

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ELGIN

[2025] SC ELG 95

ELG-A27-19

JUDGMENT OF SHERIFF OLGA PASPORTNIKOV

in the cause

WILLIAM DUTCH BEATON

Pursuer

against

WILLIAM JOHN HENDRY

Defender

Pursuer: Logan, advocate
Defender: Anderson, advocate

ELGIN, 18 December 2023

The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved.

1. Parties are as designed in the initial Writ.
2. This court has jurisdiction.
3. Parties are both farmers and proprietors of neighbouring farms. Additionally, the pursuer is an agricultural contractor and the defender a potato merchant.
4. The pursuer is the heritable proprietor of Angus House Farm, Longmorn. He has a servitude right of access from the unclassified public road U130E to Angus House Farm ("the track") to which this action relates.
5. The defender is the heritable proprietor of the property burdened with the servitude, namely, Ordhill Farm, Longmorn.

6. The servitude right was expressly granted conform to disposition by the Duke of Fife in favour of Robert Paterson Watt recorded in the Division of the General Register of Sasines for the County of Moray on 19 July 1961. The right is:

“to use for all usual purposes all existing private roads and ways forming part of any other portions of the lands of which the subjects hereby disposed form part which are at present so used.”

7. Angus House Farm has always operated as a farm and this was the case in 1961.

8. The pursuer occupied Angus House Farm as a tenant and, as well as farming the land there, ran an agricultural business from there from 1991 until around 2003.

9. Various contractors and workers used the track from 1991 and continue to do so to the present day. The vehicles used are various farming vehicles, large lorries with and without trailers, and motor cars. On some occasions, due to their size, the vehicles encroached on the verges of the track.

10. The track (including the bell mouth) has not been widened by the pursuer.

11. Over the years, the defender and his father have placed items at the side of the track and put up fencing to establish the border of their land.

12. The pursuer purchased Angus House Farm in 2018 from Michael Dean, a retired solicitor.

13. Until the purchase by the pursuer of Angus House Farm was discovered by the defender in 2019, there had been no issues in relation to the use of the track by the pursuer where he had continued his farming activities.

14. After that time, relations between parties deteriorated significantly.

15. There is now great animosity between the parties.

16. The defender has sought to place obstacles encroaching onto the track or at the very edge, thus impeding access of some vehicles, including cars, along the track.

17. The defender has engaged in behaviour which has affected the ability of the pursuer to exercise his right of access over the track. In particular, from February 2019 the defender has parked vehicles on the track or placed large items which either obstruct passage along the track or do not allow for corners to be safely negotiated by large vehicles.

18. The pursuer sought and was granted *interim* interdict against the defender on 5 April 2019 prohibiting the defender from placing any objects on the verges. The scope of the interdict extended to land beyond the Angus House track.

19. The defender placed objects on an area of land covered by the *interim* interdict, albeit not on Angus House track.

20. The pursuer has placed hardcore at the sides of the track as the edges of the track had started to crumble.

21. The defender removed hardcore placed at the sides of the track by the pursuer.

Finds in fact and law

22. The pursuer has a duty to maintain the track.

23. In exercising his duty to maintain the track, the pursuer has not sought the defender's consent, nor given notice of any such works in the past. He is under no obligation to do so.

24. In asserting his entitlement in respect of the express grant of servitude, the pursuer now undertakes to advise the defender when maintenance works to the track are to be carried out by him.

Finds in law

25. The pursuer has shown that he has a right to encroach on the verges of Angus House track where necessary for the passage of farm vehicles.

26. The defender has not breached the *interim* interdict granted 5 April 2019.

NOTE**Introduction**

[1] In this action the pursuer seeks declarator that he holds an ancillary right to use the verges in respect of a servitude right of access to the roadway conform to an express grant. The track is shown coloured blue on a plan produced by Michael Dean. He also seeks declarator in respect of the road as it continues towards Braehead Farm. In respect of the latter (although it is shown on the same plan), there are no pleadings to support this contention, and it has not been considered by me for that reason.

[2] Further, the pursuer seeks interdict prohibiting the defender from interfering with and obstructing the pursuer's right of access to Angus House Farm by way of the unmade road or track. The pursuer also seeks a finding that the defender was in contempt of court by breaching an *interim* interdict.

[3] The defender seeks declarator that, in the exercise of his maintenance right ancillary to the servitude right of access over the Angus House Farm, the pursuer is obliged to provide the defender with notice of proposed maintenance works sufficient to allow the defender to assess the validity of the proposed works as being within the scope of the servitude right of access and ancillary right.

[4] The defender also seeks interdict against the pursuer from undertaking maintenance works on the road without prior notice.

Background facts and circumstances

[5] Parties are neighbouring proprietors. The pursuer is the proprietor of Angus House Farm and the defender is the proprietor of Ordhill Farm.

[6] It is not disputed that a servitude right exists affording Angus House Farm the right of access and egress over a track between the main road from Clackmarras to Braehead Farm and Angus House Farm.

[7] What is disputed, however, is the extent of that right and, in particular, whether the servitude right includes the right to use the verges.

[8] Over the years, the pursuer has operated an agricultural contractor business from Angus House Farm and contends that the verges have been used on a regular basis where the track has been inadequate to accommodate the size of various agricultural vehicles.

[9] Parties lived amicably until the pursuer acquired ownership of Angus House Farm in 2018 after which time relations deteriorated.

[10] Thereafter, the defender started leaving items on or close to the Angus House Farm track which impeded the pursuer's right of passage. *Interim* interdict was granted on 5 April 2019. It is now alleged that this interdict has been breached and a Minute seeking a finding of contempt of court, together with Answers thereto, has been lodged.

[11] The pursuer has sought to maintain the track by making repairs to it. The defender has accused him of trying to widen it and has dug up some of the remedial works.

The proof

[12] I heard the proof before answer in this action over 8 days. I heard evidence on 17 and 18 May 2022, 6 and 7 September 2022, 1 and 2 November 2022 and 25 January 2023.

I heard submissions on 16 May 2023.

[13] A *locus* inspection was carried out with counsel and agents prior to commencement of the evidence and then again on conclusion of the evidence.

[14] Oral evidence was heard from 21 witnesses, eleven for the pursuer and 10 for the defender.

[15] Although the evidence was lengthy, given my decision, I do not propose to rehearse any evidence relating to the question of prescription in any detail and shall summarise only that evidence I considered relevant. Although the decision is, principally, based on law relating to express grant and the majority of the evidence related to the question of prescription, some matters of credibility and reliability arose in relation to use of the track as well as being relevant to the pursuer's crave for interdict and the defender's counterclaim.

[16] There are no written pleadings relating to the servitude right relating to the part of the road which runs to Braehead Farm. There was some oral testimony relating to the requirement to use the road to access certain field belonging to Angus House Farm and, of course, the servitude right extends to access roads for the benefit of access to Angus House Farm of which the Braehead Road may or may not form a part. The plan produced in 2018 refers to it. That part of the road will only be considered, therefore, in connection with the question of breach of *interim* interdict.

