL) 52 at 57.

⁹ WM Gloag and C Henderson, *Introduction to the Law of Scotland* (1st edn, 1927), Ch 36, para 29. The words of the 1st edition are repeated in the relevant chapters on land ownership in each successive edition: *Gloag & Henderson* (2nd edn, 1933), Ch 36, para 30; AD Gibb and NML Walker (eds) (3rd edn, 1939; 6th edn, 1956), Ch 38, para 30; AM Johnstone and JAD Hope (eds) (7th edn, 1969), Ch 38, para 30.

¹⁰ J Burns, *Handbook of Conveyancing* (5th edn, 1938), 137, 177.

¹¹ J Burns, *Conveyancing Practice According to the Law of Scotland* (4th edn, by F MacRitchie, 1957), 425.

¹² *Beaumont v Lord Glenlyon* (1843) 5 D 1337. See above at 53-58. “Implied grant” is also used as a synonym for presumed grant in *Macnab v Munro Ferguson* (1890) 17 R 397 at 402 per Lord Young, and *Ferguson, Roads*, 26.

¹³ DM Walker, *Principles of Scottish Private Law*, vol 2 (1st edn, 1970), 1327-1328. Oddly, this remains unchanged until the final edition (4th edn, 1988), section 3 of the 1973 Act only being acknowledged in the footnotes after reference to the Conveyancing (S) Act 1924, s16(2); cf. DM Walker, *The Prescription and Limitation (Scotland) Act 1973* (2nd edn, 1976; 6th edn, 2002), 35 and 45 respectively; this wording is retained in Russell, *Prescription*, para 2-42.

Short Commentary on the Law of Scotland (1962), TB Smith likewise mentions in passing that “positive servitudes may also be created by... prescription after use for forty years”.¹⁴

Against this backdrop, it seems fair to say that the “presumptive” consensus which had emerged towards the end of the 19th century was dissipated in the course of the 20th century. Although some writers continued to explain the prescription of servitudes by means of a presumed grant or presumed legitimate origin, others were happy to return to “acquisitive” language. There remained, however, one thing that all of the cited works and cases were agreed on: the “title” required for the positive prescription of servitudes remained infeftment in the dominant tenement.¹⁵ In other words, while there was no longer agreement on whether servitudes were created by prescription or simply presumed to have existed by consequence of prescription, there remained an acknowledgement that the prescription of servitudes depended on a “title” of sorts – namely, infeftment in the dominant tenement, as required by the 1617 Act.

C. The road to statutory recognition

To understand the next stage in the doctrine’s history, one must turn from legal writings and case reports to the deliberations of the Scottish Law Commission (SLC) and item 3 of its First Programme of Law Reform: “Prescription and the Limitation of Actions”.¹⁶ According to this Programme, submitted to the Secretary of State for Scotland (Willie Ross) on 16th September 1965, the first Commissioners believed the law of prescription as a whole, both positive and negative, to stand in need of “clarification, co-ordination and modernisation”.¹⁷ Alternatively, in the words of

¹⁴ TB Smith, *A Short Commentary on the Law of Scotland* (1962), 530.

¹⁵ “The only title required is infeftment in the dominant tenement”, *Encyclopaedia* (n 8), para 1231; “The only title required as a foundation is infeftment in the tenement which claims the servitude”, Glog and Henderson (1st edn) (n 9), 432; Burns, *Conveyancing Practice* (n 11).

¹⁶ *First Programme of the Scottish Law Commission* (Scot Law Com No. 1, 1965).

¹⁷ *Ibid*, para 15.

Lord Cameron, it was hoped that the SLC would “be able to blow up the idiocies of the law of prescription”.¹⁸

In the context of a general overhaul of the law of prescription, it is perhaps unsurprising that the references to servitudes in the relevant memoranda and working papers are relatively cursory. Indeed, it would appear that the only questions of reform initially envisaged by the SLC were, firstly, whether the prescriptive period should be reduced from forty to twenty years for servitudes and, secondly, whether the law should be harmonised with that relating to heritable property in general by abolishing the defences of minority, less-age, and *non valens agere*.¹⁹ What is notable about the relevant discussions, however, is the way in which they are incorporated into a general discussion of positive prescription in relation to heritable property. The Second Draft Working Paper states, for example, that:²⁰

Positive or acquisitive prescription or usucaption relates to the fortification of the title to heritable property or rights by possession... In Scots law the rules of positive prescription do not protect a possessor without title but operate to perfect a defective title which is *ex facie* valid.

The next paragraph continues,²¹

This prescription applies to all heritable rights including rights to fishings, minerals, servitudes and public rights of way. For the prescription to operate there must be an *ex facie* valid irredeemable title duly recorded in the appropriate register of sasines followed by possession for the prescriptive period... The period of the possession is twenty years except in the case of servitudes, public rights of way, and other public rights where the period is forty years.

It is only in the next paragraph, titled “Criticisms and Suggestions”, that the following is added:²²

Since a title to a positive servitude may be created by possession alone without a written title, the period necessary should be longer than that required to fortify a title based on written grant... if a positive servitude has been exercised without

¹⁸ Extract from letter from Lord Cameron, undated (Item 1, SLC File No. L29: “Prescription General”).

¹⁹ Compare *Memorandum on the position of the positive & negative prescription in Scots Law* (Item 8d, SLC File No L29), 12-13 and 20-21; *Summary of the Positive Prescription in Scots Law, for circulation* (Item 18b); *First Draft Working Paper* (Item 44a), paras 6, 9, and 11; *Second Draft Working Paper* (Item 94A), paras 5 and 6(c).

²⁰ *Second Draft Working Paper*, para 4.

²¹ *Ibid*, para 5.

²² *Ibid*, para 6(c), emphasis added.

interruption for twenty years, it is reasonable for the law to protect the possessor against belated interference.

While the Second Draft Working Paper therefore initially comprehends servitudes under a general doctrine of positive prescription and suggests that some form of *ex facie* valid title is required, it then goes on to except servitudes from that general rule and suggest that no written “title” is necessary after all – or at least that possession itself is a sufficient title for prescription.

It seems likely that the drafter, perhaps sub-consciously, had two senses of the word “title” in mind: on the one hand, title to a dominant tenement was recognised as necessary before a servitude could be established on behalf of that tenement; on the other hand, an actual deed of servitude or an express mention of the servitude in a previous disposition was not.²³ Such a view would be consistent with all of the conceptual approaches seen so far, since all would accept that the establishment of servitudes by prescription must, in some way, be linked back to the title to the dominant tenement, whether through reading the servitude back into the title as an implied pertinent (the interpretative approach), through viewing the apparent servitude as acquired in its own right but subject to the requirement of praediality (the acquisitive approach), or through viewing possession for the prescriptive period as grounds for presuming that the servitude had been validly created at some point in the past though the creation can no longer be demonstrated (the presumptive approach).

Whether such a dual-usage of “title” was shared by the lead Commissioner on the project, Professor JM Halliday, is not apparent from the SLC’s records. In any event, when his attention was drawn to the apparently incongruent drafting by Lord Kilbrandon, then Chairman of the Commission,²⁴ Professor Halliday appears to have accepted the suggestion that “[p]erhaps the answer to the Chairman’s points would

²³ See the distinction between written grant and *iustus titulus* above at 31-32.

²⁴ See letter from Robert Brodie to Professor Halliday, dated 28th May 1968 (Item 101, SLC File No 29): “...As mentioned to you on the telephone today, I had a short discussion with the Chairman about the Prescription Working Paper. He has some difficulty with reconciling the statement [that] “In Scots law, the rules of positive prescription do not protect the possessor without title, but operate to perfect a defective title which is *ex facie* valid” with the statement that “a positive servitude may be created by possession alone without written title”.”

be to have a separate paragraph dealing with servitudes and public rights.”²⁵ The relevant paragraphs of the working paper were accordingly rewritten by Professor Halliday and the establishment of servitudes, rights of way, and other public rights by positive prescription were henceforth dealt with in a separate paragraph from the general doctrine of positive prescription.²⁶ This solution was replicated in the resulting Consultative Memorandum²⁷ and Report.²⁸ It also appears to have been at this stage that the decision was taken to distinguish between positive prescription following an express grant of servitude and positive prescription founded on possession without any express grant.²⁹ This distinction would eventually be reflected in the distinction between subsections (1) and (2) of section 3 of the 1973 Act and became necessary once servitudes were excluded from the operation of the general positive prescription of heritable property encapsulated in section 1.³⁰

²⁵ *Ibid* and letter from Professor Halliday to HD Glover, dated 12th June 1968 (Item 128, SLC File No 29).

²⁶ Professor JM Halliday, *Replacement pages 3-7 for Working Paper* (Item 128b, SLC File No 29), paras 5A and 5B. At a later point, the reference to “other public rights” would be dropped, see “Extract from Meeting on 3 March 1970” (Item 4I, SLC File No L29/172/2: “Prescription Memorandum No.9 REPORT”). The decision to exclude “other public rights” was discussed by Lord Fraser of Tullybelton in *Wills’ Trs v Cairngorm Canoeing and Sailing School Limited* 1976 SC (HL) 30 at 165. According to Lord Fraser, “other public rights” remain subject to the common law period of time immemorial, generally satisfied by forty years’ possession. See also letter to the Scottish Law Commission from the Scottish Canoeing Association, dated December 1989, where the association unsuccessfully asked the SLC to bring canoeing along navigable rivers into line with public rights of way (Item 30, SLC File No L29A).

²⁷ Scottish Law Commission, *Memorandum on the Prescription and Limitation of Actions* (SLC CM No 9, 1969), paras 14 and 15.

²⁸ Scottish Law Commission, *Report on the Reform of the Law Relating to Prescription and Limitation of Actions* (SLC No 15, 1970), paras 11 and 12. While it was originally intended that a draft Bill be attached to the Report, this did not occur due to time restraints; accordingly, the 1973 Act was drafted after the Report had already been submitted in 1970; compare Scottish Law Commission, *Fourth Annual Report 1968-69* (SLC No 13, 1969), para 12 and Scottish Law Commission, *Fifth Annual Report 1969-1970* (SLC No 17, 1970), para 10. The Bill itself received Royal Assent on 25th July 1973 and came into force three years later, in 1976.

²⁹ “Positive servitudes may, and negative servitudes must, be constituted by express grant, and prescription operates to perfect any defect in the grant. Positive servitudes may also be created by exercise of the right for the prescriptive period without any antecedent grant and rights of way and other public rights are also created by use for the prescriptive period without written grant”, *Replacement Pages* (n 26), para 5B(i).

³⁰ See below at 117-120, 130-131.

Professor Halliday's revised drafting is retained in paragraph 12 of the resulting *Report on the Reform of the Law Relating to the Prescription and Limitation of Actions*:³¹

The positive prescription also applies to servitudes and to rights of way. Positive servitudes may, and negative servitudes must, be constituted by express grant, and prescription operates to perfect any defect in the grant. Positive servitudes may also be created by exercise of the right for the prescriptive period without any antecedent grant and rights of way are also created by use for the prescriptive period without written grant.

In response to Lord Kilbrandon's query, the positive prescription of servitudes had therefore moved in the eyes of the SLC from being a particular application of the general doctrine of positive prescription, to a parallel doctrine – title being necessary for the general doctrine and optional for servitudes and rights of way. This approach was then carried over into section 3 of the Prescription and Limitation (Scotland) Act 1973:

(1) If in the case of a positive servitude over land—

(a) the servitude has been possessed for a continuous period of twenty years openly, peaceably and without any judicial interruption, and

(b) the possession was founded on, and followed the execution of, a deed which is sufficient in respect of its terms (whether expressly or by implication) to constitute the servitude,

then, as from the expiration of the said period, the validity of the servitude as so constituted shall be exempt from challenge except on the ground that the deed is invalid *ex facie* or was forged.

(2) If a positive servitude over land has been possessed for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude as so possessed shall be exempt from challenge.

...

Since the *Report* only deals expressly with the shortening of the prescriptive period and the abolition of extra-judicial interruption, it seems clear that section 3 was intended, on the whole, to reflect rather than alter the pre-1973 law.³² It is, however, worth considering the reasoning behind the two most obvious formal changes

³¹ *Report on Prescription* (n 28), para 12.

³² See *Report on Prescription* (n 28), para 19 and 20.

introduced by the Act: namely, the shortening of the prescriptive period from forty to twenty years and the distinction which is made between prescription founded on a deed and prescription founded only on possession.

The shortening of the prescriptive period was motivated by a desire to make it easier to establish servitudes by prescription while still acknowledging that the period should be longer than that for ownership since servitudes, by their nature, are less obvious when exercised. While a forty-year period had initially applied to all heritable rights under the 1617 Act, servitudes had been expressly excluded when the period was shortened to twenty years by the Conveyancing (Scotland) Acts of 1874 and 1924.³³ According to Professor Halliday, this was because a right evidenced only by possession should take longer to establish than one which also required title.³⁴ The same reason was given by the Reid Committee in its Report on Registration of Title to Land in Scotland (1963), when it was suggested that the period for the general positive prescription be shortened to ten years but that the period required for servitudes, rights of way and other public rights remain at forty years.³⁵ While the Committee on Conveyancing Legislation and Practice – chaired by Professor Halliday – had agreed that the prescriptive period for servitudes should continue to be longer, it had recommended that the period be reduced from forty to twenty years.³⁶ Perhaps unsurprisingly, given Professor Halliday’s involvement in both projects, the SLC Report sided with the Halliday Committee rather than the Reid Committee and its suggestion was incorporated into the resulting statute.³⁷

³³ Conveyancing (Scotland) Act 1874, s34; Conveyancing (Scotland) Act 1924, s16.

³⁴ *Note of Meeting on Prescription held on 5th July 1967* (Item 77A, SLC File No 29).

³⁵ Reid Committee, *Report on the Registration of Title to Land* (Cmnd 2032, 1963), para 76.

³⁶ Committee on Conveyancing Legislation and Practice, *Report on Conveyancing Legislation and Practice* (Cmnd 3118, 1966), para 61: “we consider that the changed pattern of land development, the rapidity of modern means of communication and the active watchfulness of societies for the preservation of rights of way would justify a reduction in the period of positive and negative prescription applicable to such rights without adversely affecting the public interest.”

³⁷ See *Report on Prescription* (n 28), para 19 and Letter from Professor Halliday to Robert Brodie, dated 13th August 1966 (Item 11, SLC File No L29). In addition to the Halliday Committee’s reasons, the SLC Report added that “the existing period of forty years was unnecessarily long and that the provision of evidence necessary to establish the right over so long a period presented practical problems. If a positive servitude or right of way has been exercised without interruption for twenty years, we though it reasonable for the law to protect the possessor or the public against belated interference.”

As for the distinction between prescription founded on a deed and prescription founded only on possession, though this was not prominent in the older literature, it was well-established in case law³⁸ and practically important in deciding whether the extent of a prescriptive servitude should be decided by reference to the foundation deed or by means of the rule quantum possessum tantum praescriptum. As will be seen in Chapter 6, the distinction between section 3(1) and 3(2) continues to play the same role in modern law, though section 3(2) has been by far the more prominent.

D. Premature rumours of the doctrine's demise

While the move from registration of deeds to registration of title under the Land Registration (Scotland) Act 1979 saw no immediate consequences for the establishment of servitudes by positive prescription, its effect on conveyancing practice would lead to some debate over the doctrine's continuing relevancy.³⁹

Under the new system of title registration, conveyancing practitioners had begun to expect that any servitudes belonging to a property would be mentioned on the relevant title sheet. Where a servitude was not mentioned, this was therefore seen to affect the property's marketability. At first, the Keeper was willing to add servitudes on the basis of affidavit evidence that the servitude had been possessed properly for the prescriptive period but from 1997 onwards prescriptive servitudes were only allowed on the Register where supported by a court declarator.⁴⁰ Unsurprisingly, many conveyancers were unhappy with this new approach and Professor Rennie went so far as to claim that the decision's "effect [was] to relegate servitudes which have been properly if informally constituted to second- or even third-class rights."⁴¹

³⁸ E.g. *Lord Advocate v Wemyss* (1899) 2 F (HL) 1 at 9-10, per Lord Watson; *Kerr v Brown* 1939 SC 140.

³⁹ For an overview of the issue, see Scottish Law Commission, *Report on Land Registration* (Scott Law Com No 222, 2010) paras 10.7-10.18; Gretton & Steven, *PTS*, para 6.61.

⁴⁰ "From the Registers" (1997) 42 JLSS 507 at 508; IA Davis, "Positive Servitudes and the Land Register" (1999) 4 SLPQ 64; IA Davis & A Rennie, *Registration of Title Practice Book* (2nd edn, 2000), para 6.55.

⁴¹ R Rennie, "Land registration and the decline of property law" (2010) 14 Edin LR 62 at 66.

Indeed, “the effect of the Keeper’s policy, in practical terms at least, is to restrict the methods of creation of servitudes to creation in a deed or an Act of Parliament”⁴²

Such worries focused entirely on conveyancing situations involving the transfer of the dominant tenement and did not otherwise affect the doctrine’s practical operation as such. In any event, the issue no longer appears to be live, since the Keeper has responded to the passing of the Land Registration etc (Scotland) Act 2012 by indicating that servitudes established by prescription can be included on the Register where the applicant’s solicitor is prepared to vouch that prescription has actually taken place.⁴³

⁴² *Ibid* at 67.

⁴³ See Registers of Scotland, “Application for Registration Form”, Part B “Servitudes”; cf. Registers of Scotland, “Application for Registration – Guidance Notes”, “Question – Servitudes”, available at https://www.ros.gov.uk/_data/assets/pdf_file/0014/11345/General-Guidance-Applications-Forms-v7.pdf (Accessed 26 Aug 2016).

Chapter 5

Can servitudes be “possessed”?

A. Introduction

B. Possession in Scots property law

C. Can a servitude be “possessed”?

- (1) Servitudes and quasi-possession: the traditional approach
- (2) Possession and its objects: an alternative approach
- (3) Descending from the *Begriffshimmel*: is the “limited-possession” approach compatible with Scots law?
 - (a) Congruence with the situation on the ground
 - (b) Coherence with the Scots system of real rights

D. Implications for the 1973 Act

A. Introduction

The establishment of servitudes by positive prescription is relatively simple in principle: if someone has acted for twenty years as if he were exercising a servitude over his neighbour’s land, then – provided certain other requirements have been met – the law will exempt the existence of that servitude from challenge. Less simple, however, is the question of how best to conceptualise this behaviour. According to the 1973 Act, to have appeared to exercise a servitude is to have “possessed” it.¹ But is the factual relationship which exists between a claimant and his putative servitude really the same as the factual relationship which exists between an owner and his land?

In order to answer this question, this chapter will attempt three things: firstly, a brief consideration of the concept and role of “possession” in Scots property law; secondly, a more thorough analysis of whether the apparent exercise of a servitude is best conceptualised as possession of that servitude or as a limited form of possession

¹ 1973 Act, s 3(1) and (2). Cf., Land Reform (Scotland) Act 2003, s5(5): “The exercise of access rights does not of itself amount to the *exercise or possession of any right* for the purpose of any enactment or rule of law relating to the circumstances in which a right of way or servitude or right of public navigation may be constituted”, italics added.

of the land itself; and, finally, a decision as to whether Scots law's present terminology and doctrine are in need of reform.

B. Possession in Scots property law

According to Stair, “possession is the holding or detaining of any thing by ourselves, or others for our use.”² Possession therefore comprises both a physical element (*corpus*, i.e. holding or detaining) and a mental element (*animus*, i.e. the intention to use for one's own benefit). From this generally accepted definition and its reliance on the idea of *corpus*, it can be seen that possession in Scots law has traditionally been defined by reference to corporeal things rather than incorporeal rights. It is, however, equally clear from even a brief survey of Scots property law that certain consequences associated with the possession of corporeal things are – in some sense at least – also applied to the apparent exercise of subordinate real rights, such as servitudes.

In a broad sense, the consequences of possession can be divided into two categories: firstly, possession is protected from unlawful disturbance through the availability of certain possessory remedies; and, secondly, possession is seen as a necessary requirement before certain other consequences can follow, most notably in relation to the creation and transfer of certain real rights.³ Positive prescription effectively straddles the boundary between these two categories since its underlying rationale is the protection of long-enjoyed possession but it achieves this through the exemption from challenge of a real right in the object which is being possessed. It is also in the application of positive prescription to rights of servitude that Scots law most obviously treats the possession of land and the apparent exercise of a right as conceptually symmetrical – at least in so far as both land and servitude are seen as

² Stair, 1.1.17.

³ See Reid, *Property*, paras 116-118, who compares the rights flowing from possession (*jura possessionis*) with rights for which possession is an essential but insufficient prerequisite. Reid includes the right to a possessory judgement in the second category rather than the first category since a *prima facie* title is needed. For a recent study of the possessory judgement's application to subordinate real rights, see C Anderson, “The Protection of Possession in Scots law”, in Descheemaeker, *Consequences*, 123-125.

the object of some sort of possessory relationship. Thus, positive prescription requires each factual scenario to continue for the prescriptive period. It also requires that the nature of prescriptive possession be the same in each case – open, peaceable and without judicial interruption.⁴ As to consequences, once land has been possessed in this manner for ten years on the basis of a registered disposition, the real right which entitles the possessor to possess that land is exempted from challenge; similarly, once a servitude has been exercised in this manner for twenty years, the servitude itself is rendered unchallengeable.

Lurking beneath this apparent equivalency, however, lies a fundamental question: what underlying affinity is there between the two factual situations which qualifies them to benefit from the same “possessory” consequences? Are servitudes really the object of possession in the same way as land, or is there a better explanation? In this respect, it is important to note a couple of points of divergence between the two factual situations. Firstly, as far as positive prescription is concerned, both situations are focused on the eventual acquisition of a real right in a piece of land;⁵ nevertheless, one is described as possession of the land itself, the other as possession of a right “over” that land.⁶ To this extent, the possession of land and the possession of a servitude are conceptually asymmetrical. Secondly, whereas land exists regardless of whether it is being possessed or not, it is often the case that a servitude does not exist until *after* it has been possessed for twenty years. Accordingly, while Scots law sees the prescriptive possession of land as constitutive of a right *in* that land, it appears to see the prescriptive possession of a servitude as constitutive of the object of possession itself. Even setting aside the question of whether it is possible to possess something which does not yet exist,⁷ it is again clear that the two

⁴ Compare 1973 Act, s1 with 1973 Act, s3(1) and (2).

⁵ Land Registration (Scotland) Act 2012, Sched 5, para 18 amends 1973 Act, s5 to equate exemption from challenge with the acquisition of a real right.

⁶ Compare 1973 Act, ss1 and 2 (“If land has been possessed... the real right so far as relating to that land shall be exempt from challenge”) with s3(1) and (2) (“where a servitude has been possessed... the existence of the servitude as so possessed shall be exempt from challenge”). This conceptual asymmetry was not present in the 1973 Act’s original wording but was introduced by amendments made under the Abolition of Feudal Tenure etc (Scotland) Act 2000, see below at 109-110.

⁷ Or, like the cat in Schrodinger’s famous thought experiment, a thing which cannot yet be said to exist or not to exist, see E Schrödinger, “Die gegenwärtige Situation in der Quantenmechanik” (1935) 23 *Naturwissenschaften* 807 at 812.

superficially commensurable situations are, in fact, conceptually asymmetrical to some degree.

C. Can a servitude be “possessed”?

How then should the relationship between these factual situations be understood? Essentially, there are two ways in which the concept of possession can be meaningfully applied to servitudes. Firstly, one can say that, while rights lack a physical *corpus*, the apparent exercise of a right is equivalent to the detention of a corporeal object and servitudes can therefore be possessed (or quasi-possessed) by analogy.⁸ This appears to be the majority view amongst Scots jurists and it also has a long historical pedigree stretching back to the era of classical Roman law. Alternatively, one can say that, while possession implies comprehensive factual control of an object for one’s own benefit, certain less comprehensive degrees of factual control are also protected by the law in a manner similar to that in which full possession is protected. According to this alternative approach, the apparent exercise of a servitude constitutes a limited form of possession of the land itself – i.e. a factual relationship between the apparent-servitude-exerciser and the apparently-servient tenement which corresponds to the content of a right of servitude in the same way that possession (in the strict sense) corresponds to the content of ownership.⁹ This second approach has been less prominent in Scots law but is arguably more conceptually consistent and deserves consideration. Furthermore, while such an approach appears at first to conflict with a general acknowledgement in Scots law that possession must be “exclusive” before it will be protected,¹⁰ this apparent conflict disappears once it is recognised that Scots law already entitles holders of real rights to two distinct categories of factual control over land:

⁸ A variation of this approach is to say that we ought to redefine our concept of *corpus* to include the exercise of a right and that rights are therefore truly “possessed”, see below at 89-90.

⁹ Or, indeed, any other real right which entitles its holder to comprehensive possession of the land concerned, see below at 107-110.

¹⁰ E.g. “As a general rule, only one person can be in possession of property at any one time, for exclusivity is of the essence of possession”, Reid para 118, citing Stair, 2.1.20; Bankton, 2.1.26; and Erskine, 2.1.21.

comprehensive and residual possession on the one hand, and “intermittent and non-exclusive possession” on the other.¹¹

(1) Servitudes and quasi-possession: the traditional approach

First, the traditional approach; namely, that although rights cannot be possessed in the strict sense, since they lack a *corpus*, exercise of a servitude is conceptually equivalent to the detention of a corporeal thing.¹² According to this approach, servitudes can therefore be the object of some sort of “possession” or, more properly, “quasi-possession”. The concept of quasi-possession is one with a long history, stretching back towards classical Roman law, and results from the acknowledgement of Roman jurists that, while incorporeal “things” could not be possessed on account of their incorporeality, the factual exercise of certain rights was *as if* they were being possessed.¹³

That this is the traditional approach in Scots law can be seen from a brief survey of the institutional writers. On the one hand, the writers are almost unanimous in recognising the conceptual difficulties involved in the possession of something

¹¹ See below at 107-110. The quoted phrase is taken from Reid, para 126, fn1.

¹² As the leading student textbook puts it, “Possession of incorporeal property is possible if one is willing to regard exercise as a substitute for detention”, Gretton & Steven, *PTS*, para 11.8

¹³ Compare Buckland, *Textbook*, 260-261; Kaser, *rPR I*, §94 (390) and §105 (447); Beermann, 10-11. Kaser, in particular, notes that the Praetor protected the factual usage (*die faktische Ausübung*) of the content of certain servitudes by means of a range of interdicts, which served the *vindicatio servitutis* in the same way that the possessory interdicts prepared the way for *vindicatio*. According to Kaser, while this factual usage was therefore related to servitudes in the same way that possession was related to ownership, the jurists described it as *quasi possessio*. This was not the only context in which Roman jurists resorted to the prefix “quasi” in their attempt to explain and develop private law. The prefix was also used to create a four-fold division of obligations, supplementing contract and delict as causative categories with *quasi ex delicto* and *quasi ex contractu*. In this context, Descheemaeker notes that the term is best understood to mean “as if” or “as though” rather than “almost” – e.g. an obligation which arises *quasi ex delicto* is an obligation which arises *as though* from a delict, E Descheemaeker, *The Division of Wrongs* (2009), 43-44. As Descheemaeker goes on to note, “the expression is silent as to the event which caused the obligation: the only thing it tells us, implicitly, is that it was not a delict”. Birks considered such uses of “quasi” to be uninformative and misleading, PBH Birks, *Introduction to Restitution* (1985), 22: “Among the sillier Oxford stories is that of the Dean’s Dog. The College’s rules forbid the keeping of dogs. The Dean keeps a dog. Reflecting on the action to be taken, the governing body of the college decides that the Labrador is a cat and moves to next business. That dog is a constructive cat. Deemed, quasi- or fictitious, it is not what it seems. When the law behaves like this you know it is in trouble, its intellect either genuinely defeated or deliberately indulging in some benevolent dishonesty.”

without a *corpus*.¹⁴ On the other hand, they agree that, for certain real rights, such as servitudes, “exercise” or “use” of the right is in some sense analogous to the possession of a corporeal object. Stair, for example, states that,¹⁵

all real servitudes are constitute by possession or use; for things corporeal are said only to be possesst; therefore incorporeal rights, as servitudes, have rather use than possession to consummate them.

A similar account is given by Erskine:¹⁶

No right affecting land, though it be incapable of proper possession, can be completed without such use as the subject can admit of. As servitudes are incorporeal rights, affecting lands which belong to another proprietor, few of them are capable of proper possession... The use, therefore, or exercise of the right, is in servitudes what seisin is in a right of lands; which exercise we improperly call possession, and is in the Roman law styled *quasi possession*.

Accordingly, while Stair and Erskine recognise that a servitude’s incorporeality prevents it from being the object of true possession, they nevertheless accept that the apparent exercise of a servitude bears some affinity to the possession of land and attracts the same legal consequences. Similar views had been expressed earlier by Craig in his *Jus Feudale*, and by Bankton and Wallace, who were contemporaries of Erskine.¹⁷ What unites all of these writers is the way in which they explain this apparent affinity between the possession of land and the apparent exercise of a servitude: namely that servitudes can be the object of some sort of possessory relationship (i.e. quasi-possession) in the same way that land is the object of true possession. On the one hand, their persistence with the term “quasi-possession” suggests that they are uncomfortable with saying that servitudes can be truly

¹⁴ The exception is Bell, who does not address the issue directly, only noting in his treatment of the constitution of servitudes that “by prescription alone, with possession, a positive servitude may be established”, Bell, *Principles*, §993.

¹⁵ Stair, 2.7.3

¹⁶ Erskine, *Institute*, 2.9.3. It is unclear why Erskine says “few” servitudes are capable of proper possession.

¹⁷ Craig, 2.7.3 (“incorporeal subjects are incapable of actual possession, although in law they are susceptible of quasi-possession”); Bankton, 2.1.28 (“possession is properly of things corporeal: but there is likewise a kind of possession of incorporeal things, as of servitudes, which are acquired *usu et patienta*, by the use of the proprietor of the dominant, and acquiescence of the proprietor of the servient tenement...”); G Wallace, *Principles of the Law of Scotland*, vol 1 (1760), para 146: “They [incorporeal things] cannot properly be said to be possessed, or to be delivered; for both possession and delivery are applicable to corporeal things alone. Incorporeal ones do not admit of them... But they may be said analogically to be possessed and to be delivered.”

possessed; on the other hand, at least in so far as the servitude itself is said to be the *object* of quasi-possession, they clearly view the possession of land and the “quasi-possession” of servitudes as conceptually commensurable.¹⁸

That this continues to be the mainstream approach among Scots jurists can be seen from a number of modern accounts of the law of possession. Professor Kenneth Reid, for example, suggests that the consequences of possession are extended to certain subordinate real rights by analogy or legal fiction rather than as a proper application of the concept of possession:¹⁹

since detention is a requirement of possession it follows that incorporeal property cannot be possessed [...] There is, however, a legal fiction, for the limited purposes of positive prescription and of registration of title, that certain types of incorporeal heritable property are capable of possession [...] It is clear that “possession” in this context has a special meaning; and [...] it may be suggested that a right is ‘possessed’ in the sense intended by the statutes when it is being exercised.

Similar statements by Rankine,²⁰ Johnston,²¹ and Gretton and Steven²² suggest that, while some unease persists with the idea of possessing something without a *corpus*, most jurists have been content to view servitudes as the legitimate objects of some sort of possession or “quasi-possession”, thus equating the apparent exercise of a servitude with physical control of an object and ascribing similar consequences to each for the purposes of possessory remedies and positive prescription.

Yet it is appropriate to ask why the quasi-possessory approach remains so popular, despite the violence it requires to be done to the traditional conception of possession

¹⁸ Indeed, at points, Stair openly adopts the terminology of possession in relation to servitudes, e.g. *Institutions*, 4.45.17, presumption IX: “long possession presumes property of real servitudes: and that although there be no more title but the general title of pertinent, in any infeftment”.

¹⁹ Reid, *Property*, para 120. As will be seen below, Reid’s approach is more nuanced than that of the institutional writers, since he goes on to recognise that – to some extent at least – the possession of a servitude (or lease) involves actual possession of the land. His overall approach is, however, to view the right itself as the object of “possession”.

²⁰ Rankine, *Landownership*, 3: “In all the cases here contemplated, the object possessed has been corporeal; but by an extension of the term introduced by the Roman law, and accepted by our own, the word possession, or *quasi* possession, is used with reference to incorporeal things or real rights such as servitudes.”

²¹ Johnston, *Prescription*, para 18.10(3): “The use or exercise of the servitude right, which is what makes it good against singular successors, is therefore improperly called ‘possession’. Some of the Roman legal sources speak of ‘quasi-possession’ in this context”.

²² Gretton & Steven, *PTS*, para 11.8: “Possession of incorporeal property is possible if one is willing to regard exercise as a substitute for detention.”.

as physical control of a thing with intention to use it for one's own benefit. Perhaps the primary reason – beyond historical inertia and the adoption of Roman terminology – is that the idea of “possessing” a servitude is intuitively attractive in a system where rights are typically conceived of as incorporeal “property” on a par with corporeal assets.²³ Under such a scheme, my legal relationship to my land (a corporeal asset) is considered to be the same as my legal relationship to my servitude over another person's land (an incorporeal asset): both assets form part of my patrimony. If so, it seems intuitively correct to say that, where the law wishes to protect the apparent exercise of a servitude, it should do so by means of the possessory remedies and positive prescription. And since the law does, in fact, protect the apparent exercise of a servitude in this way, it seems equally intuitive to say that the servitude is being “possessed” or, at least, “quasi-possessed”. The intuitiveness of this thought-process is testified to by its recurrence in Roman law,²⁴ canon law,²⁵ throughout much of European legal history,²⁶ and in the works of those South African scholars who accept the classification of servitudes as “things”.²⁷

Beyond mere intuitiveness, there are, however, further advantages. The identification of a servitude as the *object* of possession or quasi-possession enables the law to

²³ Reid, *Property*, para 16; GL Gretton, “Ownership and its objects” (2007) 71 *Rechts Zeitschrift* 802 at 824-827.

²⁴ See n 13 above.

²⁵ Bruns, *Recht des Besitzes*, §15, §24-§26 and §29; Beermann, 19-21, who notes that the approach of the canon law was dogmatically grounded in the Justinianic (or Gaiian) division between *res corporales* and *res incorporales*. Indeed, the canon law and *ius commune* took the concept of *possessio iuris* (or *Rechtsbesitz*) far further than Roman law which had generally restricted the concept to the apparent exercise of servitudes; under canon law and the *ius commune*, any right could be possessed which was not extinguished by one performance – even marriage or status as a free person could be quasi-possessed.

²⁶ Bruns, *Recht des Besitzes*, §40-§46; Gierke, *Deutsches Privatrecht*, §114 (224-227); Jürgen Gräfe, *Die Lehren vom Rechtsbesitz in der Rechtsgeschichte der Neuzeit* (1983), 45-88; Beermann, *ibid*, 25-26. See also Grotius, *Inleidinge*, II.ii.5: “From its own nature possession applies to corporeal things only, as they alone are physically held: but the law has introduced also a possession of incorporeal things, as of inheritance, liberties and real rights inferior to ownership”; Aubry & Rau, §177

²⁷ E.g. D Kleyn, “The Protection of Quasi-possession in South Africa”, in Descheemaeker, *Consequences*, who seems to connect the classification of rights as incorporeal property with the possibility of quasi-possessing them, 193-194; D Kleyn, ‘Possession’, in R Zimmermann and D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996), 829ff; Silberberg & Schoeman, 13-19 and 296-300. While certain other South African writers, who restrict their definition of “things” to corporeal objects, still speak of the quasi-possession of incorporeals, their explanation of quasi-possession remains intimately linked to the exploitation of a thing, e.g. Van der Merwe, *Things* (1987), para 52 and n 35 below.

specify exactly what type of behaviour will be granted possessory protection and the benefits of positive prescription: behaviour consistent with the existence of the servitude claimed. Furthermore, by speaking of the servitude as the object of possession, the law is able to apply the same default rules to the quasi-possession of a servitude as it has developed for the general concept of possession – for example, the recognition of civil possession; the requirement that the servitude be possessed *animo rem sibi habendi*; and that the servitude be possessed openly, peaceably and without judicial interruption. Indeed, the only characteristics of possession which cannot be directly applied to the “possession” of a servitude, as such, are that the object of possession exists and is detained corporeally.

With this in mind, it is instructive to consider a variation of the traditional approach proposed by Dan Carr.²⁸ Though Carr deals with the possession of rights generally, rather than the possession of servitudes in particular, it is possible to consider the consequences of his approach for the possession of servitudes separately from its more general implications. Essentially, Carr argues that, rather than viewing the (quasi-)possession of rights as exceptional and improper, Scots law should adjust its understanding of the *corpus* element to recognise the “physical exercise” of a right as equivalent to the detention of a corporeal object.²⁹ In Carr’s own words:³⁰

The leap towards accepting a physical aspect of the possession of a right is not so much a leap as a step, and a step forward at that. The law moves on, and in this context it is right that, with the increasing sophistication of thought, the idea of *corpus* should move to a more sophisticated level. Such an incremental development has the benefit of allowing the law to leave behind the strangely resilient term “*quasi-possessio*”. This is to all intents and purposes possession; except that it comes with the rudimentary accompanying mantra that there cannot be possession of an incorporeal, only *quasi-possessio*.

While Carr admits that this proposal has not yet been accepted, he does suggest that Scots law “contains latent suggestions which can be rationalised as coming to these conclusions.”³¹ Whether this is true as a general evaluation of the possibility of possessing rights is outwith the scope of this Thesis. As far as Scots sources on the

²⁸ Carr, “Possession”, 47-60, 99-100.

²⁹ *Ibid*, 49-51, 60.

³⁰ *Ibid*, 51.

³¹ *Ibid*.

possession of servitudes are concerned, however, it is spot-on. Although the law has, indeed, professed not to recognise the possession of incorporeal property but only its “quasi-possession”, in practice – as section 3 of the 1973 Act shows – its position is already to view servitudes as the object of some sort of “possession”. To this extent, Carr’s proposal simply restates the traditional approach that there is conceptual symmetry between the possession of land and the apparent exercise of a servitude, while modifying it to suggest that, instead of calling one “possession” and the other “quasi-possession”, both should be seen as variants of a higher concept of possession. For Carr, land is possessed by detention; servitudes and other rights are possessed by exercise.

In so far as it continues to equate the exercise of a servitude with the physical detention of a corporeal object, Carr’s proposal differs from the traditional approach in a manner which is more semantic than conceptual. Furthermore, by accepting the traditional approach’s assumption that the two situations are conceptually symmetrical, it avoids a more fundamental question than whether the possession of servitudes is true possession or quasi-possession; namely, whether the apparent exercise of a servitude is really commensurable with the possession of land in the sense that the objects of each are respectively the servitude and the land.

(2) Possession and its objects: an alternative approach

It is important at this point to remind ourselves of something which can be forgotten amid abstract discussions of the “possession” or “quasi-possession” of incorporeal rights. The juxtaposition of the *apparent exercise* of a servitude with the *possession* of land can obscure the fact that the servitude which is apparently being exercised has, in turn, its own object: the land itself. Such a statement seems trite. It is, however, vital to bear this in mind when speaking abstractly of “possessing” servitudes by exercising them. For, just as the possession of land necessarily involves a level of physical control over the possessed land, so the apparent exercise of a servitude necessarily involves a level of physical control over the allegedly-servient land, albeit in a more restricted sense. In both situations, there is a factual relationship between a person and a piece of land. Furthermore, though this factual

relationship resembles behaviour which would be consistent with the existence of a right over the land in question, the factual relationship exists regardless of whether any such right does in fact exist. We can therefore begin answering the question with which the last paragraph ended by asking two more questions. Firstly, if the possession of land and the apparent exercise of a servitude can both be explained by means of a factual relationship between the possessor and a piece of land, is it really necessary (or, indeed, helpful) to speak of a servitude itself as an object of possession? Secondly, if the true object of possession in each case is the land, how should the “possession” of a servitude and the possession of land in the strict sense be properly distinguished from one another?

That the possession of a servitude involves an underlying factual relationship with the land is, of course, freely acknowledged by contemporary Scots jurists, including those who would otherwise identify servitudes as the legitimate objects of (quasi-) possession in their own right. Indeed, some of these writers go so far as to describe this underlying factual relationship with the land as a form of “possession”. For example, after having stated that certain real rights can be “possessed” by exercising them, Reid goes on to note that,³²

such exercise may or may not involve actual possession of the land to which the right relates. Thus on this view leases and servitudes are possessed, for the purposes of prescription [...], by actual possession of the land [...]. [T]wo different things are being possessed, namely the land itself and, *fictione juris*, the incorporeal interest in the land.

This suggestion that the “possession” of a servitude involves at least some sort of possession of the land itself is further developed by Cusine and Paisley, who draw a distinction between the possession which underpins the apparent exercise of a servitude and the more comprehensive possession which is normally associated with owners and tenants:³³

³² Reid, *Property*, para 120. In this respect, it is interesting that Reid should speak of “actual” possession of the land, but only possession of the servitude by legal fiction. Elsewhere, Reid states that “... it should be noted that public rights of way and certain positive servitudes confer rights of intermittent and non-exclusive possession.”, para 126, fn1

³³ Cusine & Paisley, para 1.71. In the previous paragraph, the authors had already acknowledged that “...in positive servitudes, the exercise of the right involves some activity on the servient tenement, though not to such a degree or extent as is encountered in the right of *dominium* of the servient

Whatever the terminology, exercise of a servitude involves possessory rights, but this can never amount to exclusive possession, as in *dominium*, or in a tenant's right [under] a lease conferring a real right. Nevertheless, there is some degree of use or possession in relation to positive servitudes, but this varies from one servitude to another. The use or possession entailed by a servitude of pasturage may be more invasive than a servitude of way. In some cases, possession may be almost exclusive and practically exclude even the servient proprietor. [e.g. in the case of servitudes of drainage with accompanying septic tanks or drains.]

That the exercise of a servitude involves some sort of possession of the land is also acknowledged by Johnston:³⁴

The upshot is that, quite apart from the question of natural and civil possession, the Scottish authorities vouch the proposition that two persons can concurrently possess the same thing for their own interests, whether it be landlord and tenant, creditor and debtor, servient and dominant proprietor.

Accordingly, although these writers unanimously agree that servitudes can be “possessed”, they also recognise that underpinning any such “possession” of a servitude is some form of limited “possession” of the land itself – or, to use more neutral language, some sort of factual relationship with the land which is less comprehensive than that which is enjoyed by an actual possessor.³⁵ If, however, what we usually refer to as “possession” of a servitude can be explained by means of an underlying factual relationship with the land, this brings us back to the question of whether it is necessary (or helpful) to refer to the “possession” of a servitude at all. Are there really, as Professor Reid suggests, two objects of possession – the land and the servitude – both of which are objects of a factual relationship with the apparent-servitude-exerciser? Such a “two-objects” theory seems unnecessarily complex. In

proprietor. The owner of the *dominium* in the servient tenement and the holder of the servitude hold different and complementary interests in the same property...”

³⁴ Johnston, *Prescription*, para 18.11.

