

Spanish Case Note to “*Moncrieff and another v Jamieson and others*”, House of Lords

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1. Introduction

The main issue of this case can be shortly stated in the following questions: Does the owner of the dominant tenement, favoured with a servitude of vehicular access, have the right to park in the servient tenement? In case the answer is positive, how is this right legally formulated?

The different *Opinions* of the *Lords* basically agree upon the fact that, considering the special and unusual circumstances of this particular case, the right to park vehicles on the servient tenement can be considered an incidental right to the expressly granted servitude of access. It is stated that the right to park is reasonably necessary to guarantee the comfortable enjoyment of the right of access, and this is the reason why it should be included as an incidental right to the express grant of the right to access. However, there is a different way to solve the case: Considering that the litigants tacitly created a servitude of parking which is different from the right to access initially agreed upon.

The issue is highly complex and it has many nuances in the Spanish Law. In any case, I can tell you in advance that, in my opinion, under the Spanish Law, the second option would certainly be more likely to prosper than the first one. We will now analyse each of the two alternatives separately.

2. The right to park as an incidental power of the servitude of access

2.1. Interpretation of the title

In order to properly identify the problem, we should start by knowing the exact contents of the granted servitude in the lawsuit. According to the article 598 of the Spanish Civil Code (hereinafter, CC), the “title” sets the rights of the dominant

tenement and the duties of the servient tenement. The title, as regards legal act *inter vivos* or *mortis causa* constituent of the servitude (arts. 537 and 539 CC), is thus the first regulatory source of its contents.

Therefore, the title of the studied servitude was “Da Store” contract of sale, in which the following clause was included: “(Fourth) a right of access from the Branco public road through Sandsound”. How should this clause be interpreted? It is obviously necessary to investigate which was the real intention of the parties, by applying, since this is an onerous and bilateral juristic act, the rules regulating the interpretation of contracts [SSTS dated November 27th 1981 (RJ 1981, 4674) and February 25th 1988 (RJ 1988, 1307)] in the Civil Code (articles 1281 to 1289). Moreover, we should not forget that the Spanish jurisprudence maintains two essential criteria regarding the interpretation of the servitude issue¹:

- In general, the “principle of restrictive interpretation” is established. Since freedom of ownership is presumed, both the servitude and its scope should be clearly stated.

- In case there is any doubt about the scope or extension of the servitude, the “principle of minor damage” will be applied to the servient tenement.

The so-called Spanish “minor jurisprudence”² has analyzed cases very similar to the one known by the *House of Lords*, and in all of them, without exception, it has considered that the servitude of access does not include *per se* the right of parking. Let’s take as an example the judgment of November 30th, 2000 by the Audiencia Provincial de Pontevedra (Provincial Court of Pontevedra) (LAW 219318/2000). The plaintiff, to whom a right of way had been recognized, considered that such servitude should permit him to manoeuvre and park his vehicle, since, if this were not the case, this right of way would not have any sense. The decision states that the need to enlarge the access space for parking is not justified, since in case of doubt, the interpretation of the servitude issues should be restrictive and it should favour as far as possible the interest and condition of the servient tenement. In another case, the business organization “Ayala 6, SL” sued “Centro Empresarial Hermosilla 3 SL”, claiming the declaration of a servitude of way which had become, since its constitution, a servitude to park along the pavement in the servient tenement. The decision issued by the Audiencia Provincial de Madrid

¹ On the interpretation of the servitudes, *vid.*, GUILARTE GUTIÉRREZ, *La constitución voluntaria de servidumbres en el Derecho español*, Montecorvo, Madrid, 1984, pp. 211 y 212.

² This term is used to identify the judgments of the Spanish Courts of Appeals.

(Provincial Court of Madrid) dated March 28th 2007 (JUR 2007, 213487) rejected the claim and pointed out that the servitude in question was only aimed at allowing traffic along one street, without expressly stating in no part of the title of the servitude that such space could be used for any other aim.

Taking into consideration the above-stated hermeneutic criteria as well as the case law, I think that any Spanish judge would have concluded that the parties' intention, derived from the literal contents of the contractual clause (*ex art. 1281 CC*), was that of constituting a right of way which would guarantee access to the public road system through the servient tenement. In no case could be derived from the contract the existence of a will to additionally grant the right to park in the servient estate.

2.2. The incidental rights ex article 542 CC

The article 542 of the CC states that “whenever a servitude is established, all the rights necessary for its use are considered granted”. This precept, in the words of ROCA JUAN, is a general principle to be applied to all the servitudes, and which works as a guarantee of the specific contents that each of them includes³. Although the rule has caused some interpretation problems⁴, it seems clear that we are facing a legal extension of the servitude right. That is to say, the law provides the owner of the dominant tenement with an additional set of documentary powers used to obtain a complete and satisfactory utility of the servitude right given through the constitution juristic act. The servitude should obviously be exercised *civilter*⁵, that is, without aggravating its contents beyond the title limits.

