

SCOTTISH LAW COMMISSION
(Scot Law Com No 163)



Report on Boundary Walls

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Item 6 of our Fifth Programme of Law Reform

Boundary Walls

To: The Rt Hon the Lord Hardie, QC
Her Majesty's Advocate

We have the honour to submit our Report on Boundary Walls

(Signed)

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J G S MACLEAN, *Secretary*
30 December 1997

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Report on Boundary Walls

Introduction

1.1 This is the second in a series of reports on property law, a subject which is included in our *Fifth Programme of Law Reform*.¹ We decided to consider this area of the law following representations made to us by a member of the public who was the unsuccessful party litigant in a case involving the boundary wall between his property and that of his neighbour.² The report follows on publication of a Consultation Paper³ on which we received helpful comments from our consultees.⁴ We are grateful to them for their assistance.

The existing law

1.2 Boundary walls were not much used in Scotland until the eighteenth century when the enclosure movement developed. Earlier, boundaries or "marches" were set out with march stones or left unmarked.⁵

1.3 A boundary wall requires to be distinguished from a common (or mutual) gable wall. A common gable is a division wall between two separate but connected buildings. Such walls occur in semi-detached and terraced houses and in tenements. There was much case law on the subject of gable walls in the nineteenth century, when towns and cities were developing and tenements were erected to house the growing population.

1.4 In this report we are not concerned with the law on gable walls. However, it is important to note that the law on boundary walls was strongly influenced by the development of the law in relation to common gable walls.⁶

1.5 A boundary wall built wholly on one side of a boundary belongs to the owner of the land on which it is built. The rules of accession determine ownership.⁷ A wall built equally on both sides of a boundary is owned up to the *medium filum*, or middle line, by each of the adjoining proprietors. Each has a common interest in the wall as a whole.⁸ This was held to be the law in the Outer House decision in *Thom v Hetherington*.⁹ This decision confirmed two sheriff court decisions to the same effect in *Gray v Macleod*¹⁰ and *Gill v Mitchell*.¹¹ The rule adopted in these cases is the same as the well-established rule for common gables. The effect is that each owner can use his part of the wall as he pleases, provided that he does not

¹ Scot Law Com No 159, paras 2.32-2.42.

² *Thom v Hetherington* 1988 SLT 724.

³ Consultation Paper on Mutual Boundary Walls, published June 1992 (in the report referred to as the "Consultation Paper"). The Consultation Paper was issued to a limited number of consultees.

⁴ A list of those who submitted written comments on the Consultation Paper is given in Appendix 1.

⁵ *Stair Memorial Encyclopaedia*, vol 18 para 214.

⁶ In particular by the case of *Robertson v Scott* (1886) 13 R 1127, which concerned the ownership of a common gable.

⁷ W M Gordon, *Scottish Land Law* (1989), para 1-05 (hereafter referred to as "Gordon") and *Stair Memorial Encyclopaedia*, vol 18 para 223.

⁸ Gordon, para 4-44.

⁹ *Thom v Hetherington*, 1988 SLT 724.

¹⁰ *Gray v Macleod*, 1979 SLT (Sh Ct) 17.

¹¹ *Gill v Mitchell*, 1980 SLT (Sh Ct) 48.

adversely affect the common interest in the wall as a whole.¹² Common interest imposes both a restraint and a positive obligation. The restraint is that each owner must take care not to disturb the stability of the wall as a whole. The positive obligation is that each must maintain his own part of the wall.

Comparative law

1.6 We have examined the position in other countries, both civilian and common law. Broadly, there are two models: (1) in common law countries the model is usually individual ownership up to the median line;¹³ (2) in civilian systems, the model is usually common ownership.¹⁴ The Party Wall Etc. Act 1996 makes provision for certain boundary walls in England and Wales. The Act does not affect ownership in such walls. Rather it provides a system by which works can be done to certain walls, and disputes resolved quickly by the parties and their representatives, without the need, at least initially, for recourse to the courts.¹⁵

Problems with the existing law

1.7 The representations made to us were to the effect that the existing law relating to boundary walls built on both sides of a boundary was unsatisfactory and in disarray. It was maintained that in view of the nineteenth century case law, such walls should be treated as the common property of the adjoining proprietors, with the consequence that they could not be put to exclusive use by one proprietor without the consent of the other.

