

**SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY  
AT DUMFRIES**

**[2025] SC DUM 11**

DUM-A177-24

**JUDGMENT OF SHERIFF MUNGO BOVEY KC**

in the cause

MARCO LORENZO FUSI, PAUL PETER FUSI, KAREN FUSI, and MARY FUSI

Pursuers

against

TINA GICONDA MARIA FUSI or FILIPPI, SYLVIA MARIA FILIPPI or LAVERY, LORETTA MARIA FILIPPI or LEES and RAYMOND ANTHONY FILIPPI, as Trustees for and on behalf of the T.F.T. TRUST

Defenders

**Pursuers: McLean  
Defenders: Powell**

DUMFRIES, 26 November 2025

The sheriff, having resumed consideration of this case, finds that a servitude right of fuel storage has been established and appoints the case to a procedural hearing to be afterwards fixed for submissions on the wording of the order and the expenses of the cause.

**A      Introduction**

[1]      This action was raised in December 2024 when the pursuers sought declarator that they owned the courtyard between their property at 126/127 Drumlanrig Street, Thornhill and the defenders' cottage at 2 New Street, Thornhill along with an order that the defenders remove from the courtyard gas canisters and ancillary equipment. That action was

abandoned by minute dated 25 March 2025. By this time, the defenders had lodged defences in which they counterclaimed for declarator that they had "an essential servitude right of fuel storage".

[2] On 19 June 2025, the sheriff, on joint motion, allowed parties a diet of proof on the defenders' counterclaim which was in due course fixed for 12 September 2025 when I heard the evidence for both parties in counterclaim. I heard submissions for parties on 16 October 2025.

[3] Ms Powell asked me to make a finding in fact:

"That a servitude right to store fuel in the courtyard exists for the benefit of the owners of 2 New Street and that rights of fuel storage have been possessed by the defenders for a continuous period of twenty years openly, peaceably and without judicial interruption. These actions were exercised as of right by the defenders and are existing and continuing servitude rights."

[4] On 18 November 2025 the court sent a message to the parties' agents drawing their attention to section 77 of the Title Conditions (Scotland) Act 2003, which provides:

"Positive servitude of leading pipes etc over or under land

- (1) A right to lead a pipe, cable, wire or other such enclosed unit over or under land for any purpose may be constituted as a positive servitude.
- (2) It shall be deemed always to have been competent to constitute a right such as is mentioned in subsection (1) above as a servitude."

and in the first instance, inviting submissions in writing within a week. Ms Powell lodged a brief further submission praying the section in support of the defenders' position.

[5] The parties lodged a joint minute which forms the foundation of the findings in fact:

## **B Findings in fact**

1) The defenders are the proprietors of the dwellinghouse at 2 New Street, Thornhill, title being registered in the General Register of Sasines on 17 March 1998.

- 2) The pursuers are the proprietors of the subjects known as and forming 126/127 Drumlanrig Street, Thornhill, their title being registered in the General Register of Sasines on 16 December 2003.
- 3) The properties at 1 and 2 New Street and 126 and 127 Drumlanrig Street were all owned by Quintilo Fusi who purchased the properties together in one transaction sometime in the 1930s. Mr Fusi was grandfather of all the parties except the first defender who is his daughter.
- 4) Mr Fusi created the cottages 1 and 2 New Street by combining a row of three cottages (1, 2 and 3 New Street) into two semi-detached properties as they are now.
- 5) Between 1975 and 1977 Marco Fusi, the first pursuer, lived in 2 New Street which was then still owned by his grandfather. Otherwise, none of the parties has ever lived in any of the properties facing the courtyard.
- 6) The courtyard to the rear of 2 New Street forms part of the pursuers' subjects at 126/127 Drumlanrig Street. 2 New Street lies to the south of the pursuers' property, across the courtyard from a large garage building which the pursuers also inherited from Quintilo Fusi.
- 7) The property at 2 New Street is on the market for sale with Robert Wilson and Son, Solicitors and Estate Agents, with an asking price of £110,000.00.
- 8) The pursuers' property at 126/127 Drumlanrig Street is subject to a right of access in favour of the first defender and her successors as proprietors of 1 and 2 New Street.
- 9) This right of access was constituted by disposition by the executors of Maria Fusi (the widow of Quintilo Fusi) in favour of Maria Clementina Fusi (the pursuers' mother) dated 19 May and 16 June 1992 and recorded in the General Register of Sasines on 1 February 1993 (6/5 of process).

