SCOTTISH LAW COMMISSION

CONSULTATION PAPER

MUTUAL BOUNDARY WALLS

JUNE 1992

This Consultation Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Consultation Paper were submitted by 15 August 1992. All correspondence should be addressed to:-

Mrs A F Bevan
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

(Telephone 031-668 2131)

NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Consultation Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Consultation Paper can be used in this way.

MUTUAL BOUNDARY WALLS

PART 1

1.1 This paper is concerned with the law relating to the ownership of, rights to and responsibility for boundary walls. Different rules are applied under the Law of Scotland to different types of walls and fences. The law insofar as it applies to march fences, for example, has been developed from early statutory provisions.[1] The law of mutual gables,[2] on the other hand, is almost entirely customary and might almost be described as based on expediency. The application of the law to questions arising in respect of an "urban" domestic mutual boundary wall was recently reviewed in a case raised by Mr Charles Thom[3].

1.2 In *Thom*, it was decided that, where a wall was described as "mutual property" in the relevant titles and was erected on a boundary, the adjoining proprietors were owners to the extent of one half of the thickness of the wall each with cross rights of interest in the other half. As a consequence the court held that each proprietor was free to use his or her part of the wall in any manner which did not adversely affect the interests of the adjoining proprietor. Had the court found in favour of Mr Thom and held that the wall was common property the effect of the judgment would have been that neither of the owners of that common property could legally carry out any works on the wall without the consent of the other[4].

1.3 We have received representations from Mr Thom who has suggested that this area of the law would be a suitable topic for this Commission to consider. The case in which

---

[1] See paragraph 2.9.

[2] See paragraph 2.17.

[3] Mr Thom was the unsuccessful pursuer in the case of Thom v Hetherington 1988 SLT 724 referred to in this paper as "Thom". In that case Mrs Hetherington erected a fence close to her side of a mutual boundary wall. Mr Thom argued that the fence adversely affected the wind loading on the wall and that the foundations of the wall had been damaged during the erection of the fence. He argued, unsuccessfully, that the wall was common property and, accordingly, Mrs Hetherington was not entitled to carry out any works on the wall without his consent.

[4] See paragraph 2.10.

he was the unsuccessful pursuer illustrates difficulties which can arise about the nature and extent of rights in mutual division walls when the provisions in the relevant title deeds are deficient or unclear. The particular areas of difficulty we have in mind relate to

(i) inconsistencies between older and more recent authorities defining the interests of adjoining proprietors in boundary walls. (The Courts in the nineteenth century had no difficulty in accepting that boundary walls could be in common undivided ownership and attached little significance to whether such walls were described as "common" or "mutual");[1] and

(ii) a possible alternative interpretation of a title provision that a wall should be "mutual property" to the effect that it imports, by necessary implication, a provision that the ground on which it was erected should also be "mutual property".[2]

1.4 Given the importance which we attach to minimising disputes between adjoining proprietors arising out of obscurity in the relevant titles, we have decided to invite the views of consultees as to how best the position may be clarified. This short paper is, accordingly, published as part of a series on the general topic of Property Law[3] which is included in our Fourth Programme of Law Reform[4].

1.5 In this paper we consider the various interpretations which have been given to provisions regulating the rights and obligations of parties in respect of mutual urban division walls and fences and explore possible formulations of a statutory rule which would apply in all cases where no specific or comprehensive provision is made in the title deeds of the properties affected. The paper is available to any member of the public who may wish to comment, but our initial circulation is restricted principally to

---

[1] See paragraphs 2.6-2.8.

[2] See paragraphs 2.9-2.11.

[3] The papers published in this series so far are Discussion Papers Nos 91, The Law of the Tenement and 93, Abolition of the Feudal System.

[4] Scot Law Com No 126.

individuals and organisations who have commented on earlier papers in this series. This paper is devoted to a discussion of the several approaches which may be appropriate to resolve difficulties arising in this area.

1.6 In Part 2 of this paper we discuss the decision in *Thom* and then review some of the provisions used in title deeds to describe mutual boundary walls and fences and the legal consequences of those provisions. We also outline our proposals for the treatment of common property forming part of a tenement[1] and discuss the extent to which those proposals may be applied to mutual walls. We wish to acknowledge the assistance rendered to us by Mr Kenneth Reid who kindly made available to us an advance copy of the text of his valuable contribution to *The Laws of Scotland: Stair Memorial Encyclopaedia* on the topic of Boundary Walls and Fences[2] part of which is reproduced as an Appendix by kind permission of Mr Reid and the publishers. In the concluding part of the paper, we discuss the options available for clarifying the law and pose a series of questions.