The Consultation Paper

1.8 Although we had not been aware of any general difficulties with the law on boundary walls, we decided to review the law as an adjunct to our work on the law of the tenement. We sought the views of consultees on two key matters:¹⁶

- Whether a statutory statement of the law of boundary walls was justified; and
- Whether any such statement should be based on the approach adopted in *Thom v Hetherington*, or on the approach at that time proposed for the law of the tenement.

1.9 In our Discussion Paper on the *Law of the Tenement*¹⁷ we proposed that where a wall within a tenement was essential to the structural integrity of the building, it should be the common property of the owners of all the flats. But this was to be a modified form of common property. For example, each owner was to have the right to carry out minor works

¹² On common interest generally, see Gordon, paras 15-01 to 15-49; and *Stair Memorial Encyclopaedia*, vol 18 paras 354-374.

¹³ See Corpus Juris Secundum vol 69 s.1 (USA); and Halsbury's Laws of England vol 4(1) p 964.

¹⁴ See for example, Civil Code (France) art 653-673; Civil Code (Quebec) art 1003-1008; and Civil Code (Italy) art 880-881.

¹⁵ See Trevor M Aldridge, *Boundaries, Walls and Fences* (8th edn; 1997).

¹⁶ Consultation Paper, para 3.1. A list of the specific questions on which views were sought is given in Appendix 2.

¹⁷ Discussion Paper No 91, published December 1990.

on the common property without the need for the consent of the other owners as would be required under the usual rules of common property.¹⁸

Views of consultees

1.10 While a majority of consultees supported the idea of a statutory statement of the law, they gave no detailed reasons for their views. A significant minority of consultees, including the Court of Session judges, Professor Gordon of the University of Glasgow and Professor Gretton of the University of Edinburgh, considered that the existing law was satisfactory. The judges and Scottish Homes expressed the view that the law was not in doubt.

1.11 The response on behalf of the judges was particularly persuasive. Their view, set out in a memorandum by Lord Murray with which the Lord President and the Lord Justice-Clerk agreed, was that statutory provision on boundary walls was unnecessary because the modern law was not in doubt. Piecemeal legislation in this area of the law seemed unattractive. The decision in *Thom v Hetherington* had cleared away terminological confusions. Statutory provision should not be substituted for the existing common law. This area of the law should be left for development by judicial decision. The judges' response also pointed out that if boundary walls were to be common property, serious problems would arise in relation to the remedy of division and sale if the owners were in irreconcilable disagreement, and in relation to ownership of the *solum* if the wall were to be dismantled.

Our re-thinking following consultation

1.12 In the light of the responses to the Consultation Paper, we decided to re-assess the options open to us. The options appeared to be these-

- (1) to recommend legislation on boundary walls on the lines of one or other of the following:
 - (a) to restate the existing law, namely that such walls are owned by the adjoining proprietors up to the *medium filum* with both having a common interest in the whole of the wall; or
 - (b) to change the law so as to provide that such walls are the common property of the adjoining proprietors and that each would need to obtain the consent of the other to carry out any operations on the wall; or
 - (c) to change the law so as to provide a mixture of individual ownership along with common maintenance; or
- (2) to recommend that legislation on boundary walls was unnecessary.

1.13 The responses to the Consultation Paper and our work on the law of the tenement have not persuaded us of the need for reform of the law on boundary walls. We have changed our mind about the extension of the principle of common property in relation to

¹⁸ *Stair Memorial Encyclopaedia* vol 18, para 25 *et seq.*

tenements.¹⁹ So too have we come to have doubts about the suggestion in the Consultation Paper that boundary walls should be common property.²⁰ There are of course some arguments in favour of common property. Common ownership means common maintenance, rather than separate maintenance to the mid-point. Common property is more suitable for fences and thin walls. Common property would provide for common ownership of the materials if the wall fell down. But there are also some difficulties, and common property is not an obviously better solution. The normal rules of common property, such as the right to division and the right of veto, seem unfair and ill-suited to a boundary wall. In addition, common property would prevent an owner from making proper use of that part of the wall that lay on his side of the boundary. The law of accession also causes difficulties. By accession anything attached to the wall would automatically become common property. Thus a trellis attached by the proprietor on one side for his own purposes, would become the common property of both proprietors.