- 10) The parties' respective properties fell into separate ownership when the first defender inherited 1 and 2 New Street from the widow of Quintilo Fusi with entry on 3 November 1990, following her death in 1988.
- 11) 1 and 2 New Street benefit from a right of access from back lane Thornhill to the subjects over the courtyard ground now owned by the owners of 126 and 127 Drumlanrig Street (6/3 of process).
- 12) Historically, 1 and 2 New Street were heated by coal; the current the property at 2 New Street had three fireplaces of which only the one in the main room remains. Central heating was fitted in the early 1990s by the installation of a back boiler in the lounge fireplace, which required the continued storage of coal and coking coal.
- 13) Brick coal bunkers were historically situated on the said courtyard and stored coal which serviced and supplied the property at 2 New Street without judicial interruption. A brick coal bunker was in place when the parties' properties fell into separate ownership in 1990. The storage of coal in the courtyard by the occupants of 2 New Street has never been challenged by the owners of 126/127 Drumlanrig Street.
- 14) A metal coal bunker was situated on the courtyard in around 2013 by the defenders to replace the brick coal bunker at 2 New Street and has remained without judicial interruption.
- 15) There is no mains gas in the village. In around August 2015 the defenders fitted an LPG Combi-boiler at the property at 2 New Street providing central heating and hot water. Four gas canisters were placed on the courtyard in connection therewith which serviced and supplied the property at 2 New Street peaceably and without judicial interruption to date. The footprint of the gas canisters is less than the footprint of the old brick coal bunker.

- 16) The metal coal bunker and the gas canisters continue in place at the back door of 2 New Street. Photograph 6/9/1 of process shows them the year to 12 September 2025. Those responsible for their installation did not ask permission of the owners of the courtyard before putting them in. The bunker continues in use. The canisters supply gas to the cottage by way of pipes and are replaced when empty.
- 17) The properties at 1 and 2 New Street have historically used the yard for storing fuel, for storage of rubbish bins and hanging out washing; the courtyard has not been used by vehicles and is unsuitable for such use.
- 18) The various iterations of the means of fuel supply have been successively less permanent; the brick coal bunker in place in 1990 was succeeded in about 2013 by a metal one which was supplemented in about August 2015 by gas canisters which are removed by the supplier when empty and replaced to maintain the supply. The metal coal bunker and four gas canisters would be substantial obstructions to vehicular access in the courtyard but, because they project the same distance into the courtyard, neither the canisters nor the bunker alone affects the issue of vehicular use. The addition of the gas canisters does not materially increase the burden of the defenders' pre-existing fuel arrangements on the courtyard.
- 19) Removal of the gas tanks would result in the loss of the supply of gas which would be materially disruptive of the lives of those occupying number 2.
- 20) 1 New Street was sold in around September 2016, but 2 New Street did not sell so it was re-let to a new tenant. On 30 May 2017, after the installation of the canisters, Paul Fusi, the second pursuer, wrote to the defenders objecting to the sales particulars of 2 New Street, which was on the market for sale at that time, and requesting the gas canisters be removed. Raymond Filippi, the fourth defender,

phoned Paul Fusi to explain to him that the canisters would not be removed as the defenders had a right to store them there legally and had been doing so for decades. A further letter, dated 16 January 2018, also requested the removal of the canisters. Despite the terms of the letters, the gas canisters remained and no action was ever taken by the pursuers to have them removed. Mrs Lees, the third defender, spoke to Marco Fusi, the first pursuer, on a few occasions; he said "As long as you own the property, there is no problem."

#### **C Findings in fact and law**

- i. Fuel storage has been carried out by the defenders for a continuous period of 20 years openly, peaceably and without judicial interruption;
- ii. A servitude right to store fuel in the courtyard has arisen by the operation of prescription in terms of section 3(2) of the 1973 Act for the benefit of the owners of 2 New Street.

#### **D Evidence**

##### *Raymond Filippi*

[6] The fourth-named defender adopted his affidavit of 12 September 2025, a signed copy of the unsigned one uploaded on 8 September 2025. He is 66 years, a retired micro-electronics design engineer living in Broxburn.

[7] The properties at 1, 2, and 3 New Street, Thornhill, and 126 and 127 Drumlanrig Street were all owned by Mr Filippi's maternal grandfather Quintilo Fusi who purchased the properties together in one transaction sometime in the 1930s. The bungalows at New Street are themselves hundreds of years old, likely dating back to around the 1850s. After

Mr Filippi's grandfather purchased the properties, he converted the three bungalows at New Street into two bungalows, forming 1 and 2 New Street, Thornhill as they are now. The properties remained within the family and the witness's mother, Mrs Tina Giconda Maria Filippi, inherited 1 and 2 New Street, Thornhill from his grandmother in around the summer of 1990, following his grandmother's death in 1988. The Trust has therefore owned the property at 2 New Street for 27 years, and it has been owned by the family for close to 100 years.

[8] He and his mother and sisters Sylvia and Loretta formed a family trust known as TFT Trust in March 1998 and the properties at 1 and 2 New Street were owned by the Trust, though his mother was not a beneficial owner of the property. His sister Sylvia resigned from the Trust in 2016 because she was living in the USA and his mother resigned in February 2023 due to her advancing years. The only continuing members of the Trust are Loretta Lees and the witness.