---

[1] Contained in Discussion Paper No 91.

[2] The Laws of Scotland: Stair Memorial Encyclopedia is published by the Law Society of Scotland and Butterworths. Mr Reid's contribution referred to above will be included under the general heading of Property Law in a volume to be published in 1993.

PART 2

Introduction

2.1 Many title deeds of residential and other urban property make reference to walls, fences or other physical features marking the boundaries[1]. Even where the deeds are silent there is usually a physical barrier erected on a boundary separating two areas of ground. Often the title deeds make a clear statement about ownership of such boundary or division walls and specifically allocate rights and liabilities between the proprietors of the adjoining areas of ground. Frequently, however, the deeds refer to a "mutual" or "common" division wall separating the subjects and while, in some cases, adjoining proprietors will be taken bound to contribute to the erection and the maintenance of such wall, no further provision is made. In all cases, however, the respective rights and liabilities of adjoining proprietors depend upon whether the wall is located directly on the boundary or whether it is erected wholly on one proprietor's ground. In this paper we are concerned only with the former case.

2.2 Where the title deeds are silent or fail to make comprehensive provision, and an adjoining proprietor whose lands are separated by a boundary wall wishes to carry out work which would involve the wall, difficulties often arise as to the extent of that proprietor's rights in the wall and, consequently, his or her entitlement to alter the wall without the consent of his or her neighbour. Similar difficulties may arise when a wall falls into disrepair and maintenance or replacement work is required. Such difficulties may only be resolved by reference to rights which are dependent on the extent and nature of the respective proprietors' interests as owners of the wall. An interest as an owner in common of the whole wall[2] will, for example, give rise to different rights from those belonging to an interest as sole owner in one half of a wall.

The decision in *Thom v Hetherington*

2.3 This case concerned a wall separating two gardens. In terms of the feu contract conveying the first of the two neighbouring plots to be developed the owner of that plot

---

[1] We are not concerned with agricultural fencing in this paper. The issues raised are different and other considerations apply.

[2] See paragraph 1.2 above and paragraph 2.10.

was obliged to enclose his plot by walls of a specified type and height which he was taken bound to uphold and maintain in good and complete repair. The contract went on to provide that the walls should be mutual property maintained at joint expense of the feuar and the adjoining feuars who would be bound to pay one-half of the value of the mutual wall and relieve the feuar who built the wall of one half of the cost of maintenance in all time coming. The adjoining feuar's title was framed in complementary terms and he was taken bound to pay to the first feuar one-half of the value of the mutual wall and to relieve him of one-half of the expense of maintaining it in all time coming. The argument in the case concerned the interpretation which should be placed on these obligations and the rights of the adjoining proprietor to carry out works on the wall.

2.4 Mr Thom argued that, in light of the 19th century precedents referred to at paragraph 2.6 below, the wall was common property. Consequently the defender was not entitled to put it to abnormal and extraordinary use without obtaining his prior consent. Mrs Hetherington stated that, as the wall was erected to the extent of one half on each of the adjoining plots of ground, it was not common property but "mutual" ie owned by each adjoining proprietor to the extent of one half each but subject to cross rights of interest in the other half.

2.5 The Lord Ordinary (Jauncey) favoured the defender's argument that the wall was not common property but was owned by each of the proprietors to the extent of one-half *ad medium filum* (ie to the midline on each side). Such ownership was subject to the common interest of the other proprietor in the part of the wall not in that proprietor's ownership. It therefore follows that while a proprietor could carry out works on his side of the wall, that right was limited by the requirement that he should do nothing which would adversely affect the structural integrity of the whole wall.

2.6 In a series of 19th century cases concerning division walls, the Court of Session was of the opinion that such walls were in the common ownership of the adjoining proprietors and, accordingly, any works which one co-owner proposed to carry out on

a wall required the consent of the other common owner[1]. More recently, however, the courts have tended to apply to such walls decisions and *dicta* from cases relating to mutual gables[2]. *Thom* is the most recent case in which this approach was adopted.