Conclusions and recommendation

1.14 In the light of consultation and our further work since then, including our work on the law of the tenement, we have come to the view that the existing law is satisfactory and there is no need for legislation either to restate it or to reform it. Several factors in addition to those mentioned above²¹ have influenced us in reaching this view. First, there is an absence of any general pressure for reform. Apart from the representations of one unsuccessful litigant, we have no evidence that the existing law causes any difficulties in practice, either to the public or to legal practitioners. Secondly, there has been no case law on this subject since the decision in *Thom v Hetherington*.²² This suggests that the law is clear and is widely accepted. Thirdly, under our recommendations on the law of the tenement, common gables will continue to be owned up to the *medium filum* with each side having a common interest in the whole wall. We are not recommending any change in the law in this respect. It seems to us that the rules governing boundary walls should be consistent with this approach. Fourthly, and most importantly, the existing law seems to us to as a matter of legal policy to be both clear and sensible. It does not cause any injustice. It provides for maintenance of a boundary wall as a whole while at the same time allowing each owner to make full use of his own section of the wall. The rules of common interest afford sufficient protection to an owner who thinks that his neighbour is using the wall in such a way as to jeopardise its stability and structure.²³

We therefore recommend that:

It is not necessary to introduce legislation either to reform or restate the existing law on boundary walls.

¹⁹ Report on *The Law of the Tenement* Scot Law Com No 162, para 3.5.

²⁰ Consultation Paper, para 3.5.

²¹ See para 1.13.

²² *Thom v Hetherington* 1988 SLT 724.

²³ See Report on *The Law of the Tenement* Scot Law Com No 162, para 7.3.

Appendix 1

List of consultees who submitted written comments on the Consultation Paper

British Insurance & Investment Brokers' Association

Edward Clucas

The Committee of Scottish Clearing Bankers

Convention of Scottish Local Authorities

Council of Mortgage Lenders

Dunfermline Building Society

Edinburgh New Town Conservation Committee

Mr R A Edwards WS

The Faculty of Advocates

John Fox, Architect

Professor William M Gordon, Department of Jurisprudence, University of Glasgow

Professor George L Gretton, Department of Private Law, University of Edinburgh

Ronald F Jamieson, FRICS

David A Johnstone, Messrs Shepherd & Wedderburn WS

The Law Society of Scotland

Alan Lawson

The Lord President¹

Sheriff Principal N D Macleod QC

Lionel D Most, Messrs Alexander Stone & Co, Solicitors

The New Decade for Women-Scottish Action Group

¹ The response was prepared by Lord Murray and agreed to by the Lord President and the Lord Justice-Clerk.

Somerled Notley, Messrs Brodies WS

Registers of Scotland

Colin T Reid, Department of Law, University of Dundee

The Royal Incorporation of Architects in Scotland

The Royal Institution of Chartered Surveyors in Scotland

S E Scammell, Agent for the Trustees of Kinrara Estate, Inverness-shire

Scottish Homes

The Scottish Law Agents Society

The Society of Advocates in Aberdeen

Charles B Thom

Alan Towns, City of Aberdeen, Solicitors Division

Appendix 2

List of specific questions on which views were sought in the Consultation Paper

1. Should statutory provisions be made in respect of mutual boundary walls.
2. Should any such provision apply only in the absence of a clear contrary intention in the titles to the subjects.
3. Should any statutory provision provide that, where a wall is erected to the extent of one half on each side of a mutual boundary,
 - (a) that wall should be owned by the adjoining proprietors to the extent of one half erected on their own ground subject to the interest of the other proprietor in ensuring that the other half of the wall is not used in such a way which would adversely affect the structure of the whole wall or its suitability for the purpose for which it was erected; or
 - (b) that wall should be common property (regardless of the ownership of the ground on which it is erected) but that the rights of the owners in common should be qualified to the extent that either owner would be entitled to carry out minor works on his or her side of the wall which would not adversely affect the structural stability of the wall or the purpose for which it was erected without requiring the consent of the other owner in common.
4. Should any statutory provision apply –
 - (i) in respect of walls built after the coming into operation of the provision only,
 - (ii) in respect of disputes arising in relation to walls already in existence at the time of coming into operation of the provision.
5. Would it be practicable to extend the statutory provision to other types of boundary features or should it be restricted purely to walls.