[9] The current property at 2 New Street had three fireplaces of which only the one in the main room remains. As far back as Mr Filippi can recollect, tenants have stored fuel in a yard that is immediately to the rear of the property. There is a rear entrance to this yard, which was used by the proprietors of 1 and 2 New Street, and can be accessed from Galbreck Road, which is immediately to the left-hand side of the property. It is essentially a service yard: the properties at 1 and 2 New Street used the yard for storing fuel, for storage of garbage bins and hanging out washing; the rear entrance to the properties opens out on to the courtyard. The courtyard itself is not owned by 1 and 2 New Street; it is owned by the proprietors of 126/127 Drumlanrig Street, the pursuers. However, there has never been any dubiety in the family that the properties at New Street had used the yard for storing and accessing fuel for at least 100 years. When Mr Filippi's grandfather owned the property

there was a covered stone coal bunker that was in the yard and coal was collected from that bunker and used in a fireplace inside the house. This was the same coal bunker that was used when his mother became owner of the property in 1988. To his recollection coal has always been stored in the courtyard; that is where coal was delivered to and where the people living in 1 and 2 New Street collected the coal to store and use indoors. When his mother inherited 1 and 2 New Street, and thereafter when he became an owner alongside his siblings through the family trust in 1998, the stone coal bunkers were still very much in active use.

[10] This was the only way that the property was heated. The old stone coal bunker can be seen in production 6/8 of process, and specifically beside the white building on the left in 6/8/1, the Google Maps capture of March 2009, when it remained in situ and in use. It was there in 1990. Asked if it was there some considerable time before that, he replied that it looked original.

[11] Central heating was fitted in the early 1990s by the installation of a back boiler in the lounge fireplace, which required the storage of coal and coking coal. The properties at 1 and 2 New Street were both rented and tenants would access the coal from the rear entrances of the property and into the courtyard to collect from the coal bunkers to use in the fireplaces. The use of the yard for the storage of fuel has therefore been consistent, necessary and habitual since at least the 1930s, and certainly since the property was bequeathed to the first defender in 1988. No issue was ever raised with fuel, bins or washing lines being stored in the courtyard by the owners of 126/127 Drumlanrig Street. The yard was used for the storage of fuel peaceably and has never been interrupted. In 2013, the stone bunkers were starting to become unfit for purpose and the third defender, Mrs Loretta Lees, who at this stage took on the day-to-day responsibilities of letting the properties, decided that they

needed to be updated. She therefore purchased a metal coal bunker as a replacement.

Again, this was placed in the courtyard and used continually by the tenants of 2 New Street without issue from 2013. It can just be seen beyond the red tanks in 6/8/2, a Google Maps capture from April 2021. It is shown in 6/9/1, a photograph taken in the last year. The defenders did not seek permission from the owners of 126/127 Drumlanrig Street when this happened, and they did not think it was necessary.

[12] Mr Filippi's family knew coal was becoming a "dirty fuel" and that there was a need to modernise the heating system. By this time tenants no longer wanted to have to go through the time and labour of lighting a fire. There is no mains gas in the village. They considered the installation of gas canisters would allow tenants to have hot water and heating on demand. Again, it did not even occur to them to ask for permission from the proprietors of 126/127 Drumlanrig Street because he and Mrs Lees considered that they had a right to store, and access, fuel for the property on that ground, a right they believed had always existed together with the property.

[13] Since the property was converted in 2015 the only way for the property to be heated is with gas supplied via canisters which are stored on the small area of land adjacent to the rear of the house. They are on the only location they could be in safety, outside the window of a small walk-in cupboard that houses the gas boiler; they would not be allowed outside a living area such as the kitchen or bathroom. The three windows at the back are the kitchen, the bathroom and the cupboard.

[14] After the installation of the gas canisters in 2015 the owners of 126/127 Drumlanrig Street did say that they did not want the defenders doing this. This was in a letter sent to Loretta Lees dated 30 May 2017 signed by Paul Fusi and said that they did not have a right to do this. Mr Filippi telephoned Paul Fusi, saying that he did not agree and that they did

have a right to store fuel. Paul and Marianne Fusi then wrote to the defenders' tenant on 16 January 2018. In his affidavit, the witness said that this letter reiterated that they did not believe that the defenders had a right to store gas canisters on the land behind the house. The defenders did not do anything about this letter because Mr Filippi did not believe it to be accurate. In oral evidence, the witness said the letter was prompted by dog fouling by the holiday let at number 1 and after that was sorted, the defenders heard no more about it.

[15] Despite the terms of these letters the gas canisters remained and no action was ever taken by the pursuers to have them removed. The gas canisters have been used consistently and exclusively by 2 New Street since their installation. Nothing further came from this correspondence until this current court action was raised in 2024 and the owners of 126/127 Drumlanrig Street never took any steps to prevent or remove the storage of the canisters until they raised this court action. The gas canisters were used continually throughout this time.

[16] In 2016 the Trust put both 1 and 2 New Street on the market for sale. 1 New Street, Thornhill sold in 2016 and 2 New Street was re-let but is currently on the market for sale. The current court action was raised as the defenders were trying to sell the property at 2 New Street. They have an offer to purchase the property for £97,000.00 but missives could not be concluded because of the present proceedings, and it has caused significant delay to the sale. The defenders need to declarator to be able to market or sell the property with gas central heating. They have sale contingent on having gas canisters of right.