[17] Affidavits were lodged for the pursuer and his wife and for the defender and all of his witnesses. For the pursuer and his wife, this had been in advance of the proof. For the rest, this had been during the course of the proof, by agreement between parties. The purpose had been for these to constitute evidence in chief. Largely, this was the case with witnesses adopting their affidavits and thereafter being subject to cross-examination. It is regrettable that all affidavits had not been lodged prior to the commencement of the proof as

had been anticipated by the court. Had this been done, there could have been no suggestion that affidavit testimony had been “tainted” as a result of evidence already led.

[18] In the event, the pursuer took issue with the content of the defender’s affidavit to the extent that it contained averments not on record and had been unfair as the defender had heard the pursuer’s evidence in court prior to swearing his own affidavit.

[19] The result was that a Note of Objections was lodged, then Answers. Concessions were made in respect of the defender’s affidavit which led to redaction of some of the contents. Paragraphs 12 to 13, 25 to 27, 31, 46 to 50 and 52 of Mr Hendry's affidavit were deleted.

[20] Where there is no record for any averments in relation to affidavit testimony of any of the witnesses, I have disregarded any such testimony.

Pursuer’s case

[21] The pursuer gave evidence on his own behalf. He was William Dutch Beaton, born 8 October 1968. He adopted the terms of his affidavit.

[22] In the course of his evidence, he was referred to various photographs, drone footage, maps and plans. He confirmed that his wife had taken the drone footage only of the Angus House Farm track (and not the Braehead Road) because the Braehead Road had not been blocked by the defender at that time, not because the dispute was only in relation to the Angus House Farm track.

[23] He had been a farmer and agricultural contractor since 1991. He resided at Rosebrae Farm, Longmorn and owned Angus House Farm which he rented to one of his workers and his family.

[24] From Ordnance Survey maps of 1906 and 1957 he identified the access road leading to Angus House Farm. This included the "bell mouth" area at the start where the track goes from the Clackmarras to Braehead Road up to Angus House Farm. He contended that the bell mouth had always been used as a turning area.

[25] From around 1991, he had operated his contracting business from Angus House Farm. He had been a tenant there by virtue of a gentleman's agreement with Michael Dean, a local solicitor and the then owner. The pursuer had, by then, accumulated a large amount of various farm machinery and vehicles and stored them all at Angus House Farm.

Additionally, however, some of the machinery had been used for the purposes of farming at Angus House Farm.

[26] He had used the access track since then on a daily basis, as had those working for him. Various contractors to do with the farm and animals kept on it used the track. The sizes of vehicles used in the 1990s were, in some cases, bigger than they were in the present day. The examples of a combine harvester and forager were given. A combine harvester had increased in size throughout the 1990s until about 2000, and then became smaller. In respect of the forager, this has become more manoeuvrable and, although it looks bigger, the wheel base has remained the same size or has become smaller. Prior to the combine harvester, a threshing mill had been used in the 1960s. It had to be brought from farm to farm and had been much bigger than the combine harvester used in the 1990s. The trailer size had been cut from 40 feet to 33 feet due to a change in the law. On occasions, articulated lorries required to use the track.

[27] He explained that, although the verges had been driven over by larger vehicles, this was not on a daily basis. Rather, it was as and when particular equipment was required for farming purposes throughout the year. Livestock only arrived/left twice a year in some

cases. He also conceded that Mr Hendry may not have been aware of or may not have seen the comings and goings of vehicles as he stayed in Mosstodloch at the time. He also accepted that, as he ran a contractor's business, vehicles were not always used for the behoof of Angus House Farm, but, rather, in the course of the contracting work. In any event, there had been regular use of the track for farming purposes at Angus House Farm.

[28] With reference to photographs, he described a variety of vehicles that had used the track between 1991 and the present day. This included a lorry for the delivery of fuel to the farm as well as vehicles for farming purposes. The main thrust was that the present day vehicles took up less room on the track than previously. Previously, vehicles had required to go over the verges to get past. The verges had to be used to allow two vehicles to pass each other on the track. They also required a large turning circle. The verges had therefore frequently been used by the various vehicles to travel up and down the track, as had the "bell mouth" at the bottom of the track connecting from the main road. This bell mouth had also been used by buses and various large local authority vehicles for turning.

[29] A car or tractor on its own would not require to go onto the verge whereas any trailer of over 24' would.

[30] Again, with reference to photographs and plans, he identified various items such as disused machinery and potato boxes which had been deposited over the years by the defender at the sides of the track and near the bell mouth area.

[31] He disputed that the area had increased in size artificially, contending that, in fact, it had decreased as a result of fencing erected by the defender making the corner tighter. The track had been easier to get up in the 1990s. In the 1980s, there had been a dispute between Mr Paterson, a previous proprietor of Angus House Farm and the defender and his father when they had tried to narrow the access road.

[32] Mr Beaton bought Angus House Farm in 2018 from Michael Dean, a retired solicitor. The property had not been advertised and he had been given the right of first refusal as they had previously agreed. Mr Dean had not wanted Mr Hendry to find out that he had sold the farm to Mr Beaton.

[33] He confirmed from maps and the disposition that the property he had bought was the same as that per the burdens clause, he had:

“the right to use for all usual purposes all existing private roads and ways forming part of any other portions of the lands of which the subjects hereby disposed form part which are at present so used.”

[34] There had never been any disputes between him and the defender before that time. He had done work for Mr Hendry. They had been on good terms. Notwithstanding, at the time of the disposition, Mr Beaton had asked Mr Deans to prepare an affidavit and plan showing the track that he had used during his ownership of Angus House Farm. This had been because his father (who assisted in financing the purchase) had suggested this due to problems Mr Paterson had previously had with a servitude right of access with the Hendry family.

[35] When Mr Hendry had found out about the purchase of Angus House Farm, he became increasingly hostile. He racially abused Mr Beaton's worker, mocked Mr Beaton's disability (he was diagnosed in 2002 with Multiple Sclerosis), spat and made offensive hand gestures. He had shouted at Mrs Beaton in her own house and refused to leave. He wrote to the DVLA questioning Mr Beaton's fitness to drive. He has been abusive to Mr Beaton's children and impeded access along the track by refusing to move until his tirade of abuse is over. In addition, the defender has made comment about how the pursuer must be “skint now” and that he should sell Angus House Farm to him.

[36] Mr Dean and Mr Beaton had filled in potholes and maintained the track to Angus House Farm since the 1990s without objection until 2 years ago. Video footage of Mr Hendry removing the hardcore that Mr Beaton and his father had put in was shown. Removal of the hardcore had made the road unsafe. Due to the constant driving over 30 years, the road started to crumble at the edges and gotten narrower. Also, water washed the edges of the track away and so they had to be reinstated. That is why the edges of the track were maintained. There had been no attempt to widen the track. The track had not been widened over the years.

[37] In respect of the bell mouth area, that had become narrower as a result of fencing over the past 10 years or so. This created problems for larger vehicles which would need to take a "bigger swing" to get round the corner. There had been an issue in the past with a lorry colliding with a fence.

[38] By reference to photographs, the pursuer identified various obstructions that had been place on or near the track by the defender. This had begun shortly after the defender had found out about the pursuer's purchase of Angus House Farm. The obstructions resulted in vehicles being unable to use the track either because it was impassable or because it would cause damage to the vehicle, for example large boulders at the bell mouth or side of the track could burst a vehicle's tyres.

[39] As a result of the impediments, the pursuer sought, and was granted interim interdict. The defender had breached that by placing obstructions on the Braehead part of the road.