2.7 The main reasons for Lord Jauncey's decision in *Thom* can be extracted from the following passage -

> "However I can see no reason why the principles of law applicable to the interest in a gable built half on A's land and half on B's land should differ from the principles applicable to a simple division wall similarly built (see *Jack v Begg*, Lord Gifford at p.42). The fundamental principle of *inaedificatum solo* applies equally to both structures and that being so, it follows that the division wall is not held in common property by A and B but may more accurately be described as a mutual wall."[3]

2.8 While Lord Jauncey's approach was consistent with the more recent sheriff court judgments referred to above, it departed substantially from the 19th century view mentioned in paragraph 2.6 above. He distinguished *Thom* from the earlier cases on the grounds that the facts and circumstances on which the courts were required to reach their decisions were different. While he appears to have been influenced by the fact that the wall was described as "mutual" he did not attach any significance to the words "mutual property" (emphasis added), nor, after drawing attention to the interchangeable use of the words "common" and "mutual", in some of the authorities, was he prepared to follow judicial *dicta* in those authorities which interpreted "mutual" as being equivalent to "common". He held that ownership of the wall, as with a mutual gable, was vested in the neighbouring proprietors to the extent of one-half each *ad medium filum* and that each proprietor had cross rights of common interest in the other half. The immediate effect of this interpretation appears to be that a proprietor may carry out such works as

---

[1] See Wallace v Brown (21 June 1808) FC 215, Warren v Marwick, (1835) 13S 944, Dow and Gordon v Harvey, (1869) 8M 118, Cuthbert v Whitton, (1888) 16R 259 and Cochran's Trs v Caledonian Railway Co, (1898) 25R 572.

[2] See Gray v MacLeod, (1979) SLT (Sh Ct) 17 and Gill v Mitchell, (1980) SLT (Sh Ct) 48, (both heard in the Sheriff Court) where it was held that the adjoining proprietor's consent was not needed where an encroachment on one half of the wall would not affect the other half.

[3] At page 727. The latin maxim inaedificatum solo solo cedit may be translated to mean that anything built on an area of ground belongs to the owner of the ground.

he wishes on his half of a wall subject to the overriding requirement that those works should not in any way prejudice its overall structural stability or integrity. It would also seem to follow from this that where maintenance is required only to the one-half of the wall vested in one proprietor, for example pointing work, then that work may be carried out but will not be the subject of a right of recovery for one-half of the cost from the neighbouring proprietor unless the title makes specific provision to that effect. The only work which would qualify for a contribution would be work affecting the whole wall and even then, in the absence of specific provision to that effect, it is arguable that the costs should be apportioned according to the extent of relative interest and benefit.

2.9 Lord Jauncey regarded the "fundamental principle of *inaedificatum solo*" as being a formidable obstacle to Mr Thom's case. In his view, an inevitable consequence of describing a wall as "mutual" would be that the ownership of the wall would follow the ownership of the ground on which it was erected even where the titles made no specific provision to this effect. He did, however, appear to recognise that difficulties could arise in cases where walls or fences might be referred to, indiscriminately, in titles simply as either "common" or "mutual". In such cases there could be different consequences depending on the circumstances and other title provisions. For example, one approach to the interpretation of a title provision that a wall is to be "common" could be to hold that such a provision necessarily implied that the ground on which such a wall is erected should also be "common" ie in the common ownership of the adjoining proprietors. There is support for this approach in 19th century cases and it would be consistent with rules on ownership of march fences[1] whereby, following the March Dykes Act 1661, adjoining proprietors were bound to contribute equally to the building of the dyke which thereafter became common property.

[1] See Lockhart v Seivewright, (1758) MOR 10488, Stewart v Sangster, (1849) 11D 1176 and Strang v Steuart, (1864) 2M 1015. It is however worth noting that in the later case of Dow and Gordon v Harvey (1869) 8 M 118 which concerned h ightening of a "mutual" division wall, the court also hel d that consent of the conterminous proprietor was required as the wall was the pro indiviso property of the adjoining proprietors.

Common Property

2.10 Common property is defined by Bell as:

> ".. property, in which the several parties have, *pro indiviso*, the same equal but undivided right; each being entitled to the joint use and enjoyment of the subject, and mutual consent being necessary in all acts of management or disposal"[1].

In the case of a wall one consequence of the wall being common property would be that, except where work was necessary in order to rebuild or repair the wall, one of the owners in common could not carry out works without the consent of the other owner or owners. Bell goes on to state -

> "Where a wall is common between conterminous proprietors, the expense of erection, or of necessary repairs, is common, in the proportions of the value of the share which each has in the subject. But operations on a common wall which are not necessary are to be done only by common consent. A division wall in urban subjects has been held common though built by one of the proprietors partly on his own and partly on his neighbour's land."[2]

The possible consequences of a description of a wall as being common property are, then, clear.