[17] Mr Filippi rejected the evidence in Marco Fusi's affidavit that when he went to stay at number 2 in 1975, there was an internal coal cellar which housed coal for the coal fire; there were never any coal marks or coal dust and no capacity for storage of coal inside.

[18] Asked about the statement in Paul Fusi's affidavit that the presence of the four gas canisters makes for a substantial obstruction for vehicular access in the courtyard, Mr Filippi thought the footprint of the canisters was similar to that of the brick and metal bunkers. They supply gas to the cottage by way of pipes and are replaced when empty. They are serviced every year. Having fewer would leave the occupants at risk of running out.

[19] In cross-examination, the witness agreed he was seeking to convert the coal right to a gas canister system. He had worked in the south of England from 1992 to 2002 and thereafter abroad to 2016. During that time, his sister had managed the property but he had been consulted. He denied there had been electric heating. In his mother's time, from 1990 to 2016, there had been continuous storage for the back boiler; the tenant must have used coal. Electric heaters were too expensive, it was extremely unlikely. He was never there for coal delivery. But he did open a bunker to see if there was coal in it when the property was on the market – the coal fire was still operational. It was quite possible that the coal bunker was still used up to 2024. Asked if he was claiming for the coal bunker or for the gas cylinders, he replied "fuel storage" He agreed he was claiming for both. He did not agree that the Fusis were tolerating the defenders' behaviour – they were aware the defenders had a servitude, a right he had asserted to Paul Fusi. He disagreed with the proposition that the gas canisters were there through the goodwill of his relatives not as of right.

### *Loretta Lees*

[20] The third defender is 71 and a retired teacher living in Prestwick. She adopted a signed version of the affidavit uploaded on 8 September 2025 with the correction that her grandfather was Quintilo Fusi and not Quintilo Filippi.

[21] Her mother, the first defender, who will be 100 years old in January, told her that she recalled from the 1930s that when she had gone into the yard to play with a friend, the people living there were using it as a service yard for all purposes.

[22] Mrs Lees became familiar with 2 New Street in about 1990. Work was carried out then, a fitted kitchen, heating and general decoration. The heating was a back boiler fitted to a coal fire in the main room. The bunker was continuously in use. The cottage was rented out in the 1990s and Mrs Lees helped assist with some of the more day to day aspects of renting out the property.

[23] In 1998 the bunker was still continuously in use with tenants involved in managing. Mrs Lees was not aware of there ever being internal coal storage – why would there be?

[24] The coal stone bunkers had wooden tops. In around 2013 it became clear that they could no longer continue to use them as they were starting to crumble and were no longer really fit for purpose. She purchased a metal coal bunker in 2013 which was placed in the courtyard.

[25] Coal had become an outdated means of heating the property and it was understandably becoming less popular with tenants. Therefore in August 2015 an LPG combi boiler was fitted. This came with external gas canisters that needed to be placed outside the property which gave tenants heating and hot water on demand. The fireplace in the lounge is still in the property as a secondary heating source when it gets particularly cold for tenants but in 2016 they removed the old brick coal bunkers.

[26] The defenders sought no permission to place the external gas canisters in the only location where they would be viable, namely the yard. It never occurred to them to seek permission as they considered that they had a right to store fuel there given that this had been done without interruption consistently since the 1930s. The tenants would use the fuel

as regularly as they required to heat the property on cold days. They told the witness that coal came during the day, when they were out at work.

[27] The back boiler and LPG combi boiler provided hot water. The LPG boiler provided hot water on demand and unlike the back boiler did not require the lounge fire to be on to provide hot water. No problems were ever raised in any capacity by the pursuers until 2017, once both properties had been placed on the market for sale.

[28] Mrs Lees received a letter from Paul Fusi on 30 May 2017. He objected to the sales particulars of 2 New Street, which was on the market for sale at that time, and requested the gas canisters be removed.

[29] Raymond Filippi phoned Paul to explain to him that the canisters would not be removed as they had a right to store them there legally and had been doing so for decades. The pursuers did not take any further action. 1 New Street was sold in around September 2016, but 2 New Street did not sell so it was re-let to a new tenant.

[30] Mrs Lees also spoke to Marco Fusi on a few occasions informally and pleasantly to explain the servitude rights we understood went with the property. Fuel had been stored there for nearly 100 years. He was never able really to clarify why there was no issue with one type of fuel being stored there versus another. When the two of them were in the yard together, Marco said "As long as you own the property, there is no problem." They could have been in the yard dealing with an issue with glass falling from the pursuers' property which concerned the witness about child safety. It was not a designed meeting.

[31] The footprint of the gas canisters is actually half the footprint of the old brick coal bunker. All that has happened is the fuel use has moved with the times. Solicitors' correspondence was eventually entered into with the pursuers. Despite this, gas canisters have been used and are used to this date for 10 years without interruption. It is the only

method of heating the property. The open coal fire still can be used but it is not sufficient on its own.