[40] The pursuer had been maintaining the track since the time of Mr Dean's ownership until shortly before the proof when he had been told to stop. He had given an undertaking that he would seek the defender's consent before sorting any potholes and such other work.

[41] I found the pursuer to be credible and reliable in the main. He gave his responses in a forthright and considered way. He came across as honest and in no way evasive. The only area of vagueness was in relation to why it had been considered necessary to ask Michael Dean to prepare an affidavit with plan at the time of the sale/purchase of Angus House Farm. I ultimately accepted that it had been on the advice of Mr Beaton's father given previous negative experiences and in anticipation (which proved to be prophetic) of Mr Hendry's displeasure at not owning Angus House Farm.

[42] It was clear that there was considerable animosity between him and the defender, but I was satisfied that he had been truthful and open, making appropriate concessions during cross-examination.

[43] **Sarah Beaton** - was the pursuer's wife. She was aged 41 years and a farmer. She adopted her affidavit. She had been with the pursuer for about 15 years, but had known him through family as they worked together.

[44] The pursuer had done arable and grass work for Michael Dean in the past. The machinery which would be used was be for mowing, baling and the combine harvester. It was based at Rosebrae but would go up and down the track on a regular basis. When she first came to live at Rosebrae, the combine harvester was larger than the present day one. There had been no issue taken by the defender in respect of vehicles accessing the track.

[45] Mrs Beaton supported her husband's testimony in respect of use of the track by large farming vehicles without objections to times where the vehicles had had to "tramp the verges". Her testimony also underlined the level of acrimony now existing between parties. In farming terms, it had always been customary to take machinery and equipment from farm to farm to carry out works.

[46] She presented as an honest and reliable witness.

[47] **Michael John Dean** - was aged 75 years and a retired solicitor. He confirmed having sold Angus House Farm to the pursuer in 2018. Prior to that, he had owned it since 1991. He did not live in the house, but the pursuer had initially been his tenant there. Mr Dean has lived at his current address for 40 years. Angus House Farm is visible from there. The pursuer had carried out the vast majority of his essential farming work.

[48] He confirmed that the pursuer had kept all his farming equipment at Angus House Farm and had built up a contracting business from there. Cattle also came from Skye on a large float. As well as cattle, he kept pigs on the farm.

[49] Other than vegetation and broom depending on the time of year, the track had been the same as always. He had had concerns about the visibility round a bend of the track and had sought the permission of the defender's father to cut the bank down. This was refused, but permission to remove the vegetation was given and Mr Dean had removed it himself. This had improved the sight line.

[50] Additionally, he had put in a metal water "offlet" without recourse to any party. This had been because the pursuer and his father had mentioned that there was a bump in the road which had been intended to deflect water from the track.

[51] He had been asked to produce an affidavit during the sale of Angus House farm to the pursuer. Whilst he did not know the reason for this and did not prepare it himself, he confirmed that he had been more than happy to sign the affidavit as it accurately reflected the position relating to usage of the track. The plan accurately reflected the extent of the track from the road to the farm.

[52] He had never been spoken to by either the defender or his father about the size of vehicles to be used on the track or indeed the size of vehicles actually used.

[53] Although, at times, Mr Dean had a brusque and belligerent manner, I found him to be credible and reliable. His statement in evidence that he would not have signed the affidavit if it had not been accurate was compelling.

[54] **Roy Derek Ian Matheson** - this evidence was primarily in relation to the issue of prescription.

[55] **Mark Alexander Garrick** - was aged 51 years. He was the managing director of a business specialising in supply and sales of agricultural machinery and service and repairs of same. He had been operating the business for over 20 years. He had a business relationship with the pursuer, supplying him with machinery over the past 10 years. Whilst much of his evidence was of a technical nature in respect of machinery supplied by him to the pursuer, this witness was very helpful when it came to the use of the track for farming purposes. He confirmed that on occasion, when he had been coming to and from Angus House Farm daily between May to July, he would require to run on the grass (off the track). That would be done "sensibly" and only for the purposes of getting the machinery in and out of Angus House Farm. Care would be taken not to cause any damage.

[56] I was impressed by this witness. Not only with the extent of his vast technical knowledge, but also with the fact that he appeared very open and honest in the way he gave his evidence. Where something was not within his knowledge, he simply said this and did not seek to speculate or stray outwith his area of expertise. To my mind, he was the best independent witness to say how farming vehicles would use the track for access to and egress from Angus House Farm. The bottom line was that on occasion, for the larger vehicles, these would need to stray beyond the edges of the track for safe and necessary passage, but this would be done in a way to minimise damage and it was never the case that vehicles would deliberately or unnecessarily stray beyond the track.

[57] **George McLean Campbell** - this evidence was primarily in relation to the issue of prescription.

[58] **John Paterson** - was aged 52 years. He was an offshore handyman and helideck assistant. He lived at Angus House Farm from birth in 1970 until it was sold to Michael Dean. His father had owned the farm. His father and grandfather moved to Angus House Farm in the 1930s. After the war, the property had been purchased in 1946. He described the Angus House Farm track as the "access road." Throughout his ownership, his father had farmed Angus House Farm as a mixed farm. It was arable as well as having sheep and cows.

[59] He spoke to the fact that it had always been a working farm. He described the various types of farm and other vehicles and machinery that had had to access the land. At some point, the bell mouth had been blocked by the defender's father placing items on both sides of the track. There was police involvement as well as that of the local MP as farm vehicles could not pass.

[60] When using large farming equipment to and from Angus House track, use was made of the verges. He claimed that any lorry coming up to the farm would have had to have encroached on the verges at some point.

[61] I accepted the evidence of Mr Paterson as both credible and reliable. In particular, he confirmed that his family had owned the farm at the time of the grant of servitude and that it had always been a working farm since his father and grandfather bought it in 1946.

[62] **Edward Mitchell** - was aged 58 years and was an engineer. I took from his evidence the fact that the school bus which he used in the 1960s would turn in the bell mouth area, and the fact that the defender had placed items on the Braehead Road, causing obstruction after *interim* interdict had been granted.

[63] The witness was quite open about the fact that he did not like the defender. I found him credible and reliable.

[64] **Mark Winton** - this evidence was primarily in relation to the issue of prescription.

[65] **Ronald Duncan** - was 63 years and was a retired plumber. His maternal aunt was married to Mr Paterson, the farmer at Angus House Farm in the early 1960s. As he got older, Mr Duncan had helped out on the farm. He recalled farming equipment using the Angus House track and requiring to encroach on the verges when doing so.

[66] I considered Mr Duncan's testimony to be credible and reliable, confirming simply consistent use of the track for the purposes of farming.

[67] **Gordon Charles Noble** - was aged 41 years and was a surveyor. He detailed his various qualifications. He had prepared a report and was referred to it. His evidence focussed on the fact that an articulated lorry would be able to go from the public road onto the Angus House track and thereafter to Angus House Farm, but it may require more than one attempt to make the corner and thereafter, at certain points in the road, would require to encroach on the verges. He explained that private roads did not all have verges. In that case, the verge would be the area immediately adjacent to a track.

[68] I accepted Mr Noble's evidence and it was not factually disputed. He was an independent witness speaking to issues of large vehicles accessing Angus House Farm.