³⁵ From a comparative perspective, it is interesting to note that there are other jurists who, while continuing to speak of the “possession” or “quasi-possession” of incorporeal rights, define this possession with regard to a corporeal object. For example, CG van der Merwe – who accepts the Pandectist doctrine that only corporeal things can be the object of rights – notes that, “[b]ecause of the nature of possession, it can only be exercised with regard to physical or corporeal objects. The law also recognises so-called quasi-possession or juridical possession (*possessio iuris*). This notion consists in the exercise of control over an incorporeal coupled with an animus to exercise such control. Factual control of an incorporeal is exercised whenever the thing is exploited in accordance with an actual or presumed legal right (for example, a servitude or a contractual right of use) with regard to the thing.” Van der Merwe, *Things*, para 52. Similarly, from a French perspective: “we can define possession according to our law as the fact that a person who wishes that a thing be subject to an ownership right, a real servitude, or a right of use or enjoyment in his favour holds the thing or exercises the given right”, Aubry & Rau, §177.

fact, the real difference between the possession of land and the apparent exercise of a servitude is not that they have different objects, one corporeal and the other incorporeal; rather, the difference is that, despite both having the land as their object, the factual relationship between person and land differs in extent and quality from one to the other. It is therefore the *nature* and *extent* of the factual relationship which differs, not its *object*. The only reason why a servitude is invoked as an object of “possession” is that the resulting terminology of “possessing a servitude” operates as a rhetorical device which enables us to determine the nature of the factual relationship concerned: servitudes are never the object of factual relationships in their own right.

This properly-articulated symmetry, however, poses its own conceptual problem: if the possession of land and the apparent exercise of a servitude both have land as their true object, how ought these two species of factual relationship to be distinguished from one another (i.e. beyond the rhetorical identification of a servitude as the object of “possession”)? Perhaps the most coherent attempts to answer this question can be found in the works of the Pandectist scholars of 19th-century Germany.³⁶ Admittedly, the Pandectists did not speak with one voice on every detail of this matter, nor did they focus peculiarly on the apparent exercise of servitudes.³⁷ Nevertheless, proceeding from their general acceptance that the possession of a corporeal thing (*Sachbesitz*) and the so-called “possession” of a right (*Rechtsbesitz*) both have a corporeal thing as their object, they sought to incorporate this understanding into a comprehensive and conceptually consistent theory of possession. Furthermore, the paradigm example given of *Rechtsbesitz* was generally the exercise of a servitude (*Servitutenbesitz*).³⁸

³⁶ On the qualities and values of the Pandectists which make their contribution to legal writing so helpful from a Scottish perspective, see Gretton, “Ownership and its objects” (2007) 71 *Rabels Zeitschrift* 802 at 802. For a (relatively) brief survey of their (and their Germanistic opponents’) writings on this matter, see Beermann, 47-90, especially 82-90.

³⁷ Beermann, especially 82-84, 88-89.

³⁸ Dernburg, *Pandekten*, §154: “Neben den Sachbesitz stellte sich seit der Kaiserzeit der Rechtsbesitz oder Quasibesitz. Man kann ihn auch Servitutenbesitz nennen, denn nur was die Form einer Servitut hatte, galt in Rom als Rechtsbesitz.”

In their attempts to explain the true relationship between *Rechtsbesitz* and *Sachbesitz*, Pandectist scholars were broadly divided into two camps, one of which was stronger in the first half of the 19th century and the other of which was stronger towards its conclusion.³⁹ Earlier scholars, such as Savigny and Puchta, tended to conceive of *Sachbesitz* as the exercise of ownership and *Rechtsbesitz* as the exercise of any other real right. In his celebrated treatise on possession, for example, Savigny stated that:⁴⁰

as true Possession consists in the exercise of property, so this quasi Possession consists in the exercise of a *jus in re*; and, as in true Possession, we possess the subject itself (*possessio corporis*) but not the property, we ought not properly to use the term Possession of a servitude (*possessio iuris*). But as we have no other word to which we can couple the Possession in this case, as it is coupled with the subject in the case of property, nothing remains but to use the above improper expression: it must not, however, be forgotten, that it is, in fact, an improper expression, and that nothing else is meant by it than the exercise of a *jus in re*, which stands in the same relation to the actual *jus in re*, as true Possession does to property.

The relationship between the two concepts was articulated in a similar manner by Thibault,⁴¹ Puchta⁴² and Arndts,⁴³ the last of whom, alongside a general paragraph on the exercise of rights (*Ausübung der Rechte*), divided his discussion of possession between two chapters, treating “Eigentumsbesitz” in his chapter on ownership and describing it as the factual control of a thing or factual exercise of ownership, and treating “Besitz der Dienstbarkeiten” in his chapter on servitudes and describing it as the factual relationship which exists through the actual exercise of a servitude, regardless of whether the servitude exists or not. A similar approach was adopted by Rudolf von Jhering. This was, perhaps, unsurprising given Jhering’s contention that the law protects possession as a pragmatic means of protecting owners: since the factual manifestation of ownership is protected in order to protect owners, it makes

³⁹ Beermann, 82-84; cf. Gräfe, *Rechtsbesitz* (n 24), 89-116.

⁴⁰ Savigny, *Possession*, 131. Note that the term “property” is used by Perry to translate “*Eigentum*” (i.e. ownership) rather than the object of that ownership.

⁴¹ AFJ Thibault, *System des Pandekten-Rechts* (1st edn, 1803), §269; *ibid* (9th edn, 1846), §211, titled “Ueber die Ausübung der Rechte und insbesondere über den Besitz”.

⁴² GF Puchta, *Lehrbuch der Pandekten* (9th edn by AF Rudorff, 1863; 12th edn by T Schirmer, 1877, reprint 1999), compare §122 and §§137-139. Cf. GF Puchta, *Lehrbuch der Pandekten* (1st edn, 1838), §114; GF Puchta, *Vorlesungen über das heutige römische Recht* (4th edn by AF Rudorff, 1854), §137.

⁴³ KL Arndts von Arnesberg, *Lehrbuch der Pandekten* (6th edn, 1868; 11th edn by L Pfaff & F Hofmann, 1883), compare §129, §135 and §187. In the later 11th edn, §129 is titled “Ausübung der Rechte, Besitz”.

sense for the factual manifestation of servitudes to be protected in order to protect servitude-holders.⁴⁴

By contrast, later Pandectists, pre-eminently Windscheid, tended to explain *Sachbesitz* as factual control (*tatsächliche Gewalt*⁴⁵/*sozial anerkannte Herrschaft*⁴⁶) of the will over a corporeal thing. In turn, they conceived of *Rechtsbesitz* as a more limited form of factual control, exceptionally protected by the law for policy reasons.⁴⁷ According to Windscheid, in order to have *Sachbesitz*, it was necessary to have factual control over a thing in the totality of its relationships;⁴⁸ by contrast, *Rechtsbesitz* required only factual control of the thing in respect of one or another of its individual relationships.⁴⁹ He added that, “although the expression is hardly appropriate”, one says that a right is possessed, and means by this that the factual content which would amount to the exercise of a right over a thing if legally recognised is factually realised.⁵⁰ While Windscheid recognised that possession of land, in the strict sense, required comprehensive control of the land for one’s own benefit, he also recognised that there were certain lesser degrees of control which corresponded to the factual content of servitudes and were protected as *Rechtsbesitz*.

⁴⁴ See R von Jhering, *Grund des Besitzschutzes* (2nd edn, 1869), 5-7, for an initial overview of the various contemporary theories on why possession should be protected which von Jhering rejected and, 45-71, for an explanation and defence of von Jhering’s own position; 158-160, for a discussion of “*Quasibesitz*”. See also Beermann, 69-71. Incidentally, though he would later lampoon convoluted Pandectist discussions of quasi-possession in his “Im juristischen Begriffshimmel – ein Phantasiebild”, in *Scherz und Ernst in der Jurisprudenz* (8th edn, 1899), 290, Jhering nonetheless believed the concept of quasi-possession to be one of the most impressive technical achievements of Roman jurisprudence, Beermann, p 69, citing R von Jhering, *der Besitzwille* (1889), 138. A translation of von Jhering’s satirical piece appears as R von Jhering, “In the heaven for legal concepts: a fantasy” (1985) 58 *Temple LQ* 799, transl CL Levy.

⁴⁵ Windscheid, *Lehrbuch*, §148, §151; “tatsächliche Herrschaft des Willens über die Sache”, §163.

⁴⁶ Dernburg, *Pandekten*, §142. This particular phrase appears to have been introduced by Dernburg’s editor, P Sokolowski, as earlier editions speak of “reale Herrschaft über die Sachgüter”, e.g. H Dernburg, *Pandekten* (5th edn, 1896; 6th edn with J Biermann, 1900), both §169.

⁴⁷ “When it was said earlier that... factual control over the thing in the totality of its relationships and the will to appropriate the thing to oneself in the totality of its relationships ... is required, it was not meant by this that factual control over a thing in an individual relationship, accompanied with the will to appropriate the thing in this relationship ... is without legal significance.”, Windscheid, *Lehrbuch*, §151 (own translation).

⁴⁸ *Ibid*, §151: “in der Gesamtheit ihrer Beziehungen”.

⁴⁹ *Ibid*, §163: “nur in dieser oder jener einzelnen ihrer Beziehungen”. See also J Baron, *Pandekten* (5th edn, 1885), §173. Similar language is used by E Hermann, *Kernstrukturen des Sachenrechts* (2013) to describe the difference between the rights of ownership and servitude: whereas ownership entitles one to usage of a thing in all of its relationships, a praedial servitude entitles the holder to usage of land “in einzelnen Beziehungen”.

⁵⁰ Windscheid, *Lehrbuch*, §163 (own translation); Baron, *ibid*.

Indeed, it seems fair to say that, for Windscheid, *Rechtsbesitz* was essentially a slither of *Sachbesitz*.⁵¹

But was the approach typified by Windscheid all that different from the one adopted by Savigny and Jhering? Their approaches are not obviously exclusive of one another. Indeed, there is a clear overlap between them conceptually and semantically. This does not, however, mean that the shift in perspective was purely cosmetic. Rather, it seems to have been grounded in a general shift from viewing the protection of *Sachbesitz* as a means of protecting provisional or presumptive ownership (and, when applied to *Rechtsbesitz*, the provisional or presumptive existence of other real rights) to viewing it simply as the protection of factual control in itself (and, when applied to *Rechtsbesitz*, certain specified degrees of factual control).⁵² Comparing these two approaches side-by-side, it can be seen how such a shift would lead to conceptual and practical consequences. Conceptually, those who followed Savigny's approach had tended to view both *Sachbesitz* and *Rechtsbesitz* as manifestations of a single unified principle – that the apparent exercise of a real right should be provisionally protected.⁵³ By contrast, those who adopted a similar approach to Windscheid and Dernburg tended to focus on *Sachbesitz* as the basic form of possession, with *Rechtsbesitz* as a limited, exceptional, and pragmatically

⁵¹ For a similar (modern) account, see J Wilhelm, *Sachenrecht* (4th edn, 2010), who, after noting that what appear to be rights in other rights (*Rechte an Rechten* – e.g. a pledge of personal rights) can be seen more consistently as parts (*Teilen*) of the primary right (B.VIII. Rn 124), goes on to say that a very similar conceptual pairing is found in the concepts of *Besitz* and *Rechtsbesitz* (B.VIII. Rn.132). As Wilhelm also goes on to speak of *possessio corporis* as the exercise of ownership and *possessio iuris* as the exercise of a limited real right, he might best be characterised as drawing on both streams of Pandectist thought. See also B.VIII Rn 119, fn 214.

⁵² According to Beermann, 88-89, whereas Savigny had distinguished the object of possession (a corporeal thing) from the object of the *protection* of possession (the exercise of rights on a corporeal thing), this distinction was neglected by later Pandectists. As a result, the physical thing – and control of it – became the object of possessory protection. This development led, in turn, to an increased emphasis on the exclusiveness of possession and a corresponding suspicion that *Rechtsbesitz* was exceptional and difficult to justify. Beermann is critical of this development as having contributed to the attempted exclusion of the concept of *Rechtsbesitz* from Johow's *Vorentwurfe* to the *BGB* and its marginal role in the final version of the *BGB*, which only recognises *Rechtsbesitz* of servitudes where the servitude in question has already been registered in the *Grundbuch*, *ibid*, 90-117 (cf., *BGB* §1029 and M Wolff and L Raiser, *Sachenrecht* (10th edn, 1957), §24. *Rechtsbesitz* continued to be recognised by various *Landesrechten* in relation to certain private law rights not regulated by the *BGB* – e.g. rights relating to fishing, hunting, church seats, and graves, *ibid*, §24, VI; see also HP Westermann *et al*, *Sachenrecht* (8th edn, 2011), §26 Rn 9-10.

⁵³ Beermann, 58.

protected variant of this factual relationship.⁵⁴ The first approach was more conducive to the extension of possessory protection to purely personal rights, much as the traditional quasi-possessory approach has led to the possessory protection of contractual rights to water, electricity and services in South African and Austrian law.⁵⁵ This contrasted strongly with Savigny's view that only the exercise of *iura in re* could be protected by quasi-possessory remedies.⁵⁶

When, however, one ignores abstract theories of quasi-possession and focuses exclusively on the apparent exercise of servitudes – as makes sense in Scots law with its closely circumscribed circumstances in which possessory remedies and positive prescription are available – it would seem that both perspectives can provide helpful analytical tools for understanding what is really going on when we speak of a servitude being “possessed”. If we look at what is happening on the ground and think purely in terms of human activity on the land, it is helpful to think of this in terms of limited factual control – especially where the servitude is an extensive one, such as a right of exclusive grazings or a right to use a septic tank. If, however, we wish to step into the matrix of legal rights and explain the observed behaviour by reference to subordinate real rights recognised by the law (e.g. for the purposes of positive prescription), it is helpful to think in terms of the apparent exercise of a servitude. By

⁵⁴ *Ibid*, 82-89. Though Windscheid was himself willing to speak of *Rechtsbesitz* and *Sachbesitz* as “manifestations of one and the same higher concept: factual control of the will over a thing”, §151 (own translation of “In der That sind der Rechts- und der Sachbesitz nur Erscheinungen eines und desselben höheren Begriffes: tatsächliche Herrschaft des Willens über die Sache”), he also noted in a footnote to the same paragraph that *Rechtsbesitz* was a later creation of Roman law, originally added to *Sachbesitz* as if an appendix (“Es kommt hinzu, dass der Rechtsbesitz [...] gleichsam ur als Anhang zu dem Sachbesitz hinzugefügt worden ist”), *ibid*, §151, fn3.

⁵⁵ Compare chapters by D Kleyn and T Rüfner in Descheemaeker, *Consequences*. Such reasoning is also seen in Bruns who, despite beginning with a definition of possession which is rooted in the exercise of real rights over land, goes on to accept the possessory protection of the apparent exercise of any personal right not extinguished on its first usage, Bruns, *Recht des Besitzes*, 480.

⁵⁶ Savigny, *Possession*, 133: “A great number of our Jurists have wholly misunderstood this part of the theory of Possession; for having overlooked the precise meaning of the Roman *jus (in re)*, they explained the *juris quasi possessio* as the exercise of a right simply [...] From this empty abstraction, Hommel arrives at a question which he himself gives up as unanswerable, why should not the physician, whom one ceases to employ, be protected in the possession of his right? [...] Sibeth here, as everywhere else, is quite original; he denies all *juris quasi possessio*, and falls foul of the Jurists who maintain it; the truth is that in this part, as in every other of his work, he does not know what he is writing about.” T Rüfner, “Possession of Incorporeals” in Descheemaeker, *Consequences*, 184, concurs, describing quasi-possession of such rights as “this old, but not venerable idea.” Cf. Gräfe, *Rechtsbesitz* (n 24), 89-106.

drawing on both of these perspectives, we are therefore able to explain the “possession” of a servitude both with regard to what is happening on the ground and in terms which map well with the interpretative grid provided by different real rights in land.

One work which grasps this reality well is Carl Georg Bruns’s *Das Recht des Besitzes im Mittelalter und in der Gegenwart* (1848), a historical and theoretical study of the law of possession from the time of classical Roman law until the mid-19th century. While this book deals primarily with possession in the strict sense, a substantial section is devoted to the origin, development and *Philosophie* of the concept of *Rechtsbesitz*.⁵⁷ Having begun with an acknowledgement that the possession of a thing and the exercise of a servitude both require a physical relationship between a possessing subject and a corporeal object, Bruns contends that there are only two possible points of similarity between the phenomena, both of which provide a plausible starting-point for explaining how the language of “possession” could be applied to the apparent exercise of a servitude.⁵⁸ The first point of similarity is that both scenarios involve the apparent exercise of a real right over land – ownership on the one hand and a servitude on the other. The second point of similarity is that both involve a person exercising a degree of factual control over land – comprehensive factual control on the one hand, and a more limited factual control on the other.⁵⁹ According to Bruns, it is only in these two respects that the possession of land and the apparent exercise of a servitude are commensurable. As such, it is only by reference to these points that one can construct a general concept of possession. Putting these together, Bruns concludes that possession is the factual control of a legal object by a legal subject corresponding to the apparent exercise of a right which would entitle the legal subject to that level of factual control were the right in question to exist.⁶⁰

⁵⁷ See Beermann, 61-64, for a brief summary of Bruns’s own normative views on *Rechtsbesitz*.

⁵⁸ Appropriately for a book published towards the midpoint of the 19th century, these two points of similarity collate almost exactly with the earlier and later approaches exemplified by Savigny and Windscheid.

⁵⁹ Bruns, *Recht des Besitzes*, §8 (80).

⁶⁰ *Ibid*, §57 (486). Also §61 (504-505), Article 2: “Besitz ist jede einem Recht entsprechende tatsächliche Herrschaft. Er scheidet sich in Besitz der Sachen und der Rechte”. Although Bruns goes on to postulate that the will of a debtor is a valid *Rechtsobjekt* and that the concept of *Rechtsbesitz* can

Furthermore, where that right would entitle its holder to absolute control of the object, the corresponding possession is termed possession of the object itself (*Sachbesitz*); by contrast, where the right in question would only entitle its holder to a particular limited control of the object, the corresponding possession is called possession of the right (*Rechtsbesitz/Servitutenbesitz*).

Bruns's articulation of the concept of *Rechtsbesitz* is helpful and incorporates the insights of both Pandectist camps: "possession" of a servitude is similar to possession of land in so far as its object is also the land subject to the "possessor's" behaviour; it differs from the possession of land, however, in so far as it involves a less comprehensive degree of factual control, corresponding to the apparent exercise of a servitude rather than the apparent exercise of ownership - or, indeed, the apparent exercise of any other right entitling its holder to comprehensive possession, such as lease or usufruct. To apply this to Scots law, when the 1973 Act speaks of a servitude being "possessed", it really means that there is a limited "possession" of the allegedly-servient tenement, which manifests itself in a limited factual control of the land corresponding to the apparent exercise of a servitude.⁶¹

(3) Descending from the *Begriffshimmel*: is the "limited-possession" approach compatible with Scots Law?

But how compatible is such a "limited-possession" approach with Scots law? In particular, how helpful is it as an analytical tool for understanding the establishment of servitudes by positive prescription? To answer this, it is necessary to consider two analytical advantages which come from recognising the apparent exercise of a servitude as a "limited-possession" of the land: firstly, the congruence of such an approach with what actually takes place on the ground; and, secondly, its coherence

be applied to long-term contracts, such an extension is not a necessary development of his approach, *ibid.* 479-483.

⁶¹ Or at least a possession-like factual relationship if we wish to retain the term "possession" only in its traditional sense. Bruns speaks of a "beschränkten Servitutenmäßigen Besitze der Sache", i.e. a limited servitude-like possession of the thing, *Recht des Besitzes*, 478.

with the Scots system of real rights. The first is primarily helpful for practical judicial reasoning, the second for juristic systemisation.⁶²

(a) Congruence with the situation on the ground

As has already been seen, the cornerstone of the “limited-possession” approach is its assertion that, as far as behaviour on the ground is concerned, the difference between the possession of land and the so-called “possession” of a servitude is one of extent and quality, not object. Both situations involve a “possessor” behaving in a certain way in relation to a piece of land. It is simply the nature and extent of the possessor’s behaviour which determine whether the “possession” will be characterised as possession of the land or as “possession” of a servitude – or, to phrase this more appropriately, which determine whether the possession is full possession (corresponding to the apparent exercise of ownership) or a limited possession (corresponding to the apparent exercise of a servitude). This congruence with what is actually happening on the ground constitutes the limited-possession approach’s first analytical advantage: if the real difference between the two types of possession is one of nature and extent rather than object, it is more helpful to acknowledge this explicitly.

That this system-neutral assessment of the situation on the ground is congruent with Scots law can be seen from a consideration of some concrete cases where it was not immediately apparent which type of possession was involved (i.e. to which right the possessor’s behaviour should be attributed). In such cases, it seems clear that judges do not immediately try to discern the *object* of the possessor’s behaviour – primarily because the possessor’s behaviour is invariably focused on exploiting the land itself. Instead, they assess the nature and extent of the possession and then decide which is the real right with whose apparent exercise it is most consistent. Perhaps the best example of such a situation is seen in those cases where a court must decide if possession on the basis of a clause of parts and pertinents should lead to that clause

⁶² Given the relative novelty of this discussion in Scots law, the remainder of this chapter cannot in any way pretend to exhaustiveness. Rather, the following discussion is intended as a first contribution to what will, it is hoped, prove a useful and stimulating debate for Scots jurists.

being interpreted as including the ownership (or co-ownership) of neighbouring land or merely a right of servitude over it. Such decisions were especially important in cases concerning the Division of Commonities Act 1695, since only those proprietors with rights of commonity were entitled to pursue a division and not those with mere servitudes.⁶³

A good example is found in *Johnstone, Beveridge and Gibb v The Duke of Hamilton*.⁶⁴ In that case the pursuers had “immemorially pastured their cattle, and cast feal and divot” upon certain muirs which were subject to a process of division. As the pursuers possessed on the basis of a clause of parts and pertinents, the Court of Session had to decide whether they had established a right of servitude or of common property. Unsurprisingly, the defender argued that, since the pursuers’ possession went no further than pasturage, feal, and divot, their right under the clause could only extend to a servitude for those purposes.⁶⁵ By contrast, the pursuers argued that their possession had been “such as is consistent with the idea of a right of property” since they had exercised all the “common and ordinary acts of possession incident to property of that kind”.⁶⁶ The Court found in favour of the pursuers and held that they had “immemorially possessed the said muirs” and therefore had a right of common property. Nevertheless, the fact that possession of the land was constituted by behaviour which, had it been less extensive, could readily have been attributed to the exercise of a servitude suggests that the Pandectist perspective is more congruent with the situation on the ground than the traditional quasi-possessory approach.⁶⁷ Indeed, even though the Court’s reasoning is not

⁶³ Admittedly, due to changes in conveyancing practice, such cases are far less prominent now than they were in the 17th, 18th and 19th centuries, when processes for the division of commonities were prolific; nevertheless, the insights they give into practical judicial reasoning are still valuable.

⁶⁴ *Johnstone, Beveridge and Gibb v The Duke of Hamilton* (1768) Mor 2481. The reason why this case is such a good example is that it did not involve a bounding clause or any other factor which would draw attention away from purely looking at the nature of the pursuers’ possession.

⁶⁵ *Ibid* at 2482.

⁶⁶ i.e. “wild and uncultivated” muirs, *ibid* at 2482.

⁶⁷ Unfortunately, it is not apparent whether this decision was owing to the volume of the pursuers’ possession or some other factor, *ibid* at 2483. An interesting counterpoint to this case can be found in *Chatto v Lockhart* (1790) Hume 734, where Lockhart claimed exclusive winter pasturage over Chatto’s land – according to the report, his tenants “did not pretend to control or interfere with Mr Chatto’s tenants in the tilling of their land, or the reaping of the industrial fruits; but as soon as the crop was removed, Mr Lockhart’s tenants drove in their sheep and cattle to pasture on the stubble; and there kept them to the exclusion even of Mr Chatto’s own sheep and cattle during the winter or till the

recorded in *Morison's Dictionary*, it is notable that both parties appear to have operated with a general conception of “possession” as usage of the land attributable to the exercise of one or other of the two rights. This can be seen particularly clearly from the defender’s argument that,⁶⁸

what was conveyed to [the pursuers] as part and pertinent can only be known from their possession; and, as their possession goes no farther than to pasturage, feal and divot, their right of course resolves into a servitude for these purposes. It is every where laid down in our law books, that a servitude of pasturage, feal and divot, may be acquired by prescription; but how can this be done but by possession such as that of the pursuers.

The passage from Erskine’s *Principles* that the defender cited as governing such cases is also supportive of a general concept of “possession” as always having land as its object but differing in extent depending on the particular right to which it is attributed.⁶⁹

if one of the parties has exercised all the acts of property of which the subject is capable, while the possession of the other has been confined to particular and inferior acts, as to pasturage only, or to casting feal and divot, the first is to be deemed sole proprietor, and the other to have merely a right of servitude

Particularly interesting is the fact that the term “possession” in this passage – and the corresponding passage in Erskine’s *Institute*⁷⁰ – is used of behaviour which amounts only to the exercise of a servitude rather than of the exercise of “all the acts of property of which the subject is capable”. That this interpretation of Erskine was

labour for the next year was resumed.” In this case, Hume speaks of the “sole and exclusive possession” of the pasturage of the lands during the winter. Given that the behaviour of Lockhart’s tenants effectively amounted to exclusive control of the land for a significant portion of the year, it seems somewhat contrived to describe this as possession of an incorporeal right in the land. Rather, it seems more straightforward to say that Lockhart’s possession of the *land* only extended to the level of control to which an exclusive right of pasturage would entitle him.

⁶⁸ Mor 2481 at 2482.

⁶⁹ Erskine, *Principles*, 2.6.6, cited, *ibid*, as “Erskine 2.6”.

⁷⁰ “Where neither party is expressly infeft, but both possess the same subject as pertinent, the mutual promiscuous possession of both resolves into a commony of that subject. But questions of this nature depend much on the different kinds of the possession had by the two competitors; for if one has had the exclusive possession of pasturing cattle on the ground, and has also been in use to cast feal and divot, and perhaps to turn up part of the field with a plough, while the possession of the other was confined to the casting of feal and divot only, *he who hath exercised all the different acts of property the subject is capable of, is accounted the proprietor and the other, whose possession was more limited, is entitled merely to a servitude upon the property*”, Erskine, *Institute*, 2.6.3, italics added.

essentially shared by the pursuers is apparent from their answer to the defender's argument:⁷¹

The meaning of the rule laid down by Mr Erskine is this; that where one has had full possession of the subject, and the possession of another has been limited to particular acts which fall short of the common and ordinary use of the subject, then the last is presumed to have only a right of servitude; and justly, because such possession is in some measure inconsistent with the idea of property [...] It does not follow from this, that a servitude of pasturage, or of feal and divot, may not be acquired by prescription upon a clause of part and pertinent; for, wherever the acts of possession have been so limited in their nature, as not to amount to the common and ordinary use of the subject, there the right will be construed to be a servitude only.

Again, the pursuers seem to have assumed that it is the land which is the *object* of the "acts of possession" and that it is the *extent* of such acts which determines whether they should be attributed to ownership or to servitude. Against the background of apparent unanimity, it would be surprising if their Lordships had not followed similar reasoning in reaching their decision.

Indeed, an explicit example of such judicial reasoning can be found sixty years later in *The Earl of Fife's Trs v Cuming*, another case dealing with a process for the division of a commonty.⁷² The Earl of Fife's predecessor in title had obtained a declarator in 1676 which confirmed that he was sole proprietor of certain mosses and that Cuming's predecessor in title had only a servitude right to pasture and to cast "feual, peats, and turves" for personal use. The Earl of Fife's trustees sought to have this declarator repeated, while Cuming sought a declarator of common property and division of the moors in question. Central to Cuming's case was his contention that, although his predecessor "had not then had such possession as to establish a right of property, that did not preclude [Cuming] from acquiring such right by subsequent possession". Furthermore, Cuming offered to prove that "he had exercised rights of property which could not be ascribed to the right of pasturage secured to him by that decree." In other words, he sought to prove that his exploitation of the land had been

⁷¹ *Ibid.*

⁷² *Trs of the late Earl of Fife v Lachlan Cuming* (1830) 8 S 326.

more extensive than that of his predecessor and ought therefore to be attributed to the exercise of ownership rather than the exercise of a servitude.

Clearly, such an argument is consistent with the proposition that all possession has land as its object and that what the 1973 Act calls “possession” of a servitude is, in fact, a more limited possession of the land. More obviously dependent on such an understanding of possession, is the judgement given by Lord Pitmilley:⁷³

[the previous decree] establishes Lord Fife’s right of property at the time, and that the defender’s predecessor’s right was of servitude only. The question therefore is, whether it was open to him to prescribe a right of property since that period? And I have no doubt but that it is. *If his possession was confined to the purposes of servitude, it is clear that he was not prescribing any right of property, and that this possession must be held to have been in virtue of the servitude established by the decree.* But if he can show possession as proprietor, he may, in virtue of the clause of parts and pertinents, acquire a right of property by prescription.

For Lord Pitmilley, it would appear that the apparent exercise of a servitude amounted to a “confined” possession of the land for the purposes of servitude.⁷⁴ Furthermore, once the case returned to the Second Division after having been remitted to Lord Fullerton in the Outer House, it is telling that the same approach had also been adopted by Lord Fife’s trustees, who now maintained that “the proof established no prescriptive possession [...] which was not sufficiently authorised by the right of servitude.”⁷⁵ Again, such an argument seems to require that “possession” be understood as a factual relationship between “possessor” and land, differing only in extent depending on the real right to which it is attributed.

That these cases were not isolated conceptual outposts can be seen from a number of other 19th-century cases. In *Spence v Earl of Zetland*, for example, the same possession that one udal proprietor claimed was attributable to a right of property in

⁷³ *Ibid* at 328, italics added.

⁷⁴ Admittedly, the other members of the Second Division spoke only of the “future possession” which would have allowed Cumming to acquire the right of property, *ibid* per Lord Glenlee and at 329 per LJC Boyle (“subsequent possession”). Their judgements are, however, not inconsistent with Lord Pitmilley’s.

⁷⁵ *Earl of Fife’s Trs v Cumming* (1831) 9 S 336: more fully, “it had been found, by a decree in 1676 that the right of Cumming’s predecessors was merely that of servitude, requiring a subsequent prescriptive possession by them, inconsistent with the right of property in the Earls of Fife, and only capable of being attributed to a right of property on their part, in order to establish such a right of property contrary to the decree; but that the proof established no prescriptive possession, prior to the raising of the action in 1789, which was not sufficiently authorised by the right of servitude.”

the Haroldswick scattald was claimed by the Earl of Zetland to be attributable to a right of servitude since the description in the udaller's title was bounding.⁷⁶ There, the Second Division held that the description was not, in fact, bounding and that he was therefore entitled to pursue a division of the scattald in question.⁷⁷ In *Hepburn v Duke of Gordon*⁷⁸ and *Gordon v Grant*,⁷⁹ by contrast, it was only the fact that the descriptions in the possessors' titles were bounding which excused the Court from having to decide whether the possession in question was attributable to rights of common or of servitude.⁸⁰ Certain *dicta* in *Gordon v Grant* seem consistent with a limited-possession approach⁸¹ and Lord Medwyn's dissenting opinion appears to rest implicitly on such an approach, concluding that one party had "had possession of this portion of common as a servitude" and that others had "occupied it in virtue of their titles, giving them right of common and pasturage".⁸²

A final example of such reasoning can be seen in *Carnegie v MacTier*, where the owner of land which had been retained in a split-off disposition claimed common property in a strip of land now claimed exclusively by the owner of the land which had been disposed.⁸³ In finding that the pursuer's titles were sufficient to prove

⁷⁶ *Spence v Earl of Zetland* (1839) 1 D 415. On "Scattalds", see SA Knox, "The Making of the Shetland Landscape" (1985), especially Ch 2: "Scattald and Common defined"; B Smith, "What is a Scattald? Rural Communities in Shetland, 1400-1900", in BE Crawford (ed), *Essays in Shetland History: Heidursrit to TMY Manson* (1984), 99-124.

⁷⁷ Indeed, the Lord Ordinary (Jeffrey) was heavily critical of the "many ingenious suppositions, conjectures and surmises, by which the noble objector endeavoured to give plausibility to those novel and startling propositions.", *ibid* at 423.

⁷⁸ *Hepburn v Duke of Gordon* (1823) 2 S 459 (525 in reprint).

⁷⁹ *Gordon v Grant* (1850) 13 D 1.

⁸⁰ In both cases, the majority, having found the titles to be bounded, refused to consider whether those with bounding descriptions had actually established a servitude or not. During his argument, Hepburn's counsel appears to have attempted to convince the other heritors not to contest Hepburn's title, noting that "His Grace cannot need to be told that, even though he were to be successful in opposing on the basis of a bounding charter... the petitioner would still enjoy his right under another name – servitude" and that it would therefore be no more beneficial for the Duke to prove exclusive property subject to a servitude of pasturage than to accept the division and be able to cultivate his land, *Hepburn v Duke of Gordon*, ALSP, General Collection, Nov. 25, 1823, No 510, 11.

⁸¹ E.g. "Possession alone will not give either a right of common property or servitude, and never of itself will decide whether the party has a right of common, or only of servitude, if he has any legal right at all. *It must be possession in virtue and assertion of a title sufficient for common property, or for a servitude.* Now, these parties admit that they have no right – no title in these lands – *no possession exercised over them under any right...*", *Gordon v Grant* (1850) 13 D 1 at 8 per LJC Hope, italics added. See also *ibid* at 18-20 per Lord Medwyn.

⁸² *Ibid* at 22 per Lord Medwyn.

⁸³ *Carnegie v MacTier* (1844) 6 D 1381.

either a right of common property or a right of servitude, Lord Moncreiff seems to have accepted that it would be the nature and extent of the pursuer's possession which would determine, when the case came to proof, whether any right he had established was Carnegie of common property or of servitude.⁸⁴ In particular, his Lordship relied on the "important" case of *Airlie*,⁸⁵ which had shown "that it depends on the nature of the possession, when applied to [a title of parts and pertinents], whether it is a right of common property or a right of servitude that is proved by such possession".⁸⁶ Again, this approach demonstrates that conceptualising the exercise of a putative servitude as a limited-possession of the land itself provides a more intuitive approach for analysing what is happening on the ground: if it is the nature and extent of the possessor's factual relationship with the land which is decisive in determining whether a right of ownership or a right of servitude has been acquired, then it is ought also to be the *nature* and *extent* of that possession which provides the conceptual categories we use to distinguish the two scenarios – not the asymmetrical idea of possessing the land on the one hand and possessing a servitude on the other.

What conclusions can be drawn from these cases? On the one hand, it seems clear that viewing the apparent exercise of a servitude as involving some form of limited possession of the allegedly-servient tenement is not foreign to Scots law. On the other hand, it must be acknowledged that none of these cases actively sets out to articulate and defend a particular conceptualisation although the reasoning adopted does suggest that a limited-possession approach is more practically helpful than the traditional quasi-possessory approach. Such an impression is reinforced by the fact that most modern textbooks still require (in addition to, or in elucidation of, the 1973 Act's express requirements) that prescriptive possession be "unequivocally referable to the right claimed". Professor Gordon, for example, states that,⁸⁷

⁸⁴ *Ibid* at 1406-1407. Amongst the authorities cited by Lord Moncreiff are *Johnstone, Beveridge and Gibb* (1768) Mor 2481 and the equivalent passage from Erskine's *Institute* to the passage from his *Principles* cited by the defender in that case.

⁸⁵ *Earl of Airlie v Rattray* (1835) 13 S 691.

⁸⁶ *Carnegie v MacTier* (1844) 6 D 1381 at 1407.

⁸⁷ Gordon, *Land Law*, para 24-47. Compare *Cusine & Paisley*, para 10.20.

it is equally necessary where a servitude is being established by prescription that the possession relied on must be referable to a servitude right. If the possession can be accounted for by another right, then no servitude is acquired by possession.”

Johnston likewise states in his comments on the prescriptive acquisition of *ownership* that,⁸⁸

it is not enough if the possession can be referred to a right other than ownership, for instance if the possessor is also entitled to hold the land under a lease or if he is entitled to use a right of way over a road. In that case, his possession can just as easily be ascribed to the lease or the servitude. So it does not amount to a claim of prescriptive possession.

We will return to this issue in later chapters. For present purposes, it is sufficient to note that, even though these writers speak elsewhere of servitudes being “possessed”, the quoted passages seem to concede that certain acts of possession of land, which might in one case be attributed to ownership, might also in other cases be attributed to the apparent exercise of a servitude. If so, this seems to require that “possession” in each case has the same object, regardless of which right that possession is eventually attributed to. Again, this suggests that, when faced with cases of possession which could be attributed to either ownership or servitude, judges and jurists do not really have to decide whether the possession has land or a servitude as its *object*; rather, they must decide whether the possession is comprehensive and attributable to ownership or less comprehensive and attributable to the exercise of a mere servitude. The first analytical advantage of the limited-possession approach is therefore that it recognises this expressly.

(b) Coherence with the Scots system of real rights

The limited-possession approach also offers a second analytical advantage; namely, its coherence with the Scots system of real rights in land and, in particular, the extent of factual control to which each of these real rights entitles its holder. To appreciate this coherence, it is first necessary to recognise that there are essentially two categories of factual control to which real rights can entitle their holder: firstly, a comprehensive and residual possession, and, secondly, an “intermittent and non-

⁸⁸ Johnston, *Prescription*, para 18.25.

exclusive possession”.⁸⁹ Just as ownership, lease and liferent entitle their holder to the exclusive possession of land (subject to any rights of servitude), so praedial servitudes entitle their holder to a limited, or “intermittent and non-exclusive”, control over the burdened property. If, for example, I exercise a servitude of access over a neighbouring property, this manifests itself in an intermittent and non-exclusive control over the track across which I take my access. Similarly, if I exercise a servitude of pasturage, this manifests itself in an intermittent and non-exclusive control of the area over which I graze my sheep. By contrast, the exercise of ownership is comprehensive and residual, excluding any factual control of the land by others except that which is attributable to the exercise of other subordinate real rights or personal rights. In effect, these two categories of factual control correspond to Windscheid’s definitions of *Sachbesitz* and *Rechtsbesitz*: control of land in all of its relationships and control of land in respect to one particular relationship.

At this point it is helpful to remind ourselves of the rationale for positive prescription; namely to provide legal certainty by regularising long-enjoyed *de-facto* usage of land. Given that these two levels of factual control are already recognised as the factual manifestation of those real rights which positive prescription operates to protect, it makes sense to adopt them as the relevant categories of possession for *establishing* those rights in the first place. Such an adoption would emphasise that the decisive issue when establishing servitudes by positive prescription is not whether the claimant has been “possessing” incorporeal property but whether he has demonstrated sufficient factual control over the allegedly-servient tenement to give the impression that he has been exercising a right of servitude over it.

Indeed, one could argue that the two categories are already acknowledged in an embryonic (though imperfect) manner by the 1973 Act, which distinguishes between the establishment of ownership and other real rights by positive prescription, in

⁸⁹ For the latter phrase, see Reid, *Property*, para 126, fn 1. While it might be more intuitive to describe the first category as “exclusive” possession, this overlooks the possession to which co-owners are entitled: this is comprehensive in the sense that it extends to use of the whole property, but not exclusive since it must tolerate the co-possession of co-owners.

sections 1 and 2, and the establishment of servitudes by positive prescription, in section 3. Even though section 3 requires that “a servitude has been possessed”, the 1973 Act therefore distinguishes between real rights which entitle their holder to comprehensive possession of land and real rights which only entitle their holder to a more limited control of the land. The only difference between the 1973 Act and the limited-possession approach is therefore that the 1973 Act expresses this by means of the conceptual asymmetry highlighted in the introduction to this chapter: all three sections provide for the acquisition of a real right in land but, whereas sections 1 and 2 see this as a result of land being possessed in accordance with the real right, section 3 sees this as a result of possession of the possibly-not-yet-existent right itself.

This was not the form in which the 1973 Act was initially enacted. In fact, prior to the coming into force of the Abolition of Feudal Tenure etc (Scotland) Act 2000, sections 1 and 2 of the 1973 Act referred to possession of an “interest in land” and not to possession of the land itself.⁹⁰ In one sense at least, the original drafting was therefore conceptually symmetrical. Nevertheless, as was acknowledged by the Scottish Law Commission in proposing the amendment, it also “created the conceptual difficulty that the right, or interest, in land required to be possessed and not the land itself”.⁹¹ When abolishing the feudal system, the Commission therefore also took the opportunity to recast sections 1 and 2 so that they would “focus on the key element of possession of the land”.⁹² In doing so, however, they only managed to remove one conceptual difficulty. The adoption of the limited-possession approach would allow for the removal of another and also for the clarification of the conceptual basis for the distinction between sections 1 and 2 and section 3, namely, the distinction between rights to comprehensive possession and rights to limited

⁹⁰ While servitudes were initially excluded from the category of “interests in land” by 1973 Act, s15, they are now excluded by s1(3) and 2(2).

⁹¹ Scottish Law Commission, *Report on Abolition of the Feudal System* (Scot Law Com No 168), 303. Given that the project’s aim was to abolish the feudal system, the establishment of servitudes by positive prescription was outwith the scope of the project.

⁹² *Ibid.*

possession. The practical implications of this on the wording of section 3 will be considered later.⁹³

This, then, is the second analytical advantage of the limited-possession approach: its congruence with the Scots system of real rights. Underlying it, however, is a common instinct which it shares with the first advantage; namely that, where the law can explain itself without relying on the reification of purely legal concepts (*Gedankendinge*),⁹⁴ it should do so. Accordingly, where it is possible to distinguish two categories of factual relationship by their extent and quality, the law ought not to interpose an incorporeal legal concept as the notional object of one relationship in order to distinguish its extent and nature from that of the other. Appropriate comparison can be made here to the notion of owning rights, as explored by Professor Gretton.⁹⁵ Much as the idea of owning servitudes or personal rights can be said to be unnecessary when one can simply say that one has a less extensive right than ownership or that rights can be transferred simply by swapping one holder for another, so the idea of “possessing” a right is unnecessary when one can simply say that the “possessor” has a more limited factual relationship with the land than would qualify as possession in the strict sense. If rights need not be the object of other real rights, they need not be the object of possession either.⁹⁶ This is as true for Scots law in practice as it was for the Pandectists in theory.

⁹³ See below at 111-114.

⁹⁴ “Gedankendinge”, Bruns, *Recht des Besitzes*, 80

⁹⁵ Gretton, “Ownership and its objects” (2007) 71 *Rechts Zeitschrift* 802 at 831-848.

⁹⁶ According to Gretton, although rights cannot be the *primary* objects of other rights, they can be the *secondary* object of other rights, i.e. rights can be *over* other rights but not *in* them, *ibid* at 843-844. Gretton goes on to clarify this by explaining that “in so far as a right can be an object, it cannot be an object of ownership or of the limited rights. Since rights can be the objects of transfer, there is no difficulty in saying that they can be the objects of dismemberment”, *ibid*. To re-use the terminology applied above to Windscheid, it is perhaps fair to say that Gretton only views rights as the object of limited rights in so far as this allows one to identify the primary right of which the limited right is a slither. Such a view is similar to that adopted by Wilhelm, *Sachenrecht* (n 49), B. VIII. Rn 124. See also n 51 above. Descheemaeker notes, correctly, that “the possession of rights is an analytical impossibility, and prefacing the alleged possession with the word ‘quasi’ can do nothing to rescue it” and that there is therefore “only one type of relationship I can have with ‘my’ rights”; however, he stops short of recognising that, just as my legal relationship with the objects of those rights can be comprehensive (e.g. ownership) or limited (e.g. servitudes), so the *factual* relationship I enjoy with the objects of those rights can be comprehensive (i.e. possession) or limited (i.e. limited possession) depending on the right whose content it most resembles, Descheemaeker, *Consequences*, 29.