[32] There was no attempt at judicial interruption of this until these present proceedings were raised by the pursuers in December 2024. It was all rather odd. Proceedings were served, but then abandoned without conceding the point that a servitude right of fuel storage existed. Given that 2 New Street was on the market for sale again the defenders had no option but to defend the action as a house sale could not go through when there was an active dispute about the right to store fuel in the yard of 126/127 Drumlanrig Street.

[33] In cross-examination Mrs Lees agreed that she had never lived in Thornhill; her information as to where coal was delivered to came from tenants. She did not know at all of internal coal storage. It was not the case while she was managing the property.

[34] Asked if electric heating could have been put in in 2015, she replied that because there is no mains gas, it was quite popular or common to have gas canisters – the radiators and plumbing were all there. When the question was repeated, she replied:

“Not without a lot of upset; I didn’t consider it. Even then electricity was far more expensive and I knew tenants were unhappy at the time and work to light a coal fire and I felt we had to upgrade and modernise.”

[35] Mrs Lees denied that the gas canisters made the bunker redundant. The metal bunker allows the tenants to have a fire. She denied that she was looking for two servitudes - they want what has been there a long time. The metal bunker was only ever for secondary heat. The open fire functions but not enough to heat the home on its own. She did not agree that having both increased the burden on the servient tenement.

[36] There are no tenants at present. When she visited previous tenants, they had the fire on. She would have noticed had they been keeping the coal inside; she was involved in redecorating and there was never any indication of that.

[37] When Marco said the gas tanks were not a problem as long as she owned the property, she did not accept, she never said a word. She rejected the proposition that the permission to keep gas tanks was personal to her and clearly not to exist for purchasers of the property: it was there because of modernisation to enable the renting out of the house which had been getting increasingly difficult.

### ***Marco Lorenzo Fusi***

[38] The first pursuer is 74 years old and a retired café proprietor. He adopted his affidavit of 8 September 2025.

[39] The property at 2 New Street, Thornhill was formerly owned by Mr Fusi's grandfather. In 1975, when he was just newly married, Mr Fusi resided at 2 New Street and lived there for the next couple of years. When he went to stay there, there was an internal coal cellar which housed coal for the coal fire. This was in the kitchen. Heating was by way of electric storage radiators but he found the cost prohibitive and reverted to an open coal fire. By that time the internal coal house had been removed to improve the kitchen. However, he continued to store the coal internally and did not use any outside storage facility. To his knowledge, there was no bunker. He learned of the metal one sometime after it was installed in 2003.

[40] About 2015 Mr Fusi became aware of the presence of the gas canisters connected by pipes to 2 New Street. Loretta Lees called into his Drumlanrig Café in Thornhill and he told her that he objected to the presence of the gas canisters in the courtyard. In view of the family relationship with the defenders he took the view that he would tolerate the position.

[41] In September 2024 Mr Fusi became aware that the defenders intended to sell 2 New Street. He did not want third parties to acquire rights for the gas canisters serving the

property and instructed his solicitor to raise the present proceedings. The defenders entered into the court process and at that stage the pursuers agreed that it would be distasteful to enter into a contested litigation with relatives and abandoned the action. However the defenders chose to insist on their counterclaim to declare a servitude. While he can allow the presence of the gas canisters on a tolerance but non right basis with relatives, he is not prepared to allow a right to be passed to new proprietors.

[42] In cross-examination, Mr Fusi agreed that the pursuers had never been asked for permission about coal bunkers or gas canisters. When he lived in the cottage between 1975 and 1977, both sides of the courtyard belonged to his grandfather. The gas arrangement is an installation whereas the coal is just there. If the pursuers were working or selling the property, the yard goes with the 126/7 property. The new owners do not want things on their property. The pursuers want to alleviate the problems it would cause. The big white building across the courtyard from the cottage is a garage which the pursuers also own.

#### ***Paul Peter Fusi***

[43] The second pursuer is 64 years old, a retired IT salesman living in Altrincham, Cheshire. He is one of the proprietors of the subjects 126/127 Drumlanrig Street. Part of the subjects comprises a courtyard. On the south side of the courtyard, the subjects are bounded by a cottage building known as 2 New Street.

[44] The proprietors placed movable metal coal bunkers on the south side of the courtyard. They were not a problem for the pursuers as owners of the courtyard, as they could be moved easily. The old bunker remained in place. The metal coal bunker was not used continuously for coal storage. From at least 1975, the property at 2 New Street, Thornhill, had the electric storage heating facility. In 2015, the defenders installed gas

canisters just outside the back window of 2 New Street, Thornhill, in the courtyard of 126/127 Drumlanrig Street, Thornhill. He was not happy about their presence, but in view of the fact that the defenders in this action were relatives, they did not take any action at the time. He was aware that his brother Marco had objected to Loretta Lees about the presence of the gas canisters and agreed with his stance.