The main inconvenience presented on this article is that of specifying those incidental powers necessary for using the right of access. First of all we can say that this

³ ROCA JUAN, “Comentario a los artículos 530 a 604 del Código civil”, en *Comentarios al Código civil y compliaciones forales*, t. VII, vol. 2º, Edersa, Madrid, 1990, p. 89.

⁴ Thus, some authors think that it regulates the “incidental servitudes”, the existence of which is considered necessary for the execution of the “main servitude”: GONZÁLEZ-ALEGRE BERNARDO, *Manual de servidumbres*, 3ª ed., Nauta, Barcelona, 1965, p. 148. However, the majority of the doctrine considers that the incidental powers are not servitudes in themselves, but mere forms or ways of exercising only one servitude: REBOLLEDO VARELA, “Régimen general de las servidumbres”, en REBOLLEDO VARELA (Coord.) *Tratado de Servidumbres*, Aranzadi, Pamplona, 2002, p. 266.

⁵ This principle is not expressly recognized in the Civil Code. In any case, it is not more than a reflexion of the general principle of the good faith stated in the article 7.2 CC. See LÓPEZ-MONTÉS-ROCA, *Derecho Civil. Derechos reales y Derecho Inmobiliario Registral*, 2ª ed., Tirant Lo Blanch, Valencia, 2001, p. 351.

is a fact question which should be solved according to each case. Nevertheless, the majority doctrine maintains that the existence of those *adminicula* should be interpreted in a restrictive way⁶. Therefore, only those powers which are essential for the vital utility of the servitude can be considered included⁷. On the contrary, those powers which are simply useful, convenient, or which just make the exercise of the servitude easier will be excluded. To sum up, the “necessity” cannot be equally compared with the opportunity or mere convenience, since the original sense of the regulation would be violated and the servient tenement would be unjustifiably damaged.

These explanations given, it is time to ask ourselves whether the right to park in the servient tenement can be considered an incidental power necessary to properly use the right of access (*ex* article 542 CC). Taking into account the restrictive interpretation ruling on this field, I doubtfully think that the right to park is really necessary, essential or indispensable to properly use the right of access granted by the servitude of access⁸. The owner of the dominant tenement does not need the right of parking in order to access to his property by vehicle. These are rights having a different nature and, consequently, it seems reasonable to think that the buyer should have negotiated the possibility of obtaining –through a financial consideration- the right of parking in the servient tenement.

The Provincial Court of Pontevedra has maintained this interpretation. It was an assumption in which the appellant party thought that the right of way granted in his favour included the possibility of parking vehicles or storing materials. The judgment dated May 24th 2005 (La Ley 116609/2005) points out that the parking of a vehicle -or other rubbles - goes beyond the meaning of the word "way". The way, the decision continues stating, is a different thing and not only does it aggravate the servitude but it also makes it become a different kind of servitude, of a voluntary type, for which a non-existent juristic act (art. 539 CC) is required. Moreover, obtaining a parking area cannot be considered a necessity of the dominant tenement, but rather a “mere convenience”.

⁶ See, for instance, ROCA GUILLAMÓN, “Comentario a los artículos 530 a 542 CC”, en RAMS ALBESA/MORENO LÓPEZ (Coord.) *Comentarios al Código civil, III, Libro Segundo (Títulos I a VIII)*, J.M. Bosch, Barcelona, 2001, p. 930.

⁷ See BAENA RUIZ, “Problemática general del derecho real de servidumbre”, en *Las Servidumbres, Cuadernos de Derecho Judicial*, CGPJ, Madrid, 1994, p. 45.

⁸ I agree with the words of Lord Neuberger of Abbotsbury (at par. 125): “I have real doubts as to whether the Sheriff was correct to hold that the expressly granted servitude in this case could not reasonably be enjoyed without there being a right to park”.

Therefore, it is clear that the right of parking in the servient tenement is neither indispensable nor essential for exercising the right of way, and because of this reason, it cannot be granted as an incidental power *ex* article 542 CC.

Even though this is my opinion, I recognize that the circumstances of the studied case are special and rather unusual. The geographical location of the dominant tenement makes the right of way and right of access become virtually useless without the right of parking. This is the reason why it is very difficult to safely guess which would have been the Spanish judge's decision.