D. Implications for the 1973 Act

As this chapter has attempted to show, it is better to view the exercise of a putative servitude as resulting in a limited possession of the apparently-burdened land than to view it as possession of the servitude itself. While it is clear, in practice, what the 1973 Act means when it speaks of a servitude being “possessed”, its terminology is not very helpful analytically. In fact, it is always land which is the object of any behaviour required by the Act. The servitude itself is only “possessed” in a rhetorical sense, to make clear the nature and extent of the actions that must be carried out on the land. Indeed, one could say that what the Act really requires is possession of the land *in accordance with a putative servitude*, not possession with a servitude as its object. In this respect, the reforms of section 1 and 2 of the 1973 Act have been incomplete and will only lead to conceptual symmetry if followed by reform of section 3.

That said, Scots law has not traditionally conceptualised the exercise of a putative servitude in this way. There also seems little urgency for any such reform: in practice, the law’s substance is the same under each approach and, since Scots law already restricts the availability of possessory judgements and positive prescription to real rights, there seems little risk of contagion from the concept of quasi-possession.⁹⁷ It is therefore unlikely that reform in this area would make any *practical* difference to the doctrine’s application.

What then should be done? To quote Professor Gretton:⁹⁸

...while coherence is not the only value it is a value. Every jurist has the experience of hitting upon an organising principle that suddenly turns chaos to order and opens up new avenues of investigation: this is the inherent creativity of coherence... Coherence and pragmatism are often presented as opposites. That is an error. Other things being equal, the incoherent must be the unpragmatic.

⁹⁷ See above at n 55 and n 56.

⁹⁸ GL Gretton, “Reception without Integration? Floating Charges and Mixed Systems” (2003) 78 Tul LR 307 at 308.

If the limited-possession approach is more coherent than the traditional quasi-possessory approach and has no significant drawbacks, it ought to be adopted as the organising principle for this area of law. The approach is helpful not only for its conceptual clarity and symmetry but also because it provides a more coherent view of the relationship between possession as a wider concept and the real rights which it mirrors. The jurist's task is to elucidate and systematise the law, looking for coherence and consistency in a way which judges and legislators do not always have time to pursue. For this reason, even if there is no imminent opportunity to amend the 1973 Act, jurists should acknowledge that the true object of possession is always corporeal and that the "possession" of a servitude is actually a limited possession of the servient tenement itself, corresponding to the apparent exercise of a servitude.

In the event, however, that an opportunity to amend the 1973 Act does arise, it would seem that there are two options which would reintroduce full conceptual and semantic symmetry. The first option is to adopt the idea of limited-possession in section 3, thus bringing it in line with the "land-as-object" approach of sections 1 and 2. The second option is to amend all three sections to focus solely on the apparent exercise of a real right over land. Such amendments could, for example, be drafted as follows:

Option 1: Limited possession in section 3

If a person has had limited possession of land belonging to another person for a continuous period of twenty years, openly, peaceably, without judicial interruption and as though entitled to such possession by a right of positive servitude then, as from the expiration of that period, the existence of that servitude shall be exempt from challenge.

Option 2: Prescriptive possession as the apparent exercise of a real right over land

s1: If any person... has exercised a real right over land for a continuous period of ten years... then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge.⁹⁹

⁹⁹ To allow for different prescriptive periods, sections 1 and 2 would continue to exclude servitudes and to apply to registered and unregistered real rights respectively.

s3: If any person... has exercised a servitude over land for a continuous period of twenty years... then, as from the expiration of that period, the existence of the servitude as so exercised shall be exempt from challenge.¹⁰⁰

As both of these options would have significant ramifications for the law of possession as a whole, it seems unlikely that they will be considered in the near future. Fortunately, however, a workable third option exists; namely, to leave sections 1 and 2 alone but to avoid the language of “possession” in section 3 and speak instead of a servitude being “exercised”. This is the approach adopted in the current South African legislation and a similar approach could easily be drafted for Scots law.¹⁰¹

Option 3: Restrict “possession” to section 1 and 2; introduce “exercise” to section 3

If a positive servitude over land has been *exercised* for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude as so *exercised* shall be exempt from challenge.¹⁰²

This has the advantage of dispensing with the conceptual difficulty of possessing a servitude, while also preserving the term “possession” (and its attendant juristic baggage) for comprehensive control of a corporeal thing. Admittedly, such a reform would lead to some loss of semantic symmetry between sections 1 and 2 and section 3. It would, however, compensate for this by introducing a tighter conceptual symmetry between the two categories of prescriptive possession of land (through exercise of a real right) and prescriptive “exercise” of a servitude (with the burdened land as its object).¹⁰³

¹⁰⁰ It is unclear why, at present, sections 1 and 2 speak of the “expiry” of the prescriptive period but section 3 speaks of its “expiration”.

¹⁰¹ Prescription Act 68 of 1969, s6: “a person shall acquire a servitude by prescription if he has openly and as though he were entitled to do so, exercised the rights and powers which a person who has a right to such servitude is entitled to exercise, for an uninterrupted period of thirty years or, in the case of a praedial servitude, for a period which, together with any periods for which such rights and powers were so exercised by his predecessors in title, constitutes an uninterrupted period of thirty years.”

¹⁰² These changes, modelled on section 3(2), would also be applied to section 3(1) *mutatis mutandis*.

¹⁰³ It would also introduce symmetry between section 3 and section 8 on negative prescription of servitudes, which speaks of exercise and enforcement.

In the end, however, this thesis must analyse the law as it stands. For this reason, the following chapters will accommodate themselves to the terminology used in the 1973 Act: servitudes will be “possessed” openly and peaceably and without conceptual protest. Readers should, however, bear in mind that this is being done for reasons of terminological pragmatism and not from an acceptance of the traditional quasi-possessory approach.

Chapter 6

The Law in Practice – a General Overview

A. Introduction

B. The general doctrine of positive prescription

C. Preliminary Issues

- (1) Who can establish a servitude by positive prescription?
- (2) What types of servitude can be established?
 - (a) Servitude must be of a known type
 - (b) Servitude must not interfere with statutory purposes
 - (c) Servitude/possession must not be illegal

D. What policy objectives shape prescriptive possession?

E. An overview of the relevant requirements

- (1) Possession “as (if) of right”
 - (a) Step 1: possession must be sufficient to indicate assertion of a servitude
 - (b) Step 2: possession must not be “by right”
- (2) “openly, peaceably and without judicial interruption”
- (3) “for a continuous period of twenty years”
- (4) “as so constituted” v “as so possessed”

A. Introduction

Having dealt with the history of the establishment of servitudes by positive prescription and with how best to conceptualise the apparent exercise of servitudes, we can now turn in the third and final part of this thesis to consider what exactly it is that a claimant must show before a servitude can be established by positive prescription. What does it mean, in practice, for a servitude to have been possessed openly, peaceably, and without judicial interruption for a continuous period of twenty years?¹

Since the establishment of servitudes by positive prescription is now governed by section 3(1) and (2) of the Prescription and Limitation (Scotland) Act 1973, it might be expected that this analysis should begin with detailed statutory exegesis. Such an

¹ 1973 Act, s3(1) and s3(2).

expectation is understandable but premature. Instead, it is important to bear in mind that, apart from shortening the prescriptive period to twenty years and abolishing extra-judicial civil interruption, section 3 was not intended to reform the law but only to place it on a statutory footing.² Furthermore, the brevity and opacity of the statutory wording mean that the law cannot, in practice, be understood without, first, viewing it in the context of the general doctrine of positive prescription and, second, undertaking a detailed analysis of the case law which preceded the Act but continues to govern its interpretation and application. This is especially important when seeking to apply the well-established requirements that prescriptive possession be “as of right” and “unequivocally referable to the right claimed”.³

As the following chapters will necessarily go beyond the exact wording of the 1973 Act, this chapter is intended to operate as a “road map” for the analysis ahead. It begins by analysing the relationship between the establishment of servitudes by positive prescription and the general doctrine of positive prescription contained in sections 1 and 2. It then considers two preliminary issues which must be dealt with before section 3 can be brought into play: who can establish a servitude by prescription and what types of servitude can be established. After this, and drawing on the policy justifications noted in the General Introduction, it then identifies the policy objectives which the individual elements of prescriptive possession work together to achieve. Finally, it provides a brief introduction to the individual elements of prescriptive possession, along with appropriate signposts to the chapters in which a more thorough analysis of the individual elements can be found. Unfortunately, due to the limits of the thesis format, it is impossible to do justice sufficiently to each element of the law in practice – in particular, what it means to possess for a continuous period and how the *quantum possessum tantum praescriptum* rule operates in practice. It is, however, hoped that this chapter will show how the individual elements support one another in securing the doctrine’s

² See Chapter 4 above. This is confirmed by the post-1973 case law: *Richardson v Cromarty Petroleum Co Ltd* 1980 SLT (Notes) 237 at 237 per Lord Cowie; *Strathclyde (Hyndland) Housing Society Ltd* 1982 SLT (Sh Ct) 61 at 65; *Cumbernauld & Kilsyth DC v Dollar Land* 1992 SC 357 at 365 per LP Hope.

³ See Chapters 7-9.

policy objectives and prepare the way for a more in-depth analysis of the nature of prescriptive possession itself in Chapters 7 to 11 (i.e. possession “as if of right”, “openly” and “peaceably”).

B. The general doctrine of positive prescription

There is an obvious sense in which the establishment of servitudes by positive prescription differs from the establishment of other real rights by positive prescription – most notably, in so far as the claimant’s possession need not be comprehensive⁴ and no foundation deed is required.⁵ This does not, however, mean that the positive prescription which operates under section 3 of the 1973 Act can be analysed in isolation from the more general positive prescription found in sections 1 and 2. In fact, helpful parallels can be drawn concerning the role played by prescriptive possession in each situation. This should not be surprising, since the establishment of servitudes by positive prescription is, by its very nature, a particular manifestation of the more general doctrine.⁶

In essence, three steps must be fulfilled before positive prescription will operate under sections 1 and 2 of the 1973 Act: firstly, a title must be asserted (this is evidenced by the claimant’s possession of the land following the registration or execution of an appropriate deed);⁷ secondly, the claimant’s possession must be unequivocally referable to the asserted title and not to some other factor;⁸ and, thirdly, the claimant’s possession must be maintained in a certain manner for the

⁴ For discussion of the concepts of “comprehensive” and “limited” possession, see Ch 5 *passim* and above at 107-110 in particular.

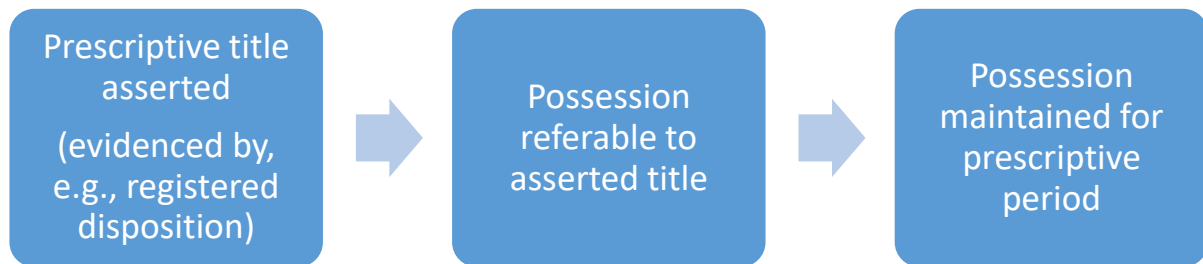
⁵ Though see below at 121-123 on whether registration or infertment continues as a requirement under the 1973 Act.

⁶ On the relationship between the establishment of servitudes by positive prescription and the Prescription Act 1617, see Chapter 2.

⁷ 1973 Act, 1(1)(a) (“...the recording of a deed...”), s1(1)(b) (“... the registration of a deed...”) and s2(1)(b) (“...the execution of a deed...”); on prescriptive possession’s role in demonstrating that a right is being asserted in the context of section 1, see *Hamilton v McIntosh Donald* 1994 SC 304. Cf. R Rennie, “Possession: Nine Tenths of the Law” 1994 SLT (News) 261; Lord Hope of Craighead, “A Puzzling Case about Possession”, in F McCarthy et al, *Essays in Honour of Professor Rennie*.

⁸ I.e. “founded on, and followed, the [recording/registration/execution] of a deed”, 1973 Act, s1(1)(a), s1(1)(b), and s2(1)(b) respectively.

whole of the prescriptive period.⁹ Taking these together, it can be seen that prescriptive possession is involved at each stage: firstly, it indicates (in conjunction with an appropriate deed) that a title is being asserted; secondly, it links the claimant's behaviour to the title which is being asserted; and, thirdly, it must be maintained for the whole of the prescriptive period. At the risk of oversimplification, these three steps can be depicted in the following diagram:



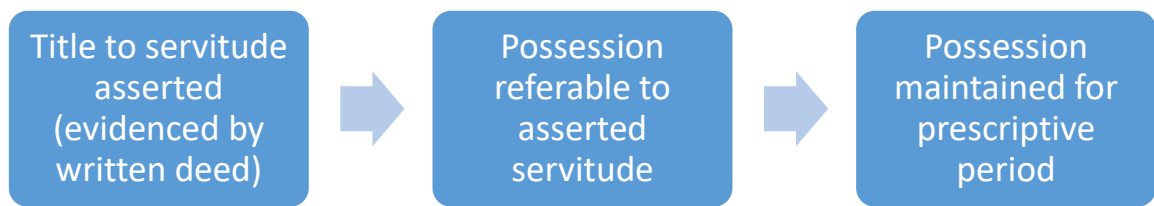
When one turns from the general doctrine of positive prescription to that relating peculiarly to servitudes, the picture is more complicated. This is because there are two ways in which a servitude can be established by positive prescription: the first is found in section 3(1) and relates to situations where prescriptive possession has followed the execution of a deed sufficient to constitute the servitude in question; the second is found in section 3(2) and provides that positive prescription is possible even without the execution of an express deed of creation.¹⁰ Of these two methods, the latter is by far the more commonly encountered; it is also, on first appearances, harder to reconcile with the three-step analysis just outlined.

It is not difficult to see how a three-step analysis can be applied to prescription under section 3(1): firstly, the claimant must assert title to the servitude in question (this is evidenced by the apparent exercise of a servitude and the execution of an appropriate deed – e.g. a deed of servitude or a disposition); secondly, the claimant's possession must be unequivocally referable to the asserted servitude and not to some other factor; and, thirdly, that same possession must be maintained in an appropriate manner for the whole of the prescriptive period. Except in so far as it relates to a servitude rather than the land itself, the claimant's possession therefore plays exactly

⁹ 10 years under section 1 and 20 years under section 2.

¹⁰ See below at 130-131.

the same role under section 3(1) as it does under sections 1 and 2. Again, this can be demonstrated diagrammatically:



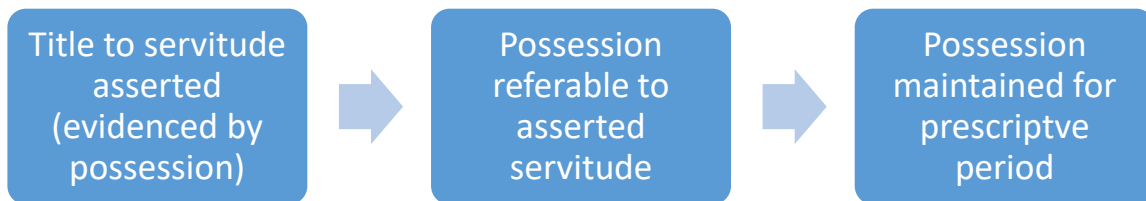
The relevance of such a three-step analysis is, however, less immediately apparent when it comes to section 3(2). This is unfortunate, since it is by keeping these three steps in mind that one can best understand how the different elements of prescriptive possession relate to one another and – just as importantly – how they can be properly distinguished. As has already been said, the biggest practical difference between section 3(1) and section 3(2) is that the first requires a written deed and the second does not. This is not, however, the same as saying that one requires a *title* to be asserted and the other does not. In fact, an asserted title is always necessary before positive prescription can operate, since it is this which is rendered unchallengeable by prescriptive possession over the prescriptive period. Under section 3(1) and section 3(2), the title which must be asserted is to a servitude over the allegedly-servient tenement.¹¹ The difference between section 3(1) and section 3(2) is not that one requires a title to be asserted and the other does not; the difference is that one requires a written deed as *evidence* that a servitude is being asserted, while the other requires no evidence beyond prescriptive possession itself.¹²

Against this background, it can therefore be seen that prescriptive possession plays essentially the same role under section 3(2) as it does under section 3(1) and in relation to other real rights: firstly, possession must indicate that a servitude is being asserted; secondly, possession must be unequivocally referable to the asserted

¹¹ Indeed, the very wording of section 3(1) and (2) seems to presuppose an *asserted* positive servitude, which is rendered unchallengeable by prescriptive possession for the prescriptive period. The words “If a positive servitude over land has been possessed” should therefore be glossed as “if an *asserted* positive servitude over land has been possessed”.

¹² Similarly, under sections 1 and 2, the title which is asserted is to a real right of ownership or lease. The deeds which found prescriptive possession are not, strictly speaking, asserted titles but only the formal steps which provide evidence that a title to a real right is *being* asserted.

servitude and not to some other factor; and, finally, possession must be maintained in a certain manner for the whole prescriptive period. As will be seen below and in the following chapters, important practical consequences flow from the fact that prescriptive possession under section 3(2) must both bring home to the landowner that a servitude is being asserted and also be unequivocally referable to the servitude which is being asserted:



Since possession will typically provide the *only* evidence that a servitude is being asserted under section 3(2), it does fulfil a wider role in one respect, namely, that possession must show not only *that* a servitude is being asserted but also the exact nature and extent of that servitude. This was traditionally known as the *quantum possessum tantum praescriptum* rule and is reflected in the fact that, under section 3(2), a servitude is only exempt from challenge “as so possessed” and not “as so constituted” by deed as in section 3(1).

C. Preliminary Issues

Two further preliminary issues must now be dealt with: who can establish a servitude by positive prescription and which types of servitude can be established?

(1) Who can establish a servitude by positive prescription?

It is clear from section 3(4) of the 1973 Act that a person claiming to have established a servitude by prescription can rely on the “possession of the servitude by any person in possession of the relative dominant tenement”.¹³ This is consistent with the law which preceded the 1973 Act and includes not only civil possession by

¹³ 1973 Act, s3(4).

those possessing on behalf of the owner of the allegedly-dominant tenement¹⁴ but even possession by those with no connection in title to the owner, so long as they have possessed the servitude in conjunction with their possession of the allegedly-dominant tenement.¹⁵ This also explains why the claimant can rely on possession by previous owners when the property has changed hands during the prescriptive period, even though section 3(1) and (2) do not mention “successors” of the original possessor as sections 1 and 2 do.¹⁶ The claimant cannot, however, rely on “possession” by those with no relationship to the allegedly-dominant tenement.¹⁷

A question which the Act does not address directly is whether the claimant must have completed title to the allegedly-dominant tenement by registration. That infestment was required under the old law has already been seen in Chapters 2 to 4 of this thesis.¹⁸ A number of modern commentators have, however, concluded that this is no longer the case in light of section 3(4).¹⁹ The issue has not been considered in case law and it seems premature to draw such a conclusion from a subsection which deals only with possession of the claimed servitude. The first reason for this is that servitudes cannot be held independently from another right but only by the owner of a dominant tenement in his capacity as owner of that tenement. An unregistered proprietor, however, has only a “personal fee” and remains vulnerable to his disponent’s insolvency or to any future good-faith purchasers.²⁰ Accordingly, even were such an unregistered proprietor to have possessed a servitude for the prescriptive period, any resulting servitude could not be held directly by him but only by the person who holds the real right of ownership over the dominant tenement.

¹⁴ 1973 Act, s15(1); Johnston, *Prescription*, para 19.04.

¹⁵ *Drummond v Milligan* (1890) 7 R 316; Gordon, *Land Law*, para 24-48.

¹⁶ Compare 1973 Act, s1(1) and s2(1) with s3(1)(a) and (2).

¹⁷ *Drummond v Milligan* (1890) 7 R 326 at 317 per LP Inglis, distinguishing *Earl of Morton v Stuart* (1813) 5 Pat App 720 and noting “the distinction between this case [i.e. *Drummond*] and the case in which a person comes into Court relying, not on the possession of persons who have been in possession of his *praedium*, but on the possession had by other persons in his neighbourhood”. Cf. Johnston, *Prescription*, para 19.04(4).

¹⁸ See Chapters 2 to 4 *passim*; cf. Johnston, *Prescription*, 19.04(4).

¹⁹ AGM Duncan in Reid, *Property*, para 460; Gordon, *Land Law*, para 24-45; Johnston, *Prescription*, para 19.04(4).

²⁰ *Burnett’s Trs v Grainger* 2004 SC(HL) 19 at paras 95-105 per Lord Rodger

A second reason is that a requirement of registration is consistent with the acquisition of a servitude by express creation. Though the authorities are “singularly silent”, Cusine and Paisley have taken the view that an uninfert proprietor cannot acquire new servitudes in favour of a dominant tenement.²¹ Similarly, Gordon suggests that the only persons who can acquire a servitude by grant are the owner of the dominant tenement and anyone acting on his behalf.²² Indeed, even though Gordon also states that infertment is “probably not required where prescription is relied on”,²³ he notes in an earlier paragraph that in order to rely on prescription,²⁴

it is necessary to show title to the dominant land, because the first requirement of acquisition of a servitude by prescription is the holding of a dominant tenement to which the servitude may attach.

It appears that Halliday and Walker assumed infertment to be necessary before a servitude can be established by positive prescription and this seems to be most consistent with the nature of a real right of servitude.²⁵ On the whole, it is therefore probable that, although *anyone* in possession of the allegedly-dominant tenement can possess a servitude for the purposes of positive prescription, only a registered proprietor of the dominant tenement (or a person acting on his behalf) can actually establish the existence of that servitude.

A final issue which should be discussed at this point is the position of any tenant of the dominant tenement: in particular, is such a tenant entitled to establish a servitude by positive prescription or must he rely on his landlord, the dominant proprietor, to do so on his behalf?²⁶ Generally speaking, a tenant is entitled to enforce any servitudes which are communicated to him as subjects of the lease of the dominant

²¹ Cusine & Paisley, para 4.08.

²² Gordon, *Land Law*, para 24-31.

²³ *Ibid* at para 24-45.

²⁴ *Ibid* at para 24-44.

²⁵ See J Halliday, *Conveyancing Law and Practice in Scotland*, vol 2 (2nd edn by IJS Talman, 1997), para 35-19; D Walker, *Prescription and Limitation of Actions* (6th edn, 2002), 46: “In instructing a right of servitude the owner of the alleged dominant tenement is entitled to found on the exercise of the right by any one who has been, in fact, in possession of the praedium”; this wording is retained in Russell, *Prescription*, para 2-44.

²⁶ A dominant proprietor can, of course, rely on his tenant’s possession to establish a servitude by positive prescription under the 1973 Act, s3(4); cf. cases listed at Cusine & Paisley, para 2.12, fn 91.

tenement and which the landlord had power to communicate.²⁷ By extension, it seems likely that the right of a tenant to establish a servitude by positive prescription will depend on whether the grant in his lease is habile to include the servitude which is now being claimed (e.g. “all servitudes pertaining to the Subjects”). If it is habile, the tenant’s exercise of the servitude for the prescriptive period would render the servitude exempt from challenge and could be relied upon by the tenant in any dispute with the allegedly-servient proprietor. This is of particular practical importance in situations where the dominant proprietor is absent and cannot be contacted or, indeed, simply has no intention of stepping in to enforce on his tenant’s behalf. In such circumstances, it seems unfair to make a tenant’s enjoyment of a servitude communicated to him in his lease and exercised for the prescriptive period contingent upon whether his landlord is contactable or amenable to seeking declarator that a servitude has been established by positive prescription.

(2) What types of servitude can be established?

Though the statutory wording does not expressly restrict the types of servitude which can be established by prescription, there are a number of controls on which servitudes can be brought under the protection of the Act. Any servitude asserted by the claimant must, for example, comply with the more general rules which govern the law of servitudes (e.g. praediality, no imposition of an active duty on the landowner, and no repugnancy with ownership).²⁸ Three restrictions more

²⁷ Admittedly, legal writers are divided on this issue. Cf. *Cusine & Paisley*, paras 1.51-1.52; J Rankine, *The Law of Leases in Scotland* (3rd edn, 1916), 205-206, 710-711; AGM Duncan in Reid, *Property*, para 481, who restricts tenants to involvement in possessory proceedings. According to *Cusine & Paisley*, para 1.51, any enforcement against the servient proprietor is really enforcement of the tenant’s real right of lease and should be distinguished from any right to obtain declarator of the underlying servitude himself. Further, the only possible (though “dubious”) exception to this would be where the deed creating the servitude includes “a specific right not only to enjoy, but also to enforce, the servitude”, *ibid*, para 1.52. No such distinction is, however, adopted by Rankine, *ibid*, 710, who states simply that “there has never been any doubt of an occupying tenant’s title to sue for declarator ... in so far as his interest extends or otherwise to protect his holding” and that “a tenant may at his own hand vindicate ... his right to exercise servitudes let to him along with the corporeal subjects in his lease so far as thus acquired by him and no further.” Suffice to say, the case law cited by these authors is inconclusive on the exact point in question. For discussion of the related issue of enforcement of real burdens by tenants, see the Scottish Law Commission’s *Report on Real Burdens* (Scot Law Com No 181, 2000), para 4.3-4.15. The SLC’s recommendation that tenants should have title to enforce real burdens was implemented in the Title Conditions (Scotland) Act 2003, s8(2).

²⁸ See *Gretton & Steven, PTS*, paras 12.1-12.8, including sources cited.

particularly encountered in relation to establishment by prescription will be considered in this section: that prescriptive servitudes should be of a “known type”, that they should not interfere with the landowner’s statutory purposes, and that their exercise should not be illegal.

(a) Servitude must be of a known type

The requirement that servitudes must be of a known type was previously a general requirement of servitude law and referred to a porous *numerus clausus*, which could only be added to when a new form of servitude was sufficiently close to a known type or demanded by social or economic developments.²⁹ The rationale behind this rule was that, since servitudes could be created informally, any purchaser of the servient tenement should only have a limited number of servitudes to look out for when buying the property.³⁰ The rule has now been abolished for servitudes created expressly by registration but remains in place for servitudes created by implication or positive prescription.³¹ This is consistent with the policy objectives of prescriptive possession proper, since the assertion of a servitude of a previously-unknown type might not be sufficient to bring home to the landowner that a servitude was in fact being asserted.

(b) Servitude must not interfere with statutory purposes

Another requirement recognised under the older law was that servitudes could not be established by prescription where the resultant servitude would conflict with any statutory purposes for which the landowner held the land.³² There is some debate as to whether this requirement remains in place. Johnston, for example, says that it has been superseded by the 1973 Act and no longer applies.³³ The English and Scottish Law Commissions have reached a similar conclusion in relation to the creation of

²⁹ Gretton & Steven, *PTS*, paras 12.9ff; Cusine & Paisley, Ch 2; Reid & Gretton, *Conveyancing 2008*, 107ff.

³⁰ Bell, *Principles*, §979 (note), cited in Reid & Gretton, *Conveyancing 2008*, 107; the relevant section is incorporated into the text of the final edition, GJ Bell, *Principles of the Law of Scotland* (10th edn, W Guthrie (ed), 1899), §979.

³¹ Title Conditions (Scotland) Act 2003, s76.

³² *Ellice’s Trs v Caledonian Canal Commissioners* (1904) 6 F 325; *The Corporation of Edinburgh v North British Railway Co* (1904) 6 F 620.

³³ Johnston, *Prescription*, para 19.27.

public rights of way at level crossings.³⁴ By contrast, *Cusine and Paisley* take the view that it does still apply, as do *Gordon* and *AGM Duncan*.³⁵

Since the issue has not been discussed in the post-1973 case law, it seems fair to say that the law is unsettled in this area. Indeed, this was noted in *R (Newhaven Port & Properties Ltd) v East Sussex CC*, a recent decision of the Supreme Court in an English appeal.³⁶ For reasons which will be discussed below, a prominent feature of this case was a discussion of the English law of statutory incompatibility in relation to prescription. As the landowner had sought support for his position from the analogous Scots law, Lords Neuberger and Hodge took the opportunity to summarise the relevant authorities. They went on, however, to note that it was not necessary in an English appeal to “express any view on whether in Scots law the doctrine of statutory incompatibility has survived the enactment of the 1973 Act” and that it sufficed to note that it is “a matter of controversy.”³⁷

(c) Servitude/possession must not be illegal

A final extra-statutory restriction, which is noted by *Cusine and Paisley*, is that servitudes cannot be established by positive prescription where possession of that servitude would be “illegal” or “as of wrong”.³⁸ As few cases have discussed illegality in the context of servitudes, parallels can helpfully be drawn with cases concerning fishing rights, such as *Mackenzie v Renton*.³⁹ In that case, the First Division held unanimously that salmon fishing rights could not be acquired by prescription where the fishing had been carried out through the use of “yairs” (i.e. weirs or fishing traps) in a location prohibited by statute. According to Lord

³⁴ Law Commission and Scottish Law Commission, *Joint Consultation Paper on Level Crossings* (Law Com CP no 194; Scot Law Com DP No 143, 2010), paras 12.59-12.68; Law Commission and Scottish Law Commission, *Level Crossings* (Law Com No 339; Scot Law Com No 234, 2013), paras 5.7-5.8.

³⁵ *Cusine & Paisley*, para 10.22; *Gordon*, *Land Law*, para 24-54; *AGM Duncan in Reid*, *Property*, para 449.

³⁶ *R (Newhaven Port & Properties Ltd) v East Sussex CC* [2015] UKSC 7, [2015] AC 1547.

³⁷ *Ibid* at para 90.

³⁸ *Cusine and Paisley*, para 10.2.

³⁹ *Mackenzie v Renton* (1840) 2 D 1078; cf. *Duke of Richmond v Earl of Seafield* (1870) 8 M 530; *Maxwell v Lamont* (1903) 6 F 245 (both fishings).

President Hope, “that is an illegal practice; and no length of possession can sanction it, or give an available right to continue it when complained of.”⁴⁰

In England, authority exists for the proposition that, where a claimant’s possession would not have been illegal had the asserted right actually existed, then this will not affect the operation of prescription. In *Bakewell Management v Brandwood*, for example, the House of Lords held that a right of vehicular access had been established over a privately-owned common by prescription, even though it was illegal to cross such a common with a motor vehicle unless already entitled to do so by an easement.⁴¹ Additionally, Cusine and Paisley seem correct to say that incidental illegality will not prevent prescription - for example, the establishment of a servitude of vehicular access is unlikely to be affected by the fact that access has been taken in a car with a broken headlights or without the necessary road insurance.⁴²

D. What policy shapes the rules on prescriptive possession?

Before introducing the individual elements of prescriptive possession, it is helpful to consider why it is that these particular elements are so important. To do this, it is necessary to remind ourselves of the doctrine’s underlying policy justifications. As was noted in the General Introduction above, two policy justifications have traditionally been identified for the establishment of servitudes by positive prescription: firstly, that it promotes legal certainty by clothing the long-enjoyed apparent exercise of a servitude with legal right; and, secondly, that any unfairness which might arise from the operation of positive prescription is mitigated by the fact that the landowner has been given sufficient opportunity to object to the claimant’s behaviour and, having failed to do so, is held to have accepted the burdening of his right.⁴³ Before either of these justifications can attain any real plausibility, however,

⁴⁰ *Mackenzie v Renton* (1840) 2 D 1078 at 1082 per LP Hope.

⁴¹ E.g. *Bakewell Management v Brandwood* [2004] UKHL 14, [2004] 2 AC 519; cf. Gray & Gray, *Elements*, para 5. 2.65.

⁴² Cusine & Paisley, para 10.21.

⁴³ See above at 2-4.

the individual elements of prescriptive possession must ensure two things: firstly, that only possession which requires protection in the interests of legal certainty is protected by positive prescription – in other words, where the claimant’s behaviour can be explained by reference to any factor other than the asserted servitude, positive prescription need not and should not operate; and, secondly, that landowners are given sufficient opportunity to prevent prescription from running should they desire to do so. Bearing these policy objectives in mind is of great help when seeking to determine the practical application of any individual element of prescriptive possession.

E. An overview of the relevant requirements

Having considered what it is that the individual elements of prescriptive possession seek to achieve in concert, it is now time to set out exactly what those individual elements are. While most elements are clear from the wording of the 1973 Act, there is one requirement which, though not apparent on the face of the 1973 Act, is well-established in the case law and secondary literature, namely, that possession be “as (if) of right”. The remainder of this chapter will briefly introduce these individual element of possession and, where appropriate, provide directions to more in-depth analysis in the following chapters.

(1) Possession must be “as (if) of right”

Perhaps the most prominent element of prescriptive possession in the case law is that the claimant’s possession must be “as (if) of right”. As will be seen in Chapters 7-9, this element of possession can be thought of in terms of two “steps”: firstly, the claimant’s possession must be sufficient to indicate to the landowner that a servitude is being asserted over the allegedly-servient tenement; and, secondly, the claimant’s possession must not be referable to any factor other than the asserted servitude – i.e. it must not already be “by right”. In chapter 7, the basis for the distinction between these two components will be discussed, along with its practical consequences.

(a) Step 1: Possession must be sufficient to indicate assertion of a servitude

The first step of possession “as (if) of right” is that the claimant’s possession must be sufficient to indicate to the landowner that a servitude is being asserted. Though the relevant test is sensitive to the circumstances of each case, it remains essentially objective in character: has the possession been such that a reasonable proprietor would not have permitted it to take place on his land unless the servitude in question already existed? The burden of proof in step 1 rests on the claimant and the claim will fail if sufficient possession cannot be shown.

(b) Step 2: Possession must not be “by right”

Assuming sufficient possession can be shown to indicate that a servitude is being asserted, it must then be decided whether the claimant’s possession was referable to any factor other than the asserted servitude – in other words, whether the possession was actually “by right” rather than “as (if) of right”. This is necessary for policy reasons, firstly, because such possession does not require protection for the purposes of legal certainty and, secondly, because such possession gives no notice that a right is being asserted and that something must be done to prevent prescription from running.

The most prominent example of possession “by right” is precarious possession, i.e. possession which is dependent on the express or implied permission of the landowner. This is, however, only one example of possession “by right” and it must be remembered that possession cannot be prescriptive where it is referable to any other right, whether arising from permission from the landowner or another right held independently by the claimant. A taxonomy of such rights is provided in Chapter 8 and the individual rights are discussed in Chapter 9.⁴⁴ By contrast with step 1, the burden of proof in step 2 rests on the landowner, who must show that the claimant’s otherwise prescriptive possession has in fact been “by right” and not “as (if) of right”.

⁴⁴ See below at 159-162 and Chapter 9 *passim*.

(2) The servitude must be possessed “openly, peaceably and without judicial interruption”

Once it is established that the claimant’s possession has been “as (if) of right”, it is necessary to consider whether the statutory requirements of openness, peaceableness, and lack of judicial interruption have been met. As will be seen in Chapters 10 and 11, the requirements of openness and peaceableness are commensurable with the requirement that possession not be “by right” and prevent a claimant’s otherwise prescriptive possession from leading to the establishment of a servitude by prescription. Since the correct interpretation of “judicial interruption” belongs to the general doctrine of positive prescription, it will not be discussed in this thesis and readers are directed to discussions in more general accounts.⁴⁵

(3) “... for a continuous period of twenty years...”

While much can be said about the requirement that possession be maintained for a continuous period of twenty years, the limitations of space imposed by the thesis format mean that only a short account can be given here and that the following chapters will focus primarily on the nature of prescriptive possession.⁴⁶

Perhaps the key to understanding this requirement, is to remember that it insists on possession for a “continuous period” of twenty years and not on continuous possession as such. In particular, this means that “it is not necessary that the full use of which the servitude claimed is capable should have been made throughout the prescriptive period”.⁴⁷ Rather, what is necessary is that the claimant’s use of the allegedly-servient tenement is of sufficient frequency and regularity to give the impression that a servitude is being exercised rather than that a series of individual incursions are being made on to the landowner’s property.⁴⁸ One case, *Scotland v Wallace*, suggests that possession can be sufficiently regular if a servitude of access

⁴⁵ E.g. Johnston, *Prescription*, para 18.19 and, in the context of negative prescription, paras 5.09ff; Cusine & Paisley, para 10.18.

⁴⁶ For a more in-depth analysis, see Cusine & Paisley, para 10.13; Johnston, *Prescription*, paras 18.26-18.29; Gordon, *Land Law*, paras 24-49 – 24-51.

⁴⁷ *Carstairs v Spence* 1924 SC 380 at 394 per Lord Blackburn.

⁴⁸ E.g. *Sawers v Russell* (1855) 2 Macq 76 at 77 per LC Cranworth.

is exercised as infrequently as once or twice a year.⁴⁹ This is, however, doubted by Cusine and Paisley, who point out that this seems inconsistent with a number of other cases.⁵⁰ In the end, each case must be decided on its own facts and, where the claimant's possession has been such as would be consistent with the existence of the servitude claimed, then prescription will operate. Authority also exists for the proposition that brief interruptions which occur during a change of ownership of the allegedly-dominant tenement should be seen as an "inevitable incident of the change of ownership and not such as to interrupt the running of the prescriptive period".⁵¹

It has been recognised since the 17th century that the years which make up the prescriptive period run *de momento in momentum* and that possession must therefore continue until the very end of the prescriptive period, not missing even one day.⁵² Despite this, a practice had emerged by the 19th century by which, if possession was proved for most of the prescriptive period and also prior to its beginning, it could be presumed to extend back to the actual beginning of the prescriptive period in the absence of any evidence contradicting this.⁵³ It should, however, be noted that this practice emerged under the longer prescriptive period of forty years and would be unlikely to continue under the shorter period of twenty years introduced by the 1973 Act.⁵⁴

(4) "as so constituted" v "as so possessed"

The final issue to be considered is the nature and extent of a servitude established under section 3(1) and section 3(2). As already noted, the two subsections differ in their wording, since a servitude whose possession follows the execution of an appropriate deed is exempted from challenge "as so constituted" but a servitude whose possession does not follow such a deed is only exempted "as so possessed."

⁴⁹ *Scotland v Wallace* 1964 SLT (Sh Ct) 9.

⁵⁰ Cusine & Paisley, para 10.13, citing *Macnab v Munro Ferguson* (1890) 17 R 397, *Purdie v Stiel* (1749) Mor 14511, *Wilson v Ross* 1993 GWD 31-2007; see also Gordon, *Land Law*, para 24-50.

⁵¹ *Aberdeen City Council v Wanchoo* 2007 SLT 289 (OH) at para 22 per Lord Ordinary (Glennie); cf. Cusine & Paisley, para 10.13.

⁵² Stair, 2.12.14; though Mackenzie, *Observations*, 346 notes the severity of taking away the "old Heretage of a Family for want of one day, or hour."

⁵³ E.g. *McGregor v The Crieff Co-operative Society* 1915 SC(HL) 93 at 102-103 per Lord Dunedin.

⁵⁴ Gordon, *Land Law*, para 24-50; AGM Duncan in Reid, *Property*, para 460.

This statutory distinction reflects a distinction already present in the older case law between prescriptive possession which followed the execution of a deed and prescriptive possession which did not.⁵⁵ The first of these led to the establishment of a servitude whose nature and extent was consistent with that described in the relevant deed, even where the claimant's actual possession had fallen short of this; the second led to the establishment of a servitude limited to the level of possession which the claimant had actually enjoyed: *quantum possessum tantum praescriptum*. Again, the limitations of length imposed on this thesis mean that a full account of this distinction cannot be given here. Readers are therefore directed to the accounts provided in more general works.⁵⁶

⁵⁵ See *Lord Advocate v Wemyss* (1899) 2 F (HL) 1 at 9-10, per Lord Watson; *Kerr v Brown* 1939 SC 140; *Carstairs v Spence* 1924 SC 380.

⁵⁶ See *Cusine & Paisley*, para 10.04; Johnston, *Prescription*, paras 19.09-19.12.

Chapter 7

Defining Possession “As (if) of Right”

A. Introduction

B. History and policy

- (1) History: origins and relationship to the 1973 Act
- (2) Policy: why must possession be “as (if) of right”?

C. Defining possession “as (if) of right”.

- (1) Terminology
- (2) Two problems with the traditional approach
- (3) The first problem
- (4) The second problem
- (5) An alternative to the traditional approach

A. Introduction

Of the different elements of prescriptive possession identified in the last chapter, perhaps the most interesting is the requirement that prescriptive possession be “as of right”. But what does this mean? Most modern textbooks begin answering this question by stating, negatively, that possession must be “not attributable to tolerance”,¹ “not precarious”,² or again “not by permission of the servient owner”.³ Such statements are of course true. They are also, at least in so far as they are intended as definitions, incomplete. In fact, to possess a servitude “as of right” simply means to behave as if you are already exercising the servitude you are attempting to establish. This positive, and more comprehensive, description of possession “as of right” is itself comprised of two components: firstly, the claimant’s possession must be of sufficient quality and quantity to bring home to a reasonable landowner that a servitude is being asserted over his land; and, secondly, the possession must not be dependent on any factor other than the asserted servitude, for example permission from the landowner or another right held independently by the

¹ Johnston, *Prescription*, para 19.04(3).

² Cusine & Paisley, paras 10.11 and 10.19.

³ Gordon, *Land Law*, para 24-46.

claimant. To rephrase this second aspect more succinctly, possession must be “as of right” and not “by right”.⁴

B. History and policy

At the outset, two preliminary issues may usefully be considered. The first of these is the historical origins of the expression “as of right” and how it relates to the wording of section 3 of the 1973 Act. The second is the exact role that the “as of right” requirement plays in fulfilling the policy objectives outlined in the General Introduction to this thesis.⁵

(1) History: origins and relationship to the 1973 Act.

Given the “as of right” requirement’s prominence in recent case law and literature, one might be surprised to learn that the expression is a relatively recent addition to Scots legal vocabulary. Indeed, although it is not certain when the term was first used in the context of establishing a servitude by prescription, a good candidate appears to be Lord Fullerton’s dissenting judgement in *Marquess of Breadalbane v McGregor* in 1846 – just over one hundred and fifty years ago.⁶ In any event, the

⁴ As will be explained below at 136-139, this requirement is more often formulated in the modern literature as two discrete requirements: firstly, that the claimant’s possession must be *nec precario* (i.e. not by permission); and, secondly, that the possession must be “unequivocally referable to the right claimed”.

⁵ See above at 2-4 and 126-127.