[45] In his affidavit, Mr Fusi said the metal coal bunker dated from 2003 but in cross-examination, he said it was in place about the time the gas canisters appeared which would accord more closely with the 2013 date in the joint minute.

[46] When 2 New Street, was put up for sale, the pursuers agreed that they did not want any new owners to keep the gas canisters in place, hence the raising of the action. The pursuers reviewed their decision to involve relatives in a contested litigation and withdraw their pursuit of the action.

[47] Mr Fusi acknowledged that coal bunkers and gas canisters are both for fuel and could be said to be for the same purpose but thought the defenders could put in electric heaters; gas installation is not storage like coal. It is plumbed in and essentially an extension.

[48] As to the inconvenience, the presence of the four gas canisters makes for a substantial obstruction for vehicular access in the courtyard. If the pursuers look to develop the garage, a purchaser might be reluctant to buy with the canisters creating confusion. Although he initially said there were no plans in place, he corrected himself to say there were no plans submitted to the authorities.

## E Discussion

[49] This action was raised on 11 December 2024 when the pursuers sought declarator that they owned the courtyard between their property at 126/127 Drumlanrig Street, Thornhill and the defenders' cottage at 2 New Street, Thornhill along with an order that the defenders remove from the courtyard gas canisters and ancillary equipment. That action was abandoned by minute dated 25 March 2025. By this time, the defenders had lodged defences in which they counterclaimed for declarator that they had "an essential servitude right of fuel storage". On 20 May 2025 the sheriff allowed the parties to adjust their pleadings further. From this I infer that the pursuers had by then answered the counterclaim in terms challenging the servitude right sought.

[50] The defenders seek declarator of certain servitude rights. The servitude is not constituted by a deed. The defenders submit that the provisions of the Prescription and Limitation (Scotland) Act 1973 section 3(2) apply and that the servitude is exempt from challenge. For that provision to apply the defenders must prove that the servitude has been:

- a. Possessed for a continuous period of 20 years or more; and that
- b. The possession has been open, peaceable and without judicial interruption.

## I Is there a servitude of coal storage?

[51] Ms Powell asked me to make a finding in fact:

"That a servitude right to store fuel in the courtyard exists for the benefit of the owners of 2 New Street and that rights of fuel storage have been possessed by the defenders for a continuous period of twenty years openly, peaceably and without judicial interruption. These actions were exercised as of right by the defenders and are existing and continuing servitude rights."

[52] The requirement for continuous possession means there must be sufficient use of the right over a 20 year period. The requirement of open possession means that the possession must be as of right and not with the permission or tolerance of the landowner. Tolerance is to be judged objectively, with consideration directed to the nature, quality and frequency of the user, rather than to the mind of the proprietor of the servient tenement (*Aberdeen City Council v Wanchoo* 2008 SC 278 at [18]).

[53] The defenders took entry to the cottages on 3 November 1990 at which time the occupants of 2 New Street had been storing coal in brick bunkers on the courtyard for many years. Informed by the discussion at paragraph 10.16 in *Servitudes and Rights of Way* (Professors Cusine and Paisley 1998, W Green) I have no doubt that the bunkers met the requirements of openness and peaceableness.

[54] I do not accept the evidence that coal was ever stored internally at New Street; the cottages are small and, when there were three of them before the 1930s, would have been even smaller. There are signs of external storage and a space in which to store. There would be no reason to give up living space to coal that could be just as conveniently stored at the back door. Rejecting this part of the evidence of the pursuers prompts me to favour the evidence of the defenders more generally where there are differences. Mrs Lees had more direct experience and detailed recall than her brother.

[55] In *Bowring Soulsby v Jones* 2021 SLT 1259, LP Carloway (at paragraph 23) quoted the classic definition in Bell, *Principles of the Law of Scotland* (10<sup>th</sup> Edition at paragraph 979):

"Servitude is a burden on land or houses, imposed by agreement - express or implied - in favour of the owners of other tenements; whereby the owner of the burdened or 'servient' tenement, and his heirs and successors in the subject, submit to certain uses to be exercised by the owner of the other or 'dominant' tenement; or must suffer restraint in his own use and occupation of the property".

[56] The elements of this definition are:

- a. A servitude is a burden on land or houses;
- b. A servitude arises by agreement - express or implied - in favour of the owners of other tenements;
- c. The effect of a servitude is that the owner of the burdened or "servient" tenement, and his heirs and successors in the subject, submit to certain uses to be exercised by the owner of the other or "dominant" tenement; or must suffer restraint in his own use and occupation of the property.

[57] Lord Carloway thereafter commented on the second element of the definition:

- a. The important feature of the definition is the manner of a servitude's creation. It is not a burden which is imposed on neighbouring proprietors by operation of law;
- b. In order to accommodate creation by prescription, it may be better to adjust Bell's definition slightly by adding "or equivalent" after "implied" ... the practical similarities between agreement and positive prescription, based on a failure to intervene in the face of an assertion of right, should not be ignored ... Servitudes, in their strict and proper sense, confer rights not implied by law and accordingly have to be constituted with the consent or agreement of the servient owner or by some means which the law recognises as an acceptable equivalent to such consent or agreement;
- c. Bell explains the difference between the creation of a servitude and an implied grant deriving from necessity upon the severance of subjects held on one title.