3. The tacit constitution of a servitude of parking

3.1. Introduction

From a theoretical point of view, there is the possibility that the parties tacitly created a right to park different from right to access initially agreed upon. That is to say, a judge could derive from the concluding facts on this case that the owner of the dominant tenement has the right to park his vehicle because the owner of the servient tenement tacitly admitted the constitution of a servitude of parking. Nevertheless, this option, considered on the law records of this case⁹, sets forward two main problems. On the first place, is it possible for an autonomous servitude of parking to exist?¹⁰ Secondly, is it possible to tacitly constitute a servitude? Let's analyze each question separately.

3.2. The autonomous right of parking

The Spanish Law provides a wide leeway for the constitution of servitudes (art. 594 CC)¹¹. There is no *numerus clausus* of servitude, and thus any owner can, in the

⁹ It should be remembered that the plaintiff of this case maintained at the beginning – in an alternating way- that he had been granted with the right of parking as a “real right by acquiescence”.

¹⁰ The different *Opinions* of the *House of Lords* argue about the possibility of a servitude existing in an autonomous way.

¹¹ “Every owner of a country tenement can establish on it the servitudes he considers convenient, and in the form and way he wishes, as long as it does not contravene the laws or the public order”.

exercise of his autonomy of will, establish on his country property the ones he wishes with the configuration and scope he will freely specify¹².

However, the freedom to create servitudes is not unrestricted. The article 594 CC makes it clear that in all cases the owner must respect the rules established by the laws and the public order. These limits have an immediate consequence: since the servitude is a real right which gives the owner of the dominant tenement a “partial benefit right” on the servient tenement (*iura in re aliena*), this means that it is not possible to constitute a servitude which completely absorbs the property right contents of the servient tenement (“general or universal servitude”)¹³. On this sense, the Spanish Supreme Court has stated that the “partiality on the utility of the servient tenement” is an essential requirement of the real servitude, and in case such partiality does not exist, we are likely to face another personal or real right (such as the usufruct), but not an servitude [STS December 31st, 1999 (RJ 1999, 9623)]. In short, the servitude voluntarily constituted cannot give a right of complete, total and exclusive usage over the servient tenement.

Does the servitude of parking violate the principle of the “partial benefit”? Obviously, this question cannot be answered a priori, but it should be considered case by case, and according to the concurrent circumstances. The facts that have led to the analyzed conflict are rather confusing in this point. Apparently, all throughout the years it was established on the servient tenement an area – identified with a pink colour – which was wide enough for the owners of the dominant tenement to park their vehicles. However, it has also been stated that the owner of the servient tenement could use this area “very restrictively” when the two cars of the appealed party were parked. We can derive from these words that the property right of the servient tenement was virtually absorbed and, therefore, the servitude contravened the limitations on the autonomy of will.

However, in my opinion it is impossible to make a rigid interpretation of the “partial benefit” requirement. All servitude imply a restriction on the natural rights for the

¹² “Nominated servitudes can be established (assigned by the Law) and servitudes can be invented”, PEÑA BERNALDO DE QUIRÓS, *Derechos reales. Derecho Hipotecario, Tomo I*, 4^a ed., Centro de Estudios Registrales, Madrid, 2001, p. 676.

¹³ See, LACRUZ BERDEJO-LUNA SERRANO, *Elementos de Derecho civil III-Segundo*, Dykinson, Madrid, 2001, pp. 98-99. DÍEZ-PICAZO-GULLÓN BALLESTEROS, *Sistema de Derecho Civil III*, 7^a ed., Tecnos, Madrid, 2002, p. 378.

owner of the servient tenement. This is why I think that prevention should be only applied to the constitution of those servitudes which totally deprive the owner of all his rights over the property. Sticking to this criterion, I think that a servitude of parking can be valid if the owner of the servient tenement has control and possession of his property, being able to do anything he wishes with it provided his actions do not prevent the owners of the dominant tenement from parking their two cars (this is what Lord Scott of Fotsote believes himself). The decision issued by the Provincial Court of Madrid and dated October 9th 2004 (JUR 2004, 87122) can be set as an example for this approach. The members of a joint ownership claimed the recognition in their favour of the servitude of parking constituted on various country properties belonging to some other people. The judicial resolution believes that such servitude is not opposed to the essence of the real right, “since, by no means, does it deprive the owner of the total powers over the servient tenements, as he will be able to obtain the corresponding exploitation of them, according to the town palling regulation, which, according to what the appellant herself has stated, it currently permits the construction of underground parking lots above the above mentioned tenements”.

These are all the reasons why I consider that the granting of the servitude of parking does not deprive the owner of all his powers over the country property, and consequently, the servitude of parking is included within the legal boundaries.

3.3. The tacit constitution of the servitude of parking

Once proved that there is nothing under the Spanish Law which prevents from granting a right of parking as the one on the studied case, the question regarding whether its constitution is admissible through a tacit consent is still to be clarified¹⁴.