⁶ *Marquess of Breadalbane v McGregor* (1846) 9 D 210, rev’d *Marquis of Breadalbane v McGregor* (1848) 7 Bell’s App 43 (though, in *Beaumont v Lord Glenlyon* (1843) 5 D 1337 at 1343, Lord Jeffrey had reminded one pursuer that they would need to “prove possession *as a servitude*” rather than as ownership – italics in original). In *Breadalbane*, certain cattle drovers claimed not only to have established a drove road over the Marquess of Breadalbane’s land, but also to have acquired “drove stances” along the way for grazing and resting their cattle as an accessory right. While a majority in the Inner House agreed that this was a relevant averment, Lord Fullerton dissented. Accepting that the drovers had averred that they had “exercised the possession as of right”, Lord Fullerton noted that the drove stances had always been used in exchange for payment of certain fixed sums; as such, “nothing [was] averred which [was] not perfectly reconcilable with the notion of assent or paction; and indeed rather more reconcilable with that than with the notion of right”. Accordingly, “[t]here could be no doubt that they averred right; but the defect was, in my opinion, that they had averred no facts from which right could justly be inferred”, *Breadalbane* at 217. In so far as it related to an ancillary right of drove stances, the decision was reversed by the House of Lords which held that the drove stances could not be held as servitude rights as they had no dominant tenement.

term did not come into general usage until around the middle of the 19th century.⁷ Prior to this, the possession needed for prescription was usually described as “peaceable”⁸ or “uninterrupted”.⁹ At other times, it was thought sufficient to ask whether a servitude had been “possessed” for the prescriptive period.¹⁰ This laconic approach followed the example of Stair, Erskine, and Bankton, who required only that possession be “uninterrupted”.¹¹ Indeed, of all the institutional writers, only Bell goes beyond this and specifies that possession must be “clear and unequivocal” to establish a servitude by prescription.¹²

But while the expression “as of right” is relatively modern, this is not true of the underlying substantive requirement which it describes. In fact, it was clear throughout the 17th and 18th centuries that a servitude could only be established by prescription where the claimant’s possession was not explicable by, firstly, the permission (or “tolerance”) of the landowner¹³ or, secondly, by the exercise of a different right held independently by the claimant.¹⁴ It has therefore always been the case that the claimant’s possession must be referable to a right of servitude. Indeed, the underlying requirement has an even longer pedigree than this, since the most prominent component of possession “as of right” – i.e. possession *nec precario*, or not by precarious permission – stretches back to the Roman requirement that prescriptive possession be *nec vi nec clam nec precario* (i.e. without force, without secrecy, and without revocable permission).¹⁵ Furthermore, its antiquity is matched by its apparent universality among legal systems which recognise the establishment

⁷ See also Reid & Gretton, *Conveyancing 2008*, 101-102.

⁸ E.g. *Nicolson v Bightie and Babirnie* (1662) Mor 11291; *Grant v Grant* (1677) Mor 10876.

⁹ E.g. *Nielson v Sheriff of Galloway* (1623) Mor 10880; *Sheriff of Cavers v Turnbull* (1629) Mor 10874; *Grant v Grant* (1677) Mor 10876; *Hill v Ramsay* (1810) 5 Paton’s App 299; *Harvie v Rodgers* (1828) 5 Wilson & Shaw 251.

¹⁰ E.g. *Marshall v Linning* (1834) 13 S 701.

¹¹ Stair, II.7.2; 2.12.11 (“free from interruption”); 4.40.20; 4.45.17, Presumption XXII; Erskine, *Institute*, 2.9.3; 2.9.16; 3.7.3; Bankton, 2.7.12.

¹² Bell, *Principles* §993.

¹³ E.g. *Laird of Fardell v Wemyss* (1673) Mor 10880; *Dalzell v Laird of Tinwall* (1673) B Supp II 172 at 174 (possession rendered precarious by annual payment of three moss-fowls).

¹⁴ E.g. *Grant v Grant* (1677) Mor 10876, where the defender successfully proved that his possession was not referable to a tack but to an asserted servitude of pasturage and sheilling.

¹⁵ See above at 9-12. Though this tripartite formula was less apparent in discussions of *usucapio* and *longi temporis praescriptio*, it was a prominent element of the establishment of servitudes by long possession.

of servitudes by acquisitive prescription.¹⁶ Thus, it is only the expression “as of right” which is a relatively recent addition to Scots law; the underlying substantive requirement has been there from the beginning.

This brief historical survey raises an obvious question: where did the expression “as of right” come from? To answer this, one must look south of the border to a major statutory development which took place in England in the decades leading up to the expression’s first appearance in Scots law: the Prescription Act 1832.¹⁷ It has already been observed in an earlier chapter that the 1832 Act is regarded as an example of poor draftsmanship.¹⁸ Nevertheless, its drafter did make one significant contribution to the English law of prescriptive easements, introducing the term “as of right” as a description of the type of possession needed to establish an easement by prescription.¹⁹ This, at least, is how later English cases understood the term’s origin²⁰ and such an understanding is corroborated by the fact that the first English cases to use the term date from 1834.²¹ Given that was only a decade or so before the expression was first used in Scotland, it is likely that the Scots adoption of the term was, in some sense at least, inspired by its appearance in English law. The likelihood that such borrowing took place is rendered even more plausible by the expression’s introduction to Scots law around the same time as Scots lawyers began to adopt a “presumed grant” theory similar to the theory of “lost modern grant” which the 1832 Act had originally been intended to replace.²² Even though no Scots source expressly

¹⁶ For England, see Gaunt & Morgan, *Gale on Easements*, paras 4-97 to 4-124; Gray & Gray, *Elements*, paras 5.2.62-5.2.72. For South Africa, see Badenhorst et al, *Silberberg & Schoeman*, 164-169, 333-334; Van der Merwe & De Waal, “Servitudes”, para 614; Van der Merwe, *Sakereg*, 277-288, 530-533; Carey Miller (with Pope), *Land Title*, 160-176. For France and the Netherlands, see LPW van Vliet “Acquisition of a servitude by prescription” in Van Erp & Akkermans, *Casebook*, 745-752 (France) and 753-762 (Netherlands). For Louisiana, see AN Yiannopoulos, *Louisiana Civil Law Treatise*, vol 4 (Predial Servitudes, 3rd edn, 2004), paras 138-139.

¹⁷ Prescription Act 1832, 2 & 3 Will IV, c71.

¹⁸ See above at 51-52.

¹⁹ Prescription Act 1832, s5: “[I]n all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case...”.

²⁰ See *Gardner v Hodgson’s Kingston Brewery Co Ltd* [1903] AC 229 at 239 per Lord Lindlay; *R v Oxfordshire CC, Ex p Sunningwell PC* [2000] 1 AC 335 at 349-351 per Lord Hoffmann.

²¹ *Bright v Walker* (1834) 1 CM&R 211 at 219 per Parke B; *The Company of Proprietors of the Monmouthshire Canal Company v Summers Harford* (1834) 1 CM&R 614 at 631 per Parke B.

²² See above at 53-58.

acknowledges an English origin for the expression, this therefore seems to be the most plausible explanation.

Regardless of its origin, the term had firmly established itself in Scots law by the final third of the 19th century and was identified as a decisive factor in a number of prominent cases.²³ This prominence continued into the 20th-century case law and was unaffected by the passing of the 1973 Act.²⁴ Indeed, why the term was omitted from the Act's wording is not clear; no reasons for the omission are given in the *Consultative Memorandum* and *Report* prepared by the Scottish Law Commission and on which the Act was based.²⁵ Since it is clear that possession must still be "as of right" under the Act, this raises another question: what is the relationship between the "as of right" requirement and the 1973 Act's actual wording?²⁶ Is it the case, as Cusine and Paisley suggest, that "[t]he Act does not completely replace the common law", and possession "as of right" should therefore be seen as an additional, extra-statutory requirement?²⁷ Such a view is understandable but unlikely to be correct given the central role which possession "as of right" plays in fulfilling the doctrine's policy objectives. The better view is therefore Gordon's: "[a]s possession must be possession of the servitude, it seems clear that possession must still be as of right, and not by permission of the servient owner."²⁸

²³ E.g. *Grierson v School Board of Sandsting & Aithsting* (1882) 9 R 437 at 442 per Lord Rutherford Clark ("of right"); *Mann v Brodie* (1885) 12 R (HL) 52 at 57 per Lord Watson ("as matter of right"); *Macnab v Munro Ferguson* (1890) 17 R 397 at 399 (note) per Lord Ordinary (Trayner) and at 401 per LJC Macdonald.

²⁴ *McGregor v Crieff Co-Operative Society Limited* 1915 SC 92; *Rhins District Committee of the County Council of Wigtownshire v Cuninghame* 1917 2 SLT 169; *Marquis of Bute v McKirdy & McMillan* 1937 SC 93; *Richardson v Cromarty Petroleum Co Ltd* 1982 SLT 237; *Strathclyde (Hyndland) Housing Society Ltd v Cowie* 1982 SLT (Sh Ct) 61; *Aberdeen City Council v Wanchoo* 2008 SC 278.

²⁵ Scottish Law Commission, *Consultative Memorandum on the Prescription and Limitation of Actions* (SLC CM No 9, 1969); *Report on the Reform of the Law Relating to Prescription and Limitation of Actions* (SLC No 15, 1970).

²⁶ See *Richardson v Cromarty Petroleum Co Ltd* 1980 SLT (Notes) 237 at 237 per Lord Cowie; *Strathclyde (Hyndland) Housing Society Ltd* 1982 SLT (Sh Ct) 61 at 65.

²⁷ See Cusine & Paisley, para 10.11.

²⁸ Gordon, *Land Law*, para 24-46. Similarly, Johnston, *Prescription*, para 18.02: "some of the requirements of the pre-1973 law are inherent in the use of the term 'possession' ... It is of the essence of possession that it should be exclusive and that it should be an assertion of right rather than depend on tolerance by someone else. Physical control that does not come up to the standard of asserting a right is simply not possession."

(2) Policy: why must possession be “as (if) of right”?

Notwithstanding the relative modernity of the term “as of right”, the substantive requirement it describes is therefore long-established: to establish a servitude by prescription, the claimant must have behaved as if already exercising the servitude in question. To understand why, it is helpful to consider once again the policy justifications underpinning the establishment of servitudes by positive prescription.

As has already been noted, two such justifications are usually given: firstly, that prescription promotes legal certainty by protecting long-established enjoyment; and, secondly, that any possible unfairness is mitigated by the fact that the landowner has been given sufficient opportunity to object and, having not done so, is held in some sense to have accepted the burdening of his land.²⁹ While this second justification has sometimes been explained in terms of punishing those who are dilatory or negligent in protecting their rights, Johnston notes, in the context of the general doctrine of prescription, that such a view “survives only in the notion that the competing interests of the parties must be weighed”.³⁰ The second justification does not therefore require that the landowner actually accepts the burdening of his right but only that he is given sufficient opportunity to object. With this qualification in place, it can be seen that the “as of right” requirement is essential before either policy justification can be seen as plausible: firstly, because where a claimant’s usage of the land is insufficient to indicate that a servitude is being exercised, or is sufficient but explicable by a factor other than the apparent exercise of a servitude, that usage does not require additional legal protection; and, secondly, because, in those same circumstances, the landowner is entitled to assume that the claimant’s possession is either too insignificant to require a response or is attributable to some other factor and that no action is therefore necessary (or, often, possible) to prevent the creation of an adverse right. In this way, the “as of right” requirement fulfils both an objective and a subjective role, justifying the doctrine’s application in the first place but also ensuring that it is not applied unfairly.

²⁹ See above, at 2-4 and 123-124.

³⁰ Johnston, *Prescription*, para 1.61.

C. Defining possession “as (*if*) of right”.

Having considered the requirement’s origins and how it helps to fulfil the law’s policy objectives, it is now possible to return to the question posed at the beginning of this chapter: what does it mean to possess a servitude “as of right”?

(1) Terminology

At the outset, the term’s ambiguity should be acknowledged. Indeed, shorn of historical context and without a background understanding of the applicable law, anyone confronted with the term might well interpret it as describing possession which is referable to an *already*-existing right – i.e. possession which is “*of a right*”.³¹ Such an interpretation is semantically plausible but entirely inconsistent with the doctrine’s history and policy objectives. In fact, to possess a servitude “as of right” means that the servitude must be possessed “as *if* of right”. The claimant’s behaviour must be such as would have been expected were his property already benefited by the servitude in question. Since the expression “as *if* of right” captures this more clearly than the traditional term “as of right”, there is much to be said for adopting it. Indeed, this was acknowledged in the Inner House as early as 1992.³² The newer term has also been used by the House of Lords and Supreme Court in a number of high-profile English cases³³ and its adoption in Scots law has been advocated by Professors Reid and Gretton.³⁴ On the whole, this seems a sensible

³¹ See Reid & Gretton, *Conveyancing 2006*, 124: “if possession must be ‘as of right’, it is a natural mistake to suppose that any possession founded on a ‘right’ must qualify”; cf. Reid & Gretton, *Conveyancing 2008*, 105-107.

³² *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SC 357 at para 370 per Lord Cowie: “[S]enior counsel for the respondents submitted that a public right of way is established if the public have used the route over the prescriptive period in a manner which was consistent with use “as if of right” ... I am satisfied that the test formulated by the respondents is the correct one.”

³³ E.g., *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at para 72 per Lord Walker; *R (Lewis) v Redcar & Cleveland BC (No.2)* [2010] AC 70 at 101 per Lord Brown and 110-111, 116 per Lord Kerr; cf. S Gardner & E MacKenzie, *An Introduction to Land Law* (4th edn 2015), para 7.3.1.

³⁴ Reid & Gretton, *Conveyancing 2008*, 101-102: “[T]he accepted test today is that a person possesses ‘as of right’ where he possesses *as if* he had the right ... ‘As if of right’ would thus be a more accurate formulation than ‘as of right’”. See also the current South African legislation: “Acquisitive prescription of a servitude occurs if the acquirer has openly and as though he were entitled to do so,

change and the “as if of right” formula will therefore be used throughout the remainder of this thesis.

(2) Two problems with the traditional approach

Merely behaving in a manner consistent with the existence of the alleged servitude is not, however, sufficient to render possession “as if of right”. In order to satisfy the law’s policy objectives, something more is required. As already noted, Scots sources have tended to identify this “something more” with the requirement that possession be *nec precario* or not dependent on the landowner’s tolerance or permission.³⁵ As an immediate identification, however, this is problematic for two reasons: firstly, it is too narrow, focusing on just one of a number of factors which can prevent possession from being “as if of right”; and, secondly, it is too imprecise, obscuring the difference between those factors which (negatively) prevent possession from being “as if of right” and the quality of possession which is (positively) required before the claimant’s possession is sufficient. By considering these two problems in turn, it is possible to construct a more comprehensive and systematic account of what it means to possess a servitude “as if of right”; this account can then be used to provide a practical template for applying the law in the future.

(3) The first problem

The first problem with the traditional approach is that it is too narrow, taking a single example of possession “as if of right” to be a comprehensive definition of the whole. In fact, possession can only be “as if of right” if the claimant’s behaviour is not referable to *any* factor other than the apparent exercise of the alleged servitude. Express or implied permission is an example of such a factor, but so too is any other right held by the claimant which entitles him to make use of the land in the manner now alleged to have been in assertion of a servitude. Most modern accounts of the law go on to recognise this when they say that possession must also be

exercised the rights and powers which a person who has a right to such a servitude is entitled to exercise...”, Law of Prescription Act 68 of 1969, s6.

³⁵ E.g. Cusine & Paisley, paras 10.11, 10.19; Gordon, *Land Law*, para 24-46; Johnston, *Prescription*, para 19.04(3).

“unequivocally referable to the right claimed”.³⁶ In doing so, however, they give the impression that they are speaking of a separate and discrete requirement. In reality, the exact same policy considerations apply: where possession is referable to *anything* other than the alleged servitude, the landowner has no reason to believe that a servitude is being asserted and will not realise that something must be done to prevent prescription from running its course.³⁷ Given this shared rationale, it should be acknowledged that we are dealing with only one requirement, and that all those factors which could render possession “equivocal” are, in fact, variations on a single theme. Since this is obscured by the tendency to identify possession “as if of right” with possession *nec precario*, it is better to say that, for possession to be “as if of right”, it must not already be “by right”.

That this is not an obscure taxonomical point but one of practical importance can be seen in *Aberdeen City Council v Wanchoo* (2008).³⁸ In that case, the defender owned a warehouse which bordered on land belong to the pursuer (a local authority). While the defender’s predecessor in title had originally accessed the warehouse from a public road, this became impracticable when the road was upgraded to a dual carriageway. It appears that an agreement was reached to allow the defender’s predecessor to use an alternative access across the pursuer’s land; however, nothing was committed to writing. Following this agreement, the defender’s predecessor sought planning permission to construct a new entrance onto the pursuer’s land. This was granted and the appropriate alterations were made at significant expense. When a twenty-five-year lease of the pursuer’s land was granted to the defender’s predecessor, however, the lease was expressly restricted to use for car parking. In any event, access to the warehouse was taken across the pursuer’s land for the duration of the lease.³⁹ When the lease approached its end, the pursuer wrote to the

³⁶ E.g. Cusine & Paisley, para 10.20; Gordon, *Land Law*, para 24-47.

³⁷ Reid & Gretton, *Conveyancing 2006*, 122: “The policy basis of this rule is notice. If possession is to be sufficient to create a new right, the owner of the land thus possessed must be in no doubt as to what is going on – and as to the legal consequences of allowing it to continue”. Indeed, where the right in question is not “precarious”, the landowner will not be allowed to prevent the possession from continuing.

³⁸ *Aberdeen City Council v Wanchoo* 2007 SLT 289 (OH), aff’d *Aberdeen City Council v Wanchoo* 2008 SC 278 (IH); cf. Reid & Gretton, *Conveyancing 2006*, 122-124; Reid & Gretton, *Conveyancing 2008*, 105-107.

³⁹ *Wanchoo* (OH) at paras 12-13; *Wanchoo* (IH) at para 9.

defender – who had acquired the warehouse and lease – and asked whether he wished to renew the lease or to stop taking access.⁴⁰ In response, the defender claimed to have no further interest in the land beyond his “prescribed servitude right”. Though the pursuer sought declarator that the defender had established no such servitude, this was rejected by the Lord Ordinary and an Extra Division of the Inner House who held that the asserted servitude had indeed been established.

Though most of the principles identified by the judges in *Wanchoo* were unimpeachably orthodox, the application of these principles to the case at hand was not. Both the Lord Ordinary (Lord Glennie) and the Extra Division acknowledged, for example, that possession could only be prescriptive where it was “as of right” and “unequivocally referable to the right claimed”.⁴¹ Likewise, the Extra Division recognised that the greater the volume of the defender’s possession the more likely it would be to qualify as possession “as of right”.⁴² When turning to the facts of the case, however, they proceeded to apply these principles in a manner which was potentially subversive of the very policy objectives that the “as if of right” requirement has developed to secure. Noting that the pursuer was, in all likelihood, personally barred from preventing the defender from continuing to take access across the site, the judges in both Houses concluded that the possession was not precarious or dependent on continuing permission. It followed, the court continued, that, since the possession was not precarious, it *must* therefore have been “as of right”.⁴³ This is, of course, not true and demonstrates a fundamental misunderstanding of what it means for possession to be “unequivocally referable to the right claimed”. Indeed,

⁴⁰ *Wanchoo* (OH) at para 16.

⁴¹ *Wanchoo* (OH) at para 23; *Wanchoo* (IH) at para 11.

⁴² *Wanchoo* (IH) at para 19.

⁴³ *Wanchoo* (OH) at para 24: “It would have been sufficient to entitle Duthies [i.e. the defender’s predecessor] to succeed in a plea of personal bar in answer to any attempt by the council to prevent them using the access across the site. To that extent, it is clear that the access taken by Duthies was taken ‘as of right’ and not simply by tolerance on the part of the council”; *Wanchoo* (IH) at paras 16-19, especially 18: “... unless it can properly be said that the access so taken could not be ‘of right’ but could only be by mere ‘toleration’, the servitude right for which the defender contests is established or constituted.”

the Extra Division, in particular, seems to have assumed the requirement to mean the exact opposite of what it has traditionally been understood to mean:⁴⁴

But with the passage of time and the expiry of the prescriptive period a personal right of access may become a real right of servitude by user. That is the very nature of the creation of servitude rights by operation of positive prescription. We reject the submission advanced by counsel for the pursuers and reclaimers that the right of access upon which the prescriptive claim is founded has to be a real right of servitude. If it were a real right of servitude there would be no need to invoke the positive prescription. *Cadit quaestio*. [i.e. the question falls]

No one disputes that prescription would be unnecessary where a real right of servitude already exists. But what is required on the part of those claiming prescription is that their possession *appears* to be referable to the servitude which they are attempting to establish. This is the only way in which the policy objectives of the “as if of right” requirement can be achieved, since possession which is referable to any other right – including a personal right which the landowner is personally barred from disputing – would give the landowner no notice that prescription is running and, in turn, no opportunity to prevent it.⁴⁵ The truth is that precarious possession is only one of a number of factors which can render possession “by right” and not “as if of right”.⁴⁶

(4) The second problem

The second, and more structural, problem with the traditional approach is that it is too imprecise, attempting to deal with two logically distinct issues at the same time. On the one hand, it asks whether any factor is present which (negatively) prevents the possession from being “as if of right”; on the other hand, it asks whether the claimant’s behaviour has (positively) been of sufficient quality to qualify as possession “as if of right” in the first place. This imprecision follows inevitably from the tendency, when dealing with prescriptive servitude cases, to begin by asking whether the claimant’s possession has been “precarious” or not; that is, whether or

⁴⁴ *Wanchoo* (IH) at para 17.

⁴⁵ Reid & Gretton, *Conveyancing 2006*, 122-124; Reid & Gretton, *Conveyancing 2008*, 105-107.

⁴⁶ See below at 159-162 and Chapter 9, *passim*.

not it has been dependent on the landowner's "tolerance" or permission.⁴⁷ Of course, this makes sense in situations where the landowner's attitude towards the claimant's possession is clear: any express permission immediately excludes the possibility that possession has been "as if of right" and makes further inquiry unnecessary. It is, however, less helpful in situations where the landowner has said – and done – nothing in response to the claimant's behaviour. This is because it presents the relevant issue as simply being whether the possession has been "in assertion of right", on the one hand, or dependent on the landowner's permission or tolerance, on the other – a greater volume of possession suggesting the former and a lesser volume of possession suggesting the latter.⁴⁸ The traditional approach therefore treats as inversely correlative the questions of whether the claimant's possession has been of sufficient quality to suggest that a servitude is being exercised and whether the possession has been "tolerated" by the landowner. But is this necessarily the case?

In one sense, such an approach is understandable, since a number of decided cases do indeed suggest that possession should be attributed to "tolerance" when it is of insufficient quantity to bring home to the landowner that a right is being asserted.⁴⁹ "Tolerance" is, however, a vague term and can be used in at least two distinct senses: on the one hand, it can be used as a synonym for actual permission ("active tolerance"); on the other hand, and perhaps more intuitively, it can refer to nothing more than a landowner's passive willingness to put up with the claimant's behaviour ("passive tolerance"). The first of these senses involves an objective granting of permission, though this may need to be inferred from the circumstances of the case; the second involves a subjective state of mind which explains why the landowner has remained inactive in response to the claimant's behaviour. It is, necessarily, this second sense of "tolerance" that is imputed to a landowner where his actual

⁴⁷ E.g. *Cusine & Paisley* para 10.19; Gordon, *Land Law* para 24-49. See also Peterson, "Keeping up Appearances", which adopts this approach uncritically at 4-5. Recent cases which move immediately to this question include *Wanchoo* (IH); *Neumann v Hutchison* 2008 GWD 16-297.

⁴⁸ E.g. *Wanchoo* (IH) at para 18; *Cusine & Paisley* para 10.19; Gordon, *Land Law* para 24-49: "If usage is only occasional the court is likely to infer that the usage was by tolerance rather than as of right."

⁴⁹ E.g. *Duke of Athole v McInroy's Trs* (1890) 17 R 456, e.g. at 462-463 per LJC Macdonald; *McInroy's Trs v Duke of Athole* (1891) 18 R (HL) 46 at 48 per Lord Watson; *Rhins District Committee of the County Council of Wigtownshire v Cuninghame* 1917 2 SLT 168 at 171 per Lord Sands.

subjective attitude towards the claimant’s possession is unclear. As the Inner House acknowledged in *Wanchoo*, “tolerance” (in this passive sense) is “directed not so much to the mind of the proprietor of the servient tenement but to the nature, quality and frequency of the user.”⁵⁰ Where the claimant’s possession has been of insufficient quality to indicate that a servitude is being asserted, the law will therefore characterise the landowner’s inaction as “tolerance”; by contrast, where the possession has been sufficient to indicate that a servitude is being asserted, the law will characterise the landowner’s inaction as “acquiescence” in the claimant’s exercise of his servitude.⁵¹ This distinction can be demonstrated in the following table:

Claimant’s behaviour	Insufficient Possession	Sufficient Possession
Characterisation of inaction by the landowner	“Tolerance”	“Acquiescence”

It is important to acknowledge this two-fold usage of “tolerance”, since the two types of “tolerance” have significantly different juridical consequences: active tolerance prevents possession from being “as if of right”; passive tolerance, by itself, does not. Rather, in cases which invoke passive tolerance, it is the insufficiency of the claimant’s possession which is the important juridical fact. “Tolerance”, in this sense, is only invoked as an explanation once a logically prior decision has already been reached that the claimant’s possession has been of insufficient quality to qualify as the exercise of an alleged servitude. Accordingly, even though – as will be seen below – the standard which a claimant must meet in order to indicate that a servitude is being asserted is, essentially, that his possession has been such that a reasonable

⁵⁰ *Aberdeen City Council v Wanchoo* 2008 SC 278 at para 18. Note that “of right” is used by the Inner House in *Wanchoo* as a synonym for “as if of right” and not in the sense of “by right”, as it is in recent English case law (e.g. *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at 72 per Lord Walker and *R (Barkas) v North Yorkshire CC* [2015] AC 195 at para 14 per Lord Neuberger).

⁵¹ “Acquiescence” in this context, is used in a non-technical sense and is not to be confused with the possible mode of creation, Bell, *Principles*, §947; Cusine & Paisley, paras 11.37- 11.46; AGM Duncan in Reid, *Property*, para 462; EC Reid & JWG Blackie, *Personal Bar* (2006) paras 1-23 to 1-28, 6-45 to 6-64.

landowner would not have allowed it to continue (i.e. “tolerated” it) unless the alleged servitude actually existed, this remains an *objective* test. It does not take into account the actual *subjective* attitude of the landowner in question.

That “tolerance” can refer to an imputed characterisation of a landowner’s inaction is further suggested by a brief comparison with the term’s usage in English law. As Lord Rodger acknowledged in *R (Beresford) v Sunderland City Council*, the Scots and English terminology differs in an important respect: ⁵²

[In] reading the Scottish cases a linguistic point must be noted. English judges have tended to use “tolerance” as a synonym for acquiescence [...] Scottish judges, on the other hand, have tended to use “tolerance” as a synonym for permission and as a translation of *precarium*. This is perfectly understandable since an owner who, perhaps somewhat reluctantly, decides to permit the public to walk across his land until further notice may be said to “tolerate” them doing so.

In other words, the term “tolerance” is generally used south of the border to describe a landowner’s inaction in the face of a successfully asserted right. Once this terminological point has been taken on board, it can be seen that the English treatment of inaction in the face of a successfully asserted right is similar in substance to the Scottish approach: once a claimant’s possession has reached a level sufficient to indicate that a right is being asserted, inaction on the part of the landowner will be characterised as “acquiescence” or “tolerance” and not as a factor that prevents possession from being “as if of right”.⁵³ As Lord Dillon explained in *Mills v Silver*, “mere acquiescence in or tolerance of the user by the servient owner cannot prevent the user being as of right for purposes of prescription.”⁵⁴ Both systems therefore use the term “tolerance” to characterise inaction on the part of a landowner; they simply do so with different paradigms in mind. In Scots law,

⁵² *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at para 65 per Lord Rodger. Also, more succinctly, Lord Bingham: “As my noble and learned friends Lord Rodger and Lord Walker point out, some caution is required of English lawyers reading the Scottish authorities, since the applicable legislation is not the same and “tolerance” is used to mean not acquiescence but permission”, *ibid* at para 6.

⁵³ *R (Lewis) Redcar & Cleveland BC (No.2)* [2010] AC 70 at para 30 per Lord Walker and para 67 per Lord Hope.

⁵⁴ *Mills v Silver* [1991] Ch 271 at 281 per Dillon LJ. See also Gaunt & Morgan, *Gale on Easements*, para 4-115: “The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand ... Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence.”

“tolerance” in its passive sense is generally used to describe inaction in the face of insufficient possession; in English law, it is generally used to describe inaction in the face of sufficient possession. Significantly, neither system treats “tolerance” in its passive sense as the operative factor which prevents possession from being “as if of right”. Rather, “tolerance” is only invoked as a retrospective explanation for why the landowner has remained inactive in response to the claimant’s behaviour.

While use of the term “tolerance” is therefore understandable in the context of establishing servitudes by positive prescription, the fact that the term has two possible meanings is unhelpful. In particular, it obscures the difference between those factors which, negatively, prevent possession from being “as if of right” and the quality of possession which is, positively, required before possession can be “as if of right” in the first place: tolerance can refer to either of these and its usage in case law and academic literature has, as a result, contributed towards a failure to distinguish them as separate issues. For this reason, the term “tolerance” should be avoided where possible – or at least used subject to an appropriate caveat.

Furthermore, since the imputation of “tolerance” in its passive sense depends not on the subjective attitude of the “servient” landowner but on the objective behaviour of the claimant, it seems sensible to reflect this in legal terminology. In this context, it is more helpful to say that possession can only be “as if of right” if it is of sufficient quality to indicate that a servitude is being asserted than to say that landowners are presumed to “tolerate” low-level possession. This issue is distinct from, and logically prior to, the issue of whether the claimant’s possession could be referable to any other factor which would prevent otherwise sufficient possession from being “as if of right” – for example, express or implied permission. While “tolerance”, in the active sense of actual permission, renders possession “precarious” and operates as a factor which prevents otherwise sufficient possession from being “as if of right”, “tolerance”, in the imputed and passive sense, is an objective hurdle which must be overcome by the claimant in order for possession to be sufficient in the first place. The traditional approach fails to distinguish these two issues and therefore fails to provide an adequate account of possession “as if of right”.

(5) An alternative to the traditional approach

The traditional approach of identifying possession “as if of right” with possession *nec precario* is therefore too narrow and too imprecise to explain exactly what the law is looking for. However, by acknowledging the two issues distinguished above and inverting their order, it can be seen that there are essentially two aspects to possession “as if of right”. Firstly, for possession to be “as if of right”, it must be objectively sufficient to indicate that a servitude is being asserted; and secondly, it must not be referable to *any* factor other than the servitude which is being so asserted. Though it may be clear in certain situations that only one of these aspects is relevant, the two aspects can be helpfully considered as logically successive steps. Firstly, it must be decided whether the claimant’s possession has been of sufficient quality to indicate that a servitude is being asserted over the allegedly-servient tenement. If this first step is not satisfied, prescription will not begin to run – not because the possession was “tolerated” by the landowner but simply because it was not of sufficient quality to qualify as possession “as if of right”. Secondly, assuming sufficient possession *has* been demonstrated, it must then be decided whether that possession can be explained by some factor other than the servitude which is being asserted – for example permission from the landowner or another right held independently by the claimant. If so, the possession is “by right” rather than “as if of right” and prescription is excluded. By distinguishing these two aspects of possession “as if of right” it is therefore possible to construct a systematic and practical two-step template for deciding in individual cases whether possession has been “as if of right”.

Distinguishing these two steps is helpful for two further reasons. One is that it helps to explain why the law allocates burdens of proof as it does: while the claimant must prove that his possession has been sufficient to indicate that a servitude is being asserted,⁵⁵ it will be argued below that it is then up to the landowner to demonstrate whether any factor is present which prevents such otherwise-sufficient possession

⁵⁵ *Sawers v Russell* (1855) 2 Macq 76 per LC Cranworth and 148-154 below.

from being “as if of right”.⁵⁶ It is much easier to allocate these burdens appropriately in the context of a two-step process than a single-step process.

The second reason is that, by recognising the “by right” objection as a vice or vitiating factor distinct from the positive requirement of assertion, it is easier to see how the different elements of prescriptive possession relate to one another.⁵⁷ This is connected to the first reason but extends to the wider conceptual structure of prescriptive possession as a whole. Just as objectively sufficient possession will not be “as if of right” if it is already “by right” (e.g. *precario*) and referable to a factor other than the alleged servitude, so objectively sufficient possession will not be prescriptive where it has been hidden (*clam*) or violent (*vi*). This recognition brings Scots law back in line with the Roman formula which required prescriptive possession to be *nec vi nec clam nec precario* and facilitates a properly systematic approach to the prescriptive possession of servitudes.

Interestingly, English law has tended to use the term “as of right” to exclude all three vitiating factors (i.e. as a synonym for *nec vi nec clam nec precario*).⁵⁸ It has also moved towards recognising a “general proposition” that, before any of these vitiating factors will be relevant, the claimant must first bring home to the relevant landowner that a right is being asserted against him.⁵⁹ In essence, this is the same analytical framework as that which will be adopted in the following four chapters. That said, while it could be argued that Scots law should also recognise openness and peaceableness as elements of possession “as if of right”, it should be acknowledged that Scots law has traditionally restricted the term’s application to possession *nec*

⁵⁶ *Neumann v Hutchison* 2008 GWD 16-297 and 159-163 below.

⁵⁷ Although the concept of “vices” of possession or “vitiating factors” is well-established in English law (e.g. *Redcar & Cleveland BC (No 2)* [2010] AC 70 at para 30 per Lord Walker and para 67 per Lord Hope), its origin and development lie in Roman law (e.g. Kaser, *rPR 1*, §96 III) and this is reflected in its adoption by civilian and mixed legal systems (e.g. Windscheid, *Lehrbuch* §183; Planiol with Ripert, Nos 2275-2284, 2954; AN Yiannopoulos, *Louisiana Civil Law Treatise*, vol 4 (Predial Servitudes, 3rd edn, 2004), §§138-139; AN Yiannopoulos, *ibid*, vol 2 (Property, 4th edn, 2001), §§31-321).

⁵⁸ See especially, *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 at 349-351 per Lord Hoffmann; Gaunt & Morgan, *Gale on Easements* paras 4-97 – 4-124; Gray & Gray, *Elements*, paras 5.2.62-5.2.72.

⁵⁹ *Redcar & Cleveland BC (No 2)* [2010] AC 70 at para 30 per Lord Walker and para 67 per Lord Hope.

precario.⁶⁰ Furthermore, since peaceableness and openness are expressly mentioned in the 1973 Act as independent elements of possession, the decision has been taken to structure the following chapters in a manner which reflects this. Accordingly, the next chapter (Chapter 8) will provide a detailed analysis of the two steps involved when deciding whether possession has been “as if of right”; the chapter after that (Chapter 9) will examine the different categories of factor which can render possession “by right”; and the final two chapters (Chapters 10 and 11) will examine the express statutory requirements of openness and peaceableness while also attempting to show how they operate within the structure of the two steps set out in Chapter 8. It is hoped that this accommodation to the traditional vocabulary and statutory wording will allow this part of the thesis to be of more practical use for Scots law in its current form. It should, however, be acknowledged that the Scots law of prescriptive possession of servitudes *could* be expounded in terms of a general first step, which asks whether the claimant’s possession has been sufficient to indicate that a servitude has been asserted, and a more defensive second step, which asks whether the landowner can demonstrate that a vitiating factor is present which prevents prescription from running after all. Alongside the conceptual recommendations made in Chapter 5 (on the “possession” of servitudes), this is something which should be considered in any future legislative reform.⁶¹

⁶⁰ Though see *McGregor v Crieff Co-Operative Society* 1915 SC(HL) 93 at 103 per Lord Dunedin.

⁶¹ See above at 111-114.

Chapter 8

The Two Steps to Possession “As if of Right”

- A. Step 1: Possession must be sufficient to indicate assertion of a servitude**
 - (1) The primary test: what would a reasonable proprietor allow?
 - (2) Other relevant factors
- B. Step 2: Possession must not be “by right”**
- C. The landowner’s response: the necessity of “inaction plus”**
- D. Burden of proof**

A. Step 1: Possession must be sufficient to indicate assertion of a servitude

As was noted in Chapter 6, when a party seeks to establish a servitude by positive prescription, the only available evidence for the existence of such a servitude will generally be the claimant’s own possession.¹ For this reason, possession fulfils, in relation to the positive prescription of servitudes, a similar role to that played under section 1 of the 1973 Act by a combination of the registration of a relevant deed and the possession which follows on from the deed: possession must not only be consistent with the title which is being asserted but must also provide evidence that a title is being asserted in the first place.² When seeking to establish a servitude by positive prescription, it is not therefore sufficient for the claimant’s behaviour to be *consistent* with the existence of a servitude; rather, it must positively bring home to

¹ Though section 3(1) is also available, there do not appear to have been any cases where that subsection has successfully been relied upon.

² In the context of section 1, see *Hamilton v McIntosh Donald* 1994 SC 304. See also R Rennie, “Possession: Nine Tenths of the Law” 1994 SLT (News) 261, and Lord Hope of Craighead, “A Puzzling Case about Possession”, in F McCarthy et al, *Essays in Honour of Professor Rennie*.

the landowner that a servitude is being asserted. Unless this first step is satisfied, the claimant's possession cannot qualify as prescriptive. In the words of Lord Watson:³

I do not doubt that, in order to found a prescriptive right of servitude according to Scots law, acts of possession must be overt, in the sense that they must in themselves be of such a character or be done in such circumstances as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted, and the nature of the right.⁴

As has already been explained, what is at issue in this first stage is not the landowner's subjective attitude towards the claimant's possession but rather whether that possession has been objectively sufficient to indicate that a servitude is being asserted. This raises an important practical question: when will a claimant's possession be found to have been sufficient to bring home to the landowner that a servitude is being asserted?

(1) The primary test: what would a reasonable proprietor allow?

The primary indicator that a claimant has successfully asserted a servitude is that the possession has been such that a reasonable proprietor would not have permitted it to take place unless the servitude already existed. An early example of such reasoning is found in *Sawers v Russell*, which came before the House of Lords in 1855.⁵ In that case, Sawers claimed to have established a right to cast turf on Russell's land, despite having only been able to produce witnesses who had seen him do so once or twice. Unsurprisingly, the Lord Chancellor (Cranworth) held that a party claiming to have established a servitude by prescription "has cast upon him the onus of showing what all the circumstances were", that Sawers had "totally failed to make out his

³ *McInroy's Trs v Duke of Athole* (1891) 18 R (HL) 46 at 48 per Lord Watson. Cf. *R (Lewis) v Redcar & Cleveland BC (No.2)* [2010] AC 70 at para 30 per Lord Walker.

⁴ As the word "overt" suggests, there is an overlap between this aspect of possession "as if of right" and the concept of "open" possession. This overlap is addressed below at 202-205. In summary, the two concepts can be distinguished as follows: the "assertion" requirement requires that the claimant bring home to the landowner that a servitude is being *asserted* and that something must be done if the landowner wants to prevent prescription from operating; by contrast, the "openness" requirement requires that the *acts* constituting possession be sufficiently obvious that they would come to the attention of a reasonably observant landowner. As Lord Watson went on to note immediately after the passage quoted above: "The proprietor who seeks to establish the right cannot, in my opinion avail himself of any acts of possession *in alieno solo*, unless he is able to shew that they either were known, or ought to have been known, to its owner or to the persons to who he intrusted the charge of his property", *ibid* at 48.

⁵ *Sawers v Russell* (1855) 2 Macq 76 at 78 per LC Cranworth.

case”, and that the evidence he had produced was consistent with his having merely “cut a few turfs on a little piece of ground adjoining a place where he had a right to cut it.”⁶ Lord Cranworth went on to discuss what considerations would positively suggest that a servitude *had* been successfully asserted:

If a person uses habitually and constantly a right which it must be presumed that the persons against whom it is used knows he is so using, and if he is not interfered with in the exercise of that right, – if, moreover, it be a right burthensome to the person against whom it is used, – his acquiescence will afford cogent evidence to show that what the other has done he has done rightfully and not wrongfully.

According to Lord Cranworth, the primary indicator that possession has been “rightful” will therefore be that the landowner has allowed it to continue, even though it was burdensome to the landowner. As has already been noted, a number of cases and commentators suggest that the volume of the claimant’s usage will be decisive in such matters: i.e. the more possession that has been had, the more likely it is that the possession has been in assertion of right.⁷ While this is true, it is perhaps more accurate to say that, although the best evidence of possession “as if of right” is often the volume of the claimant’s possession, this is only because a higher volume of possession would be unlikely to have been tolerated by a reasonable landowner in the absence of an existing servitude and, as a result, it is clear that a right is being asserted. This would explain, for example, why servitudes have sometimes been successfully established where the possession was relatively regular but of low volume.⁸ The common factor in each of these cases would therefore be that “user was such as presumably a proprietor would not voluntarily have permitted where there was no right”.⁹

That the standard against which this possession must be measured is an objective one is supported by a number of *dicta* which discuss the “as if of right” requirement in

⁶ *Ibid* at 77-78 per LC Cranworth. The Lord Chancellor was astounded to note that Sawers had pursued his claim before “six different tribunals” over the course of a decade – the sheriff-substitute, the sheriff-depute three times, the Inner House and eventually the House of Lords – all for a right of negligible value (300 turfs per year at a total value of 16 shillings).

⁷ E.g. *Cusine & Paisley*, para 10.19, approved in *Aberdeen City Council v Wanchoo* 2008 SC 278 at para 18.

⁸ E.g. *Scotland v Wallace* 1964 SLT (Sh Ct) 9, where the servitude was used only once each year. *Cusine and Paisley*, para 10.13 suggest that this case was wrongly decided.

⁹ *Rhins District Committee of the County Council of Wigtownshire v Cuninghame* 1917 2 SLT 168 at 171 per Lord Ordinary (Sands).

the context of public rights of way. For example, in the case from which the previous quotation was taken, Lord Sands went on to explain how a judge is meant to assess what a proprietor would and would not permit:¹⁰

There may be special historical or other circumstances, but in general the law presumes that the public went as of right when their user was such as presumably a proprietor would not voluntarily have permitted where there was no right. In determining this matter, however, the Court is governed by certain conventions. A judge is not altogether free to exercise his own opinion as to what an easy-minded and good-hearted proprietor might tolerate. He is required to assume a vigilant proprietor, who knows the law as to rights-of-way and keeps it before his mind — who takes note of the period for which user has been exercised, and who accordingly will not tolerate trespass which does not harm him if that trespass is likely to lead to an assertion of right [...] although the judge may be of the personal opinion that such tolerance as an act of neighbourhood by a good-natured proprietor was not altogether improbable.

A similar standard is found Lord Gifford's opinion in *Mackintosh v Moir* – this time concerning possession which was found to have been insufficient:¹¹

The evidence as to the use of the road is anything but consentaneous... certainly there was nothing established more than what might happen on any unenclosed property through the indulgence or carelessness of the proprietor, without any thought of a public right, or assertion of any such right.

A claimant will therefore only be held to have brought home to the landowner that a servitude is being asserted if his possession is such that a hypothetical reasonable landowner would not have allowed it to continue unless the servitude in question actually existed. Alternatively, to use terminology found in the case law, a servitude will be found to have been successfully asserted at the point at which a hypothetical reasonable landowner's inaction would look less like "tolerance" of low-level incursions on to his land and more like inaction (or "acquiescence" in a non-technical sense) in the face of an asserted right. Once this level is reached, it will be held that enough has been done to indicate to the landowner that a servitude is being asserted – even if the landowner did not actually realise this. By contrast, where the possession is no more than might have been expected to take place in the absence of any right of servitude, it will be found that a servitude has not been successfully

¹⁰ *Ibid.*

¹¹ *Mackintosh v Moir* (1871) 9 M 574 at 580 per Lord Kinloch and at 580 per Lord Gifford. See, however, the subsequent proceedings in which the same claimants were successful after substantially fortifying the evidence: *MacIntosh v Moir* (1871) 10 M 29.

asserted. In *Purdie v Stiel*, for example, a claimant who had led his corn through his neighbour's land every harvest for forty years was informed that "in the case of town acres, every one, after the corns are cut down, leads his corn through his neighbour's ground, which, though done for 100 years, will not infer a servitude".¹²

The objectivity of this standard also means that any failure to show possession of the required level cannot be excused by, for example, the excuse that the claimant held back from asserting his right out of affection or respect for the landowner. This is seen most clearly in *Mann v Brodie*, where the public had possessed a road from 1820 to 1846 but were then excluded from it for the next 37 years.¹³ Although it was argued for the public that their failure to assert a right during this latter period "as vigorously as they would otherwise have done" stemmed from deference towards the feelings of a "very popular" landowner, the court held that such considerations were "utterly irrelevant" and that,¹⁴

Public user is a fact which must be inferred from overt acts of possession and defective evidence of user cannot be strengthened by proof of the motives which induced individuals to abstain from acts of that kind.