Defender's case

[69] The defender gave evidence on his own behalf. He was William John Hendry and was aged 66 years. He was a potato merchant. He adopted the terms of his affidavit, subject to some changes where he had reconsidered matters after hearing evidence.

[70] In the course of his evidence he was referred to various productions, including photographs, video footage, maps and plans. He confirmed that he was the proprietor of Ordhill Farm and that the public road and Angus House track ran through his land.

[71] He explained that in February 2019 he had begun to notice encroachment on the verges of Angus House track by the pursuer's vehicles. He had placed a stone at the corner. The pursuer had asked for it to be move so he could pass with his cattle loader. He had told him to move it for access and then move it back afterwards. This had happened on a number of occasions, but, subsequently, the pursuer had not bothered to discuss the matter and moved the stone without his permission. Vehicles were using his land to access the junction to the track. He used this part of the land for dumping stones and old machinery for over 60 years. Tyre marks had shown that vehicles had been running over that area. The junction had been widened by large vehicles.

[72] Further, there had been encroachment at the track near The Dip. This was most likely caused by a trailer as a result of laziness in negotiating the corner there. At other areas, there are tracks from farm vehicles which have gone beyond the extent of the track.

[73] The defender had asked for his own surveyor's reports as to the extent of the track. He did not accept the extent of the track as per the plan attached to the 2018 disposition in favour of the pursuer.

[74] Prior to 2019, the defender's position was that the track had not been used by large vehicles and there had never been any encroachment on the verges. There had been no commercial need. He had inherited the farm in 2001 and if his father had been aware of any such use which encroached on the verges, he would have intervened. He himself had never seen any encroachment on the verges. Although the evidence was led in relation to prescription, the defender conceded that the road had had to be used by farming equipment

necessary for crop growing, as well as transporting cattle. Although he initially stated that larger vehicles were only now being used (since 2019) and encroaching on his land, he also had to concede that large vehicles (wider than the extent of the track) had been used when Mr Dean owned Angus House Farm.

[75] He accepted that service roads were there to service the farm and that Angus House Farm had been a farm for at least 100 years. He also conceded that the requirements for a farm changed from time to time as he had seen over his lifetime there. He accepted that cattle were kept by Mr Paterson and Mr Dean and he had no control of the type of farming any proprietor chose to engage in. It was his view, however, that any equipment necessary for the farming would have to conform to the size of track so that there was no encroachment. In 1965 the track had been covered by a gravel sub base by the defender's father as an improvement to the road surface at the request of Mr Paterson.

[76] He had widened the bell mouth area to enable the school bus to turn, but denied that this affected the pursuer's servitude right of access in any way.

[77] He denied any animosity between himself and the pursuer to the extent of his refusing to get out of the way of the pursuer's vehicle by dancing on the track. He had to accept that he had done so when shown video footage. He denied racially abusing anyone, stating that there had been an exchange between him and a worker of the pursuer's whom he had assumed to be Polish. It was the pursuer who had been intimidating and aggressive on occasion, not him. Since the raising of court proceedings, the pursuer's use of the track has increased to the extent that the track and verges were driven on when there was no requirement to do so. Areas where items had been dumped for 60 years had become exposed. The grassy centre became mud.

[78] He disputed that he had blocked the track at any time, opining that there was ample place to pass. He had been careful not to put items onto the roadway. Vehicles should not be making the turn if it damaged his property. He had put items down to focus the pursuer's mind as to the extent of the track. It had been to define the extent of his land and normal vehicles would have been unrestricted.

[79] He took exception that the pursuer would use the track in the exercise of his own contracting business, albeit he had done work on the defender's behalf. The work for others should not depend on his goodwill to facilitate that. The pursuer had carried out contracting work for him until the raising of the court action.

[80] He denied the conversation about the purchase of Angus House Farm had been as stated by the pursuer. Rather, he had offered to buy a portion of it to make it easier to move his cattle. He denied being abusive in the pursuer's home and refusing to leave. He did, however, state that the pursuer's plan was "fucking rubbish". He had no desire to buy Angus House Farm.

[81] Any abuse had come from the pursuer, not him. He did tell the pursuer that he should not be driving because he did not consider it safe. He and his employees and family had been harassed by the pursuer and his family.

[82] He accepted that he had been served with *interim* interdict but the plan had not been attached. He had, however, seen it at his solicitor's offices. He had thought that the interdict had only covered a corner at the junction and the Angus House track. He answered "no comment" to any questions in relation to placing items on the track in an apparent breach of that interdict, having received a warning from me that he did not require to answer any question which may incriminate himself.

[83] The defender had not seen any evidence of the track having maintenance work carried out on it since 1965. That was because there had been no need. Neither he nor his father had maintained that. It was not necessary for the pursuer to spread any gravel there. He considered that the pursuer putting down gravel was in an attempt to widen the road, not maintain it.

[84] The defender accepted that the pursuer had a right to maintain the Angus House track, but refuted that he had done so until 2019. He requested that the pursuer provide him with notice of any planned works.

[85] In his evidence, I considered the defender to be evasive and, at times in cross-examination, involving himself in an attempt of one upmanship with the learned advocate for the pursuer. He did not appear to appreciate the solemnity of the court, simply smiling when he had been caught out in a lie. Where his evidence differed from that of the pursuer and the pursuer's witnesses, I had no hesitation in preferring that evidence to Mr Hendry's.

[86] Notwithstanding his position about taking pride in the neatness of the track and verges, the fact that the Millbuies track is overgrown and unkempt and that all sorts of items have been dumped by the defender (by his own admission), since the early 1960s rather flew in the face of that.

[87] In respect of breaching the *interim* interdict, the defender accepted that if he had done so, it had been in ignorance. It was apparent that, although he understood that he had to obey the order of court for interdict, it appeared to me that he had tried to engage in brinksmanship to cause as much inconvenience as he could to the pursuer within what he perceived had been the parameters of the law.

[88] **Pauline Milton** - was aged 50 years. She was the defender's bookkeeper and general farm hand. She adopted the terms of her affidavit.

[89] Mrs Milton had worked for the defender since May 2011. She confirmed that the defender had always used the pursuer and his company as contractors and they enjoyed a good working relationship.

[90] She had become aware that the pursuer had purchase Angus House Farm in 2019. Since then, the track and bell mouth have been eroded. There are more vehicles on the track. Initially, the track had been green in the middle and now it was not. She had noticed this because she walks along the track 3 or 5 days a week at lunchtimes since starting her work there (initially part time). She could also hear them from her workplace. She was not aware of combine harvesters going along Angus House track. She was not aware of pigs or sheep being at Angus House Farm and never saw any floats with livestock.

[91] She did not consider that this would bother the defender and he did not show any signs of upset or annoyance.

[92] Silage bales had been placed at the road side by the defender in her presence. This was for the purpose of feeding the cattle. She had taken some of the photographs and video footage for the defender's productions in this case.

[93] I was not impressed by this witness. My impression of her was that she was trying very hard to undermine the pursuer's case but without a basis. She indulged in speculation and embellishment. In response to a question whether the defender showed any upset or annoyance at the fact that the pursuer had bought Angus House Farm, her response was to imply that he defender would not have been interested in the farm anyway. She described tyre marks on verges as "deliberate" with no basis. Her description of the track being "green in the middle" was inconsistent with aerial photographic evidence of the track taken

in 2009. Finally, her evidence was inconsistent with that of the defender in relation to why he had placed silage bales at the side of the road.