[58] The circumstances here are that the servient property has been in the pursuers' hands since the separation of the parties' properties. The pursuers have not objected at all to the

brick coal bunker or its metal successor and there has been no judicial interruption (joint minute paragraphs 5 and 6). Although the current pleadings deny the existence of a servitude relating to coal, the initial writ raised in December 2024 and abandoned in March 2025 sought only removal of the gas cylinders. The pursuers' consent can readily be inferred. Before me, the pursuers' attitude to whether there was a servitude for coal was said to be "largely neutral" if the court was satisfied on the "scanty evidence." Mr McLean argued that the defenders have failed to show that the servitude claimed namely the right of fuel storage has existed for 20 years.

[59] The professors deal with coal storing at paragraph 3.16 citing the English case of *Wright v Macadam* [1949] 2 KB 744 discussed by the House of Lords in *Moncrieff v Jamieson* 2008 SC (HL) 1. The Court of Appeal had to consider whether the right to use a coal shed could exist as an easement and held that it could (see Jenkins LJ at 752). In that case, the right to use a coal shed was implied into the grant of tenancy.

[60] The present case is more an example of encroachment by the defenders placing their means of fuel storage on the pursuers' land. An owner is in general terms entitled to use, possess and dispose of property. Anything which prohibits or materially interferes with those rights is thereby inconsistent with the rights and is therefore repugnant. Repugnancy, or the ouster principle, was considered at length in *Moncrieff*. It was recognised there that the fact that the servient proprietor is excluded from part of the property is not necessarily inimical to the existence of a servitude (Lord Hope at para [24]), but the exclusion must not negate the very concept of ownership.

[61] At paragraph 3.22 Cusine and Paisley argue that encroachment can in some circumstances be the foundation of a servitude.

[62] In *Compugraphics International Ltd v Nikolik* 2011 SC 744 an Extra Division had to deal with air-conditioning pipes and ductwork attached to the southern wall of the pursuers' factory, overhanging the defender's land and supported by metal stanchions embedded in concrete on his land. At paragraph 45 they found that the pursuers might establish a servitude right - a *jus projiciendi* - by the encroaching pipes and ductwork having remained in position in the neighbouring airspace for the prescriptive period of 20 years without challenge or objection. However, the court was careful, at paragraph 43, to distinguish between that situation and any case that might be characterised as an attempt to acquire land or other heritable rights beyond the stipulated limits of a clear and unambiguous bounding title.

[63] At the end of the Inner House opinion (paragraph 49) the court drew attention to section 77 of the Title Conditions (Scotland) Act 2003, which provides:

"Positive servitude of leading pipes etc over or under land

- (1) A right to lead a pipe, cable, wire or other such enclosed unit over or under land for any purpose may be constituted as a positive servitude.
- (2) It shall be deemed always to have been competent to constitute a right such as is mentioned in subsection (1) above as a servitude."

[64] In *Conveyancing* 2009 (at page 105), Professors Reid and Gretton comment on the *Compugraphics* case:

"If one focuses on the purpose of the ductwork and not on the ductwork itself, one quickly realises that this is simply a pipeline servitude of the kind given express (and retrospective) recognition by section 77 of the Title Conditions (Scotland) Act 2003. The servitude is the right to lead a substance in the form of gas, the ductwork merely the means by which such leading is achieved."

And counsel for the pursuers in *Compugraphics* indicated that section 77 had been considered, and might be relied upon if the case were remitted back to the Outer House.

[65] The factual background against which the present case requires to be decided is:

- a. A brick coal bunker was in place when the parties' properties fell into separate ownership in 1990;
- b. Coal storage has taken place for over 20 years since then;
- c. Gas has not and any servitude requires to be found as part of a servitude of coal storage;
- d. Although gas is more important to the defenders, they also continue to store coal;
- e. The defenders did not ask permission for the installation of the gas canisters.

The pursuers objected after the event but did not insist in their objection because of their relationship with the defenders;

- f. The various iterations of the means of fuel storage have been successively less permanent; the coal bunker in place in 1990 was succeeded in about 2013 by a metal box which was supplemented in about August 2015 by tanks which are removed by the supplier when empty.

[66] Notwithstanding the element of encroachment inevitably involved in the leading of a pipe, cable, wire or other such enclosed unit over or under land, this exercise can constitute a servitude. Indeed, Parliament tells us, it was always thus. The importance of power and fuel has been recognised in the legislation.

[67] With the assistance of the 2003 Act, I would have no difficulty in holding that the installation of the canisters and piping associated with gas supply could constitute a servitude. However, as it has only been in place, for one rather than two decades, the status of the coal arrangements comes back into focus.