While the personality and popularity of the landowner are therefore irrelevant, the test's application is contextualised for the location of the allegedly-servient tenement. Since servitudes might normally be exercised less often in remote places, this is likely to be taken into account when deciding whether the claimant's possession has been sufficient to indicate that a servitude is being asserted.¹⁵ Nevertheless, this must always be balanced against the possibility that a reasonable landowner might be more willing to overlook intermittent incursions on to remote

¹²*Purdie v Stiel* (1749) Mor 14511. Also, Hume, *Lectures*, vol III, 268: "such use being the natural result of the situation of that kind of property, while uninclosed, and what no one has any interest to hinder".

¹³ *Mann v Brodie* (1885) 12 R (HL) 52.

¹⁴ *Ibid* at 58 per Lord Watson.

¹⁵ This approach was taken in a number of well-known public rights of way cases, e.g., *Macpherson v Scottish Rights of Way and Recreation Society Limited* (1888) 15 R (HL) 68 at 70 per Lord Selborne; *Marquis of Bute v McKirdy & McMillan* 1937 SC 93 at 119-120 per LP Normand; *Richardson v Cromarty Petroleum Co Ltd* 1982 SLT 237 at 238 per the Lord Ordinary (Cowie) where it was suggested that the amount of possession which must be proved "need only be such as might have been reasonably expected, having regard to the nature of the country and the requirements of its inhabitants" and, accordingly, "the amount of user which must be proved to establish a public right of way in a comparatively remote part of the Highlands would be considerably less than the amount of use required in an urban environment".

land, or indeed be less physically capable of preventing individual incursions from taking place even if he wished to do so. Accordingly, anyone seeking to establish a servitude over land in remote or rural areas must still ensure that their possession is greater than that which would normally be permitted by a reasonable proprietor in similar circumstances. As LJC Macdonald said in the Inner House stage of *Duke of Athole v McInroy's Trs*:¹⁶

The effect to be given to evidence of possession, both as to its quantity and character, depends to a great extent on the situation and characteristics of the locality. The same kind of possession may tend to indicate assertion of a right, or be reasonably attributable to the tolerance of good neighbourhood, according to the surrounding circumstances.

Accordingly,

It is evident that on such a piece of hill ground an occasional traversing of a path such as this may well be unobserved, and if in very rare cases it be observed, it may be thought unimportant, and be tolerated from good neighbourhood, nothing having been brought to the proprietor's notice suggesting that anyone is asserting a right. It is quite true that in a district of the country like that in question such frequent use is not to be expected as would be the case in more closely peopled estates, and there can be no doubt that a much smaller amount of evidence of adverse possession would be sufficient to prove the right than would be necessary in lower ground. But the character of the possession as being in the exercise of right must be proved by the litigant asserting the claim of the alleged dominant tenement, whatever be the locality. It is for him to prove, and to prove conclusively, that what was done was in the assertion of a right, and so done as to bring the assertion of the right home to the proprietor of the tenement which is said to be servient.

In the case itself, this meant that occasional usage of a path through a remote part of a large estate could not be deemed "as if of right" since it was "just the sort of place where a short cut is very likely used occasionally when it is necessary to pass from one part of a shooting to another."¹⁷ In the more recent case of *Jones v Gray*, by comparison, the fact that two properties were located in an urban developed area and adjoined the same lane was thought sufficient to suggest that it might be that "the

¹⁶ *Duke of Athole v McInroy's Trs* (1890) 17 R 456 (IH) at 462 per LJC Macdonald.

¹⁷ *Ibid* at 462-463. Much was also made in the House of Lords of the remoteness of the land in question as a factor arguing against possession being as if of right, *McInroy v Duke of Athole* (1891) R (HL) 46. Similar statements were made in *Mackintosh v Moir* (1871) 9 M 574 at 579 per Lord Kinloch and in *Fraser v Chisholm* (1814) 2 Dow 561 at 562 per Lord Redesdale, the latter with reference to rights of common: "In these vast wilds trespasses were very easily committed, and with great difficulty restrained. The boundary marks were tops of mountains, cairns, huge stones, etc. It must therefore be a strong case of usage which could give a right where there was no written evidence to warrant the claim."

natural and necessary inference from its local situation is that the user must have been known to the owner of the *solum*".¹⁸

(2) Other relevant factors

The primary indicator of whether possession has been sufficient to indicate that a servitude is being asserted will therefore be whether the possession was more than a hypothetical reasonable landowner would have allowed to continue if a servitude had not already existed. Nevertheless, a number of other actions on the part of a claimant may also prove relevant by either increasing or decreasing the likelihood that a reasonable landowner would realise that a servitude was being asserted over the allegedly-servient tenement.

Perhaps the best example of behaviour inconsistent with the assertion of a servitude would be where the claimant is ordered to leave the land and does in fact do so for a period of time. In *Burt v Barclay*, for example, the pursuer was stopped from using a road twice and his tenant, when stopped, apologised and promised not to use the road again.¹⁹ By contrast, successfully resisting an attempt to stop possession is clear evidence of possession "as if of right". Indeed, in *McInroy's Trs*, Lord Watson suggested that "persistent use in the face of challenge is a clear assertion of right."²⁰ It is not certain when resistance shades over into unpeaceableness and we will return to this issue in Chapter 11. To anticipate, it would appear that prompt, successful and decisive resistance of an attempt to stop possession will be evidence of a right being asserted; by contrast, where such an attempt is not resisted immediately and continues long enough to render the possession contested or unpeaceable, prescription will be prevented.

¹⁸ *Jones v Gray* [2011] CSOH 204, 2012 GWD 2-18 at para 15 per Lord Doherty, citing *McInroy's Trs v Duke of Athole* (1891) 18 R (HL) 46 at 48 per Lord Watson; Russell, *Prescription*, 54-55.

¹⁹ *Burt v Barclay* (1861) 24 D 218.

²⁰ *McInroy v Duke of Athole* (1891) R (HL) 46 at 50 per Lord Watson. It is, perhaps, more accurate to say that "persistent use in the face of an *unsuccessful* challenge is good evidence of use as of right", Gordon, *Land Law*, para 24-49, italics added. In *McInroy's Trs* itself, the order had been acquiesced in and this therefore suggested that the possession was *not* "as if of right". See also *Duke of Athole* (1890) 17 R 456 (IH) at 462 per LJC Macdonald. Similar comments were made in *Mackintosh v Moir* (1871) 9 M 574 at 576 per Lord Deas: "If the proprietor has attempted to stop people, and has not succeeded, there is then an assertion of right on the part of the public to continue to go, and there may arise a plea of subsequent acquiescence in that right on the part of proprietor".

On the opposite end of the “contentiousness” scale, and after some suggestions to the contrary, there is now authority in English law for the proposition that mere deference on the part of a person claiming to have asserted a right does not, in itself, suggest that a right is not being asserted. The context for this was the growing recognition of a “principle of deference” in cases concerning the registration of town or village greens, which viewed deference by the public towards the owners of an alleged green as inconsistent with their having “indulged as of right in lawful sports and pastimes on the land”.²¹ In *R (Lewis) v Redcar & Cleveland BC (No 2)*, the existence of any such principle was dismissed by the Supreme Court, which held that the practice of walkers in deferring to golfers was not necessarily inconsistent with those walkers asserting rights over a golf course. Rather, so long as possession was otherwise *nec vi nec clam nec precario*, the golf club should have known to object to possession if they wished to protect their rights.²²

Given that servitudes must, in any event, be exercised *civiliter modo* in Scots law, it seems likely that Scottish courts would also consider deference to be consistent with the assertion of a servitude, so long as that deference was consistent with the manner in which such a servitude would normally have been exercised.²³

²¹ See Commons Act 2006, s15(1)-(4). On the “principle of deference”, see *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P&CR 573 at 85 per Sullivan LJ and *R (Lewis) v Redcar and Cleveland BC* [2008] EWHC 1813 (Admin) per Sullivan LJ. When the latter was appealed, Dyson LJ did not accept the existence of a “principle of deference”. He did, however, accept that deference might be a factor in deciding whether the landowner would realise a right was being asserted against him or not, [2009] EWCA Civ 3 at paras 35-54. Cf. R Meager, “A setback for the ‘village green industry’?” (2009) 68 CLJ 281.

²² *R (Lewis) v Redcar & Cleveland BC (No 2)* [2010] AC 70 at para 36-38 per Lord Walker, para 70-77 per Lord Hope, and para 94-96 per Lord Rodger: “Such a conclusion might, just conceivably, have been plausible and legitimate if there had been no other explanation for the inhabitants' behaviour. But that is far from so. The local inhabitants may well have deferred to the golfers because they enjoyed watching the occasional skilful shot or were amused by the more frequent duff shots, or simply because they were polite and did not wish to disturb the golfers who – experience shows – almost invariably take their game very seriously indeed. A reasonable landowner would realise that any of these motives was a more plausible explanation for the inhabitants' deference to the golfers than some supposed unwillingness to go against a legal right which they acknowledged to be superior.”

²³ As Lord Jauncey of Tullichettle observed in *Cumbernauld and Kilsyth DC* 1993 SC (HL) 44 at 47: “There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor.”

B. Step 2: Possession must not be “by right”.

It is therefore clear that, before it can be “as if of right”, a claimant’s possession must have been objectively sufficient to bring home to a reasonable landowner that a servitude is being asserted. Once possession has reached this level, the fact that it is allowed to continue by the landowner suggests that the claimant’s possession is indeed attributable to the alleged servitude. Even then, however, prescription will not run if it turns out that the possession was explicable by some other factor after all – for example, express permission from the landowner or another right held by the claimant himself. The reason for this is clear and flows directly from the policy considerations outlined above: where the claimant is entitled to make use of the land by some right other than the asserted servitude, his possession needs no further legal protection, and furthermore, the landowner is entitled to assume that the possession was referable to that other right and that nothing need therefore be done to prevent a servitude from being established. As Baron Hume explained in his lectures,²⁴

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

This aspect of possession “as if of right” has traditionally been expressed in terms of two distinct requirements: firstly, that possession must be *nec precario*, or not dependent on the permission of the landowner; and, secondly, that possession must be “unequivocally referable to the right claimed”. This distinction is also found in a number of legal systems influenced by the French *Code civil*, which conceptualise precariousness and “equivocalness” as separate vices of possession.²⁵ Nevertheless, as has already been explained, these two categories are really manifestations of a single underlying requirement.²⁶ In turn, this requirement is itself a particular application of a general rule of positive prescription: where a person seeks to

²⁴ Hume, *Lectures*, vol III, 267.

²⁵ See LPW van Vliet, in van Erp & Akkermans, *Property Casebook* at 749-752 (French Law), 759-762 (Dutch Law). For Louisiana, see AN Yiannopoulos, *Louisiana Civil Law Treatise*, vol 4 (Predial Servitudes), §§138-139.

²⁶ See above at 140-143.

establish any right by positive prescription, his possession must be “unequivocally referable to the right claimed”.²⁷ While it would be possible to subsume the concept of “precarious” possession under the requirement that possession be “unequivocally referable to the right claimed”, a less unwieldy terminology has been developed in English law and adopted by the Supreme Court in a number of prominent cases.²⁸ This is to say that, where the claimant has a lawful reason for carrying out his activities on the allegedly-servient tenement, his possession is not “as if of right” but “of right” or, more distinctively, “by right”.

It might be objected at this point that Scots law has not traditionally described precarious possession as possession “by right” or “of right” and that the notions of “precarious” possession and possession “by right” are somehow antithetical. While such an objection is superficially attractive, it overlooks the fact that someone with permission to be on land is, by definition, there lawfully and, in some sense at least, has a “right” to be there. This right may be dependent on the landowner’s continuing permission and, as a result, “precarious” but it is a right nonetheless. The better view is therefore that of Professors Reid and Gretton, who note that permission is simply “a species of a larger genus – the genus of rights to possess, both real and personal.”²⁹ For this reason, it is legitimate and convenient to say that, wherever a claimant already has a lawful reason to be on the allegedly-servient tenement, his possession is not “as if of right” but “by right”.

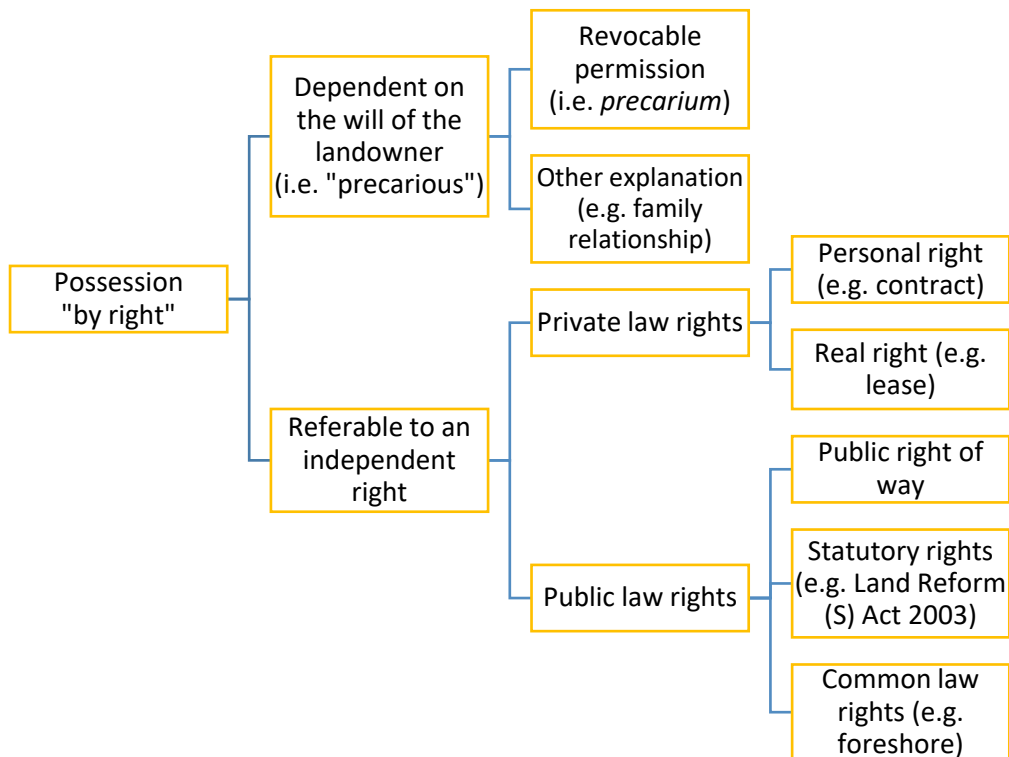
²⁷ E.g. *Houston v Barr* 1911 SC 134 (lease) and *Duke of Argyll v Campbell* 1912 SC 458. See also Johnston, *Prescription*, paras 18.24 – 18.25.

²⁸ The current trend in English law seems to originate with Lord Bingham’s observation in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at para 9 that the inhabitants in that case “might have indulged in lawful sports and pastimes for the qualifying period of 20 years or more not ‘as of right’ but pursuant to a statutory right to do so” and that “[s]uch use would be inconsistent with use as of right.” Lord Walker’s speech in *Beresford* is also conducive to this reasoning, see para 72 in particular. Two prominent cases in which the Supreme Court has enthusiastically adopted the “as if of right”/“by right” dichotomy are *R (Barkas) v North Yorkshire CC* [2015] AC 195 and *R (Newhaven Port & Properties Ltd) v East Sussex CC* [2015] AC 1547. The introduction of the “by right” terminology has, however, proved somewhat controversial in England, especially with regard to its relationship to the well-established “tripartite test” of vitiating factors: *nec vi nec clam nec precario*. Some commentators have criticised its introduction as lacking precedent and being inconsistent with the idea that the tripartite test is exhaustively synonymous with the term “as of right”, R Austen-Baker and B Mayfield, “Uncommon confusion: parallel jurisprudence in town and village green applications” [2012] Conv 55. A compelling defence of the “by right” jurisprudence is, however, given in L Blohm, “The ‘by right’ doctrine and village green applications - a response” [2014] Conv 40.

²⁹ See Reid & Gretton, *Conveyancing 2008*, 105-107.

To recognise the underlying unity of the various factors which render possession “by right” is not, however, to say that the older categories of “precarious” possession and “equivocal” possession are irrelevant. In fact, the real utility of these categories lies in their provision of a practical and comprehensive taxonomy of the various factors which can render possession “by right” rather than “as if of right”. In the first place, there are those factors which render possession “precarious” and *dependent* on the continuing permission of the landowner. In the second place, there are those factors which, though not rendering possession precarious, still render it “equivocal” and referable to an *independent* right held by the claimant.³⁰ This second category can be further divided into private law rights (i.e. personal rights and real rights) and public law rights (i.e. any rights held by the claimant as a member of the public or of a particular section of the public). The resulting taxonomy is seen in the table overleaf.

³⁰ Scots law has tended to refer to “equivocal” possession only inversely, specifying that possession must be “unequivocally referable to the right claimed”.



A detailed analysis of these two categories of possession “by right” can be found in chapter 8. Before turning to this analysis, however, it is important to discuss two preliminary issues: firstly, the role played by the landowner’s response to the claimant’s assertion of a right; and, secondly, which party bears the burden of proving whether or not the claimant’s otherwise sufficient possession has, in fact, been “by right” rather than “as if of right”.

C. The landowner's response: the necessity of “inaction plus”

When faced with the claimant's possession, a number of responses are open to the landowner. These range from express approval and encouragement to vehement objection and physical obstruction. At its most basic level, however, the landowner's response will fall into one of two categories: either he will do something about the possession or he will do nothing. The juridical effects of the first option are varied and depend on the exact course of action taken: express permission, for example, will render the claimant's possession precarious, while an attempt at physical obstruction has the potential to prevent the possession from being peaceable. The juridical effect of the second option is simpler: unless another factor is present which prevents prescription from running its course, inaction on the part of the landowner has no juridical effect at all.

While this statement of the law appears at first to conflict with most modern accounts of the law, it follows from the distinction made above between deciding whether a claimant's possession has been sufficient to indicate the assertion of a servitude (“Step 1”) and deciding whether the otherwise sufficient possession has been “as if of right” or “by right” (“Step 2”). Since most accounts take these two issues together, they tend to suggest that the juridical effect of inaction will depend on the volume of the claimant's possession and that inaction in the face of less possession should be characterised as “tolerance”. However, once the decision has been reached that the claimant's possession is sufficient to bring home to the landowner that a servitude is being asserted, the only question which remains is whether another factor is present which explains why possession was allowed to continue for the prescriptive period. Accordingly, unless any factor is present which suggests that the possession was “by right” (e.g. monetary payments,³¹ a pre-existing family relationship,³² or evidence of an independent real right³³), the claimant's

³¹ See below at 185-188.

³² See below at 180-182.

³³ See below at 188-192.

possession will be held to have been “as if of right” and prescription will run its course.³⁴ In the words of Professor Gordon:³⁵

As a matter of good neighbourhood a proprietor is not likely to object to occasional use of his property by a neighbour, and the law does not oblige him to object to such occasional use in order to prevent his neighbour from acquiring a right. But if use is substantial and fairly constant, challenge is necessary to preserve freedom from servitude rights [...].

It is notable that a similar approach has been adopted in a number of recent English Supreme Court cases. Particularly influential has been a remark by Lord Walker in *R (Lewes) v Redcar and Cleveland Borough Council (No 2)*,³⁶ since approved in two other Supreme Court judgements,³⁷ where he accepted the “general proposition” that persons seeking to establish a right by prescription,³⁸

must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him.

Lord Hope likewise explained in the same case that,³⁹

If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right [...] the owner will be taken to have acquiesced in it—unless he can claim that one of the three vitiating circumstances applied in his case.⁴⁰ If he does, the second question is whether that claim can be made out. Once the second question is out of the way—either because it has not been asked, or because it has been answered against the owner—that is an end of the matter.

Where a landowner remains inactive in response to the claimant’s possession, the question in both Scots and English law is therefore whether any factor is present which explains why no steps were taken to bring possession to an end. Inaction, in itself, is not enough: what is needed is “inaction plus”. Since one of the policy justifications for the establishment of servitudes by positive prescription is that the

³⁴ As will be seen in Chapters 10 and 11, prescription will also be prevented from running where it is shown that the possession was not “open” or “peaceable”.

³⁵ Gordon, para 24-49.

³⁶ *Redcar* [2010] 2 AC 70 at para 30 per Lord Walker.

³⁷ *R (Barkas) v North Yorkshire Council* [2014] AC 195 at para 16 per Lord Neuberger and at para 65 per Lord Carnwath; and, noting Lord Carnwath’s adoption of the proposition, *R (Newhaven Port & Properties Ltd) v East Sussex CC* [2015] AC 1547 at para 70 per Lord Neuberger and Lord Hodge.

³⁸ *Redcar* at para 30 per Lord Walker.

³⁹ *Ibid* at para 67 per Lord Hope.

⁴⁰ i.e. that the possession was *vi, clam* or *precario*.

landowner has been given sufficient opportunity to prevent prescription from running, inaction on the landowner's part is often characterised as "acquiescence".⁴¹ This tendency is even clearer in English law, where it has been said by one commentator that "acquiescence vitally underpins all claims of prescription".⁴² In Scots law, however, the use of "acquiescence" is problematic since it is already a technical term in the context of personal bar and can, as a result, refer to a method of creation of servitudes in its own right.⁴³ For this reason, it is perhaps better to speak simply of "inaction" on the part of the landowner.

D. Burden of proof

The substantive law is therefore clear: where a claimant has successfully negotiated step 1 by demonstrating that his possession has been sufficient to indicate that a right is being asserted, his possession will be "as if of right" unless some additional factor is present to indicate that it was "by right" after all. This, however, raises an important practical question: which party bears the burden of proving whether such a factor is present or not?

There have been occasional suggestions that it is for the claimant to exclude the possibility of "tolerance" and, by extrapolation, any other factor which might render possession "by right".⁴⁴ The consensus, however, appears to be that once sufficient possession has been demonstrated to dislodge the "tolerance" imputed by the law to a landowner (i.e. our step 1) it is then up to the landowner to show that some factor was present which prevented prescription from running its course.⁴⁵ This consensus

⁴¹ E.g. *Sawers v Russell* (1855) 2 Macq 76 at 76 per LC Cranworth; *Neumann v Hutchison* 2008 GWD 16-297 at para 36 per Sh P Dunlop.

⁴² Gray & Gray, *Elements*, para 5.2.57; also *Dalton v Angus & Co* (1881) 6 AC 740 at 773 per Fry J: "the whole law of prescription [...] rests upon acquiescence".

⁴³ See Bell, *Principles*, §947; Cusine & Paisley, paras 11.37- 11.46; Reid, *Property*, paras 450 and 462; and EC Reid & JWG Blackie, *Personal Bar* (2006), paras 1-23 to 1-28, 6-45 to 6-64.

⁴⁴ E.g. *MacPherson v Scottish Rights of Way and Recreation Society Limited* (1887) 14 R 875 at 885-887 per Lord Young (dissenting); *Middletweed v Murray* 1989 SLT 11 at 15 per Lord Davidson. The suggestions are stronger in older public rights of way cases, such as *Napier's Trs v Morrison* (1851) 13 D 1404 and *Mackintosh v Moir* (1871) 9 M 574, but see below at 173 n 11.

⁴⁵ See, e.g., the cases discussed below at 166-172 relating to precarious possession: *Grierson v School Board of Sandsting & Aithsting* (1882) 9 R 437 at 441-442 per Lord Rutherford Clark; *Macpherson v Scottish Rights of Way and Recreation Society Limited* (1888) 15 R (HL) 68 at 70 per Lord Selborne;

was, however, challenged relatively recently in an Outer House *obiter dictum* by Lady Smith in *Nationwide Building Society v Walter D Allan*⁴⁶ and at Sheriff Court level in *Neumann v Hutchison*.⁴⁷ Both cases resulted in victory for the landowners on the basis that those claiming to have established servitudes had not excluded the possibility that their possession was attributable to tolerance. Lady Smith's *dictum* in *Nationwide* relied primarily on a single English judgement and a dissenting judgement by Lord Young.⁴⁸ The sheriff in *Neumann* adopted a similar approach and claimed that:⁴⁹

The Defenders have not made out their positive case for permission or tolerance but that doesn't get the Pursuer home. It is for the Pursuer to prove the negative in this case – ie to prove the use did not result from permission or tolerance.

Given the difficulty involved in proving a negative like this, both decisions were criticised by academic commentators as placing too heavy a burden on the pursuers.⁵⁰ The decisions also seem to be inconsistent with the way in which the burden of proof is applied in cases of positive prescription under sections 1 and 2 of the 1973 Act.⁵¹ Taking these two factors together, it is perhaps unsurprising that, on

and the public rights of way cases of *Marquis of Bute v McKirdy & McMillan* 1937 SC 93 at 119-120 per LP Normand; *Cumbernauld & Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SC 357 at 366 and 368 per LP Hope.

⁴⁶ *Nationwide Building Society v Walter D Allan Limited* unreported, 4 August 2004, 2004 GWD 25-539.

⁴⁷ *Neumann v Hutchison* 2006 GWD 28-628.

⁴⁸ "It is well established that it is for the party claiming the prescriptive acquisition of servitude to prove that the usage relied on occurred by means of assertion of right rather than by the tolerance or licence of the landowner. Further, if the approach of the Court of Appeal in England is to be followed, it seems that that party must exclude tolerance as an explanation of the use founded upon. If their use of the other party's land is as consistent with toleration or licence on the part of that landowner as it is with user as of right, that is not enough", *Nationwide* at para 31 per Lady Smith. The English authority given by Lady Smith is *Patel & Ors v WH Smith (Eziot) Ltd* [1987] 1 WLR 853. Lady Smith's remarks are further addressed at Reid & Gretton, *Conveyancing 2004*, 89-90. The better view in England appears to be that given by Lord Hope in *Redcar* [2010] 2 AC 70 at para 67, namely, that once sufficient possession has been demonstrated by the claimant, it is for the landowner to show that a vitiating factor is present which prevents prescription from running.

⁴⁹ *Neumann* 2006 GWD 28-628 at 91.

⁵⁰ See, e.g. Reid & Gretton, *Conveyancing 2006*, 125-128; Johnston, *Prescription*, para 18.38.

⁵¹ E.g., Johnston, *Prescription*, para 18.37: "It is clear that in general the party pleading prescription bears the onus of proving the facts necessary to support it. In the context of possession, this means proof that possession of the necessary quality has followed upon a sufficient title for the required period. On the other hand, if the pleadings disclose the necessary possession following upon a sufficient title, it will be for the party who challenges the assertion that prescription has been completed to show, for example, that the title is not in fact sufficient to support the right claimed."

appeal, the sheriff principal in *Neumann* (Dunlop) returned to the former consensus, noting that where possession is⁵²

of such amount and of such character as would reasonably be regarded as being an assertion of right it will readily be inferred that the use was as of right unless that inference can be displaced by evidence of permission or tolerance as those words are properly to be understood. But if there is no such evidence, or if the evidence is of insufficient weight, there is in my view no justification for refusing to hold that the use was as of right simply because the pursuer had failed to exclude the speculative possibility that the use might be attributable to permission.

As Professors Reid and Gretton have noted, the sheriff principal's decision in *Neumann v Hutchison* is "to be welcomed as providing a particularly clear statement of the law in an area where there have been difficulties in the past".⁵³ In returning to what was previously the consensus, it is now clear that, once the claimant has demonstrated sufficient possession to indicate that a servitude was being asserted, the burden of proof shifts and any person claiming to have "tolerated" or permitted such possession must then prove that this was the case. Not only does this acknowledge the difficulty of the pursuer having to prove a negative, it also fits well with the two-step process adopted in this thesis. Furthermore, while *Neumann* itself was concerned with precarious possession, it seems fair to extrapolate from this to the conclusion that this allocation of the burden of proof also applies to other factors which would render possession "by right". Indeed, this must be the case since the difficulty of proving that possession was not *permitted* pales in comparison to the burden which would be placed on a pursuer if it was necessary in every prescriptive servitude case to prove that possession was not attributable to any of a number of private or public law rights which might entitle access to be taken over the allegedly-servient tenement.

In summary, therefore, while the claimant bears the burden of proving that his possession has been sufficient to bring home to the landowner that a servitude is being asserted, once this threshold has been reached, the burden shifts and it is up to the landowner to show why the possession was not "as if of right" after all.

⁵² See 2008 GWD 16-297 at para 46.

⁵³ Reid & Gretton, *Conveyancing 2008*, 105.

Chapter 9

Possession “By Right”

A. Possession dependent on the will of the landowner

- (1) The nature of precarious possession
- (2) Some examples

B. Possession referable to an independent right

- (1) Personal rights
- (2) Real rights
- (3) Public rights
 - (a) Examples of public rights
 - (b) Access rights under the Land Reform (Scotland) Act 2003
 - (c) Lessons from the English “town or village green” cases
 - (d) Conclusions

C. Summary: possession “as if of right”

A. Possession dependent on the will of the landowner

While an argument could be made that precarious or dependent possession is simply a subset of possession referable to a personal right (in this case, a revocable licence), there are two reasons why it is helpful to deal with it separately: firstly, it is by far the most prominent example of possession “by right” in the Scots case law; and, secondly, the traditional treatment of express and implied permission together with imputed “tolerance”¹ has tended to obscure the fact that possession is only “precarious” where it is dependent on the revocable permission of the landowner. This permission may be implied, but when “tolerance” is imputed to the landowner in response to the claimant’s insufficient possession, this is more appropriately categorised as possession which has failed to qualify as the assertion of a right.² With this in mind, it is important to ask what exactly it means for possession to be

¹ See above at 143-150.

² *Ibid* and above at 147-153.

“dependent” on the will of the landowner. After this, a number of practical examples of such dependent possession can be gathered from the case law.

(1) The nature of precarious possession

The paradigm example of precarious possession is relatively uncomplicated: where the claimant has sought and received permission from the landowner, any resulting possession on his part will be precarious. This is what was meant in Roman law when it was said that possession must be *nec precario* and such a conception of precarious possession is a familiar one in Scots law too.³ In his *Practicks*, for example, Balfour explains precarious possession in the following terms:⁴

Possessio precaria gevin be tolerance, may be revokit, stoppit, or interruptit be him that gave or grantit the samin, quhen and in quhat leasum maner he pleasis.

Precariousness is, however, a more nuanced concept than merely the express request and granting of permission. The leading case is *McGregor v Crieff Co-operative Society Limited*,⁵ which involved an access road whose use had been regulated by a predecessor of the landowner by means of a locked gate. In the Inner House, Lord Skerrington took the opportunity to object to the terminology normally used in cases involving the positive prescription of servitudes – in particular, the term “as of right”, which he saw as “inaccurate and misleading”:⁶

The question is put whether the use of a certain access was had by tolerance or whether it was as of right? I think the true question must always be whether the use was by tolerance—that is, by permission—or whether it was without permission.

³ In Roman law, *precarium* was essentially a revocable grant which allowed one party to enjoy another’s property gratuitously until permission was withdrawn by the owner, see Buckland, *Textbook*, 521-523; Kaser, *rPR 1*, §95 (388-389); M Kaser, “*Zur Geschichte des precarium*” (1972) 89 *ZSS(RA)* 95. See also *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at paras 57-65 per Lord Rodger, especially para 57: “however informal, the arrangement does involve a positive act of granting... as opposed to mere acquiescence in its use”. On *precarium* in Scots law, see Reid, *Property*, para 128. Cf. J Trayner, *Trayner’s Legal Maxims* (4th edn, 1894, reprinted 1993), “precarium”; George Watson, *Bell’s Dictionary and Digest of the Law of Scotland* (7th edn, 1890; reprint 2012), “precarium”.

⁴ Balfour, *Practicks*, 148, citing a case, 24 Julij, 1550, 1 t.c. 1120.

⁵ *McGregor v The Crieff Co-operative Society* 1915 SC(HL) 93.

⁶ *Ibid* at 100, note per Lord Skerrington.

When the case reached the House of Lords, however, both Lord Dunedin and Lord Sumner were quick to distance themselves from Lord Skerrington's remarks, Lord Dunedin in particular noting that,⁷

I really do deprecate the observation made by Lord Skerrington, that the expression "as of right" is misleading, and that the true question is whether the use "was by tolerance—that is, by permission—or whether it was without permission." With great deference, I think his substituted phrase is apt to be misleading—so apt that if a jury were charged in those words alone, without further explanation, that "by permission" includes tacit permission, and "without permission" means in assertion of right, I would not hesitate, on exception taken, to grant a new trial.

For Lord Dunedin, the important distinction was not, therefore, between possession which was "by permission" and that which was "without permission"; rather, it was between possession which was by permission – including tacit permission – and possession which was in assertion of right. This, however, raises an important question: what counts as "tacit permission"?

From the examples given by Lords Dunedin and Sumner in their speeches, and since both appear to have assumed that the absence of permission necessarily implies the assertion of a right, it seems clear that both would understand "tacit" or "implied" permission to include any objective "tolerance" imputed to a landowner on the basis that a hypothetical reasonable proprietor would have allowed such activity to continue.⁸ However, as has already been demonstrated above, it is better to say that any such *imputed* "tolerance" does not so much render possession "precarious" as show that it was not sufficient to bring home to the landowner that a right was being asserted in the first place. Recognising this, it is possible to reserve the concept of "implied permission" for situations in which the circumstances of the case suggest

⁷ *McGregor v The Crieff Co-operative Society* 1915 SC(HL) 93 at 103 per LP Dunedin. Similarly, at 107 per Lord Sumner: "I think that this proposition must be received with caution. If, 'without permission,' used in antithesis to 'by permission,' means in disregard or defiance of the want of permission, it may be right, but I do not see in that case why 'as of right' is wrong. If the party entering virtually says to the owner of the property entered, 'Here I am and here I stay; I do not care whether you permit me or not,' and he is neither ejected nor proceeded against, I think his user may be said to be 'as of right' ... Open unqualified user in ordinary course may well be deemed to be in fact adverse user as of right, when no more appears; but if the evidence suggests that it was after all due to tacit permission, the question must then be whether the user does, upon the whole case, establish the growing acquisition of a servitude right."

⁸ *Ibid* at 103, per Lord Dunedin: "persons go there knowing full well that they are tolerated but probably not one out of twenty has had an interview with the proprietor, or received a letter from him in which permission to go was accorded"; and at 107 per Lord Sumner.

that, even though no express permission was given, the resulting possession was nevertheless *dependent* on the will of the landowner. Such a conception of precariousness is therefore wider than that envisaged in the paradigm example of expressly revocable permission. Nevertheless, it still requires some additional factor to be present which indicates that the claimant's possession positively depends on the landowner's continuing permission and not simply on the landowner's inaction in the face of the asserted right. To phrase this in terms of the two steps outlined above, the question is always whether, once there has been objectively sufficient possession to indicate that a servitude is being asserted, the landowner can nevertheless show that the possession was expressly or impliedly permitted and therefore "by right" rather than "as if of right".

To illustrate this concept of precariousness, it is helpful to draw on terminology used in the case law, in particular the distinction made between implied permission (or "tolerance" in an active sense) and "acquiescence" (or "tolerance" in a passive sense). As has already been noted, this terminology is problematic, since "acquiescence" already has a technical meaning in the law of personal bar and since "acquiescence", even in a non-technical sense, is not actually *required* on the part of the landowner before prescription will run. Nevertheless, subject to these caveats, the distinction can be helpful in drawing out the juridical difference between the two situations: while implied permission renders possession precarious and can be withdrawn at any time, "acquiescence" is of no juridical effect in itself and can be best understood as a resignation to, and acceptance of, the fact that a servitude is being asserted. Whereas possession in the first case is *dependent* on the landowner's permission, possession in the second case takes place *regardless* of it.⁹ This distinction was articulated by the sheriff principal in *Neumann v Hutchison*.¹⁰

In my view these observations helpfully point to a distinction between permission, which is essentially a positive concept, and acquiescence, which is a negative one. In seeing the word tolerance as a synonym of permission one is more clearly pointed to

⁹ See also *Burrows v Lang* [1901] 2 Ch 502 at 510 per Farwell J; "What is precarious? That which depends, not on right, but on the will of another person."

¹⁰ *Neumann v Hutchison* 2008 GWD 16-297 at para 38 per Sheriff Principal Dunlop.

the need for something positive to be done in the face of apparently adverse use of a way whereas the word acquiescence points more to silence or inactivity.

When adapted to take account of the two-step process advocated in this thesis, this means that, once it is clear that a right is being asserted over the allegedly-servient tenement, inaction on the part of the landowner will always be interpreted as “acquiescence” unless some additional factor is present which suggests that possession was nevertheless dependent on the revocable permission of the landowner and therefore precarious.¹¹ Accordingly, while permission can be implied, it cannot be implied on the basis of simple inaction. What must be shown is “inaction plus”.¹²

That this is indeed the case can be demonstrated from *dicta* in a number of cases where an inactive landowner claimed to have impliedly permitted the claimant’s possession, despite being unable to point to anything which supported this claim. A particularly clear example is *Grierson v School Board of Sandsting and Aithsting*.¹³ In that case, Gilbert Williamson, Schoolmaster at Twatt in Shetland, had been in the habit of cutting peats on a part of the Aithsting scattald which was subsequently assigned to Mr Grierson when the scattald was divided in 1878.¹⁴ Although the parties were agreed that Williamson had already cut peats for the prescriptive period before the scattald was divided, Grierson sought to interdict him on the basis that

¹¹ While later public rights of way cases agree on this, earlier cases should be consulted with caution since some suggest that, provided there was no challenge to the public’s use, the landowner’s “tolerance” of it was clear. For example, *Mackintosh v Moir* (1871) 9 M 574 at 576 per Lord Deas: “the mere fact that he does not prevent other people passing along the same road or track goes very little way to infer a right of public road, so long as there has been no challenge, followed by perseverance...” Indeed, Lord Deas continued, “if the proprietor never prevented anybody at all from going, if he allowed everybody that pleased to go, looking upon it as an indulgence to them and no injury to him at all, there can be no question that there would be more tolerance, which of itself would not make a public road, for whatever length of time it might have endured.” Underlying this reasoning appears to have been a concern that allowing the public to acquire rights over land too easily would lead landowners to prevent any such usage from taking place in the first place and therefore injuring the public interest in the long run: *Ibid* at 576 per Lord Deas: “consequently nothing could be more detrimental to the interest of the public than to hold that mere tolerance for the prescriptive period was sufficient to establish a right of road.”

¹² See above at 163-165.

¹³ *Grierson v School Board of Sandsting & Aithsting* (1882) 9 R 437. On the conceptual significance of the decision in *Grierson*, see above at 65-66.

¹⁴ For Scattald, a type of common grazings found peculiarly in Shetland, see above at 105 n 76.

Williamson's possession should be attributed to "tolerance". Lord Rutherford Clark disagreed, stating that:¹⁵

A long continued and uninterrupted use is, I think, to be presumed to be in the exercise of a right, unless there is something either in its origin or otherwise to shew that it must be ascribed to tolerance. The pursuer cannot appeal to any circumstance which can construe the use into a mere tolerance. There is no fact in the case but the use only. It is said that it is not unlikely that the heritors were willing that the successive schoolmasters should have permission to cut peats as a favour. But it seems to be just as probable, if not more probable, that it was an addition to the benefice, and that the usage is the evidence of a grant, or in other words, as of right and not of tolerance.

In other words, where the claimant has demonstrated sufficient possession to indicate that a servitude is being asserted, it is not therefore sufficient for the landowner to suggest that "tolerance" or implied permission was an equally plausible explanation. Rather, the burden of proof has shifted and it is up to the landowner to produce evidence that such permission was actually given. That this should be seen as a general principle of the Scots understanding of precarious possession can be seen from a number of similar *dicta* in public rights of way cases. In *MacPherson v Scottish Rights of Way and Recreation Society*, for example, Lord Selborne remarked that:¹⁶

[where] the evidence is as great in quantity and as cogent in its effect as could be expected under the circumstances of the place and of the country if the right did exist ... it would be rather alarming if without evidence of some kind to counterbalance the impression so made the evidence were held insufficient, because it would follow from that that practically under such circumstances no amount of evidence at all would establish such a right.

¹⁵ *Grierson v School Board of Sandsting & Aithsting* (1882) 9 R 437 at 441-442. Lord Young, relying on an unusually literal understanding of the presumed grant theory (see above at 53-67), objected to Lord Rutherford Clark's reasoning and the idea that allowing the schoolmaster to cut peats on the commony should constitute a servitude in favour of the schoolmaster's residence. According to Lord Young, "I may very well allow my parish minister to cut peats in my peat moss, but the conclusion from my admission that he has done so would not be to establish a servitude in favour of the manse. Manses have passed from parish priests, and a parish church might pass into the possession of the Roman Catholics. The house in which the schoolmaster or minister has resided might pass to an occupant of a totally different class, and permission to one occupant of it who happens to hold a particular public position or office would not be a safe ground for concluding that a servitude had been created in favour of the tenement itself in which he resided", *ibid* at 442. Contra Lord Young, the moral of the story would appear to be that a landowner should always make clear to any occupiers of the manse in question that peat is being cut at the pleasure of the landowner and that permission could be revoked at any point.

¹⁶ *Macpherson v Scottish Rights of Way and Recreation Society Limited* (1888) 15 R (HL) 68 at 70 per Lord Selborne.

In his dissenting judgement in the Inner House, Lord Young has suggested that the public's possession was *consistent* with the idea that it had been *precario*.¹⁷ But, on the view taken by the House of Lords, this was irrelevant since the public's use had been such as to "call the attention of the proprietors and occupiers to the matter, and to lead either to interference or to definite permission if the thing were not of right".¹⁸ Lord Selborne concluded that there was no evidence of "leave or licence or tolerance and sufferance" and not the "least trace of its having been suggested or thought of by anybody".¹⁹

A similar approach was taken by Lord President Normand in *Marquis of Bute v McKirdy & McMillan*, where it was said in relation to a particular route that,²⁰

The question is rather whether, having regard to the sparseness of the population the user over the prescriptive period was in degree and quality such as might have been expected if the road had been an undisputed right of way. If the public user is of that degree and quality, the proprietor, who fails for the prescriptive period of possession to assert or put on record his right to exclude the public, must be taken to have remained inactive, not from tolerance, but because the public right could not have been successfully disputed or because he acquiesced in it.

Finally, in the more recent case of *Cumbernauld & Kilsyth District Council v Dollar Land*, Lord President Hope observed that,²¹

...where the user is of such amount and in such manner as would reasonably be regarded as being in the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance. If his position is to be that the user is by his leave and licence, he must do something to make the public aware of the fact so that they know that the route is being used by them only with his permission and not as of right.

¹⁷ *MacPherson v Scottish Rights of Way and Recreation Society Limited* (1887) 14 R 875 at 885-887 per Lord Young (dissenting).

¹⁸ *Macpherson v Scottish Rights of Way and Recreation Society Limited* (1888) 15 R (HL) 68 at 70-71.