[94] **Robert John Hendry** - was the son of the defender. He was aged 42 years and worked for his father running the lorries and organising supply and delivery. He adopted the terms of his affidavit.

[95] He had known the pursuer since he was 9 years old. He used to do seasonal work for him until around 2003. He looked up to the pursuer and was particularly interested in all of his farming machinery. He could not recall any combine harvesters going up and down the track. He had never seen an articulated lorry going along the track, it would be impossible. It is possible to use the track without going onto the verges.

[96] The track has been widened since 2019. He had taken video footage of a livestock vehicle going up and down the Angus House track. The lorry could not have used the track prior to 2019.

[97] Angus House track should not be used for large equipment. Mr Beaton knew that when he bought the farm. The witness used the track to go to Millbuies and would have been aware of use of the track by other vehicles over the years. He did concede, however, that he had taken photographs for a school project in 1995 of large farming equipment at Angus House Farm which had been using the track. This included a forge harvester and large tractors 3.2m wide. In one of his photographs, he accepted that crops had been grown at Angus House Farm.

[98] He denied that his father would have been interested in the purchase of Angus House Farm.

[99] I accepted Mr Hendry's evidence insofar as it did not contradict that of the pursuer. He made many concessions in cross-examination as to the size and type of farming

equipment used. He did not see any livestock during Mr Dean's ownership of the farm.

This cast doubt on his reliability, as did his refusal to accept a proposition that a vehicle of over 3m wide would require to encroach a track measuring 2.8m, as did his refusal to accept that obstructions had been placed at the side of the track by his father (a fact the defender himself had accepted). I did not accept his testimony that the road had been deliberately widened.

[100] **Hugh MacAndrew** - was aged 80 years and was now retired. He adopted the terms of his affidavit, subject to later clarification in relation to how the Angus House track looked. He had grown up in the area and had worked for the defender's father after leaving school until joining the army in 1962. He recalled the Angus House track from that time.

Subsequently, he had been a postman in the area until 1997/98. He thought that the track looked very similar at that time to that depicted in photographs taken in 2019. He did not recall the track having any maintenance work carried out, nor indeed was any maintenance work needed. It was a track that required one to be careful on.

[101] Mr MacAndrew's testimony was credible and mostly reliable (after clarification in cross-examination). I understood from his testimony that the track had not been widened.

[102] **Gary McIntosh** - was aged 44 years and ran a business carrying out surveys and civil engineering designs. He detailed his various qualifications. He adopted the terms of his affidavit and the reports which he had prepared. He viewed track with Mr Hendry in May 2021 and compared it to a CAD (Computer Aided Design) of a plan prepared by another surveyor in 2019. He accepted that the earlier surveyor could have taken a different view as to where the edge of the verge was as he was unaware of the scope of the earlier survey. Mr McIntosh also attended at the site later in August 2021 to witness an archaeological dig to find evidence of a strainer post. Mr Hendry and Mrs Milton had been

present and Mr Beaton had also been observing from his vehicle. He had also visited the site with Mr Hendry in April 2022. Again, Mr Beaton had been observing.

[103] Mr McIntosh explained that the process of measuring a track is subjective. His view was that the road surface was the aggregate (or hard packed) area and a verge is an area beyond that. Usually, there would be vegetation there as vegetation doesn't grow on the aggregate. For the purposes of measuring any overrun of a track, he would take the measurement from the edge of the aggregate. It depends on the seasons, as well as the usage. It is common for tracks like the Angus House track to shift over time as a result. This could be because of the weather. Over time, a road becomes wider more often than not.

[104] Further, there are reasons why the track might be overrun. This could be to allow two vehicles to pass, to avoid icy patches or simply because the track is too narrow.

[105] He disputed Mr Noble's view that a large vehicle would have been unable to turn into the bell mouth if the strainer post had been marked in its original place. That said, he accepted Mr Noble's methodology as being sound.

[106] He explained that his plan on the ground did not accord with an OS map of the same area. This was not uncommon and various factors influence this, including human error.

Applying that to the plan produced by the pursuer, he accepted that it did indeed follow the line of the track, but with no definitive measurements.

[107] In cross-examination, he accepted that the root mean square error could lead to discrepancies in measurements being quite significant between what an Ordnance Survey map shows and what is on the ground.

[108] I found the witness credible and reliable. He was very open about the fact that measurements of the track were subjective and the margin of error could be a large one.

[109] **James Alexander Smith** - this evidence was primarily in relation to the issue of prescription.

[110] **Trevor Andrew William Bell** - this evidence was primarily in relation to the issue of prescription.

[111] **Colin Thomas Keir** - this evidence was primarily in relation to the issue of prescription.

[112] **Callum Mark Duncan Murray** - this evidence was primarily in relation to the issue of prescription.

[113] **Wendy Isabel Cooper** - this witness struck me as so incredible and unreliable, that, in fairness to the defender, I have disregarded her evidence in its entirety.

Submissions

[114] I was helpfully provided with written submissions by each side and I am grateful to them for this. Each had access to the other's submissions. I was further addressed by each side in oral submissions which were subsequently submitted in written form. Copies of all submissions are in the process and I will not rehearse the terms of them at length.

[115] Submissions were, at times, repetitive and I have focussed on those I considered relevant.

[116] Parties had lodged a joint bundle of authorities. They referred to these, applying or distinguishing them as they considered appropriate. I have referred to those authorities in my consideration of the law *infra*.

Pursuer

[117] Counsel for the pursuer rehearsed the background to the claim and what the pursuer sought to establish. This was that he was entitled to use the verges of the Angus House track on two bases. The first, by express grant of servitude and secondly, by prescription. Further, I was invited to grant interdict against the defender to prevent his interference with that entitlement. Finally, the pursuer lodged a Minute for breach of interim interdict and I was invited to make a finding that the defender has been in contempt of court.

[118] Objections were taken to the defender's affidavit and I have dealt with this issue elsewhere in this judgment.

[119] In support of the pursuer's case, I was referred to the terms of the burdens section in the 1961 disposition. Together with the various maps of the track and the testimony of witnesses relating to its use over the years, read short, that entitled the pursuer to use the Angus House track including the verges.

[120] That was the way that the track had always been used. There was evidence of its use at the time of the grant. The right was disposed to the pursuer by Michael Dean in 2018 with reference to the 1961 disposition. A plan was produced in the later disposition, however, obviously, did not fall to be considered for the purposes of prescription. For that, it was the earlier grant which had to be relied on.

[121] As far as the title deeds went, emphasis was placed on the words "for all purposes ... which are at present so used". These are service roads, without restriction and the dimensions of the roads were not defined.

[122] The pursuer relied on the following authorities in support of express grant, interdict, ancillary rights and civiliter: Rankine, *Landownership in Scotland* (4th Edition), *Alvis v Harrison*, 1991 SLT 64, *Irvine Knitters Ltd v North Ayrshire Cooperative Society Ltd*, 1978 SC 109,

White v Grand Hotel Eastbourne Ltd [1913] 1 Ch 113, *South Eastern Railway Co v*

Cooper [1924] Ch 211, *Wimpey Homes Holdings Limited v Collins* 1999 SLT (Sh Ct) 16,

Stansfield v Findlay 1998 SLT 78 and *MacAllan v Arbuckle*, 2022 SAC Civ 9.