The declaration of will constituent of an servitude should be clear and explicit [*vid.*, STS December 6th 1985 (RJ 1985, 6324)]. Since the principle of restrictive interpretation rules on servitude issues, and the property is presumed free unless otherwise proven (SSTS June, 19th 1978, May 12th 1981 and May 26th 1993), it is logical to claim the unequivocal statement of the intention of creating an servitude.

¹⁴ It is in favour of tacitly expressing the will, CORBAL SÁNCHEZ, “Artículos 537 a 539”, en SIERRA GIL DE LA CUESTA, *Comentario del Código civil*, Tomo III, 2^a ed., Bosch, Barcelona, 2006, p. 687.

Nevertheless, we cannot forget that the principle of freedom of form rules on the Spanish Law (art. 1278 CC), which implies that the consent can be orally stated [STS February 25th 1956 (RJ 1956, 1502)] and it can even be derived from concluding facts (*facta concludentia*). In this context, the question can arise about whether the exercise of a servitude in continuous, public and pacific way and during a lot period of time with the acquiescence of the owner of the *supposedly* servient tenement expressly states the existence of a tacit consent to the constitution of a real servitude right.

The main problem on admitting the tacit constitution lays on the fact that if the servitude is discontinuous the possession *ad usucapionem* is not possible and any exercise carried out is considered a “merely tolerated act” which does not affect the possession (*ex arts. 444 and 1942 CC*). Consequently, no real right can be born when the partial use of a country property belong to someone else has a discontinuous nature. And the right of parking is precisely discontinuous¹⁵, since it is used at quite sporadically and it depends on the man’s acts (art. 532. III CC). Therefore, the owner’s passiveness before the exercise of an alleged right of parking should be no more than an act of mere tolerance which lacks any constituent efficacy.

However, a sector of the Spanish Scholars argues that there is tacit consent when the owner tolerates the exercise of a servitude for years and, besides, he makes works on his country tenement respecting the external charge signs or he allows the one exerting the servitude to make works for its conservation¹⁶. That is to say, the possession of the servitude in the above-mentioned circumstances reveals a tacit consent which, at the same time, proves the existence of a previous servitude constituent title (art. 540 CC).

The Spanish jurisprudence has also begun to accept this theory. There is a great number of judgments that act in the same way¹⁷, but we should specially point out the decision made by the Provincial Court of Madrid dated October 9th 2004 (JUR 2004, 87122), the facts of which have already been presented. In this case, in spite of the fact that there was no written stated title which granted the right of parking, the judges concluded that the acts of the owner of the servient tenement themselves, as well as the

¹⁵ Nevertheless, the decision of the Provincial Court of Madrid dated October 9th 2004 (JUR 2004, 87122) considers it continuous.

¹⁶ REBOLLEDO VARELA, “Régimen general de las servidumbres”...*op. Cit.*, p. 177.

¹⁷ A complete compilation of that jurisprudence can be consulted on, REBOLLEDO VARELA, “Régimen general de las servidumbres”...*op. Cit.*, pp. 181 a 184.

set of subsequent events sufficiently proved the existence of such servitude. In other words, the continuous use of someone else's property for parking together with the passive behaviour of the owner clearly stated tacit consent for the constitution of a servitude of parking.

In my opinion, it is clear that in the analyzed case by the *House of Lords* a servitude of parking had been tacitly constituted. The facts clearly state that on December 24th, 1987 the plaintiff started using the servient tenement in order to park his vehicle. Even though he did not have a written stated permission, the owner of the servient tenement knew this fact from the very beginning and he did not show any resistance. In the autumn of 1988 the owner of the dominant tenement made on the servient tenement a work valued on £1012, with the aim of improving the area he had been using for parking. The owner of the servient tenement had been always aware of these works and he did not present any objection about it. Later on, in the summer of the 1989 one of the defendants set up a wooden fence whose boundaries clearly excluded the parking area. In 1993 two of the defendants asked the plaintiff for permission to modify the access route, and the latter agreed under the condition that the parking area should be widened so that his wife could also park there. Such requirement was accepted without inconveniences. Finally, in 1994 the first defender removed the old hydro-electric pole and filled the hole with hardcore, thus making the parking area bigger. In my opinion, all these circumstances safely lead to the two following conclusions. First of all, from 1983 until 1998 the owners of the servient tenement tolerated that the plaintiff park in the area belonging to their property, showing no resistance or any other attitude to prevent this from happening. Secondly, all throughout the years, both parties made a number of works and modifications which prove the existence of a tacit agreement for the constitution of a servitude of parking. To sum up, I think that the facts are so concluding that any Spanish judge would have believed that in this case a servitude of parking had been tacitly constituted.