¹⁹ *Ibid.*

²⁰ *Marquis of Bute v McKirdy & McMillan* 1937 SC 93 at 119-120 per LP Normand.

²¹ *Cumbernauld & Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SC 357 at 366 per LP Hope. Similarly, at 368: "It seems to me to be clear, on an examination of all the later authorities, that a proprietor who allows a way over his land to be used by the public in the way the public would be expected to use it if there was a public right of way cannot claim that that use must be ascribed to tolerance, if he did nothing to limit or regulate that use at any time during the prescriptive period". The case was aff'd 1993 SC (HL) 44 and the passage quoted in the main text above was cited with approval at 47 per Lord Jauncey.

Contrary to occasional suggestions found in the case law,²² the general approach of Scots law is therefore clear: where a claimant has demonstrated sufficient possession to indicate that a servitude is being asserted, he need not exclude the possibility that the possession was dependent on permission or “tolerance”; rather it is up to the landowner to produce evidence of such permission before the possession can be rendered “precarious”.²³ Such permission need not be expressly granted by the landowner but can also be implied from the circumstances. Accordingly, possession is “precarious” whenever it is dependent on the will of the landowner and not only where it is attributable to the landowner’s express permission. In practice, this means that, once possession has reached a level sufficient to indicate that a servitude is being asserted over the allegedly-servient tenement, simple inaction or “tolerance” on the landowner’s part will not be sufficient to render possession “precarious” – evidence of actual permission, express or implied, must be produced

(2) Some examples

It is now possible to consider some practical examples of circumstances which will suggest that possession is indeed dependent on the will of the landowner. As has already been said, the paradigm example of precarious possession occurs when a claimant has asked for, and received, express permission from the landowner to carry out certain activities on the allegedly-servient tenement – for example, to park his car on the verge of his neighbour’s drive, or to take a shortcut over his back garden when heading to the shops. In such cases, it is quite clear that permission has been given and that the behaviour depends on the will of the landowner; it is therefore “by right” and not “as if of right”. More complicated issues arise where no express request or grant can be shown but circumstances suggest that the possession is

²² E.g. *MacPherson* (1887) 14 R 875 (IH) at 885-887 per Lord Young (dissenting); *Middletweed v Murray* 1989 SLT 11 at 15 per Lord Davidson; *Nationwide Building Society v Walter D Allan Limited* unreported, 4 Aug 2004 (OH) at para 31 per Lady Smith.

²³ This also accords with the approach taken in English law, Gaunt & Morgan, *Gale on Easements*, para 4-115: “...user which is acquiesced in by the owner is ‘as of right’; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not ‘as of right’. Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence.”

nevertheless dependent on the continuing, though implied, permission of the landowner.

Perhaps the best example of possession impliedly dependent on the landowner's will is seen when the landowner maintains a measure of discretion over the claimant's access. The extent to which a servient proprietor is entitled to put up gates over an access road is a long-running issue in Scots law and a full exposition of the relevant law is outwith the scope of this chapter.²⁴ Suffice to say, it seems that landowners are entitled to erect gates across roads which are subject to servitudes and public rights of way at their own discretion, so long as these do not constitute a "material" inconvenience to the dominant proprietor or public.²⁵ Since a servitude-holder is entitled to allow visitors and others to use an access road on his behalf, any gate across such a road can only be locked subject to an agreement with the holders or a real condition in the deed of servitude.²⁶ By contrast, where the servitude is a right of pasturage or fuel, feal, and divot, the servitude-holder is not entitled to communicate this to third parties and the landowner is therefore entitled to lock the gate, so long as a key is furnished to the dominant proprietor.²⁷ The relevance of this for the establishment of servitudes by positive prescription is that, where a gate has been locked and no key provided – or a key has been provided in a manner which suggests that the provision depends on the "tolerance" or permission of the landowner – this will tend to suggest that the possession has been precarious and not "as if of right". Such a situation occurred in *Middletweed v Murray*.²⁸ In that case, the pursuers owned salmon fishings *ex adverso* to the allegedly-servient tenement and sought to establish that they had acquired a vehicular right of access over and above the pedestrian access implied by law as necessary to exercise their fishing rights.²⁹ It was, however, proved that vehicular access was taken through a locked gate, the key to which had been provided to the salmon fishers "as a privilege and not as a right",

²⁴ See *Cusine & Paisley*, paras 12.96-12.107.

²⁵ See *ibid*, para 12.98; *Sutherland v Thomson* (1876) 3 R 485 (public rights of way); *Wood v Robertson*, 9 Mar 1809 FC (servitude); *Drury v McGarvie* 1993 SC 95 (servitude).

²⁶ *Cusine & Paisley*, para 12.98.

²⁷ See *Cusine & Paisley*, para 12.99-100, where a number of other exceptions are given to the general rule.

²⁸ *Middletweed v Murray* 1989 SLT 11

²⁹ *Cf. Miller v Blair* (1825) 4 S 214.

and that the possession was therefore not “as if of right” but attributable to permission.³⁰ More obviously conclusive of precariousness will be situations where the claimant has to request a key each time he wishes to use the road.³¹ In *Lauder v MacColl*, it was held that, where a gate is capable of being locked but no regular practice of locking can be established, this will not suggest that possession by the public was precarious, even where the gate *may* have been locked occasionally.³² While Lord Coulsfield went on to say in *Lauder* that it was not necessary to decide whether a ritual locking of such a gate once a year would be sufficient to prevent a right of way from being established, the decision was not sympathetic to such a conclusion.³³ Finally, where the landowner locks and unlocks the gate without reference to any other party, and thus has complete control over the use of the land, possession is precarious and not “as if of right”.³⁴

Even where access is not physically controlled by the landowner by means of a key or other mechanism, the parties’ behaviour may indicate an awareness of precariousness on the part of the claimant or an acknowledgement of “right” on the part of the landowner. A recent example of is the unreported case of *Fowlie v Watson*.³⁵ The pursuer sought to interdict the defender from laying a new pipeline on

³⁰ *Middletweed* at 15 per Lord Davidson.

³¹ For example, the situation which predated the prescriptive period in *McGregor v Crieff Co-operative Society* 1915 SC(HL) 93

³² *Lauder v MacColl* 1993 SCLR 753.

³³ In particular, Lord Coulsfield suggested that such a rule is tied to the English requirement of a “real intention of dedicating the way to the public”, *Ibid* at 753.

³⁴ E.g. *Wallace v Police Commissioners of Dundee* (1875) 2 R 565, In this case, a door was inserted into one entrance of a close in Dundee, thus allowing the owner to open and close the entry at his pleasure. At first instance, the Lord Ordinary (Shand) acknowledged that the gate was often locked at night and sometimes during the day but his Lordship also noted that the close was used extensively, had continued for sixty years without permission being asked by anyone who used the close and that those using the close had regarded it as a use “of right”. Accordingly, “there was the clearest notice to the proprietor that the public were acquiring a right over the ground”, *ibid* at 567 per Lord Ordinary (Shand) note. This argument was, however, rejected by the majority in the Inner House, who reasoned that, since the only people who could use the close when the gate was locked were the proprietor and those tenants allowed a key by the proprietor, “the right of the proprietor was asserted from first to last, by the existence of the door, locked at pleasure by night and by day, as suited himself or herself, without regard to what did or did not suit the public.” Indeed, “every man, woman, and child who were challenged acquiesced in the challenge, and only returned when they saw an opportunity afforded by the door standing unlocked to suit the proprietor’s own exigencies and nobody on the outlook to interfere.”, *Ibid* at 579-580 per Lord Deas. See also Lord Moncreiff’s judgement at 586.

³⁵ *Fowlie v Watson*, unreported, 9 July 2013, Peterhead Sheriff Court. For a discussion of this case, see KGC Reid & GL Gretton, *Conveyancing 2015*, 14-16.

the pursuer's land; the defender responded by claiming that he had established a servitude by positive prescription. This argument was rejected by the sheriff, who accepted the pursuer's submissions that use of the water supply had originally been allowed in the interests of "cordial neighbourly relations" and that it was "entirely logical and understandable" that the pursuer would cease to tolerate the defender's usage when he ceased to make use of it himself.³⁶ Particularly decisive in the sheriff's reasoning was, firstly, the defender's failure to "engage with" British Gas when they carried out works which interfered with his water supply, and secondly, the defender's failure to assert his right when the pursuer indicated that the water supply was going to be switched off. Indeed, in both cases, the defender "did not do anything lawfully to assert his purported right".³⁷ Accordingly, the sheriff rejected the defender's plea and granted interdict.³⁸

Where the claimant fails to act in a manner consistent with his already having the alleged servitude, this will therefore suggest that possession was precarious and not "as if of right". Professors Reid and Gretton have expressed reservations about the decision in *Fowlie*, however, noting that while it might have been wise for the defender to protest against the termination of his water supply, doing so would have meant running the risk that his "bluff" would be called and his title challenged. Since this could have led to the conclusive defeat of his claim to the servitude, his reticence was therefore understandable and it may therefore have been "unfair to place much weight on the defender's failure to do so".³⁹ While such an objection has merit, the apparent unfairness must be balanced against the fact that, had the defender successfully protested against British Gas or the pursuer, this would have been seen as evidence of an assertion of right and therefore possession "as if of right"; by contrast, his failure to assert his right against the pursuer can be interpreted as an acknowledgement that no servitude yet existed. Since possession must continue for the whole prescriptive period before the law steps in to clothe it with legal

³⁶ Transcript, *ibid*, 44-45.

³⁷ Transcript, *ibid*, 45.

³⁸ Another reason for doing so was that the defender's possession had not been peaceable, see below at 235.

³⁹ KGC Reid & GL Gretton, *Conveyancing 2015*, 16.

protection, it should not be surprising that there will on occasion be situations where a claimant's possession is challenged and he must run the risk of continuing to act as if already entitled to the servitude in question or, alternatively, admitting that no servitude has yet been established. For this reason, the decision in *Fowlie* should be accepted as an accurate application of the concept of precarious possession.

A final example of precarious possession is where there is a pre-existing relationship between the claimant and landowner, especially a family connection. In such circumstances, this relationship may be seen as a better explanation of the claimant's behaviour than the apparent exercise of servitude. In *Grieg v Middleton*, for example, it was held that, where neighbouring houses were owned by close family members, "[there] will always be, in the absence of anything destroying or sufficiently weakening those family ties, a sufficient and strong enough explanation available to explain why possession has been allowed without resorting to establishment by right, no matter the volume and the length of the possession enjoyed."⁴⁰ This makes sense: while proprietors will generally agree to behaviour from family members which they would not accept from strangers, nevertheless, they still retain the right to prohibit family members if relations deteriorate. Accordingly, where there is a pre-existing family relationship between the claimant and landowner, this may be the only situation where possession will be presumed to be precarious without any other evidence being produced on the part of the landowner.

That said, where a family relationship has existed between the owners of the properties at some point in the past, this does not mean that this presumption of precariousness will continue to affect the current claimant's possession. For example, in *Rome v Hope Johnstone*,⁴¹ it was held that, where an access road had initially been used by the brother of the landowner in his capacity as tenant of the allegedly-dominant property (which belonged to a third party), this did not mean that

⁴⁰ *Greig v Middleton* 2009 GWD 22-365.

⁴¹ *Rome v Hope Johnstone* (1884) 11 R 653.

any possession by a third generation of tenants unrelated to the landowner would be seen as precarious. Lord Justice-Clerk Moncreiff had the following to say:⁴²

In these circumstances I should have found difficulty in avoiding the effect of a period of possession which may be called inveterate, even if there had been more reason to conclude that it probably had its origin in kindness and good will. Many rights which length of time has confirmed have had a similar source; but when the arrangement which might have been temporary at first is possessed by one generation after another, it may be too late to recur to the details of its commencement.

In other words, while a personal relationship, such as a family connection, might render possession precarious between those particular parties, this precariousness is linked to the relationship itself and the landowner's successors in title are unlikely to be able to rely on this as evidence that the possession remained precarious.

Indeed, two other factors in *Rome v Hope Johnston* suggested that, even in the context of a close relationship, the presumption of precariousness might not apply in certain circumstances: firstly, the two parts of the road crossing both tenements were “constructed simultaneously as portions of one thoroughfare”, implying – in the absence of opposing elements – “the contemplation of permanent, and not temporary or precarious use”; and, secondly, the road was, throughout the prescriptive period, the only possible access to the allegedly-dominant tenement for agricultural purposes.⁴³ Accordingly, as Lord McLaren had pointed out at first instance, if the use of the road had really been extended as a family privilege to the brother of the landowner, “it [was] unfortunate that Mr Stewart [the landowner] did not obtain from his brother, or from Mr Hope Johnstone [i.e. his brother's landlord], a letter of acknowledgement in writing that the road was used by them under his permission, and not as of right.”⁴⁴ Accordingly, while a family relationship is strongly suggestive of precariousness, this is not an absolute rule and circumstances can displace its application.

Another example of such circumstances can be seen in *Wall v Kerr*, where, regardless of the close family relationship between the pursuers and defenders, it was

⁴² *Ibid* at 657 per LJC Moncreiff

⁴³ *Ibid* at 657-678 per LJC Moncreiff.

⁴⁴ *Ibid* at 656, note per Lord Ordinary (McLaren).

clear from “the nature, quality and frequency of the use made of the disputed access ... that the disputed access was an integral part of the daily lives of the pursuers” for over twenty years. Accordingly, the evidence was clearly more consistent with the exercise of a servitude than possession dependent on a family relationship.⁴⁵

While no authority exists to this effect in Scots law, it has been suggested in a recent Louisianan Supreme Court case, *Boudreaux v Cummings*, that a close friendship between neighbours could render possession precarious even after it has continued for sixty years.⁴⁶ The case has proved controversial in Louisiana and a forceful dissent claimed that the majority decision “eviscerates the well-established burden-shifting structure” laid out in the Louisianan Civil Code by allowing the landowner to rely on a simple assertion of “neighbourliness” without providing any evidence that the possession was truly used by permission.⁴⁷ Given that Scots law is otherwise clear that sufficient possession by one neighbour must be met by proof of possession “by right” from the other neighbour, it seems likely that a Scottish court would be more likely to follow the dissent in *Boudreaux* than the majority. Accordingly, even when a landowner enjoys a close friendship with his neighbour, it is advisable for him to ensure that the neighbour is aware that any “possession” remains dependent on the will of the landowner.⁴⁸

On turning to circumstances which suggest that possession was *not* dependent on the landowner’s permission but was indeed “as if of right”, it seems clear that any deference on the part of the landowner towards the claimant’s possession (e.g. an acknowledgement that the landowner’s own behaviour is limited by the alleged servitude) would tend to suggest that the possession was taking place regardless of the landowner’s permission. An example is *Stuart v Symers*, where the parish

⁴⁵ *Eric Wall and Marion Wall (otherwise Marion Boylen or Gardner or Wall) v Kames Kerr and Kelly Kavanagh*, unreported, Airdrie Sheriff Court, 30 July 2015 (case ref A28/11) at paras 41 to 50. Indeed, while it was held that possession would have been “as if of right” if needed, the route was “reasonably necessary for the comfortable enjoyment” of the allegedly-dominant tenement and a servitude had therefore been created by implication on the initial division of the properties over thirty years before, *ibid* at para 33.

⁴⁶ *Boudreaux v Cummings*, 2014-1499 (La 5/5/2015) 167 So 3d 559. See also JA Lovett, “Precarious Possession” Louisiana LR (forthcoming).

⁴⁷ *Ibid* at para 568 per Knoll, J (dissenting).

⁴⁸ See text accompanying n 53 below; *Cusine & Paisley*, para 10.19.

minister's servants, when ploughing his glebe, were in the habit of leaving space for a path of a neighbouring farmer leading from his farm to the church and the minister ensured that the path was repaired when damaged by his servants.⁴⁹ A more recent example is the unreported case of *Abel v Shand*.⁵⁰ There, the claimant was seeking to have works done to a disputed access route and, having become frustrated with the landowner's refusal to carry these out, arranged to have these done directly. Significantly, the landowner did not contest the claimant's right to use the road but only the right to carry out works on it.⁵¹ The sheriff also noted that the claimant's husband was a "forceful (somewhat aggressive) man" who the sheriff did not doubt would have sought to vindicate his rights if challenged. This contrasted with the landowner, who despite claiming to have challenged the claimant's predecessor three or four times decided not to "take it to the law" in case he was seen as being "officious or making a noise".⁵² According to the sheriff, this was problematic since, by disporting himself in a courteous and gentlemanly fashion, he had failed to make his position clear to the claimant. As such, while the claimant's predecessor had asserted a right, the landowner had merely demurred in its use. This was insufficient to render possession precarious and the moral of the case appears to be the same as the general remarks made by Cusine and Paisley in their treatment of possession *nec precario*:⁵³

The moral for the "good neighbour" is to make it clear to his other neighbour that the use is being tolerated and that it may be exercised only at the will of the "good neighbour". If that is not done, and it would be better to reduce it to writing, there is a danger that long use which is not objected to by the "servient tenement" may flourish into a servitude right, especially where singular successors are concerned.

Finally, it should be noted that certain older public rights of way cases, such as *Napier's Trs v Morrison*,⁵⁴ suggested that, where a road's origin shows that it was intended for the private use of the landowner, no possession by the public could

⁴⁹ Court of Session, 6 December 1814, noticed in Hume, *Lectures*, vol 3, p 268.

⁵⁰ *Abel v Shand*, 4 December 1997, Stonehaven Sheriff Court, case ref A 264/95. The unextracted process (4 August 1998) for this case is available through the National Archives, CS348/1998/2727. The case is also discussed in Cusine & Paisley, paras 10.16-10.17.

⁵¹ *Abel* at 58-59 in Sheriff's note.

⁵² *Ibid* at 62.

⁵³ Cusine & Paisley, para 10.19.

⁵⁴ *Napier's Trs v Morrison* (1851) 13 D 1404.

establish a right of way in their favour. These decisions do not represent the current law and appear to have proceeded from an inappropriate adoption of the English idea of presumed dedication.⁵⁵ Furthermore, the reasoning followed in such cases is inconsistent with Lord Watson's confirmation in *Mann v Brodie* that the positive prescription of public rights of way "does not depend upon any legal fiction, but upon the fact of user by the public, as a matter of right, continuously and without interruption."⁵⁶ For this reason, caution must be exercised when referring to discussion of possession "as if of right" in earlier public rights of way cases.

B. Possession referable to an independent right

Possession which is dependent on the will of the landowner cannot be "as if of right" and will not lead to the establishment of a servitude by positive prescription. As was explained above, however, possession is equally "by right" (and not "as if of right") where it is explicable by any other right held independently by the claimant. This is a general principle of positive prescription and has traditionally been formulated as a requirement that possession be "unequivocally referable to the right claimed".⁵⁷ As was seen in the diagram on page 158 above, such rights can arise from private law (i.e. personal and real rights) or public law (i.e. rights held as a member of the public or as a member of a certain class of the public). The remainder of this chapter will examine each of these categories in turn.

⁵⁵ Indeed, the approach was rejected vehemently by Lord Cockburn (dissenting) at 1409, who remarked that he could "discern no authority for this principle in our law" and that "[a]s to the law of England, which was copiously quoted to us, I am not bound to understand it, and I really do not; and if I did understand it, I am bound to disregard it in the decision of a cause depending on the principles of the law of Scotland. I really wish we could imitate the example set us by the counsel and the judges of that kingdom, who decide their causes by their own rules and customs, without exposing themselves by referring to foreign systems, the very language of which they do not comprehend. The law of England, or rather what is fancied to be so, is quoted oftener in the Court of Session every day, than the law of Scotland, in which I acknowledge no inferiority, is quoted in all the English courts in twenty years. Neither Stair nor Erskine found this necessary. A party in a strictly Scotch cause rarely turns aside to pay his addresses to the law of England, unless when he feels that the law of Scotland rejects his suit."

⁵⁶ *Mann v Brodie* (1885) 12 R (HL) 52 at 57 per Lord Watson.

⁵⁷ E.g. *Houston v Barr* 1911 SC 134 at 143 per Lord Dundas: "Now, it seems to me that all the alleged acts of possession were at least quite as referable to the right of tenancy of the fields as to that of ownership in the feu... The possession, to avail the defender, must have been not only continuous, but clearly and unequivocally referable to his title of ownership".

(1) Personal Rights

The primary difference between precarious possession and possession referable to a non-revocable personal right is that, whereas one is precarious and revocable at the whim of the landowner, the other can be enforced by the other party and cannot be brought to an end unilaterally, or at least not without exposing the landowner to a claim for damages.⁵⁸ While the most common example of such a personal right would be a contract between the claimant and the landowner, it is conceivable that an entitlement to use the land could result from a unilateral promise made by the landowner or from a *jus quaesitum tertio* arising from a contract between the landowner and a third party. Where the claimant's behaviour *could* be explained by any of these, his possession will be "by right" and not "as if of right".

As with precarious possession, the existence of a personal right may be inferred from the circumstances of the case. For example, where the claimant has made payments to the landowner during the prescriptive period, this will generally be understood as evidence that a contract exists and that the claimant's possession was "by right".

This is because, even though some servitudes make provision for annual payment, such payment is more likely to be referable to a contract than a servitude.⁵⁹ An early example is *Dalzell v Laird of Tinwall* (1672),⁶⁰ where it was held that the annual payment by Tinwall's tenants of three "moss-fowls out of each half-merk land" to Dalzell was sufficient to exclude Tinwall's claim to have constituted a servitude by possession, "the tenants who acquired the possession having paid the moss-fowls."⁶¹ This was despite the fact that Tinwall's tenants claimed only to have paid the moss-fowls to Dalzell as a "great [i.e. powerful] man" and friend of their landlord.

⁵⁸ Reid & Gretton, *Conveyancing 2008*, 106: "[T]he difference between possession by 'toleration' and possession by 'contract' is slight. It is merely that, in the first case but not (usually) the second the landowner can bring the arrangement to an end as and when he wants".

⁵⁹ On servitudes which make provision for payment, see Cusine & Paisley, paras 5.12-5.18.

⁶⁰ *Dalzell v Laird of Tinwall* (1673) B Supp II 172.

⁶¹ *Ibid* at 176

That such payment need not be made expressly as consideration for use of the land was confirmed in *Campbell v Duke of Argyle*.⁶² There, a tenant of the Duke of Argyle had formed a canal from his own land through land belonging to an intervening proprietor, and leading to the port at Campeltown. On the expiry of the tenant's lease, the Duke of Argyle adopted the canal and continued to use it throughout the remainder of the prescriptive period. Significantly, the original tenant – and later the Duke himself – had paid annual “damages” to the tenants of the intervening proprietor throughout this time. When an action of removal was brought against the Duke a number of decades later, it became necessary to determine whether the Duke had acquired a right of servitude over the land or whether his possession was referable instead to an annual licence. The Duke's claim was eventually dismissed on the basis that the landowner had been a minor for part of the prescriptive period and therefore protected from the operation of positive prescription under the law as it then stood. Nevertheless, even had the full prescriptive period been allowed to run, it seems clear from Lord Jeffrey's opinion in the Outer House that the yearly “damages” paid by the Duke would have prevented the possession from being “as if of right”. According to Lord Jeffrey,⁶³

the annual payments which the defender (or his tenants) had uniformly made, very plainly for the use of the ground occupied by the canal... are inconsistent with his right to the possession being any other than the right of a tenant.

In response to the Duke's argument that it would be absurd to suppose that someone “would lay out such a large sum in constructing a canal, upon so precarious a right, as a verbal, and consequently annual, lease of the ground”, Lord Jeffrey countered that,

where neighbours are on good terms, and there is both a desire to oblige and a common interest to keep the work going, instances are to be met with of a rash and exuberant reliance on the result.

⁶² *Campbell v Duke of Argyle* (1836) 14 S 798.

⁶³ *Ibid* at 802, note, per Lord Ordinary (Jeffrey).

As such, even though no written document existed to prove that the “damages” were paid as rent for use of the land, the fact that this was the probable interpretation of the payments rendered the possession “by right” rather than “as if of right”.⁶⁴

A final example of the inferences which may be drawn from unexplained payments of money is found in the English case of *Gardner v Hodgson's Kingston Brewery*.⁶⁵ The facts were relatively simple. For over seventy years, the plaintiff and her predecessors had accessed their stables through a yard belonging to a neighbouring inn. For the majority of that period, it was proved that an annual sum of fifteen shillings had been paid to the inn's owner or occupier. While the plaintiff claimed that this payment was either for repairs to the yard or a “perpetual payment” attached to a previous grant of an easement, the defendant claimed it had been paid as rent for use of the road. Interestingly, though the House of Lords held unanimously that an easement had not been established by prescription, the reasons given for this decision differed. On the one hand, Lords Halsbury and Macnaghten held it to be self-evident that the payment was for permission to use the road.⁶⁶ On the other hand, Lords Ashborne, Davey, and Lindley considered that the annual payment had been “in the absence of direct evidence ... consistent with inferences which [had] been drawn by both sides”;⁶⁷ “of an ambiguous character, and capable of either explanation”;⁶⁸ and “equally open to explanation in one of two ways”.⁶⁹ Accordingly, the majority held that because the sum could plausibly have been paid either as rent for the use of the road or as a perpetual payment tied to an original grant, it was up to the plaintiff to prove that the latter was true.⁷⁰ It is admittedly difficult to reconcile this aspect of the majority's reasoning with the approach to

⁶⁴ In addition, Lord Jeffrey found it significant that “when... the word damages had been first written, it appears that the word rent [was] anxiously added and interlined before the receipt [was] given up to the defender, *ibid*.”

⁶⁵ *Gardner v Hodgson's Kingston Brewery* [1903] AC 229.

⁶⁶ *Ibid* at 231 per Earl of Halsbury, LC and 234-235 per Lord Macnaghten.

⁶⁷ *Ibid* at 232 per Lord Ashbourne.

⁶⁸ *Ibid* at 238 per Lord Davey.

⁶⁹ *Ibid* at 239 per Lord Lindley.

⁷⁰ I.e., “if the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established”, *Ibid*.

burdens of proof outlined above⁷¹ and adopted in more recent English case law.⁷² Nevertheless, it seems significant that each judge in the majority would have been prepared to find in favour of the plaintiff *but for* the existence of the annual payment. In this respect, the result reached in *Gardner* is consistent with the trajectory established in *Dalzell v Tinwall* and *Campbell v Duke of Argyle* and supports the general proposition that, whenever a landowner can show that payment has been made by the claimant in connection with behaviour which is now claimed to have taken place in assertion of a servitude, such payment will be viewed as evidence that possession was referable to an existing personal right unless the claimant can show that payments were made for another reason.

(2) Real Rights

Just as personal rights between the claimant and the landowner will render the claimant's possession "by right" rather than "as if of right", so possession cannot qualify as prescriptive where the claimant is already entitled to it by virtue of another real right, such as ownership, lease, or life interest. This will render the possession "by right" regardless of which right the claimant *thought* he was exercising. This is because a landowner is entitled to assume that, where another right is available to explain the claimant's possession, then the possession is referable to that other right and nothing need therefore be done to prevent a servitude from being established by prescription. Accordingly, as Lars van Vliet has noted in relation to the acquisitive prescription of servitudes in Dutch law, the relevant question is always whether the landowner should have expected the burdening of his land by a servitude.⁷³

⁷¹ I.e. that, once a claimant has demonstrated sufficient possession to indicate that a servitude is being asserted, the burden shifts and it is then up to the landowner to show why the possession was not "as if of right" after all, see above at 165-167 and 170-176.

⁷² E.g. *Redcar* [2010] 2 AC 70 at para 30 per Lord Walker, subsequently cited in *R (Barkas) v North Yorkshire Council* [2014] AC 195 at para 16 per Lord Neuberger and at para 65 per Lord Carnwath; and, noting Lord Carnwath's adoption of the proposition, *R (Newhaven Port & Properties Ltd) v East Sussex CC* [2015] AC 1547 at para 70 per Lord Neuberger and Lord Hodge.

⁷³ LPW van Vliet, "Acquisition of Servitudes by Prescription in Dutch Law", in S van Erp and B Akkermans (eds), *Towards a Unified System of Land Burdens* (2006), 58.

An early, but unsuccessful, attempt to have a claimant's possession attributed to a lease rather than the asserted servitude is found in *Grant v Grant*.⁷⁴ In that case, the landowner produced an old lease document and pursued the claimant for rent in respect of the area of land over which a servitude of pasturage was now claimed. It was held that the possession could not be referable to the old lease, since rent had not been paid for forty years but the right of pasturage had been exercised throughout that period. This can be contrasted with the situation in *Macdonald v Macdonald*, where a tenant of two farms on South Uist bought one of the farms but continued as tenant of the other.⁷⁵ Throughout the remainder of the lease, seaware was taken from the rented farm to use on the farm which was now owned outright. When the erstwhile tenant attempted to continue taking seaware after the expiry of the lease, the landowner argued successfully that, since "the possession had been solely attributable to the lease, no right of servitude [could] attach".⁷⁶

Illustrative examples can also be drawn from cases concerning the positive prescription of ownership, such as *Houston v Barr*, where the prescriptive claimant's possession could just as easily be attributed to his tenancy of the field in question as to a right of ownership.⁷⁷ Another example which more closely concerns servitudes is the recent case of *Campbell-Gray v Keeper of the Registers of Scotland*, in which it was claimed that a party had acquired ownership of the verge of a road through prescriptive possession.⁷⁸ The Lands Tribunal, however, concluded that, while the party's acts of possession were indeed consistent with ownership, they were also consistent with the party's existing rights of servitude. As such, the Tribunal was not satisfied that the other party "could reasonably have been aware that the various appellant's activities were unequivocally referable to an assertion of ownership" and the claim failed.⁷⁹

⁷⁴ *Grant v Grant* (1677) Mor 10877.

⁷⁵ *Macdonald v Macdonald* (1801) 4 Paton 237.

⁷⁶ *Ibid* at 241.

⁷⁷ *Houston v Barr* 1910 SC 134.

⁷⁸ *Campbell-Gray v Keeper of the Registers of Scotland* 2015 SLT (Lands Tr) 147 at paras 53-55.

⁷⁹ *Ibid*.

Where it can be shown that both properties were owned by the same person at some point during the prescriptive period, the maxim *res sua nemini servit* will apply and any servitude-like behaviour which took place prior to division cannot be taken into account for the purposes of prescription.⁸⁰ A narrow exception is, however, admitted where it can be shown that the properties were held in different capacities. An example is *Grierson v Sandsting & Aithsting School Board*, already discussed above.⁸¹ Since the schoolhouse in that case was owned by heritors who had previously had a right of common property in the scattald over which the servitude was claimed, it was argued that the principle of *res sua nemini servit* applied and that no servitude had been established. This argument was, however, rejected by Lord Rutherford Clark, who found that the heritors had held the two pieces of land in different capacities, one on their own behalf and one as a school board.⁸²

Where possession is referable to ownership of the allegedly-servient tenement, it will therefore be excluded. But what about possession which is properly attributable to ownership of the allegedly-dominant tenement? The prime example of such possession would arise where the allegedly-dominant tenement is landlocked and the claimant is exercising an access right of necessity like that seen in *Bowers v Kennedy*.⁸³ That such exercise would be “by right” rather than “as if of right” arguably follows from its characterisation as an incident of ownership and, as such,

⁸⁰ *Robert White of Bennoch v Bogie-Bennoch* (1700) Mor 10881 appears at first to be an exception to this rule, since prescription was held to have run its course only 28 years after the two properties had been divided. However, as was suggested above at 37 n 55, this case possibly represents some nascent form of creation by implied grant.

⁸¹ *Grierson v School Board of Sandsting & Aithsting* (1882) 9 R 437; see also above at 65-66 and 169.

⁸² *Ibid* at 441. The sheriff-substitute (Rampini) and sheriff (Thoms) had reached the same result by different reasoning. According to them, though the principle of *res sua nemini servit* would usually apply, an analogy should be drawn between the parish schoolmaster and a parish minister, the latter of whom was entitled to a servitude right of pasturage, fuel, feal, and divot, which prescribed in favour of his benefice rather than any particular dominant tenement. The authority for this was given as Erskine, *Institute*, 2.9.5. It appears from contemporary accounts that Thoms was known personally to the Grierson family, making regular visits to their house and bringing sweets for Grierson’s children. This generous nature appears to have made little impression on Grierson’s son, who was willing to testify to the sheriff’s eccentricity as “verging on insanity” during Thoms’s family’s attempt to challenge his testament which had left most of his considerable estate to the renovation of St Magnus Cathedral in Kirkwall, PJ Sutherland, *Mirth, Madness & St Magnus and the eccentric Sheriff Thoms* (2013), 31-32, 45. A similarly generous donation of a portrait to be hung in Lerwick Sheriff Court depicting Thoms as Magnus Troil – a fictional Shetland landowner from Sir Walter Scott’s *the Pirate* (1822) – appears to have been met with similar ingratitude, *ibid*, 15, 24 and 63.

⁸³ *Bowers v Kennedy* 2000 SC 555; cf. *Inverness Seafield Development Co v Mackenzie* 2001 SC 406.

res merae facultatis.⁸⁴ If so, access taken on the basis of such a right should arguably be excluded from leading to the establishment of a *servitude* right of way until an alternative access right becomes available and the residual access right is no longer being exercised out of necessity.⁸⁵ In fact, this is unlikely to be the case and, if anything, the lack of an alternative access route will tend to support a claimant's position that possession has been in assertion of a *servitude*.⁸⁶ This is of obvious practical importance since, otherwise, access taken by necessity could never in itself lead to the establishment of a *servitude* by prescription.

One final point should be noted. Not only must the possession not be attributable to an independent real right which the claimant already holds. In addition, as Lord Jeffrey pointed out in *Beaumont v Lord Glenlyon*, it must be consistent with the nature of a *servitude* and not only with the assertion of a different real right, "for the party must prove possession *as a servitude*, and guard himself against the objection that he is attempting to prove possession as proprietor."⁸⁷ In *Beaumont*, for example, it was necessary to prove that the "animals pastured on the disputed ground did truly belong to the dominant tenement" and not to another property. This was because Beaumont claimed to have established a right of exclusive pasturage over the land and such extensive possession without reference to a dominant tenement would have been consistent only with an assertion of ownership and not assertion of a *servitude*.

⁸⁴ On the juridical nature of the right in *Bowers v Kennedy*, see Cusine & Paisley, paras 11.19-11.36; RRM Paisley, "Bower of Bliss" (2002) 6 Edin LR 101; RRM Paisley, "Real Rights: Practical Problems and Dogmatic Rigidity" (2005) 9 Edin LR 267 at 280. See also D Cabrelli, "The landlocked proprietor's right of access" 2001 SLT (News) 25. On the wider concept of *res merae facultatis*, see Johnston, *Prescription*, paras 3.07-3.18 and 19.07; DJ Cusine, "*Res Merae Facultatis*: Through a Glass Darkly", in McCarthy et al, *Essays in Honour of Professor Rennie*.

⁸⁵ That the right of necessity is no longer exercisable once an alternative access route becomes available is clear from *Inverness Seafield Development Co v Mackenzie* 2001 SC 406 at para 19.

⁸⁶ See *Carstairs v Spence* 1924 SC 380 at 388-389 per LP Clyde and at 391 per Lord Skerrington. In that case, the only route which allowed access by cart from the public road was that over which the claimant asserted a *servitude*. Both judges refer to *Rome v Hope Johnstone* (1884) 11 R 653 at 658 per LJC Moncreiff which involved a similar scenario. Significantly, all three judges cite a passage of *Stair* (*Stair*, 2.7.10) which was also cited by the First Division in *Bowers v Kennedy* at para 13.

⁸⁷ *Beaumont v Lord Glenlyon* (1843) 5 D 1337 at 1343 per Lord Jeffrey. Note, however, that possession which is consistent with *both* assertion of a *servitude* and assertion of another real right, such as ownership, is not in itself problematic; see the next paragraph, the discussion of the division of commonies cases above at 99-107 and, in addition, *Breadalbane v Menzies of Culdares*, 30 March 1738, House of Lords, where it was held that the Respondents' previous assertion of ownership of certain lands would not prevent him from insisting on a right of *servitude* before the Court of Session.

A practical difficulty in such cases is that the claimant's possession might be consistent with the exercise of more than one type of real right - for example, where sheep are being grazed on a piece of land which is only really profitable for grazing, or access is being taken across a small strip of land which is only really useful for access. In such situations, the mere fact that a claimant's behaviour is consistent with either ownership or servitude does not prevent the possession from being "as if of right" for the purpose of acquiring a servitude. Rather, so long as the claimant's possession is consistent with the assertion of a servitude, the fact that it could also qualify as possession consistent with the assertion of a right of ownership is irrelevant.⁸⁸ This makes sense from a policy perspective, since possession will be sufficient to indicate to the landowner that some sort of right is being asserted (our step 1) but the landowner will not be entitled to assume that possession is attributable to another already-established right, since no such right yet exists.

(3) Public Rights

Where the claimant is entitled to use the allegedly-servient tenement on the basis of a pre-existing personal or real right, his possession will therefore be "by right" rather than "as if of right". But an entitlement to use the property may not only be attributable to an independent patrimonial right held by the claimant; it might also be attributable to any right which benefits him as a member of the public or as a member of a certain section of the public. Since there are many public rights, both common law and statutory, which might entitle a claimant to make use of land belonging to someone else, only some particular examples can be given in the following paragraphs. The remainder of this chapter will therefore discuss a number of illustrative examples from the category of public rights before focusing on one

⁸⁸ See discussion of cases involving divisions of commonties at 98-104 above; cf. *Hepburn v Duke of Gordon* (1823) 2 S 525; *Spence v Earl of Zetland* (1839) 1 D 415; *Gordon v Grant* (1850) 13 D 1; *Carnegie v MacTier* (1844) 6 D 1381. Under the Sasine system descriptions in title could be ambiguous and in particular cases could be interpreted as constituting a servitude or transferring a property right. If such deeds were *a non domino*, an issue could arise as to whether subsequent prescriptive possession constituted a servitude or a property right. While such scenarios are less common under the modern land registration system, at least two rectification cases in recent years, although not involving prescriptive possession as such, have involved possession which was equally consistent with ownership or a servitude: *Rivendale v Keeper of the Registers of Scotland* [2015] CSIH 27, 2015 SC 558 at para 32; *Campbell-Gray v Keeper of the Registers of Scotland* 2015 SLT (Lands Tr) 147 at paras 53-56.

particular case: the statutory access rights introduced under section 1 of the Land Reform (Scotland) Act 2003 (“statutory access rights”). Since no case law yet exists on the interface between these rights and the positive prescription of servitudes, reference will be made to recent English cases involving the registration of town or village greens.

(a) *Examples of public rights*

While there has been little analysis of the connection between public rights to use land and the establishment of servitudes by positive prescription, the general principle is clear: where a claimant’s possession could be attributed to a right which benefits him as a member of the public or of a certain section of the public, prescription will be excluded. An example is *Cameron & Gunn v Ainslie*,⁸⁹ where certain fisherman claimed to have established a servitude of drawing up their boats and drying their nets on an uncultivated piece of land belonging to the defender. When the defender pointed out that their behaviour could just as easily be ascribed to an Act which allowed “all persons engaged in the fisheries ... to use all shores below the highest water-mark, and for a hundred yards of any waste ground beyond it, for landing their nets and erecting tents”,⁹⁰ the pursuers insisted that “it could not be assumed beforehand that the possession had, was under it” and that “that point must be established by proof”.⁹¹ The pursuers’ reply was rejected by Lord Jeffrey on the grounds that the pursuers were bound to ascribe their possession to the “most patent” title – in this case the statute.⁹²

As far as servitudes of way are concerned, it seems clear that, where a claimant has taken access by means of a route which forms part of a public right of way, his possession will be “by right” and not “as if of right”. This was recently confirmed by the Inner House in *Livingstone of Bachuil v Paine*, where a croft had been accessed by means of a route which had previously been subject to a public right of way.⁹³

⁸⁹ *Cameron & Gunn v Ainslie* (1848) 10 D 446.

⁹⁰ Fisheries (Scotland) Act 1756 (29th Geo II., c23, §2).

⁹¹ *Cameron & Gunn* at 449.

⁹² *Ibid.*

⁹³ *Livingstone of Bachuil v Paine* [2013] CSIH 110, 2014 GWD 2-40.

Drawing on earlier case law, an Extra Division of the Inner House noted that, while use of a public right of way can co-exist with the use of a private right of road over all or part of its route, this does not mean that, when the public right ceases to be used from end to end, any previous access to the allegedly-dominant tenement can be attributed to a private right of servitude.⁹⁴ This is because, once a public road has been established between two public places, individual members of the public are entitled to access their own land at different points along it.⁹⁵ Any such possession, being attributable to the public right of way, is therefore be “by right” rather than “as if of right”.⁹⁶ In addition, use of any public road created by a developer or government body cannot be “as if of right” since the public’s use will be attributable to public law rather than a right of servitude.⁹⁷

(b) Access Rights under the Land Reform (Scotland) Act 2003

It is likely that the interaction between public rights and the establishment of servitudes by prescription will become more prominent in future as a result of the wide-ranging access rights introduced by section 1 of the Land Reform (Scotland) Act 2003 (“statutory access rights”). These rights have created a new default position in Scotland whereby “everyone” has the right to be on land for recreational and educational purposes⁹⁸ and to cross land for the purpose of getting from one place to another.⁹⁹ In turn, this raises an important question: how do these wide-ranging access rights interact with the ability to acquire more particular servitude rights over land by the operation of positive prescription?

⁹⁴ *Ibid* at para 28.

⁹⁵ *McRobert v Reid* 1914 SC 633 at 638-640 per LP Strathclyde and at 646-649 per Lord Skerrington; *Lord Burton v Mackay* 1995 SLT 507 at 509-510 per Lord Coulsfield; cf. Russell, *Prescription*, 56-57.

⁹⁶ Where the public right of way has ceased to run from one public terminus to another, it seems certain that members of the public who have previously accessed their properties by means of this route are entitled to continue doing so, *Lord Burton* at 509-510 per Lord Coulsfield, who reserved opinion as to whether this access is taken under some form of residual public right or as a private right of access.

⁹⁷ Cf. Gretton & Steven, *PTS*, para 18.23, who suggest that such use would be attributable to the consent of the developer or government body concerned.

⁹⁸ Land Reform (Scotland) Act 2003, s1(2)(a) and s1(3)(a)-(b). Statutory access rights can also be used for “the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit”, s1(3)(c).

⁹⁹ *Ibid*, s1(2)(b) and s1(4)(b).

Section 5(5) of the 2003 Act states that,¹⁰⁰

The exercise of access rights does not *of itself* amount to the exercise or possession of any right for the purpose of any enactment or rule of law relating to the circumstances in which a right of way or servitude or right of public navigation may be constituted.

This means that the exercise of access rights is not sufficient in and of itself to amount to possession of a servitude “as if of right”. But could behaviour exercise of the statutory access rights *ever* be “as if of right” and available for positive prescription? Given the extensive area over which the statutory access rights are applicable, this is a question of great practical import. As of yet, however, there has been no judicial discussion of the interaction between prescriptive possession and the statutory access rights. Professor Paisley has discussed the issue in relation to the creation of public rights of way and suggests that it is indeed the case that possession which *could* be referable to the exercise of statutory access rights cannot normally be “as if of right” for the purposes of positive prescription:¹⁰¹

... by a strange irony, the existence of the new statutory access rights may make it more difficult to establish a new public right of way by prescriptive exercise, i.e. use as of right for at least 20 years. This is because it is provided in the 2003 Act that the exercise of the statutory access rights does not, of itself, amount to the exercise of possession of any right for the purpose of any enactment or rule of law relating to the circumstances in which a right of way may be constituted. In other words, use of the statutory access rights will not normally count towards use of a route for the prescriptive period of 20 years necessary to create a right of way.