[123] In oral submissions, the position focussed on the point that the track had always been used for the purposes of farming with encroachment on the verges and so that reflected the “usual purposes”. It was submitted, for want of a better phrase, that “it’s aye been”. That was sufficient to establish use in that manner.

[124] An alternative position, that of prescription, was offered.

[125] There was a recap of the evidence of the witnesses, issues of credibility and reliability were dealt with and I was invited to prefer the testimony of the pursuer’s witnesses to that of the defender’s witnesses. Supplementary submissions addressed the defender’s submissions. These sought to comment further of the evidence of witnesses and to distinguish authorities relied on by the defender. I was invited to grant decree in the principal action, to assoilzie the pursuer from the claims in the counterclaim and to make a finding of contempt of court. In respect of expenses, these should follow success if one party were to be wholly successful. Otherwise, a hearing on expenses ought to be fixed.

Defender

[126] Counsel for the defender provided a summary of the case, highlighting the fact that the route and the extent thereof from the public road to Angus House Farm had not been provided for in the disposition creating the servitude. Subsequently, a purported right of servitude was then created by way of a plan attached to a disposition in favour of the pursuer. Accordingly, the extent of the servient tenement was disputed.

[127] Focus was on the fact that the extent of the Angus House track was not known.

Emphasis was very much on the fact that the track had no measurements and so it could not be said with any certainty that the access track was the correct one and that use of the verges was included.

[128] A distinction was drawn between the types of creation of a servitude right – express grant/reservation and prescription. Both types were discussed. In relation to express grant, that could not be justified in law; in relation to prescription, that the testimony did not support that. In each scenario, it was submitted that the lack of a detailed plan were fatal to the pursuer's case.

[129] The court had to bear in mind what amounted to objectively reasonable access by a dominant tenement, not what was merely convenient as claimed by the pursuer. The pursuer had failed to prove his case.

[130] There was a very detailed recap of the evidence of the witnesses, issues of credibility and reliability were dealt with and I was invited to prefer the testimony of the pursuer's witnesses to that of the defender's witnesses. Oral submissions addressed the pursuer's submissions. These sought to comment further of the evidence of witnesses and to distinguish authorities relied on by the pursuer. Additionally, it was submitted that the pursuer's claim had started off as a case based on express grant with prescription introduced by later amendment. Now, there appeared to be some sort of hybrid position with no basis in law.

[131] There were no pleadings for any other access road or track other than the Angus House track and so there should be no order for the Braehead Road route to the back of Angus House Farm.

[132] The pursuer had no idea of what the extent of his right was and how that translated to the plan produced with the disposition in his favour. He could not rely on that plan. The pursuer had to show that the right disposed to him was the same right that had been constituted in 1961 and that the plan referred to that and he had failed to do so.

[133] Prescriptive possession ought to be rejected on the evidence. In any event, it was an attempt to “reverse engineer” the plan. The track did not include the verges.

[134] The defender relied on the following authorities in support of express grant, interdict, ancillary rights and civiliter: Macphail, *Sheriff Court Practice* 4th Edition paragraphs 21.42, 21.50 and 21.60, *Cuisine and Paisley, Servitudes and Rights of Way*, paragraphs 19.001 - 19.003, *Alvis v Harrison*, 1991 SLT 64, *Moncrieff v Jamieson* [2007] UKHL 42, *Cronin v Sutherland*, (1900) 2 F 217, *Stansfield v Findlay* 1998 SLT 78, *Thomas v Allan*, 2003 SC 393, *MacAllan v Arbuckle*, 2022 SAC Civ 9, *Ferguson v Tennant*, 1978 SC (HL) 19, *Drury v McGarvie*, 1993 SLT 987.

[135] There was no case for interdict as a result of lack of specification. The request was too vague in the absence of knowing where the boundaries of the track are. In any event the interdict and the order *ad factum praestandum* could only be granted if the declarators of the existing rights of access are granted. Further, as the pursuer had failed to show the extent of the track, it was not possible to say whether the hardcore had been removed from the area over which the pursuer is entitled to exercise access.

[136] The pursuer was not a reasonable proprietor of Angus House Farm – he does not require to access the farm with large equipment for the behoof of that farm.

[137] In relation to the alleged breach of interdict, it was contended that it was inappropriate to enforce an interdict in respect of an area for which there are no pleadings. No plan had been served with the interlocutor containing the court order. The fact that the

defender had been aware of the plan and what it referred to was insufficient. The pursuer had not proved beyond reasonable doubt that the interdict had been breached.

[138] In relation to the defender's counterclaim, the requirement of the pursuer to exercise his rights *civilter* would necessitate the pursuer giving notice of intended works on the basis that the track is used by both parties. It is not reasonable that the pursuer should not provide notice of intended maintenance works when he could give such notice easily.

[139] In respect of expenses, these should follow success if one party were to be wholly successful. Otherwise, a hearing on expenses ought to be fixed.

The law

[140] This is a summary of which authorities I have had regard to and what I have taken into account from the authorities cited by parties. I have commented on them as I consider relevant to the present case:

Text Books

Bell, *Principles of the Law of Scotland*, p 984 – A distinction is made between urban and rural servitudes, indicating that the purposes may differ. The definitions the exercise of servitudes by the dominant and servient tenement is set out. Among other things, it is stated:

“The benefit of servitude is limited to the dominant tenement; and is confined to the necessary use of that tenement as fairly in contemplation of the parties in creating the servitude”

Additionally, the obligations in relation to maintenance (which are not in dispute) are set out.

Cusine and Paisley, *Rights Ancillary to servitudes*, 1st Edition, Volume 2 – Exercise of Ancillary Rights subject to Legally Implied Servitude Conditions, paragraphs 19.001 - 19.003 – Again, it is not disputed that ancillary rights must be exercised *civiliter*.

MacPhail, *Sheriff Court Practice*, (4th Edition), paragraphs 21.41 - 21.66 – Sets out the requirements for a crave *ad factum praestandum* to be framed in unambiguous terms.

Interdict in perpetuity can only be granted on strong or at least reasonable grounds.

Penalties for breach of interdict are at the sheriff's discretion.

Rankine, *Land Ownership in Scotland*, (4th Edition) p 417 – The presumption in favour of freedom is stated and the fact that a servitude is a burden on a property is reiterated per Bell, *supra*. A servitude “must be exercised in the mode least disadvantageous to the servient tenement, consistently with full enjoyment.”

Case law

Alvis v Harrison, 1991 SLT 64 – per Lord Jauncey of Tullichettle:

“Where a right of access is granted in general terms, the owner of the dominant tenant is entitled to exercise that right not only for the purpose of the use to which the tenement is then being put but also for any other lawful purposes to which it may be put thereafter”.

Cronin v Sutherland, (1900) 2 F 217 – A grant of a servitude for a right of access was in restricted terms, which is not the case here.

Drury v McGarvie, is 1993 SLT 987 – an obstruction by the proprietor of the servient tenement for a specific purpose (eg, containing stock) is in order as long as any such obstruction does not inconvenience the dominant tenement. Placing objects on or near the Angus House Farm track is clearly an obstruction to the use of the right of access, not merely an inconvenience.