[68] As Sheriff S Reid observed in *Johnson, Thomas & Thomas v Smith* [2016] ScotSC 50 (3 August 2016) at paragraph 26, recognised categories of servitude are flexible and adaptable to modern conditions and new forms of technology; locomotive trams in succession to horse-drawn (*North British Railway v Park Yard Co Ltd* (1889) 25 R 47) and sheep pasturing in a servitude measured only by reference to cattle (*Ferguson v Tennant* 1978 SC 19; Cusine and Paisley, paragraph 1.31). An activity or restriction that is similar in nature to an existing recognised type is more likely to be countenanced.

[69] The issue raised by the coal bunkers is to a large extent the reverse of the approach on technical development. One of the considerations in the latter situation is that the innovation is not known to the purchaser of land; here the owners of the servient tenement have been well aware of the coal bunkers since they came into ownership. In my view, notwithstanding the small element of encroachment involved, the storage of coal in the years from 1990 can found a servitude right.

[70] I hold that by 3 November 2010 the occupants of 2 New Street had been storing coal on the pursuers' land for a continuous period of 20 years openly, peaceably and without judicial interruption. A servitude right to store coal in the courtyard has arisen by the operation of prescription in terms of section 3(2) of the 1973 Act for the benefit of the owners of 2 New Street.

[71] From 2013 the brick bunker was replaced by a metal bunker - a box - and from 2015, this arrangement was supplemented by gas canisters. The servitude right of storage created by the operation of prescription has not been extinguished by abandonment.

## II Does having a coal bunker and gas tankers increase the burden unduly?

[72] The pursuers' submission was that a servitude right acquired by prescription cannot be extended:

"The principle is *tantu prescriptum quantum posessum* (as much as prescribed as is possessed). The extent of the servitude is limited to what was actually used and possessed. Authority for this is given in *Kerr -v- Brown* 1939 S.C. 140 where it was held that a prescriptive servitude right established for the disposal of waste water through a channel could not be extended to carry closet sewage. In this case, applying that principle, the servitude right of coal storage in coal bunkers cannot be extended to the installation of gas canisters connected by mechanical means to the house subjects. The gas heating system is completely different. The general law of servitudes prohibits the dominant tenement increasing the burden on the servient tenement."

[73] I do not find this argument persuasive in the context of the present case. Although no measurements were given, Raymond Filippi spoke to the photograph 6/9/1 showing the metal coal bunker and the gas canisters in the last 12 months. That photograph and 6/8/1, the Google Maps capture of March 2009, supports the evidence I have accepted that the properties at 1 and 2 New Street have historically used the yard for storing fuel, for storage of rubbish bins and other domestic matters; the courtyard has not been used by vehicles. In my view it is unsuitable for such use. The metal coal bunker and four gas canisters would be substantial obstructions to vehicular access in the courtyard but, as they project into the yard to the same extent, neither the canisters nor the bunker alone affects the issue of vehicular use. The pursuers are not near to obtaining vacant possession; the photographs show rubbish bins in the courtyard reflecting a practice on the part of the occupants of the cottages no doubt fortified by long usage.

[74] In my view, the extent to which the owners of the yard are excluded from it by the presence of the metal coal bunker and the four gas tanks is very marginal, far from negating the concept of ownership. In that context, I contrast the present situation with the gate

found by the Sheriff Appeal Court to contravene the principle in *McCabe v Patterson* [2022] ScotSAC Civ 2 (29 June 2021).

[75] I conclude that the addition of the gas tanks to the coal bunker does not materially increase the burden on the servient tenement.

### ***III Is the storage of gas canisters by reason of consent only?***

[76] In any event, the pursuers submitted, the right claimed for the servitude right in respect of the gas canisters cannot be sustained as the installation of the gas canisters was not made as a right but, as was made clear by the evidence of Marco Fusi and Paul Fusi, was a neighbourly tolerance and due to the relationship of the parties. Prescription must be based on a right not a tolerance.

[77] I do not find for the pursuers on this point:

- a. The defenders installed the gas tanks without asking or obtaining permission;
- b. The pursuers asked them to remove them;
- c. The defenders refused;
- d. The pursuers took no action to have them removed until the present action was raised.

[78] In *A.C. & I.C. Fraser v Munro* 2024 SAC (civ) 41 relied on by the pursuers, the use derived from an agreement between the two proprietors and, at paragraph 28, the court applied the doctrine Hume sets out that 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 (*Lectures*, volume III, 267).

[79] However, every servitude arises because the servient tenement has failed to take steps to stop the usage. I am not clear that the motive of the pursuers for not doing so earlier

is relevant. No effort has ever been made to have coal storage stopped and I have held that the addition of gas does not materially increase the burden of that exercise.

#### **F      Decision**

[80]    In the foregoing circumstances, I find a servitude right of fuel storage has been established. There are, however, drafting issues with the crave, including the word "essential", which need to be addressed. I will therefore put the case out for a procedural hearing on the wording of the order and the expenses of the cause.