This seems correct, and the reasoning extends equally to servitude rights of access. Nevertheless, for servitudes, this is a narrower issue than for public rights of way since the content of servitudes is much more varied and many servitudes which allow their holder to do something on, or take something from, the land (e.g. rights of grazing, aqueduct, *aquaehustus*, or fuel, feal and divot) do not fall under the statutory access rights. Conversely, the majority of recreational and educational activities which are permitted to be carried out on land under the 2003 Act will not be capable of constitution as praedial servitudes, since they offer no praedial benefit to any dominant tenement. In most cases, the servitudes whose establishment might

¹⁰⁰ My emphasis.

¹⁰¹ Paisley, *Access Rights*, 9; cf. Gretton & Steven, *PTS*, para 18.19.

be affected by interaction with statutory access rights will be servitude rights of access. Furthermore, even the public right to “cross” land under section 1(2)(b) is limited to access by non-mechanised means and will not therefore interfere with the establishment of rights of vehicular access or servitudes of parking. Accordingly, the most likely type of servitude to be affected by the 2003 Act will be servitude rights of access by non-mechanised means – i.e. by foot, horse, or bicycle. Finally, many of the places where such rights are most likely to be constituted as servitudes may be land excluded under section 6 of the 2003 Act, for example, the curtilage of a building,¹⁰² land which “comprises [in relation to a house] sufficient adjacent land to enable persons living there to have reasonable measures of privacy in that house or place and to ensure that their enjoyment of that house or place is not unreasonably disturbed”,¹⁰³ or private gardens to which two persons have rights in common.¹⁰⁴ It is therefore possible to overestimate the extent to which the positive prescription of servitudes will be affected by the statutory access rights introduced by the 2003 Act.

Nevertheless, even taking all of these exemptions into account, there could still be a significant number of situations in which people are on land “by right” under the 2003 Act and therefore “normally” unable to acquire a servitude of access over that land. In this respect, Professor Paisley goes on to note that,¹⁰⁵

[b]y contrast, where the public openly use a route passing through land *excluded* from access rights, they will be assumed to be doing so as of right, and this may also assist in determining the quality of the right being exercised through land which is not excluded.

Though this issue has not yet been discussed judicially, where access is taken across excluded land in such a way that it is dependent on access across non-excluded land, it is therefore plausible that a court would view such possession as an indivisible whole and not referable to the statutory access rights but rather to the asserted servitude. Where, however, the access is taken entirely over land which is not excluded from access rights under section 6, it is unlikely to be possible to establish

¹⁰² 2003 Act, s6(1)(b)(i).

¹⁰³ *Ibid.*, s6(1)(b)(iv)

¹⁰⁴ *Ibid.*, s6(1)(c).

¹⁰⁵ Paisley, *Access Rights*, 9.

a servitude by positive prescription, since access will always be “by right” rather than “as if of right”. Such a conclusion is supported by recent English case law concerning applications to register town or village greens under section 15 of the Commons Act 2006.

(c) Lessons from the English “town or village green” cases

Since its introduction to English law by the Prescription Act 1832, the term “as of right” has been adapted for use in a number of other statutes which enable particular persons, or groups of persons, to establish private or public rights by prescription.¹⁰⁶ Of these statutes, the Commons Act 2006 and its statutory predecessors have been particularly prominent in recent years, leading some English commentators to speak disparagingly of a “village green industry”.¹⁰⁷ For present purposes, two aspects of the 2006 Act are particularly significant. The first is that section 15(2) and (4) of the Act allows a person to have land registered as a town or village green, where “a significant number of the inhabitants of any locality ... have indulged *as of right* in lawful sports and pastimes on the land for a period of at least 20 years.”¹⁰⁸ The second is that there have been a number of cases where local authorities have rejected applications for registration on the grounds that the public’s use of the land was referable to another statutory basis – i.e., their indulgence in sports and pastimes had not been “as of right” but “by right”. Though these rights are, of course, more limited and local in scope than the access rights granted under the Land Reform (Scotland) Act 2003, the resultant litigation has produced a number of judgements which have explored the interaction between public recreational rights and prescriptive possession to an extent not yet witnessed in Scots law. Of particular interest are two recent Supreme Court cases: *R (Barkas) v North Yorkshire*

¹⁰⁶ On the relationship between these usages, see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 at 349-356 per Lord Hoffmann.

¹⁰⁷ As Lord Walker notes in his judgement in *R (Lewis) Redcar & Cleveland BC (No.2)* [2010] AC 70 at para 41. Cf. R Meager, “The ‘village green industry’: back in business” (2010) 69 CLJ 238, citing Lord Walker in *Redcar* at para 48; R Meager, “A setback for the ‘village green industry’?” (2009) 68 CLJ 281.

¹⁰⁸ Commons Act 2006, s15(2) and (4), italics added. S15(2) concerns activities which have continued up until the time of application, while s15(4) concerns activities which had ceased less than 5 years before the date of application.

*Council*¹⁰⁹ and *R (Newhaven Port & Properties Ltd) v East Sussex County Council*.¹¹⁰

The first of these cases, *Barkas*, involved a field bought by North Yorkshire County Council in 1951 as part of a larger area purchased for the purposes of building social housing. Though the majority of this area was built on, as intended, this particular field had been “laid out and maintained as recreation grounds” under section 80(1) of the Housing Act 1936, predecessor to section 12(1) of the Housing Act 1985. These sections permitted a local housing authority to

“...provide and maintain in connection with housing accommodation provided by them... (b) recreation grounds... which, in the opinion of the Secretary of State,¹¹¹ will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided.”

Over the following fifty years, the land was used “extensively and openly” by local inhabitants from three neighbouring residential estates for “informal recreation, largely, but not exclusively, for children playing and walking dogs.”¹¹² But, when the local neighbourhood council sought to register the land as a town or village green, the County Council rejected the application on the basis of an inquiry which had concluded that the use had been “by right” rather than “as of right”.¹¹³ On appeal, the question facing the Supreme Court was whether recreational use of land provided for public use under s12(1) of the 1985 Act or its statutory predecessors could be “as of right” under section 15(2) of the 2006 Act: if so, the field should be registered as a town or village green; if not, the use would be “by right” and no registration could take place.

According to Lord Neuberger, the Council was correct to argue that, since the field had always been held for public recreation purposes, the public had always had a

¹⁰⁹ *R (Barkas) v North Yorkshire Council* [2014] UKSC 31, [2015] AC 195.

¹¹⁰ *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] UKSC 7, [2015] AC 1547.

¹¹¹ The 1936 Act had “the minister”, *Barkas* at 204 per Lord Neuberger.

¹¹² *Barkas* at para 7 per Lord Neuberger.

¹¹³ *Ibid* at para 10 per Lord Neuberger. The inquiry was conducted by Vivian Chapman QC.

statutory right to use it. Accordingly, their use had always been “by right” and not “as of right”:¹¹⁴

In my judgement, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land “by right” and not as trespassers, so that no user “as of right” can arise [...] In the present case, it is, I think, plain that a reasonable local authority in the position of the council would have regarded the presence of members of the public ... as being pursuant to their statutory right to be on the land and to use it for these activities, given that the field was being held and maintained by the council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.

Lord Neuberger continued:¹¹⁵

The basic point is that members of the public are entitled to go onto and use the land – provided they use it for the stipulated purpose in section 12(1), namely for recreation, and that they do so in a lawful manner.

Accordingly, since the public were entitled to access the land by virtue of the 1985 Act, their use of the land would always be “by right” and prescription would never have an opportunity to start running. Since “everyone” has the statutory rights established by section 1 of the Land Reform (S) Act 2003, this last statement is significant from a Scots perspective. Before drawing any definite conclusions on this issue, however, it is also important to look at the second Supreme Court case mentioned above: *Newhaven*.¹¹⁶

The disputed land in *Newhaven* was an area of the foreshore called “West Beach”. This formed part of a port owned and operated by Newhaven Port and Properties Limited (NPP). Parts of the beach had been used by the public for bathing throughout the relevant prescriptive period and, in response to an attempt by NPP to exclude the public, an application was made to have it registered as a town or village green. By the time the case was appealed to the Supreme Court, three points were at issue: firstly, whether the public’s use had been referable to public rights of recreation over the foreshore; secondly, whether byelaws made by NPP’s predecessors as harbour authority had the effect of impliedly permitting the public’s

¹¹⁴ *Ibid* at para 21 per Lord Neuberger.

¹¹⁵ *Ibid* at para 22 per Lord Neuberger.

¹¹⁶ *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547.

use of West Beach; and, thirdly, whether registration of West Beach as a town or village green would lead to statutory incompatibility with the purposes for which NPP held the land in question.¹¹⁷

Of the three issues, only the first two are relevant for the purposes of this chapter.¹¹⁸ In essence, both resolved into the same question: was the public's use of West Beach "by right" rather than "as if of right". Having discussed the example of the Scots law of public rights of recreation over the foreshore, Lords Neuberger and Hodge concluded that they would not reach a decision on public rights of recreation unless a decision could not be reached on the basis of implied permission under the byelaws.¹¹⁹ These byelaws were passed by NPP's predecessors under s83 of the Harbour, Docks and Piers Clauses Act 1847, which entitled the relevant undertaking to make byelaws "for regulating the use of the harbour, dock, or pier".¹²⁰ Particularly significant in this regard were two byelaws which prohibited the public from bathing in a certain area of the Harbour without the Harbour Master's permission.¹²¹ The question was whether this express prohibition involved a reciprocal implied permission to bathe in and use West Beach (which was not in the excluded area) for recreational purposes. In the opinion of Lords Neuberger and Hodge, this *did* amount to implied permission:¹²²

In our view, particularly when one remembers that the Byelaws are made and enforced by and on behalf of the owner and operator of the Harbour, this argument is correct. A normal speaker of English reading the Byelaws would assume that he or she was permitted to bathe or play provided the activity did not fall foul of the restrictions in the two byelaws (and in any other byelaws). This conclusion is also supported by reference to the consent of the harbour master in the first part of byelaw 68 and the second half of byelaw 70: if the activities referred to in the latter byelaw (ie including an activity which endangers others) are permitted if the harbour master's consent is obtained, that reinforces the view that generally harmless activities such as bathing and playing are permitted, at least in principle. The conclusion is further reinforced by the fact that, at the time the Byelaws were made,

¹¹⁷ *Ibid* at para 24 per Lords Neuberger and Hodge.

¹¹⁸ Though see above at 124-125 in relation to statutory incompatibility in Scots law.

¹¹⁹ *Ibid* at paras 50-51.

¹²⁰ Harbour, Docks, and Piers Clauses Act 1847, s83.

¹²¹ *Newhaven* at para 14.

¹²² *Ibid* at para 61, "the Byelaws" refers to all of the byelaws made for Regulation of Newhaven Harbour in February 1931, *Newhaven* at para 14.

members of the public had been and were using the Beach freely for the purpose of bathing and recreation.

Furthermore, although the normal rule for private landowners is that such implied permission must be communicated before it renders possession “by right”, Lords Neuberger and Hodge drew on the recent decision in *Barkas* to hold that NPP’s failure to display the Byelaws properly did not prevent them from rendering the public’s use of the beach “by right”. This followed from the Byelaws’ legislative nature since, although there was an obligation to display the Byelaws, they were effective as byelaws as soon as they were passed in compliance with the 1847 Act.¹²³ Accordingly, from the moment they were passed, the Byelaws rendered the public’s use lawful, and it was irrelevant whether the public had realised that their use was attributable to particular byelaws or not: their possession was “by right” and could not be relied on to establish a town or village green by prescription.¹²⁴

(d) Conclusions

Turning our attention north of the border again, it seems that the town or village green cases provide reasoned and persuasive authority for the proposition that any “possession” by the public which the public would already be permitted to carry out by virtue of their statutory access rights will always be “by right” where that possession *could* have taken place in exercise of those statutory rights. This conclusion can be supported by asking two questions. Firstly, could the landowner be aware that the claimant was asserting a right of servitude rather than exercising his statutory access rights? And, secondly, even if he did suspect that the claimant intended to assert a servitude, could that access be lawfully prevented? Although, in

¹²³ *Ibid* at para 66.

¹²⁴ *Ibid* at para 71, drawing parallels with the decision in *Barkas*: “In our judgment, the position in the present case is indistinguishable from that in *Barkas* for the purpose of deciding whether the use of the land in question by members of the public was ‘as of right’. In this case, as in *Barkas*, the legal position, binding on both landowner and users of the land, was that there was a public law right, derived from statute, for the public to go onto the land and to use it for recreational purposes, and therefore, in this case, as in *Barkas*, the recreational use of the land in question by inhabitants of the locality was ‘by right’ and not ‘as of right’. The fact that the right arose from an act of the landowner (in *Barkas*, acquiring the land and then electing to obtain ministerial consent to put it to recreational use; in this case, to make the Byelaws which implicitly permit recreational use) does not alter the fact that the ultimate right of the public is a public law right derived from statute (the Housing Act 1936 in *Barkas*; the 1847 Clauses Act and the 1878 Newhaven Act in this case).”

answer to the second question, it could be argued that a landowner could seek declarator every twenty years that no servitude existed over his land, in a practical sense, the answer to both questions is “No”. As far as the exercise of statutory access rights under the 2003 Act is concerned, therefore, this means that any access to land which the claimant could have taken by exercising statutory access rights is “by right” not “as if of right” and, so, cannot be relied upon to establish a servitude by positive prescription.

C. Summary: possession “as if of right”

In summary, the requirement that possession be “as if of right” can be explained as follows: firstly, the claimant’s possession must be sufficient to indicate that he is asserting a servitude over the allegedly-servient tenement; and, secondly, once this has been demonstrated, the burden of proof shifts and it is up to the landowner to show that the possession was nonetheless attributable to a factor other than the asserted servitude. If the first is established but not the second, the possession is “as if of right” and can found prescription; if the second is established as well as the first, then possession is “by right” and prescription is excluded.

Possession “by right” can either be *dependent* on the continuing permission of the landowner or referable to an *independent* right already held by the claimant. The first of these categories requires the landowner to show that permission was expressly granted or to demonstrate from the circumstances of the case that possession was dependent on his continuing permission; the second category requires the landowner to demonstrate that the claimant was entitled to be on the land by reason of another right, arising either from private law (e.g. a personal right arising from contract or a real right of lease) or public law (e.g. a public right of way, common law rights of recreation over the foreshore or statutory access rights under the Land Reform (Scotland) Act 2003).

With this summary in mind, it is possible to move on to the remaining vitiating factors of “clandestine” and “violent possession”, now framed by the 1973 Act as the (positive) requirements of openness and peaceableness.

Chapter 10

Open Possession (*nec clam*)

A. Introduction

B. History and Policy

- (1) History: from vitiating factor (clandestine) to positive attribute (open)
- (2) Policy: why must possession be “open”?

C. Defining open possession

- (1) The positive aspect: ought a reasonably observant landowner to have been aware of it?
- (2) The negative aspect: possession *nec clam*
- (3) Pipes and other “hidden” servitudes

D. Burden of proof

A. Introduction

In this chapter, the first of the express statutory elements of prescriptive possession will be addressed, namely, the requirement that the claimant possess the servitude “openly”. Positively, this means that the claimant’s possessory acts must be such as would come to the attention of a reasonably observant landowner or his representatives. Negatively, this means that the claimant must not have exercised the servitude by “stealth” or in such a way as intentionally to conceal his acts of possession from the landowner. While the first of these overlaps with the already-discussed requirement that possession be sufficient to indicate that a servitude is being asserted, the second is more obviously a “vice” of possession, which prevents otherwise prescriptive possession from leading to the establishment of a servitude.

B. History and Policy

As was just noted, the modern (positive) formulation of the openness requirement can be difficult to distinguish from the requirement that the claimant’s possession be

sufficient to indicate that a servitude is being asserted.¹ In order to understand properly the distinction between these two requirements, it is helpful to trace briefly the way in which Scots law has moved from formulating the openness requirement as a negative and vitiating factor (clandestinity), which disqualifies the claimant's possession, to viewing it also as a positive attribute (openness), which must be present before the claimant's possession can lead to any juridical consequences. Against this background, it will then be possible to set out more exactly the particular role played by open possession in the positive prescription of servitudes.

(1) History: from vitiating factor (clandestine) to positive attribute (open)

In Roman law, a person who acquired possession *clam* (i.e. by means of stealth) was excluded from claiming protection under the possessory interdicts or, by extension, from establishing a servitude by long possession.² As with the other vices of possession (i.e. force and precariousness), Roman law focused on the acquisition of possession rather than on how that possession, once acquired, had been maintained.³ Possession was only acquired *clam* where the possessor had intentionally sought to hide the acquisition from the other party or where he sought deliberately to acquire possession in circumstances where the other party could not prevent this from taking place.⁴ Roman law therefore focused on secrecy as a vice rather than on openness as a positive attribute.⁵

¹ i.e. Step 1 of possession "as if of right", discussed above at 147-154. On the similarities between open possession and possession "as if of right", see Cusine & Paisley, para 10.19; Gordon, *Land Law*, paras 24-46, 24-53.

² On the possessory interdicts, see e.g. Buckland, *Textbook*, 726-739; Kaser, *rPR I*, §36 (141), §96, §106 (447); Nicholas, *Roman Law*, 108-110; Thomas, *Textbook*, 115-117, 147-149. For particular discussion of the possessory protection of servitudes through interdicts, see Möller, *Servituten*, 86-90.

³ See, e.g., D 41.2.6.1 (Ulpian), where it is pointed out that someone who takes possession of a home when the owner is at market is understood to be in possession *clam* – discussed in H Hausmaninger and R Gamauf, *A Casebook on Roman Property Law* (2012, transl GA Sheets), 91. See also D 43.24.3.7 (Ulpian): "Cassius writes that anyone will be considered as acting *clam* ('by stealth'), if he conceals his action from his opponent and does not inform him, because he fears opposition or ought to fear it", translated and discussed in Hausmaninger and Gamauf, *Casebook*, 239.

⁴ A Watson, *The Law of Property in the Later Roman Republic* (1968), 223-226.

⁵ This was also true of the Germanic *Partikularrechten*, which only held possession to have been exercised clandestinely if it was intentionally concealed: "Der Besitz darf nicht heimlich geübt sein, ist aber nicht schon heimlich, wenn er nicht zur Kenntnis des Eigentümers gekommen ist, sondern, nur, wenn er ihm verheimlicht werden sollte", Gierke, *Deutsches Privatrecht*, vol 2, 644-655 fn 23.

This understanding of clandestine possession can also be discerned in the early Scots sources, which tended to speak of possession being kept secret from the landowner rather than possession not being obvious enough to have come to the landowner's attention. Balfour, for example, notes that:⁶

Clandestina *possession*, quhilk is obtenit privilie and covertlie, sould not be callit possessioun, and thairfoir the samin may not stop nor mak ony interruption, in ony trew, reall or natural possessioun.

Erskine likewise states, in terms reminiscent of the Roman sources, that:⁷

Possession may be also divided into that which is acquired lawfully, i.e. by fair and justifiable means; and that which is got *vi aut clam*, by violence or stealth. Possession is got *clam*, when one, conscious that his right in the subject is disputable, and apprehending that he will not be suffered to take open possession, catches an occasion of getting into it surreptitiously, or in a clandestine manner, without the knowledge of the owner...

These descriptions are given in the context of the general doctrine of possession and of possessory remedies. Nevertheless, it appears that, in other contexts too, an element of deliberate concealment was considered to be a part of clandestine possession.

On turning to the doctrine of positive prescription itself, it is interesting to note that, while the Prescription Act 1617 required land to have been possessed “peaceably” for the prescriptive period, it did not require possession to have taken place “openly”.⁸ This contrasts with the modern formulation in section 3 of the 1973 Act, which requires, positively, that a servitude must be possessed “openly” for the prescriptive period before it can be exempted from challenge – a shift also apparent in other countries which have moved from a reliance on the tripartite formula of vices to a positive statutory formulation.⁹ In practice, and especially in the absence

⁶ Balfour, vol 1, 148, citing two cases, 24 Mart 1546 and 9 Julij, 1547, 1 t.c. 70.

⁷ Erskine, *Institute*, 2.1.23.

⁸ See CM Campbell, “Prescription and Title to Moveable Property” (2012) 16 Edin LR 426 at 428-429. As Dr Campbell correctly points out, the *nec vi nec clam nec precario* formula was not apparent on the face of the Prescription Act 1617, which required only that possession continue for forty years “peaceably” and “without any lawful interruption”. It is, however, significant that the tripartite formula was invoked by counsel in the context of positive prescription as early as *Feuars of Dunse v Hay* (1732) Mor 1824; the phrase also appears in a text cited in a possessory judgement case from the 16th century: *Laird of Wedderburn v Laird of Blackadder* (1582) Mor 13781 at 13783.

⁹ The equivalent shift in French law – from speaking of vices of possession under the older law to positive attributes, such as “publicity” and “peaceableness”, in the *Code civil* – has been criticised for

of any express statutory statement that prescriptive possession must be “as if of right” or sufficient to indicate that a servitude is being asserted, modern commentators have generally understood the term “openly” in the modern statutory formulation to function as an acknowledgement that prescriptive possession fulfils a publicity role and, in so doing, seeks to satisfy one of the two general policy justifications usually given for positive prescription; namely, that the person whose right is being burdened has an opportunity to object and, failing to do so, can be held to have accepted the burdening of his right.¹⁰

(2) Policy: why must possession be “open”?

As just mentioned, modern commentators have generally described the policy rationale which underlies the openness requirement as being to ensure that the landowner is aware of the claimant’s possession and has an opportunity to stop it. Johnston, for example, notes:¹¹

Prescription does not allow the acquisition of rights by stealth but protects only rights that have been openly asserted. The reason is obvious. Only if the possessor possesses openly can a person whose interest is affected by the adverse possession be said to have had a fair chance to challenge the rights asserted. And only then, if he fails to challenge, can he be said to have slept on his rights.

Given how similar this rationale is to that which underlies the requirement that the claimant’s possession be sufficient to indicate that a servitude is being asserted (i.e. step 1 of possession “as if of right”), it is important to ask how the two requirements differ practically in fulfilling their policy roles. Essentially, the main difference is as follows: the “assertion” requirement considers the claimant’s possession as a whole and seeks to determine whether it has been sufficient to indicate to the landowner that a servitude is being asserted; by contrast, the openness requirement focuses

failing to distinguish between those vices which prevent prescription from having any juridical effect and those factors which must be present before one can speak of possession at all, Planiol with Ripert, vol 1, part 2, para 2276. This is a helpful distinction, though Planiol and Ripert’s inclusion of precariousness in the second of these categories reflects the French legal tradition’s restrictive understanding of true possession as requiring *animus domini* rather than the *animus sibi habendi* accepted in Scots and German law – see E Descheemaeker, “The Consequences of Possession”, in Descheemaeker, *Consequences*, 7-17; Y Emerich, “Why Protect Possession?”, in *ibid*, 34-42.

¹⁰ See, e.g. Johnston, *Prescription*, para 18.14; Cusine & Paisley, para 10.16; Gordon, *Land Law*, paras 24-46, 24-53; Gordon & Wortley, *Land Law*, para 12-45. See also Peterson, “Keeping up Appearances” at 8-9.

¹¹ Johnston, *Prescription*, para 18.14.

more particularly on the possessory acts of the claimant and seeks to determine whether these have been sufficiently obvious to come to the attention of any reasonably observant landowner. The openness requirement is therefore subtly different from the assertion requirement: for example, one can imagine a situation where the claimant's possession is such that a reasonable landowner would not normally have permitted it to continue unless a servitude already existed, but where the claimant exercises the servitude only at night or while the landowner is away from the property. In such circumstances, the claimant might be fulfilling step 1 of possession "as if of right" since the landowner may be aware that the claimant is purporting to exercise a servitude; the individual acts of possession are, however, clandestine since the landowner may be unaware of them until they have already taken place and cannot therefore catch them in the act. Conversely, a more probable situation in practice would be where the claimant's possession is "open", in so far as the individual acts of possession are known to the landowner, but insufficient to indicate that a servitude is being asserted.¹² As such, the particular role of the openness requirement is to ensure that the landowner is aware of the claimant's possessory acts and not, strictly speaking, to ensure that the landowner is given notice that a servitude is actually being asserted.

With respect to the positive and negative aspects of open possession, it is interesting that a similar distinction was considered by the Scottish Law Commission in its recent project on *Prescription and Title to Moveable Property*.¹³ In so far as open possession plays a positive role in publicising possession, the Commission recognised that this may be more relevant for heritable property than for corporeal moveables, which by their very nature are less likely to be possessed in public.¹⁴

¹² As Carey Miller and Pope note in the context of the acquisitive prescription of ownership in South African law, "Acts of possession may satisfy the requirement of open possession without amounting to a manifestation of rights of ownership sufficient to satisfy the criterion of possession 'as if he were the owner'. Possession must not, of course, be secret or concealed and it is in this sense that possession must meet the positive requirement of being 'open'", Carey Miller (with Pope), *Land Title*, para 3.2.4.2.

¹³ Scottish Law Commission, *Discussion Paper on Prescription and Title to Moveable Property* (Scot Law Com DP no 144, 2010) and Scottish Law Commission, *Report on Prescription and Title to Moveable Property* (Scot Law Com No 228, 2012).

¹⁴ "The first of these terms ('openly') is straightforward for land, and indeed it is not easy to possess land other than openly. In contrast, it is difficult to possess moveables openly, at least in any useful

Therefore, despite advocating that the openness requirement not be expressly adopted for any future positive prescription for corporeal moveables, the Commission asked whether an exception should be made for “deliberate concealment” by the person claiming the benefit of prescription.¹⁵ After consultation, the Commission decided that such a requirement would be unworkable and, in any event, superfluous when combined with a prospective requirement of good-faith possession.¹⁶ Nevertheless, the fact that such a requirement was considered at all demonstrates that the *nec clam* requirement’s historical role is still relevant, especially in a system which does not require good faith for positive prescription in the context of heritable rights.

Interestingly, it has been suggested in the context of French law that the openness requirement (in the negative sense of deliberate concealment) is *less* relevant for immovable property than for moveables, since it is difficult to occupy a house secretly or to make secret use of a field for cultivating crops.¹⁷ This objection is not, however, convincing with respect to the exercise of most servitudes (or, indeed, in the context of border disputes). Unlike the possession of larger plots of land or corporeal moveables, the possession of servitudes is generally non-exclusive and

sense of that term”, Scottish Law Commission, *Report on Prescription*, para 3.27. The Discussion Paper gives, as an example, a situation where a picture is hung on a wall in a private house, see Scottish Law Commission, *Discussion Paper on Prescription*, para 7. 24.

¹⁵ Report, para 3.28; Discussion Paper, para 7.24.

¹⁶ Report, para 3.28: “Consultees were agreed that there should be no requirement that possession be ‘open’. We also asked whether deliberate concealment should bar prescription. There was less consensus on this. Professor Johnston was ‘not much in favour of making specific rules about deliberate concealment, and my inclination would be to leave this out and rely once again purely on the test of good faith’. Professor Reid was ‘not sure that provisions for deliberate concealment would be workable’. The Faculty of Advocates considered that deliberate concealment should not bar prescription, but the Judges of the Court of Session took the opposite view. Rowan Brown of Industrial Museums Scotland and Tamsin Russell of the Scottish Museums Federation “strongly disagreed with the statement in [the Discussion Paper at paragraph 7.24] that museums might keep items hidden in store if they are unsure about the provenance. Items stored in publicly funded institutions are physically accessible on an appointment basis and are therefore publicly available and ‘open’”. Cf. CM Campbell, “Prescription and Title to Moveable Property” (2012) 16 Edin LR 426 at 428-429.

¹⁷ Planiol with Ripert, No 2283: “Concealed possession is readily understandable as regards movables. But instances of concealment applicable to immovables are very few in number. Practically no examples are found in adjudged cases because it is extremely difficult to hide the fact that one occupies a house or cultivates a field. Those cited in text books are purely hypothetical. It is assumed that an owner digs a pit that extends beneath the home of his neighbour. If there be no exterior sign, such as an opening that reveals the encroachment, the possession will be clandestine.”

will therefore take place alongside more general possessory acts by the owner or possessor of the property.¹⁸ This accordingly provides greater scope for the claimant to continue exercising the putative servitude while attempting to keep his exercise secret from the landowner or, at least, to exercise it in such a way that the landowner will be practically unable to prevent the possessory acts from taking place. In this respect, the openness requirement, in both its negative and positive aspects, is more important for the exercise of servitudes than for either the possession of land or the possession of corporeal moveables.

C. Defining open possession

As has been suggested, there are therefore two aspects to possessing a servitude openly: firstly, the claimant's possessory acts must be such as would come to the attention of a reasonably observant landowner; and, secondly, the claimant must not have attempted to hide his behaviour from the landowner. These two aspects are best thought of in terms of a positive aspect and a negative aspect to open possession. This section will address each aspect before going on to consider the further practical issue of how the openness requirement can be reconciled with positive prescription in relation to servitudes which seem, by their very nature, to be "hidden" – for example, servitudes of underground pipes and septic tanks.

(1) The positive aspect: ought a reasonably observant landowner to have been aware of it?

The clearest statement of the positive aspect of open possession is found in Lord Watson's speech in *McInroy's Trs v Duke of Athole*. Immediately after noting the need for the claimant's possession to be sufficiently "overt" to indicate to the landowner that a servitude is being asserted, Lord Watson went on to note that,¹⁹

The proprietor who seeks to establish the right cannot, in my opinion avail himself of any acts of possession *in alieno solo*, unless he is able to shew that they either

¹⁸ On the distinction between the possession of land and the limited "possession" of the servient tenement by a servitude-holder, see Chapter 5.

¹⁹ *McInroy's Trs v Duke of Athole* (1891) 18 R (HL) 46 at 48 per Lord Watson.

were known, or ought to have been known, to its owner or the persons to whom he intrusted the charge of his property.

In *McInroy's Trs*, the appellants' behaviour consisted primarily of using a sheep or deer track as a short-cut to get from one part of their own estate to another. It was held that the "use of the track was made in such circumstances that it was not likely to come, and in point of fact never came, to the knowledge of the respondent or his predecessors."²⁰ Particularly relevant in this respect was the location of the pass, which meant that any incursions by the appellants and their sportsmen would be unlikely to be noticed by the respondent or his representative.²¹ The fact that Lord Watson's explanation of open possession follows directly after his remarks on the "assertion" requirement emphasises how closely linked the two requirements will be in practice. It does, however, seem clear that the primary focus with regard to open possession is to determine which possessory acts can be relied upon when attempting to satisfy the more stringent requirement of showing that the claimant's possession has been sufficient to indicate that a servitude is being asserted.

Modern commentators have reiterated that open possession need only be such as *ought* to come to the attention of the landowner and that it is not necessary to prove that the landowner was actually aware of it.²² The only exception to this consensus is Duncan, who suggests, without citation of any authority, that "the requisite possession or use must take place with the full knowledge of the quasi-servient owner and not stealthily, as by night."²³ In so far as this means that the landowner must have actual knowledge of the claimant's behaviour, this is incorrect. Indeed, as Johnston notes, if this were the case, it could amount to a "major obstacle" to the running of prescription and conflict with the doctrine's own policy grounds of

²⁰ *Ibid* at 49 per Lord Watson.

²¹ *Ibid* at 49 per Lord Watson: "that is an inference [i.e. that the user must have been known to the owner] which it would be very unsafe to derive from the mere fact of the occasional user of an isolated deer tract, in a region remote from public observation, which is only visited at rare intervals by a few sportsmen, foresters, or shepherds". Cf. *Duke of Athole v McInroy's Trs* (1890) 17 R 456 at 462-463 per LJC Macdonald.

²² E.g. *Cusine & Paisley*, para 10.19 generally, and text accompanying fn 22 in particular; Johnston, *Prescription*, para 18.15. See also Gordon & Wortley, *Land Law*, para 12-45.

²³ AGM Duncan in Reid, *Property*, para 460.

providing certainty and penalising only those who have not actively protected their rights.²⁴ A similarly nuanced test is applied in England²⁵ and South Africa.²⁶

A modern example of a case which discussed the positive aspect of open possession is *Abel v Shand*, already mentioned above in the context of possession “as if of right”.²⁷ In that case, the sheriff listed a number of factors which suggested that possession had indeed been open for the purposes of positive prescription.²⁸ Particularly important was the fact that the use of the servitude had always been during daylight hours and that, at one point, the road over which the servitude was being asserted was used around seven or eight times per week.²⁹ This was particularly significant since the landowner’s residence was situated close by the road in question. In addition to this, it was clear that extensive works had been carried out by the claimant and her predecessors and that the only suitable route for transporting the required materials was the road in question.³⁰ Finally, it was clear that the landowner knew of the possession, since he was willing to discuss the claimant’s demands that the road be improved and her own attempts at doing so.³¹

(2) The negative aspect: possession *nec clam*

As well as the positive threshold which a claimant must pass before his possession will be held to have been “open”, there is a negative aspect to open possession. This means, as it did in Roman law and early Scots law, that possession cannot be prescriptive where the claimant has possessed “by stealth” or sought deliberately to

²⁴ Johnston, *Prescription*, para 18.15.

²⁵ See Gaunt & Morgan, *Gale on Easements*, paras 4-108 – 4-113; Gray & Gray, *Elements*, para 5.2.68. In the words of Romer LJ, enjoyment is open when it is “of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment”, *Union Lighterage Co v London Graving Dock Co* [1902] Ch 557 at 571.

²⁶ Possession must be “so patent that the owner, with the exercise of reasonable care, would have observed it”, Carey Miller (with Pope), *Land Title*, para 3.2.3, citing *Smith & Others v Martin’s Executive Dative* (1899) 16 SC 148 at 151 and *Bisschop v Stafford* 1974 (3) SA 1 (A) at 8A.

²⁷ *Abel v Shand*, 4 December 1997, Stonehaven Sheriff Court, case ref A 264/95. The unextracted process (4 August 1998) for this case is available through the National Archives, CS348/1998/2727. The case is also discussed in Cusine & Paisley, paras 10.16 and 10.17.

²⁸ For a helpful overview of these factors, see Cusine & Paisley, para 10.16.

²⁹ *Abel v Shand* (n 27), sheriff’s note at 59.

³⁰ *Ibid.*

³¹ *Ibid* at 63 and 69.

conceal his possession from the landowner.³² To take an English case as an example, possession would not be open if a claimant had discharged toxic waste into a system at night without the landowner's knowledge.³³ More broadly, possession would not be open whenever it is shown that the claimant deliberately waited until the landowner had left the property before purporting to exercise the servitude in question, as for example, where the claimant exercised the servitude when the landowner was away from the property during working hours, or where the property was a holiday home and the claimant refrained from exercising the servitude when the landowner was in residence.

(3) Pipes and other “hidden” servitudes

Having dealt in general terms with the negative and positive aspects of open possession, this section will close with a consideration of a particular practical issue: how can the requirement of open possession be reconciled with the possibility of acquiring servitudes by positive prescription which, by their very nature, are not obvious – for example, servitudes involving underground pipes and septic tanks?

It would appear that the only Scots case to discuss this question expressly is the unreported case of *Buchan v Hunter*.³⁴ In that case, the pursuer's property relied on an underground sewerage system, which led into a septic tank situated on the allegedly-servient tenement. Having used the system for over forty years, the pursuer sought declarator that a servitude had been created, either by oral grant and acquiescence or by positive prescription. While the sheriff noted that the entire system was located underground and had therefore been “essentially unseen” for over forty years, he also noted that “a servitude of the type in the instant case involving underground pipes and related structures is easily distinguishable from

³² Johnston, *Prescription*, para 18.14; Cusine & Paisley, para 10.16; AGM Duncan in Reid, *Property*, para 460. Similarly, in the context of French law: “[t]o be useful, possession must be public. The possessor must act without hiding himself, as generally do those who make use of a right. His possession will be clandestine, when he attempts to hide his acts from those who are interested in knowing of them”, Planiol with Ripert, No 2281.

³³ *Liverpool Corp v Coghill* [1918] 2 Ch 557.

³⁴ *Buchan v Hunter*, 12 February 1993, in Paisley & Cusine, *Unreported Property Cases*, 311 (published 2000); cf. Cusine & Paisley, (published 1998), para 10.16: “We have been unable to locate any reported Scottish authority directly in point...”.

such circumstances as were considered in the case of *MacInroy v Duke of Atholl* [sic]” and that “the fact that use is unobserved does not mean that it was clandestine”.³⁵ Furthermore, it was clear from the facts of the case that the original installation had been discussed by the predecessors of each party and that alterations had been carried out to the system in 1989 with the knowledge and acquiescence of the landowner. Bearing all these factors in consideration, the sheriff granted declarator. As Paisley and Cusine note in their commentary on the case, “[t]he sheriff took the pragmatic and undoubtedly correct view that the possession requires only to be as open as it can reasonably be.”³⁶ The fact that the septic tank was only visible from the surface after 1989 – towards the end of the prescriptive period – indicates, as Paisley and Cusine also point out, that “there is no need for the dominant proprietors to advertise the existence of the right by placing markers on the surface”.³⁷

While *Buchan v Hunter* is a single sheriff court case, the decision also fits with comments made by Cusine and Paisley prior to reporting the decision in their *Unreported Property Cases* book.³⁸

In the case of underground drains the requirement that possession is “open” will take account of the nature of the right and the geographical and physical make-up of the servient and dominant tenements. In our view it seems sufficient in such cases that the installation of the drains or pipes was done in an open manner and that the dominant proprietor, if asked, has not since then sought materially to misinform the servient proprietor as to the existence and location of the drains or pipes.

That servitudes which are “hidden” by their very nature are capable of open possession is also consistent with *Wemyss’s Trs v Lord Advocate*, where an *ex adverso* landowner claimed to have acquired submarine coal works by positive prescription.³⁹ While acknowledging that there was a sense in which the possession had not been “open” because it was under water, Lord President Robertson went on to note that there was no obligation on a prescriptive claimant to prove that the

³⁵ Paisley & Cusine, *Unreported Property Cases*, 314-316.

³⁶ *Ibid*, 317.

³⁷ *Ibid*. See also Johnston, *Prescription*, para 19.04 fn 5.

³⁸ Cusine & Paisley, para 10.16, citing the American case of *Motel 6, Inc v Pfile*, United States Court of Appeals, Third Circuit, 1983, 718 F 2d 80.

³⁹ *Wemyss’s Trs v Lord Advocate* (1896) 24 R 216 – the case was reversed on another point in the House of Lords, *Lord Advocate v Wemyss’s Trs* (1899) 2 F (HL) 1.

Crown had been informed of the workings or knew of them. Rather, what mattered was the fact that,⁴⁰

the evidence shews that the workings under the sea were in no sense clandestine; that they were well known in the district; that they had been the subject of public scientific discussion, and that they were inspected and reported on in the usual way by the Government Inspector of Mines.

Accordingly, even though the Crown had not been informed directly, the pursuer had not carried out the workings clandestinely and the behaviour was such as ought to have come to the Crown's attention.⁴¹

Where, however, a servitude of this kind is already established, any change in its nature which could not be known of by the landowner will not be sufficiently open for the purposes of prescription – e.g. a secret change from discharging waste domestic water to discharging sewage.⁴²

D. Burden of Proof

In so far as the openness requirement operates, positively, to ensure that the claimant's possessory acts are sufficiently obvious to come to the attention of a reasonably observant landowner, it would seem that the burden of proof rests on the claimant rather than the landowner.⁴³ This explains, for example, why Lord Watson said in *McInroy's Trs* that the claimant could not "avail himself of any acts of possession" unless they were known or ought to have been known to the landowner.⁴⁴ By contrast, where the landowner asserts that the claimant has deliberately concealed his acts of possession, the burden of proof will rest on the landowner.⁴⁵ This is because the vice of clandestinity is in view in such a situation and the matter being contested is therefore on the same conceptual level as the vices

⁴⁰ *Ibid* at 229 per LP Robertson.

⁴¹ Johnston, *Prescription*, para 18.15.

⁴² See *Kerr v Brown* 1939 SC 140, especially at 146-147 per LJC Aitchison, 150-151 per Lord Mackay and 156-157 per Lord Pitman.

⁴³ Johnston, *Prescription*, para 18.15, presupposes this when explaining why the claimant cannot be required to prove actual knowledge on the part of the landowner as this would be a "major obstacle".

⁴⁴ *McInroy's Trs v Duke of Athole* (1891) 18 R (HL) 46 at 48.

⁴⁵ E.g. *Buchan v Hunter* in Paisley & Cusine, *Unreported Property Cases*, 311

of force and of possession “by right” (i.e. step 2 of possession “as if of right”). As with the other vitiating factors, once the claimant has demonstrated sufficient possession to indicate that a servitude is being asserted, it is then up to the landowner to show that the possession has, nevertheless, been clandestine and cannot lead to the establishment of a servitude. Again, as with the other vitiating factors, this seems the fairest solution, since the claimant would otherwise have to prove a negative – namely, that he had *not* sought to conceal his possession from the landowner.⁴⁶

⁴⁶ See above at 165-167 and below at 239-240. In Roman law, the claimant did not have to prove the absence of a vitiating factor but it sufficed that the possession was not presented as vitious, Windscheid, *Lehrbuch*, §213 fn 5. In the context of possessory interdicts, see Buckland, *Textbook*, 731. According to Windscheid, some commentators made an exception for openness. In English law, the claimant must show that the landowner had “reasonable means of knowledge” but, “where an access way has been used for many years”, the onus will rest on the landowner, Gray & Gray, *Elements*, para 5.2.68; cf. Megarry & Wade, *Real Property*, para 28-048.

Chapter 11

Peaceable Possession (*nec vi*)

A. Introduction

B. History and comparative context

- (1) History: Roman and 17th-century Scots law
- (2) Comparative context: England and South Africa

C. Policy: why must possession be “peaceable”?

D. Defining peaceable possession.

- (1) Whose behaviour and which circumstances are relevant?
- (2) Verbal objections and physical altercations
- (3) Removal of obstacles to already-begun possession
- (4) Interactions with third parties

E. Burden of proof

A. Introduction

In this chapter, the second of the express statutory elements of prescriptive possession will be addressed, namely, the requirement that the claimant possess the servitude “peaceably”. Though both Scots and English law acknowledge peaceableness as an element of prescriptive possession, the modern Scots approach diverges to some extent from that adopted in English law. Most noticeably, Scots law recognises certain circumstances in which a claimant is permitted to use force without his possession necessarily ceasing to be peaceable. In particular, where a claimant has already begun to exercise a servitude in a manner otherwise consistent with prescriptive possession, that claimant is entitled to use force to continue the possession in response to an attempted obstruction by the landowner – provided that the claimant’s response is immediate, decisive and successful. If, however, the claimant’s response is delayed, leads to a physical altercation between the parties, or is part of a cycle of obstructions and removals, this will no longer be viewed as peaceable and any previous possession must also be discounted from the prescriptive period.

B. History and Comparative Context

To set the modern law of peaceable possession in perspective, it is helpful to consider two preliminary issues: firstly, the origins of the *nec vi* requirement in the Roman law of possessory interdicts and how this compares with earlier Scots discussion of peaceable possession; and, secondly, how two legal systems – England and South Africa – with otherwise similar laws on the positive prescription of servitudes (or “easements”) to that found in Scots law have developed starkly contrasting attitudes towards the requirement of peaceableness. As will be seen in the remainder of this chapter, the Scottish understanding of peaceable possession essentially charts a middle course between these two systems, allowing for a more robust response to challenges to possession than English law but nevertheless retaining a role for peaceable possession unlike South African law.