Ferguson v Tennant, 1978 SC (HL) 19 – per Lord Fraser of Tullybelton - “In order to obtain a permanent interdict a pursuer requires to show that the defender has interfered with his servitude right, will go on doing so, and that the interference is substantial in degree.”

Garson v McLeish, is 2010 SLT (Sh Ct) 131 – Encroaching on the verges is an acceptable use of a servitude right of access if passage by larger vehicles is *reasonably necessary* (*my emphasis*), as opposed to just being convenient. *Garson* related to an access road, as opposed to a track. If extending the width of the road at had been absolutely necessary in order to render the servitude capable of exercise, there might not have been any question that that could be carried out by the dominant proprietor (paragraph 68).

Irvine Knitters Ltd v North Ayrshire Cooperative Society Ltd, 1978 SC 109 – per Lord President Emslie:

“It follows, and this is not in dispute either, that the defenders as proprietors of the dominant tenement are entitled to use the lane for traffic of all kinds which is intended to serve, and which in fact serves, any lawful purpose to which they may choose to devote the dominant subjects. Putting the matter in another way, the defenders are entitled to obtain access to the dominant tenement in connection with the purposes for which they elect to use it and to facilitate the carrying on of those purposes”;

and at p 112 per Lord Cameron:

“In the deed of constitution of this servitude there is nothing which places any limit on the purposes to which the subjects may be put, and therefore it can be said that not only is there no limit on the extent of user but also no limit on the purpose which the proprietors of the dominant tenement as such proprietors may lawfully pursue within the subjects or for which they may use them.”

MacAllan v Arbuckle, 2022 SAC Civ 9 – in *Macallan*, the servitude right itself was granted by reference to a map. A subsequent deed of servitude was granted with reference to a cadastral map. Access was over a road through a working farm. The access there was clearly marked and did not include passing places or verges. In the instant case, the right is simply given for access over the track as a general proposition without reference to any map.

Servitude rights originate in contract and principles of interpretation apply. Each case turns on its own merits.

Moncrieff v Jamieson [2007] UKHL 42 – per Lord Hope at paragraph 7 - “at the time of the grant, account may also be taken of the use to which the dominant tenement might then be reasonably have expected to have been put in the future” and paragraph 12 – “where a grant of servitude is indefinite as to the exact route, the dominant proprietor may choose the route over which the servitude is exercisable”.

South Eastern Railway Co v Cooper [1924] 1 Ch 211 - a wayleave of a general right of way for all purposes did not restrict the user to access which prevailed at the time of the grant.

Accordingly, it would be open to the track at Angus House Farm to be used by encroaching on the verges if that was required to fulfil the purpose of gaining access to and egress from the farm for the usual farming purposes.

Stansfield v Findlay 1998 SLT 784 – This case can be readily distinguished from the present case insofar as the ratio is concerned. However, the obiter remarks are pertinent. *Stansfield* concerned an express grant of access over a track with reference to a plan. – per

Lord Macfadyen at page 788:

“We accept that there may be cases in which it can be inferred that a right of way which passes between fenced enclosures extends to the full width between the fences and is not limited to a worn or metalled track lying within that area. That may, for example, be the case with former drove roads. Each case depends on its own facts, however, and in the present case there is nothing in the deed or the averments to suggest that the parties must have intended that the right of passage should be exercisable over the full width between the fences. The plan is drawn in such a way that there are gaps of varying width between the brown track and the boundaries of the pink and green areas. It is difficult to see how that can have been other than intentional: if it was intended that the pursuer should have access across the whole width of the gap between the pink and green areas, there would have been no point in ‘indicating’ a narrower track coloured brown.”

In any event, I consider that a right to merely pass is different to a right to use the track “for all usual purposes” in the context of a working farm.

Thomas v Allan, 2003 SC 393 – consideration is given to what constitutes unreasonable obstructions on land which a servient proprietor claims ownership of. In the instant case, would the defender have the right to place items on the verges in interference of a servitude right. In that case, there was an ambiguity in respect of the servitude right. That is not so in the instant case. It is accepted by the defender that the servitude right exists.

Wimpey Homes Holdings Limited v Collins 1999 SLT (Sh Ct) 16 – per Sheriff Principal Cox:

“In my opinion it assists the dominant tenement that (1) the plot in question was described as a road which was to be used for both pedestrians and vehicles; (2) the plan attached to the disposition provides detailed measurements but does not differentiate between track, verge or ditches; (3) the servient tenement made no reservation concerning the exercise of the servitude over any part of the plot in question and in particular did not differentiate between the first three quarters of its length and the final quarter extending to 61 metres with which this action is concerned; (4) the servitude was granted in general terms and accordingly ‘the dominant tenement is entitled to exercise that right not only for the purpose of the use to which the tenement is then being put but also for any other lawful purposes to which it may be put thereafter’. Thus if pedestrians seeking access to Mr Sherry's cottage had chosen to walk on the verges rather than the track itself this would have been within the terms of the right reserved. If the volume of traffic increased to an extent that it was safer and more convenient to do so then the servient tenement could flatten the verges and form a more amenable walkway for the better enjoyment of his right.”

White v Grand Hotel Eastbourne Ltd [1913] 1 Ch 113 – the position in the relating to rights of way in the English Courts appears to be similar to that in *Irvine Knitters*.

Decision

[141] The first issue in its narrowest form is this - was the pursuer entitled to go beyond the edge of the existing track for the purposes of access to and from Angus House Farm?

[142] Simply put, the answer is yes. It is accepted that there is a track from the public Clackmarras to Braehead Farm road leading to Angus House Farm. The pleadings contain the associated wording relating the right of access to the plan. The words “which ...” suggest that there is a right to use the track **and** (my emphasis) that that is shown on a plan.

[143] The right in this case is in respect of “all existing private roads **and ways** (my emphasis).”

[144] In any event, there was evidence to suggest that comparing the exact measurements of a track to an overlay on an Ordnance Survey map was almost impossible. For the purposes of a servitude right, therefore, the plan shown is sufficient to identify the Angus House track.

[145] A servitude right of access is not akin to ownership of the land which would have to be exact. The whole ethos of a servitude is to **burden** the party giving that right. That is why the authorities refer to the right of the dominant tenement being able to exercise the right in whatever way he chooses and why interference with that right is not allowed.

[146] This is a case whereby the servitude right is for access to and egress from Angus House Farm to the main road by a proprietor in the context of a working farm. Accordingly, so it would be reasonable to assume that the track would have to be used by farm vehicles. As far back as 1906, it is likely that the track would have been used to drive cattle, per *Stansfield and Harris* (as a distinguishing feature). From the evidence of Mr Paterson, the inference can be drawn that in 1961, Angus House Farm was a working farm. It would therefore be reasonable to anticipate that the right of access and egress would be used for its behoof in the future.

[147] Whilst the defender contends that the access track is not used solely for the behoof of Angus House Farm and that it could be farmed with smaller vehicles, I do not agree that

that is the case. Certain equipment described (such as the combine harvester) would require to pass, as would other large vehicles delivering fuel and livestock. In any event, the defender's contention relates only to a snapshot in time, namely possible current use. In terms of the authorities, there would be nothing to preclude any future dominant proprietor in running Angus House Farm on a larger commercial scale. Further, the defender's contention that any farming activity would have to conform to the extent of the access track is incorrect; rather, the position is that the access track has to be allowed to be used in such a way as to allow passage to and from Angus House Farm to service whatever activity is carried out on the farm.

[148] In the circumstances of this case, it is obvious that there is only one track at the location shown and that the servitude right can only relate to that. Although the pursuer has not shown measurements and dimensions of the track, I do not consider that that is of note here. In any event, it is not necessary to show the track on a plan or a map if the description in the disposition is sufficient to identify the track. A plan would be for the purposes of identification and/or to provide assistance and clarification if required. Per *Stansfield*, certain areas were excluded from the right of access. That is not the case here. In this case, a plan is not required. It is obvious that the track in question is the one that leads from the unclassified road to Angus House Farm. Finally, per *Wimpey*, the question of the plan is somewhat redundant; given that even had detailed measurements been provided, it would not have had to differentiate between track and verges.

[149] It is not the case that an ancillary right to use the verges is sought; the pleadings are that the verges form part of the track for the purposes of general use in terms of *Irvine Knitters*. The position adopted by the pursuer in oral submissions, that the track area on the plan coloured blue simply reflected the use of the track by the pursuer and others in the way

that it had been (encroaching occasionally on the verges) over the years, was a confusing one. Initially, it appeared to me that what was contended was some sort of hybrid position between express grant and prescription. However, following further submissions in clarification, I was advised that the pursuer had sought to establish what “usual purposes” was. In the whole circumstances, and after considerable reflection, I took the view that it was appropriate to treat the case as seeking declarator in respect of a right of express grant with prescription as an *esto* position.

[150] Although the pleadings in condescendence 4, 5 and to some extent 6 mainly relate to the issue of prescription, they are equally applicable to the question of habitual use and to demonstrate that this is the way the track has been used and thus constitutes “usual purposes.” On the basis, therefore, that the verges were encroached on from time to time over the years, they can be deemed to have been included in the servitude right per – *Ruddiman v Hawthorne, Moncrieff v Jamieson and Stansfield v Harris.*

[151] The plan attached to the disposition by Michael Dean in favour of the Pursuer relating to the servitude right of access shows the general area of the track. There is still uncertainty as to why the affidavit and attached plan was given by Michael Dean. If there had been no issues in the past with the pursuer’s use of the track to Angus House Farm, it is not known what changed at that point. The issue that other benefitted proprietors family had encountered difficulties at another property with Mr Hendry’s father had been mentioned, but the pursuer had had no such issues about using the track. Whilst the pursuer claims that his father told him to ensure that an affidavit was obtained, as well as the fact that the pursuer kept his purchase of Angus House Farm secret, suggests to me that the pursuer was apprehensive of issues in continuing his usage of the track. From the

evidence, and what has transpired since the defender has discovered the sale, gives rise to the inference that the pursuer's apprehension was correct.

[152] I do not, therefore, agree with the defender's position that the pursuer's pleadings rely on the fact that the plan must have specific measurements. In any event, I have already stated that the plan is not a requirement here for the purposes of the servitude right. It exists as a guide to the location and direction of the track. The track itself is obvious and its location not in dispute. From an inspection of the locus, there is an obvious track from the public road to Angus House Farm, and that track appears generally to follow the track on the plan as per the evidence of Michael Dean. The track can be described as a "way" for the purposes of the right of access.

[153] In 1965, the defender's father had improved the road surface. A track had therefore been made whereas, as at 1961, the land would previously have been wild.

[154] Nor do I accept the defender's submission that this is a "hybrid case". I have considered the matter as one primarily of express grant with the question of prescription as an *esto* position.

[155] Given my decision that the servitude right includes the right to use the verges, after considerable reflection, I find it unnecessary to consider the case for prescription.

[156] As an aside, I would also say that, in my opinion, Mr Dean would not have required to seek Mr Hendry's permission for the removal of vegetation only as the lack of visibility was affecting the enjoyment of the servitude right, but as a courtesy would have required to advise him.

[157] The second issue is whether the defender can put down objects on his own land but which interfere with the pursuer's right of access. In short, the answer is no. To this end, *Thomas v Allan* can be distinguished. Any obstruction to vehicles passing along the Angus

House Farm track is unlawful in the face of a clear and unambiguous right of access. It should be a matter of common sense that access over the track might be impeded if certain obstructions are placed. From the evidence, blatant obstruction such as refusing to move a vehicle from the track are obvious. The fact that items were not placed on or near the track in such a way as to impede access prior to 2019 indicates deliberate obstruction. Whilst a proprietor is of course entitled to place objects on his own land, where that is done to deliberately obstruct a right of access in terms of the servitude, that action becomes unlawful.

[158] In relation to the action for interdict, therefore, the nature of some agricultural vehicles is such that, even if the wheels are on the track, there may be an overhang above the verges. In such a situation, even if the vehicle itself is not touching the verge, anything placed on the verge might impede the passage of such a vehicle and thus the exercise of the servitude right. Where a vehicle requires to use the verges for safe passage, any overhang may therefore go beyond the verges. In that event, the "fence to fence" argument may be invoked, albeit, in reality, there has never been any question of access being taken by going off the track. In reality, reasonable enjoyment of the right is restricted to only going over the verges occasionally when required by larger vehicles.

[159] Accordingly, nothing should be placed on the track or any verge, namely land immediately adjacent to the track which could be capable of impeding the right of access nor should any obstruction which narrows access to the track at the bell mouth be left or erected. Any obstruction would interfere with the pursuer's reasonable enjoyment of the right of access.

[160] Given the bad feeling between parties and the previous behaviour of the defender, I do not consider that the defender would desist from so doing in the absence of an interdict.

I consider that an interdict is therefore necessary for both the impediment of the track and verges and from removing any materials placed to maintain the track.

[161] The third matter is the breach of the interim interdict. The test for contempt of court is on a balance of probabilities, not beyond reasonable doubt as contended by the defender.

I do not consider that the *interim* interdict granted by this court of 5 April 2019 has been breached. Whilst it is clear that the defender has sought to increase some obstructive activity following the initiation of court proceedings, I do not consider it amounts to a deliberate affront to the authority of the court. Rather, it appears to have been an attempt by the defender to be “clever” and the primary purpose had been to cause annoyance to the pursuer. It is hoped that the interdict now pronounced in this unfortunate matter and which relates to the Angus House track only will bring closure to any attempts to obstruct the track or bell mouth.

[162] The fourth and fifth issues are related and form the counterclaim sought by the defender seeking declarator and interdict preventing the pursuer from carrying out any maintenance works without written notice to the defender. Until 2019, there had been no issue with the pursuer carrying out maintenance works without the express permission of the defender. On that basis, and on the basis that I do not consider that parties would be in a position to amicably agree any such works without the intervention of the court or court proceedings in the background acting as a deterrent, I do not consider that any declarator or interdict is either appropriate or necessary. In any event, in asserting his right to access, Mr Beaton has given an undertaking that he will advise Mr Hendry of his intention to carry out maintenance works.

[163] I will fix a hearing on expenses. However, should parties come to an agreement in relation to expenses, I would ask that they notify the court in advance of the hearing.