(1) History: Rome and 17th-century Scots law

As has been mentioned in previous chapters, possession could qualify for interdictal protection in classical Roman law only if it had been acquired *nec vi nec clam nec precario*.¹ In particular, the *nec vi* requirement meant that a party could not succeed in a possessory interdict where possession had been acquired from the other party by use of force. This was true regardless of whether the interdict was sought to retain possession in the face of an attempted disturbance² or to recover possession which had already been lost by force to that other party.³ By extension, the *nec vi nec clam nec precario* formula was also applied to the nature of possession required for the protection of long-enjoyed servitudes.⁴ Finally, once the last of these doctrines was assimilated with the *longi temporis praescriptio* under Justinian, the possession needed for the establishment of servitudes by long possession continued to be only

¹ See Buckland, *Textbook*, 726-739; Kaser, *rPR I*, §36 (141), §96, §106 (447); Thomas, *Textbook*, 115-117, 147-149; Nicholas, *Roman Law*, 108-110. On the interdictal protection of servitudes, see Möller, *Servituten*, 86-90.

² i.e. the *uti possidetis* for immovables.

³ i.e. the interdicts *unde vi* and *unde vi armata*, the latter of which applied to dispossession by armed force.

⁴ See above at 10-12 and, for further references, Möller, *Servituten*, at 185-192, 221-250, 347-352.

nec vi nec clam nec precario without the additional requirements of *bona fides* and *iusta causa* needed for the acquisition of ownership of corporeal objects.⁵

In practice, it appears that the threshold above which the use of force was considered *vi* was relatively low in Roman law. This is expressed particularly clearly in the following passage of Ulpian's:⁶

5. Let us see what is done by force or stealth. Quintus Mucius wrote that anything is done by force if it is done against prohibition, and I hold Quintus Mucius's definition to be adequate. 6. And if anyone, when prohibited by the throwing of the smallest pebble, persists in doing something Peditius and Pomponius write that he is doing it by force, and this is the rule we follow... 9. Again, Labeo writes: "If I prohibit someone from doing something and he desists for the present, and later begins again, he is held to have done it by force, unless he began to do it with my permission or because there happened to be some good cause.

In recent years, this passage has been cited by Lord Rodger in the Supreme Court to suggest that, in Roman law as in English law, possession became *vi* as soon as it was prohibited from continuing by a landowner.⁷ While this is true in one sense, it is also clear that, in the context of the Roman law of possessory remedies as a whole, the use of force was permissible when used in the immediate resistance of an attempt to expel a current possessor from his possession or to return immediately to land from which the possessor had been expelled.⁸ While force was not therefore permitted as a means of acquiring possession, or returning to possession after an interval of some time, its use was permissible where possession had already begun and another party was seeking to bring it to an end.

⁵ See above at 12.

⁶ E.g. D.43.24.1.5-9 (Ulpian), see T Mommsen and P Kreuger (eds), *The Digest of Justinian* (1985, transl and edited AJ Watson), vol 4; D.43.24.20.1.

⁷ *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11 at paras 88-89 per Lord Rodger; see also below at 215.

⁸ See H Hausmaninger and R Gamauf, *A Casebook on Roman Property Law* (2012, transl GA Sheets), 89-102, discussing D 41.2.6.1 (Ulpian), D.41.2.18.3-4 (Celsus), D.43.16.1.30 (Ulpian), D.43.16.17 (Julian), and D.43.16.1.27 (Ulpian).

In Scots law, recognition of peaceableness as an element of prescriptive possession can be traced back to the Prescription Act 1617, which required that land be possessed⁹

for the space off fourtye yearis, continewallie and togidder following and inewing the date of thair saidis infetmentis, and that peciablle without anye lauchfull interruptioun made to thame thairin during the said space of fourtie yeiris...

Notably, none of the institutional writers devotes much time to discussing peaceable possession in the context of prescription in general or the positive prescription of servitudes in particular. Instead, their discussion is found in their accounts of possession itself and of the possessory remedies.¹⁰ As a result, it is difficult to say exactly how the institutional writers understood the peaceableness requirement to operate in the context of the positive prescription of servitudes. But it is possible to draw some parallels between the role played by peaceableness in each context – especially with regard to the legitimacy of using force in response to attempts to bring already-established possession to an end.

According to Stair and Erskine, the rationale for requiring possession to be peaceable is that civil society could not function were everyone to take the law into his or her own hands.¹¹ In the context of possessory judgments, however, and drawing on Roman sources, Stair recognised that a possessor faced with an attempt to establish a contrary possession “may lawfully use violence to continue possession, which afterwards he may not, for recovery therefore, when it is lost, though unwarrantably or violently, unless it be *ex continenti*”.¹² Likewise, when discussing the rights of possessors, Stair noted that private force is only allowed in order to “continue possession against contrary violent and clandestine acts, immediately after acting of the former, or notice of the latter”; this is because “possession may not be recovered by violence, but by order of law”.¹³ Similar accounts are given by Erskine and

⁹ Prescription Act 1617, c.12 – see www.rps.ac.uk for full text and translation into modern English. By contrast, the Prescription Act 1594, c. 218 required only that the claimant had “bruiokit” the land for forty years and mentions no requirement of peaceableness.

¹⁰ E.g. Stair, 2.1.20-22; Bankton, 2.1.31-33; Erskine, *Institute*, 2.1.23-24.

¹¹ E.g. Stair, 2.1.22; Erskine, *ibid.*

¹² “*Ex continenti*” means “immediately” or “without delay”, Stair, 2.1.20, citing D.43.16.1.27 (1.I.§27. ff. *de vi et vi armata*) and D.43.16.3.9

¹³ Stair, 2.1.22.

Bankton.¹⁴ At least in the context of possessory protection, the institutional writers therefore recognised that it was legitimate for a possessor to use force, so long as that force was restricted to the immediate resistance of an attempt by another to bring that original possession to an end; force could not, however, be used to resume possession after some time had passed or to acquire possession in the first place. This remains the case in modern Scots law¹⁵ and, as will be seen below, there is a distinct similarity with the way in which peaceable possession is now understood to operate in the context of establishing servitudes by positive prescription: just as a possessor is entitled to use force to resist an attempt to bring his possession to an end without necessarily losing the protection of possessory remedies, so there are circumstances in which it is legitimate for a person exercising a servitude to use force in response to an attempt to bring that exercise to an end without necessarily having his possession rendered unpeaceable and ineligible for prescription.

Another parallel between the role played by peaceableness in the context of possessory remedies and its role in the context of positive prescription can be seen in the close connection which the institutional writers recognised between peaceable possession and uninterrupted possession.¹⁶ This connection is also apparent from the wording of the 1617 Act which requires that possession have taken place “peciablie without anye lauchfull interruptioun”. In their own discussions of prescription, the institutional writers focus on the latter rather than on the former.¹⁷ Similarly, few 17th- or 18th-century cases provide any real discussion of the nature of peaceable

¹⁴ Erskine, 2.1.23: “Violent possession is, when one turns another masterfully, or by force, out of possession, and puts himself in his place. As to this last ... the possessor against whom the violence is used, may also use force on his part to maintain his possession, in the same manner that he might in defence of his life. But after he has lost the possession, however unwarrantably, he cannot use force to recover it, unless he do it *ex continenti*, l.3. §9. *De vi et vi arm.* but must apply to the judge, that he may be restored by order of law: for society could not subsist, if it were permitted to private men *jus sibi dicere*, to do themselves right by the method of force”; Bankton, 2.1.31: “... one with us may continue or recover his possession by force, being *ex continenti*, or instantly used, before the other party has got the peaceable possession; for, after that, he must take the legal course, and not *sibi jus dicere*, do right to himself.”

¹⁵ E.g. Reid, *Property*, para 163 fn 6 and para 164.

¹⁶ E.g. Stair, 2.1.21: “...the ordinary distinctions of possession may be easily understood as being either... continued, quiet and peaceable, or interrupted and disturbed...”

¹⁷ See, e.g. Stair, 2.12.26-27; Erskine, *Institute*, 3.7.39-45; Bankton, 2.9.50-75.

possession.¹⁸ Indeed, some situations which might intuitively be considered from the perspective of peaceableness if they occurred today were instead considered from the perspective of whether possession had been successfully interrupted or not.

An example is *Nicolson v Bightie & Babirnie*, where the pursuer's cattle were annually turned off the allegedly-servient tenement and the pursuer himself was stopped from cutting peats but returned to these activities immediately.¹⁹ In these circumstances, the court held that prescription had been interrupted and that Nicolson needed to show possession of forty years preceding the first interruption before he could establish a servitude of common pasturage. A similar approach was taken in *Sheriff of Cavers v Turnbull*, where the defender had possessed common pasturage of a piece of land on the basis of a clause of pertinents (*cum pascuus et pasturis*) but repeatedly had his goods debarred and poinded by the pursuer.²⁰ Though the defender sought to prove that he had returned and pastured after each poinding, his defence was repelled and the court held that his possession had been interrupted.

When these cases are considered alongside other contemporary cases, it can be seen that, where a landowner actually stopped the claimant in the process of exercising his alleged servitude (e.g. pasturing cattle or cutting peat), this was held to interrupt possession even where exercise of the servitude was quickly resumed.²¹ This is because such an interference with the actual exercise of the servitude is a contrary assertion of possession and so brings the claimant's possession to an end. This is conceptually distinct from placing obstacles in the way of later acts of possession, since such obstacles can be removed by the claimant the next time he wishes to exercise the servitude without any actual physical interaction taking place between

¹⁸ An exception is *Hugh Maxwell v Alexander Ferguson* (1673) Mor 10628, where setting march stones to include 9 or 10 acres of the pursuer's land and violently barring him from possession rendered the defender's entry to possession vitious and prevented his son from claiming a possessory judgement; *Menzies v Campbell* (1679) Mor 10629 expands on this, confirming that, while entry to possession must be lawful in order to qualify for a possessory judgement, "the long prescription excludes all question, as to the entry of the possession".

¹⁹ *Nicolson v Bightie and Babirnie* (1662) Mor 11291.

²⁰ *Sheriff of Cavers v Turnbull* (1629) Mor 10874.

²¹ E.g. *Nicolson v Bightie & Babirnie*; *Kinnaird v Fenzies* (1662) Mor 14502; *Sheriff of Cavers v Turnbull* (1629) Mor 10874; *Haining v Town of Selkirk* (1668) Mor 2459.

the parties. As will be seen below, it is only in the latter of these two scenarios that modern Scots law permits the use of force by a claimant, since such force qualifies as the continuance of already-begun possession and not the resumption of possession which has been successfully interrupted.

(2) Comparative context: England and South Africa

At this point, it is instructive to look at the way in which the peaceableness requirement has developed in two systems with otherwise similar laws on the establishment of servitudes (or easements) by prescription to that found in Scots law. Though both English and South African law inherited the Roman requirement that prescriptive possession be *nec vi*, only English law persisted with the strict Roman understanding of the requirement. By contrast, South African law has come to the conclusion that the peaceableness requirement is superfluous and does not retain any express reference to it in its current statute on prescription. The approach taken by each system appears to follow from the primary rationale which that system gives for positive prescription: the landowner's acquiescence in England and legal certainty in South Africa.

According to the leading English textbook on the law of easements, possession ceases to be peaceable in English law once it becomes "violent or contentious".²² The authority given for this proposition is a judgement of Lord Rodger's, which cites the passage from Ulpian quoted above:²³

The opposite of 'peaceable' user is user which is, to use the Latin expression, *vi*. But it would be wrong to suppose that user is '*vi*' only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts *vis* was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances, what he did

²² Gaunt & Morgan, *Gale on Easements*, paras 4-101 – 4-107 (owing to an unfortunate typographical error, the first sentence of para 4-101 reads "The enjoyment must not be peaceable, i.e. neither violent nor contentious").

²³ *R (Lewis) v Redcar & Cleveland BC (No 2)* [2010] 2 AC 70 at paras 88-89. Somewhat recursively, para 90 of Lord Rodger's judgement – i.e. the paragraph cited in *Gale on Easements* – goes on to cite the earlier 18th edition of *Gale on Easements* (2008) as authority for the phrase "neither violent nor contentious".

was done *vi*. See, for instance, D.43.24.1.5-9, Ulpian 70 *ad edictum*, commenting on the word as used in the interdict *quod vi aut clam*.

English law has interpreted the expression in much the same way [...] If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being *vi* and so does not give rise to any right against him.

At first, it might be thought surprising that, of the two systems, it is English law which seeks to model itself most closely on Roman law. This is, however, less surprising when one remembers that the primary rationale given for the prescriptive constitution of easements in England is the acquiescence of the servient landowner and that any contrary indication will overturn any inference of acquiescence.²⁴

Though at least one prominent case speaks of “continuous and unmistakable protests”,²⁵ it appears that the level of contentiousness required is not high. In *Smith v Brudenell-Bruce*, for example, two forcefully worded letters from the landowner to the claimant were held sufficient to render possession contentious and no longer “as of right”.²⁶ Indeed, in the recent case of *Winterburn v Bennett*, even a public notice attached to a wall, and a sign in a window warning that a certain car park was for the sole use of patrons of the local Conservative Club Association, were held sufficient to render parking in that car park “contentious” and to prevent the owner of the next-door chip shop from acquiring an easement of parking on behalf of his customers.²⁷

²⁴ “In the law of prescription the claim of user ‘as of right’ is inevitably negated by the claimant’s knowledge (actual or constructive) that there is objection to his user. Evidence of ‘contentiousness’ or ‘perpetual warfare’ between the parties destroys the element of acquiescence which is fundamental to prescription and palpably falsifies the shallow fiction that the claimant’s user proceeded on the footing of some past grant”, Gray & Gray, *Elements*, para 5.2.67.

²⁵ *Dalton v Angus* (1881) 6 App Cas 740 at 786 per Bowen J: “[a] neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised”. See also Gaunt & Morgan, *Gale on Easements*, para 4-102.

²⁶ *Smith v Brudenell-Bruce* [2002] P&CR 4 at para 12 – though, in that case, user had continued “as of right” for 20 years and prescription was therefore held already to have operated, see *ibid* at para 22-25. Also interesting is the test given by Pumfrey J at para 12: “It seems to me a user ceases to be user ‘as of right’ if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with the dominant owner’s knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either by physical obstruction or by legal action. A user is contentious when a servient owner is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user.”

²⁷ *Winterburn v Bennett* [2016] EWCA 482. Though such a proposition had previously been made in *Betterment Properties (Weymouth) Ltd v Dorset City Council* [2012] EWCA Civ 250, that case concerned the registration of a town or village green, and Gaunt & Morgan, *Gale on Easements*, para 4-105, had suggested that such reasoning would be unlikely to extend to the prescriptive acquisition of easements, where “any challenge needs to be directed to the owner of the would-be dominant

In this respect, Richards LJ stressed that “[i]n circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be ‘as of right’”; and, in the next paragraph, that he did not “see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land”.²⁸ This fits with the English emphasis on acquiescence as the rationale for prescription. By contrast, such letters and notices would be seen in Scots law as strong evidence that the claimant’s possession had been “as if of right” rather than precarious or “by right”.²⁹

At the opposite end of the scale from the position taken in English law is that taken in South Africa, namely, the decision not to retain any express reference to the *nec vi* requirement in the Prescription Act 68 of 1969.³⁰ A number of reasons have been given for this decision in South African literature, two of which have been particularly prominent. The first is that the peaceableness requirement is superfluous and is already comprehended under the requirement that the claimant must have “openly and as though he were entitled to do so, exercised the rights and powers which a person who has a right to such servitude is entitled to exercise”.³¹ Since an actual servitude-holder would not need to maintain his possession by force, any possession maintained substantially by force would not therefore qualify as prescriptive anyway. An example of such reasoning is provided by Professor Carey Miller, who notes in the context of ownership that any possession which has to be

tenement and a warning or prohibitory notice directed to the world at large might be insufficient to bring home to the dominant landowner that his use was being challenged.” Indeed, Gaunt & Morgan – the first author appeared as counsel for the chip shop owners in *Winterburn* – went on to suggest that, where the dominant proprietor “simply ignores the notice, his continuing user may be regarded as being ‘as of right’” and that “any challenge to an individual landowner is best demonstrated by correspondence addressed to him”.

²⁸ *Winterburn* at 40-41. Richards LJ also advanced a more fundamental policy basis for his decision at para 41, namely, that “[t]here is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others.” While such policy considerations have weight, they were less convincing in Scots law prior to the coming into force of the Title Conditions (Scotland) Act 2003, s75, since servitudes could be created without registration of any deed and either party might therefore have argued that they were seeking to defend a right which was truly theirs.

²⁹ See above below at 229.

³⁰ While the Prescription Act 18 of 1943, s2(1) required that prescriptive possession be “*nec vi, nec clam, nec precario*”, the Prescription Act 68 of 1969 s6 does not mention “peaceableness” or “*vi*”.

³¹ Prescription Act 68 of 1969, s6.

maintained by force “in any absolute manner” could not be consistent with the existence of an actual right, since anyone who was actually entitled to the right being asserted would also be entitled to legal protection and would not therefore need to rely on force, in any absolute sense, to maintain his possession.³² According to Carey Miller, peaceableness therefore remains relevant in South African law under the current Act, since it is implicitly comprehended under the question of whether the claimant has acted as though exercising a right of servitude.³³

Carey Miller also made use of a second reason for dropping the *nec vi* requirement from the statute: where an element of force is used by a prescriptive possessor in a manner consistent with the exercise of the right in question, this need not be prohibited by the law, since the landowner against whom the force is used will also be entitled to bring such possession to an end judicially – indeed, where the landowner has not done so, there is arguably no policy reason for protecting his ownership from being burdened by the asserted right.³⁴

It is this second justification which is emphasised by the present editors of *Silberberg & Schoeman*, who suggest that force *is* now permitted in the process of maintaining prescriptive possession but that this is of little practical import given the length of the prescriptive period and the availability of judicial remedies:³⁵

Section 1 of the 1969 Prescription Act (unlike section 2 of 1943 Prescription Act) makes no reference to the *nec vi* requirement of the common law and it appears that ownership in things not only obtained but also retained by force (during the prescription period) may now be acquired by prescription. Startling though this suggestion may seem, it is no more so than the proposition that the *mala fides* of the

³² Carey Miller (with Pope), *Land Title*, para 3.2.3.5, which reproduces DL Carey Miller, *The Acquisition of and Protection of Ownership* (1986), para 6.2.3.5.

³³ Cf. H Mostert et al, *Principles of The Law of Property in South Africa* (2010), para 7.2.6.1: “This ‘without force’ requirement is not explicit in the 1969 Act because it has no real practical purpose. If property is possessed ‘openly, as if owner’, then, impliedly, it is also possessed without force”.

³⁴ Carey Miller (with Pope), *Land Title*, para 3.2.3.5.

³⁵ Badenhorst et al, *Silberberg & Schoeman*, para 8.6.5. Dr Ernst Marais adopts a position somewhat closer to that of Carey Miller: “The 1969 Act omits *nec vi*, which may seem to imply that property retained by force can now also be acquired through prescription. However, many authors state that the omission of the *nec vi* requirement is of little practical relevance, since forceful possession of property is unlikely to be consistent with the *animus domini* requirement. Furthermore, the fact that the possessor has to possess the property continuously for 30 years also eliminates the possibility of acquiring ownership through forceful possession, as it is highly unlikely that someone will be able to forcefully maintain possession over property for the entire 30-year period”, Marais, “Acquisitive Prescription”, para 2.3.3.2.

possessor is no obstacle to the acquisition of ownership by prescription, which must now be regarded as having been established in modern law. In any event, the excision of the *nec vi* element from the law relating to acquisitive prescription is probably not of any real importance in practice, because it is not likely that anyone will be able to possess for a relatively long period by means of force. Should the owner be resisted by force, nothing prevents him or her from enforcing his or her right in court.

A similar view is put forward by Professor van der Merwe, namely, that a right-holder is entitled to bring a possessory or petitory action before prescription runs its course and, as a result, the abolition of the *nec vi* requirement “has no real practical importance since it is unlikely that anyone will be able to possess for a relatively long period by means of force.”³⁶ On the whole, it would appear that South African law takes a robust approach to force on the part of a prescriptive possessor, admitting the possibility that such force could, in some circumstances, prevent prescription, but generally taking the view that the length of prescription and availability of judicial remedies render the question of force of little practical importance.

What can be learned for Scots law from this brief comparison? As English law’s lower threshold follows from its subjective focus on acquiescence, so South Africa’s approach appears to follow from its more objective focus on legal certainty.³⁷ Given that Scots law attempts to do justice to both of these justifications, it is perhaps unsurprising that it effectively charts a middle course between these two, otherwise similar, systems. As will be seen in the remainder of this chapter, Scots law has a higher threshold for permissible force than English law, so that a simple instruction not to continue possession will not render further possession unpeaceable. At the same time, it has a lower threshold than South African law and continues to insist that certain behaviour on the part of the claimant will render his possession unpeaceable and, hence, ineligible for the purposes of prescription.

³⁶ Van der Merwe, *Things*, para 152; cf. Van der Merwe, *Sakereg*, 275-276 and 530-533.

³⁷ While both a “punishment” justification and a “legal certainty” justification have been put forward in South African sources, the latter is the more widely-accepted, Marais, “Acquisitive Prescription”, para 4.2.3; see also above at 2-4, including n 10.

C. Policy: why must possession be “peaceable”?

Before examining what it means to possess a servitude “peaceably”, it is first important to ask what “law job” this requirement fulfils in the context of positive prescription. The inquiry assumes particular importance due to the fact that so few Scottish cases (or, indeed, modern commentators) have examined the principles underlining the requirement in any real depth.

On one hand, it is clear from the related context of possessory remedies that the concept of “peaceable” possession can play an important role in maintaining public order. Stair, for example, notes that “civil society and magistracy being erected, it is the main foundation of the peace, and preservation thereof, that possession may not be recovered by violence, but by order of law.”³⁸ On the other hand, it is less clear that the concept plays exactly this same role in the context of positive prescription. Instead, it is necessary to bear in mind, once again, the two policy justifications generally given for the establishment of servitudes by prescription: firstly, that prescription promotes legal certainty by protecting long-established enjoyment of another’s land, and, secondly, that any unfairness arising from the operation of prescription is mitigated by the fact that the landowner has been given sufficient opportunity to interrupt prescription and, having not done so, is held in some sense to have accepted the burdening of his right. The requirement that possession be “peaceable” follows from both justifications, firstly, because possession which is maintained substantially by force is inconsistent with the behaviour expected of an actual servitude-holder and need not therefore be protected for reasons of legal certainty; and, secondly, because possession which is maintained substantially by force denies the landowner an opportunity to interrupt prescription naturally and bring it to an end without the expense of taking the claimant to court. The requirement that prescriptive possession be peaceable therefore supports the requirements that possession be open and “as if of right” in ensuring that only the

³⁸ Stair, 2.1.22; cf. Erskine, *Institute*, 2.1.23-24

“right” kind of possession is allowed to lead to the establishment of a servitude by positive prescription.

The observant reader may have noticed that the word “substantially” appeared twice in the last paragraph. This is because, while possession maintained substantially by force will always fall foul of the policy justifications given for positive prescription, it is nevertheless conceivable – and is, in fact, the case in Scots law – that the policy justifications could be satisfied by a formulation of the peaceableness requirement which does not prohibit the use of all force whatsoever. This makes sense, since anyone who actually has a servitude over the servient tenement would be entitled to use force to remove obstructions wrongfully placed in obstruction of the exercise of that servitude,³⁹ provided this is done immediately and not after a delay.⁴⁰

Accordingly, where a person who purports to be exercising a servitude responds to an attempted obstruction by immediately removing that obstruction and resuming his otherwise unobjectionable possession, such behaviour is outwardly consistent with the existence of the servitude in question and qualifies for protection in the interests of legal certainty. In such circumstances, the role of the peaceableness requirement is therefore modified and focuses instead on ensuring that the landowner does not face too high a hurdle in bringing prescription to an end. Peaceableness need not be affected by a one-off use of force similar to that which an actual servitude-holder would be entitled to carry out in response to an attempted obstruction. Where, however, it is clear that the landowner is “consistently and resolutely”⁴¹ attempting to interrupt prescription and bring the claimant’s possession to an end, the maintenance of such possession by force will fall foul of the second policy justification and render possession no longer peaceable.

³⁹ See Gordon, *Land Law*, para 24-72, citing *Calder v Learmonth* (1831) 9 S 343 and *Macdonald v Watson* (1830) 8 S 584.

⁴⁰ See Gordon, *ibid*, citing *Geils v Thompson* (1872) 10 M 327.

⁴¹ To paraphrase Paisley, *Access Rights*, 32

D. Defining peaceable possession.

It therefore seems clear that a requirement that prescriptive possession be peaceable need not necessarily mean that a claimant will never be permitted to rely on force to maintain his possession. In practice, however, the most striking thing about the requirement of peaceable possession in modern Scots law is the uncertainty which surrounds its definition. Indeed, apart from the obvious exclusion of actual physical altercations between claimant and landowner, it can be difficult to ascertain exactly what behaviour is permitted or prohibited. This uncertainty is reflected in the discussions in textbooks, most of which tend to be either so brief that they give only a very general definition of what it means to maintain possession by force⁴² or so tentatively worded that they appear hesitant to make any definite pronouncement on what qualifies.⁴³ For example, after stating that “the precise meaning of ‘peaceable’ is not altogether clear”, Professor Gordon goes on to say that,⁴⁴

Although there is authority for the view that possession is not peaceable if resistance is offered and overcome, whether physical resistance or erection of barriers, it is not clear that removal of an obstruction to possession already begun as an act of self-help in assertion of right, makes the possession no longer peaceable. If an altercation results from attempts at removal, possession may no longer be peaceable and successful physical obstruction will interrupt the continuity of possession.

As will be seen in the remainder of this chapter, Professor Gordon’s comments, though tentatively phrased, provide an accurate summary of the present state of Scots law. Indeed, since so few cases have turned on the issue of peaceable possession, an element of tentativeness is inevitable in this context. Accordingly, it may be that the only way for Scots law to rationalise and develop this area of law is to consider the extent to which these tentative suggestions are consistent with the wider policy aims of prescriptive possession and, where they are consistent, to adopt them wholeheartedly.

⁴² E.g. Gretton & Steven, *PTS*, para 2.28; AGM Duncan in Reid, *Property*, para 460; Johnston, *Prescription*, paras 18.16 and 19.04.

⁴³ Gordon, *Land Law*, para 24-53; Cusine & Paisley, para 10.17.

⁴⁴ Gordon, *ibid*, para 24-53, citing *McKerron v Gordon* (1876) 3 R 429; *Richardson v Cromarty Petroleum Co Ltd* 1982 SLT 237; *Strathclyde (Hyndland) Housing Society v Cowie* 1983 SLT (Sh Ct) 61. See also Gordon & Wortley, *Land Law*, para 12-45.

(1) Whose behaviour and which circumstances are relevant?

Logically, there are three parties whose behaviour might be thought relevant when deciding whether a claimant's possession has been peaceable or not: the claimant, the landowner, and any third party who happens to become involved. Of these parties, it is necessarily the claimant's behaviour which is of most importance for it is his possession which is at issue. This makes sense when one remembers the policy roles played by the peaceableness requirement and that, where a landowner attempts to prevent possession from continuing, his primary aim will not be simply to render the possession no longer peaceable but actually to bring it to an end. Accordingly, it is only when the claimant responds illegitimately to that attempt that policy dictates his possession should be considered vitious and no longer capable of leading to the permanent burdening of the landowner's right of ownership.⁴⁵

This is not, however, to say that the landowner's conduct is irrelevant. In practice, much of the behaviour which could lead to a claimant's possession losing its status as peaceable will take place in response to the landowner's behaviour. Indeed, the manner in which a landowner attempts to interrupt the claimant's possession will often determine whether the claimant will be able to respond peaceably or not. Essentially, when faced with the unwelcome assertion of a right by the claimant, a landowner who decides to resist can take one of two approaches: either he can attempt to stop the claimant in the process of exercising the servitude (e.g. by verbally objecting or by attempting to stop the claimant physically) or he can attempt to prevent further possession by placing an obstacle in the way (e.g. by erecting a fence or locking a gate). Since success in the first of these approaches will interfere with the exercise of the servitude itself, this will count as an interruption and break the continuousness of possession, thus meaning that any forcible attempts to resume possession by the claimant will become unpeaceable.⁴⁶ By contrast, the second of these approaches is essentially non-interactive and does not directly challenge the claimant in the process of exercising the claimed servitude. As such, the claimant has

⁴⁵ See above at 148-150 on the concept of "vices" of possession.

⁴⁶ E.g. *Burt v Barclay* (1861) 24 D 219. See below at 234-236.

an opportunity to remove the obstacle and continue possession as an actual servitude-holder would be entitled to do.⁴⁷

(2) Verbal objections and physical altercations

It is clear that, at least in certain circumstances, the landowner can prevent possession from continuing to be peaceable by successfully ordering the claimant to cease possession. According to Cusine and Paisley, for example, “[i]f a person using a route is stopped and told not to use it, that would prevent the use being peaceable.”⁴⁸ This statement is consistent with both *Burt v Barclay*⁴⁹ and *Macnab v Munro Ferguson*,⁵⁰ where claimants were stopped by a landowner or his representative and turned back.⁵¹ It is, however, significant that the claimants in both of these cases did in fact turn back when told to and, at least temporarily, accepted the landowner’s right to prevent exercise of the servitude. Furthermore, in both cases, it would appear that the verbal objection was successful in turning back would-be possessors at least more than once. This suggests that, rather than being examples of a lack of peaceableness, they should, more properly, be seen as interruptions of possession or examples of possession which was really by tolerance rather than “as if of right”.⁵² Accordingly, in *Burt*, it was only once the claimant continued to assert a servitude over the relevant land that his possession was no longer seen to be peaceable.⁵³

Latterly, no doubt, the pursuer has set forth his pretensions more clearly, by going himself and getting his tenants and others to go along what he claims as a road; but that has not been peaceable and will not do. The pursuer himself has been stopped twice, and his tenant was stopped, and apologised, and promised not to go again, and he has not done so.

⁴⁷ E.g. *Greig v Middleton* 2009 GWD 22-365.

⁴⁸ Cusine & Paisley, para 10.17. See also Paisley, *Access Rights*, 32: “If in these circumstances [i.e. in response to sufficient possession to indicate an assertion of right] the proprietor intervenes with some resolution and consistency to stop persons using the route, their possession or use is not peaceable.”

⁴⁹ *Burt v Barclay* (1861) 24 D 219.

⁵⁰ *Macnab v Munro Ferguson* (1890) 17 R 397.

⁵¹ See also *McInroy’s Trs v Duke of Athole* (1891) 18 R (HL) 46 at 51 per Lord Bramwell.

⁵² The latter seems to be the interpretation adopted by LJC Macdonald and Lord Young in *Macnab* at 401 and 403; see also *McInroy’s Trs*, *ibid*, at 49 per Lord Watson and at 51 per Lord Bramwell.

⁵³ *Burt v Barclay* (1861) 24 D 219 at 220-221 per LP McNeill.

A final example is *Fowlie v Watson*.⁵⁴ In that case, the defender initially responded to the pursuer's instructions by ceasing to use a pump on the allegedly-servient land. Once the defender then took access to the water pump again "by his own direct actings", it was held that the resulting possession could not be peaceable.

By contrast, where a landowner's verbal objection is ineffective or ignored by the claimant, this in itself will not render possession unpeaceable. Indeed, as Gordon points out, "persistence in use in face of an unsuccessful challenge is good evidence of use as of right".⁵⁵ Accordingly, where a party is challenged unsuccessfully and continues to exercise the servitude in the face of this challenge, this will not be considered unpeaceable.⁵⁶ Similarly, mere obstructiveness on the part of a landowner will not render possession violent. This is demonstrated in *Sidebottom v Green*, where the fact that the defender's predecessor had "caused difficulties" had no effect on the peaceableness of the pursuer's possession.⁵⁷ It also seems clear that forcibly worded letters could never render prescription unpeaceable as they have been held to do in English law.⁵⁸ In this respect, it is instructive to note that the trajectory in the Scots law of positive prescription has been to move away from recognising extra-judicial interruptions of possession which do not actually bring the claimant's physical possession to an end.⁵⁹

Where, however, an attempt to stop possession results in a physical altercation between the parties, it seems clear that this will prevent prescription from being

⁵⁴ *Fowlie v Watson*, 9 July 2013, Peterhead Sheriff Court, transcript, para 46. See also above at 174-176 and commentary in Reid & Gretton, *Conveyancing 2015*, 14-16.

⁵⁵ Gordon, *Land Law*, para 24-49. This view was expressed even more strongly by Lord Watson: "Persistent use in the face of challenge is a clear assertion of right", *McInroy's Trs v Duke of Athole* (1891) 18 R (HL) 46 at 50 per Lord Watson.

⁵⁶ E.g. *Abel v Shand*, 4 December 1997, Stonehaven Sherrif Court, case ref A 264/95 (unextracted process (4 August 1998) NAS, CS348/1998/2727), sheriff's note, 62.

⁵⁷ *Sidebottom v Green*, 16 May 2014, Banff Sheriff Court, transcript, para 41; Russell, *Prescription*, 55.

⁵⁸ See, e.g. *Webster v Chadburn*, 9 May 2003, Inverness Sheriff Court; cf. *Smith v Brudenell-Bruce* [2002] P&CR 4; Gaunt & Morgan, *Gale on Easements*, paras 4-101 – 4-107. See also above at 220-221.

⁵⁹ See, e.g., the Scottish Law Commission, *Report on the Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15, 1970), para 20, with respect to extra-judicial interruption by means of notarial protest (i.e. civil interruption) rather than adverse possession (i.e. natural interruption): "If physical possession is not conceded, then a dispute as to the rights of the parties should be determined by judicial process."

peaceable. The best example is *Strathclyde (Hyndland) Housing v Cowie*, which is discussed more fully below.⁶⁰

(3) Removal of obstacles to already-begun possession

Where a landowner is unwilling to make a direct challenge to the claimant's possession, or has already attempted to do so unsuccessfully, an alternative approach is to place an obstacle in the way of the possession. In itself, such an approach is an attempt to interrupt or prevent possession rather than to render it unpeaceable.

However, where the claimant overcomes that objection in an illegitimate manner, his continuing possession will no longer be peaceable and the prescriptive clock will stop running.

One frustrating aspect of the modern case law on peaceable possession is that it can be unclear exactly which factors tipped possession over the line from being peaceable to being unpeaceable in any particular situation. Generally, this has been because more than one factor is present which could have prevented the possession from being peaceable and it is unclear whether each would have done so in isolation. A prime example is *Burt v Barclay*, already mentioned.⁶¹ In that case, the Inner House held that possession had ceased to be peaceable once a putative possessor had torn down a fence erected by the landowner, filled up ditches dug to stop him, twice been successfully stopped from crossing land by the landowner, and once had his tenants turned back from using the road. Despite this, Lord President McNeill was willing to accept that the claimant might have been justified in cutting down the fence, had he done so "at once" rather than only after "the fences had been up for a considerable time".⁶²

More recently, in both *Abel v Shand*⁶³ and *Greig v Middleton*,⁶⁴ obstructions which were clearly intended to prevent access to the servient tenement were removed

⁶⁰ *Strathclyde (Hyndland) Housing Society Ltd v Cowie* 1983 SLT 61; see below at 237-238.

⁶¹ *Burt v Barclay* (1861) 24 D 219; See above at 234-235.

⁶² *Ibid* at 221 per LP McNeill.

⁶³ *Abel v Shand*, 4 December 1997, Stonehaven Sheriff Court, case ref A 264/95. The unextraced process (4 August 1998) for this case is available through the National Archives, CS348/1998/2727. See also *Cusine & Paisley*, paras 10.17 and 10.19.

⁶⁴ *Greig v Middleton* 2009 GWD 22-365.

without rendering the possession unpeaceable. The obstructions in *Abel v Shand* consisted of a post-and-wire fence and, once this had been removed, pipes and other obstructions laid across the road. In *Greig v Middleton*, the obstructions consisted of filling in two gaps in an existing fence and padlocking a gate, both of which were subsequently reversed by the claimant under police supervision “more or less immediately”.⁶⁵ On the whole, this suggests that, where the claimant has immediately resisted an attempted obstruction and resumed possession of the claimed servitude, this will be seen as an assertion of right rather than an indicator that the possession is unpeaceable.⁶⁶

The main case standing against this interpretation is *Strathclyde (Hyndland) Housing v Cowie*.⁶⁷ In that case, a landowner erected three bollards across a lane in an attempt to prevent access being taken by the public. This attempt resulted in an “altercation” with two members of the public and the forcible removal of the three bollards. Undeterred, the landowner proceeded to erect “five or six” more bollards. These bollards were subsequently removed by means of a Land Rover. Eventually, eleven bollards were placed by the landowner, eight of which were, again, removed by Land Rover and the remainder of which were removed by Strathclyde Regional Council.⁶⁸ In his opinion, the sheriff held that the *initial* erection, altercation and removal meant that the possession could not be said to be “peaceable”.⁶⁹ The sheriff did not, however, comment on whether the two later incidents of erection by the landowner and removal by the public and local council would also have rendered possession unpeaceable had they taken place in isolation. This point is noted by both Gordon and by Cusine and Paisley, the latter suggesting sensibly that,⁷⁰

[t]he mere removal [of an obstruction] would not be enough to affect the nature of the possession because the owner of the subjects might simply be testing the mettle

⁶⁵ *Ibid*, transcript, finding in fact 36. Decisive in the sheriff’s reasoning was the “very short period in which the pursuer allowed the new fence to remain.”

⁶⁶ Cf. Gordon, *Land Law*, para 24-49.

⁶⁷ *Strathclyde (Hyndland) Housing Society Ltd v Cowie* 1983 SLT 61.

⁶⁸ This third act of bollard-placing led to the landowner being charged with a criminal offence which was ultimately dropped, *ibid*, at 62.

⁶⁹ *Ibid* at 66.

⁷⁰ Cusine & Paisley, para 10.17.

of those asserting the right or continuing to use it. If no objection is taken to the removal, it is submitted that the possession remains peaceable.

In any event, even had no “altercation” taken place during the first incident, it seems likely that the public’s possession could not have been said to be peaceable by the time at which the third incident took place. Rather, where any such incident forms part of a cycle of obstruction and removals, the possession will no longer be peaceable.⁷¹ This will especially be the case where, as was envisaged in one English case, there is a state of “perpetual warfare” between the parties.⁷²

In summary, a claimant is entitled to use force when his otherwise-prescriptive possession is challenged. Such force must, however, be immediate, decisive, and successful if the possession is to remain peaceable. Accordingly, where an attempt to resist interruption leads to an “altercation” between claimant and landowner or forms part of a cycle of obstructions and removals, possession will no longer be peaceable and the prescriptive period must begin anew.

(4) Interactions with third parties and the Landowner’s tenants

There is no suggestion in the case law or secondary literature that interactions with third parties can affect the peaceableness of a claimant’s possession. Indeed, from a policy perspective it is unclear why incidental violence between the claimant and third parties should be allowed to prevent prescription from running: such behaviour may be objectionable but it cannot be said to affect the landowner’s ability to halt prescription as such. This can be contrasted with the position which exists in relation to tenants of the allegedly-servient tenement. A landowner is entitled to rely on steps taken by his tenants to interrupt prescription, so long as they were carried out with his knowledge and assent.⁷³ That said, while it appears that a tenant is entitled to protect his own position and even seek interdict against a claimant’s use of an “alleged servitude road”, a landowner is not entitled to rely on his tenant’s actions

⁷¹ *McKerron v Gordon* (1870) 3 R 429.

⁷² *Eaton v Swansea Waterworks Co* (1851) 17 QB 267.

⁷³ *Stevenson v Donaldson* 1935 SC 551.

where these were aimed generally at keeping the public off the allegedly-servient tenement rather than aimed at the claimant's possession in particular.⁷⁴

Historically, Roman law saw violence as relevant only between the two parties to a possessory action and so allowed a person who had acquired violently from one person to defend his possession against another.⁷⁵ A helpful concept in this context is the idea of peaceableness as a “relative vice” of possession. This concept has been developed in French and Louisianan literature and recognises that, “[v]iolence represents – just as clandestine possession does – a purely relative defect which can be asserted only by the person against whom it was exercised”.⁷⁶ Again, this accords with the primary policy objective of the three, historically recognised, vitiating factors (*nec vi nec clam nec precario*), which is to ensure that a landowner is given sufficient notice that prescription is running against him and sufficient opportunity to bring it to an end if he so wishes.

E. Burden of Proof

It has already been suggested that the burden of proof in relation to other vices of possession – i.e. possession “by right” and “clandestine” possession – lies primarily on the landowner rather than the claimant.⁷⁷ Once a claimant has shown sufficient possession to indicate that a servitude is being asserted, the burden of proof then rests on the landowner to show that a vitiating factor is present such that prescription ought not to operate in the particular case. In practice, this seems especially appropriate in the context of peaceable possession, since even though a claimant will assert in argument that his possession has been “peaceable”, it will be the landowner who must prove that certain incidents took place which prevented it from being so. Indeed, placing the burden of proof on the claimant would amount to asking the

⁷⁴ *Ibid* at 557-558 per Lord Murray; cf. J Rankine, *The Law of Leases in Scotland* (3rd edn, 1916), 710-711; Cusine & Paisley, para 10.13.

⁷⁵ Thomas, *Textbook*, 148; Buckland, *Textbook*, 727-730.

⁷⁶ Aubry & Rau, §180; Planiol with Ripert, No 2280; AN Yiannopoulos, *Louisiana Civil Law Treatise*, vol 2 (Property, 4th edn, 2001), § 315.

⁷⁷ See above at 165-167 and 216-217.

claimant to prove a negative – i.e. that no incidents had taken place which challenged the peaceableness of the claimant’s possession – and would therefore be inconsistent with the approach taken in relation to possession “by right”, where the burden falls on the landowner for this very reason.⁷⁸

⁷⁸ This was also the position in Roman law, where the claimant did not have to prove the absence of a vitiating factor but only to present his possession as non-vitious, Windscheid, *Lehrbuch* §183 fn 5; Buckland, *Textbook*, 730-731.

Appendix 1: Checklist for claimants and landowners

Preliminary issues for claimant and landowner (See Chapter 6)

- 1) Is the claimant registered as proprietor of the allegedly-dominant tenement?
- 2) Is the claimed servitude capable of being acquired by positive prescription – i.e. of a known type, not interfering with statutory purposes, not illegal?

Assessing the claimant's possession

A) Burden of Proof on claimant to show:

- 1) possession was sufficient to indicate to the landowner that a servitude was being asserted over the allegedly-dominant tenement (See Chapter 8)
- 2) that the *acts* of possession were sufficiently overt to come to the attention of a reasonably observant landowner (See Chapter 10)
- 3) possession was maintained for a continuous period of twenty years

B) Burden of Proof on landowner to show:

- 1) possession was vitious:
 - a) possession was not “as if of right” but “by right” – i.e. dependent on the landowner's permission or on another right held independently by the claimant (See Chapter 9)
 - b) possession was not open, i.e. claimant sought to conceal possession from the landowner (See Chapter 10)
 - c) possession was not peaceable, i.e. possession was maintained by use of illegitimate force (See Chapter 11)
- 2) possession was interrupted and not maintained for a continuous period of twenty years (See Chapter 6)

Extent of prescribed servitude: s3(1) by deed; s3(2) by possession

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