2.11 Lord Jauncey and, among others, Mr Kenneth Reid in his forthcoming contribution to the Stair Memorial Encyclopaedia, have drawn attention to the anomoly of describing, as common property in the usual sense, a boundary wall which accedes to ground in individual ownership (for example, where the titles make specific provision). Mr Reid questions whether, in such cases, it is competent to create an interest of common property by contract. Consistency with this argument requires that a wall should only be common property in the sense envisaged by Bell if it is erected on ground which is itself common property. In some cases walls which are "mutual" in character have been described as "common" and, in questions as to the relative rights and interests of the adjoining proprietors, the law of common property has been applied. There is,

---

[1] G J Bell, Principles of the Law of Scotland (10th ed 1899) para 1071.

[2] Para 1078.

at the very least, an element of confusion in this area of the law. Mr Reid[1] points out, for example, that in *Thom* it seems to have been assumed that "mutual wall" and "mutual property" were synonymous with ownership *ad medium filium*, whereas in fact they can refer equally to common property (footnote 83). He concluded, however, that the modern law is not in doubt (Paragraph 400 and the cases referred to in footnote 74 which include *Thom*).

2.12 Given the practical difficulties which arise for individual proprietors where property is held in common, we take the view that it would not be desirable, in the absence of a clear provision in the title deeds to that effect, to accept that interests in common property should be implied. We consider that where proprietors' interests are not clearly defined, a statutory rule which would enable proprietors to exercise some degree of flexibility would be useful.

2.13 It is not uncommon for titles to provide for boundary walls to be "common and mutual". If a description of a wall as "common" may imply a different type of ownership from a wall described as "mutual", there would be an inconsistency in such an approach which might be difficult to resolve unless the title itself goes on to explain by other means whether the property is to be treated as being held in common ownership (regardless of the legitimacy of such an approach) or whether it is to be subject to a split *ad medium filum* with cross rights of common interest. Where a title framed in these terms gives no such explanation, there may be room for a statutory rule as to the interpretation which is to be applied. It is also possible that walls are erected on boundaries where no specific provision is made in the titles. In these circumstances it is thought that ownership of the wall might follow ownership of the ground in accordance with the rules set out in *Thom* for mutual walls.

Our proposals for the law of the tenement

2.14 We indicated at paragraph 1.6 above that we have considered the extent to which the rules we have proposed in our Discussion Paper on the Law of the Tenement[2] for common walls within a tenement might form the basis for a rule to apply to mutual

---

[1] See the Appendix to this Paper.

[2] Discussion Paper No 91, published in December 1990.

boundary walls in cases where the titles are deficient. Our proposals in relation to tenements, however, concerned only the rights and obligations attaching to walls erected wholly on the *solum* of the tenement.

2.15 In Discussion Paper No 91 we proposed that where a part, including a wall, was essential to the structural integrity of a building, that part should be owned in common by all the proprietors of units in the tenement on a *pro indiviso* (ie undivided) basis. Common ownership would, however, in this case be subject to certain qualified rights on the part of the individual owners to carry out minor works on the common property adjoining units individually owned without the need to obtain consent from other owners.

2.16 Our proposals, which met with general support from consultees, would lead to the introduction of a new form of common ownership which would be subject to certain statutorily defined rights and obligations -

Rights - (i) Where the common part is located wholly within a unit in exclusive ownership of one owner in common, that owner in common would be entitled to carry out works affecting the part eg leading through pipes, cables etc so long as the structural integrity of the part was not adversely affected.

(ii) Where the common part is located only partially within a unit in exclusive ownership, the owner in common would be entitled to carry out works which would not adversely affect the structural integrity of the part and would not alter in any way the portion of the part which is not located within his or her unit.

(iii) Where the part is located wholly outwith a unit in exclusive ownership, the owner in common would require to obtain the consent of all other owners in common prior to any works.

(iv) Surface finishes would belong to the owner of the unit or space in which they are located.

Obligations - (i) The structural integrity of the common part and its contribution to the structural integrity of the tenement would be paramount and all

rights of owners in common would be subject to an obligation to maintain that structural integrity.

(ii) In addition, owners in common would be obliged to maintain the common property in good order and repair.

(iii) Where a routine repair or maintenance is required, a majority of owners in common could bind the minority in a decision to effect such repair and all proprietors would be liable for a share of the costs of any work.

(iv) A general requirement of reasonableness in questions relating to the maintenance and renewal of common parts would be specifically imposed.

2.17 The rules detailed above in relation to common property would apply not only to structural walls but also to non-structural external walls and various other parts of the tenement such as the solum and roof. The rules would also apply to gable walls erected wholly on the solum of the tenement. Discussion Paper No 91 does not propose any change in the nature of the relationship between the owners of the adjoining halves of a mutual gable, but only in respect of the ownership of each half. Under the current common law rules[1] the proprietors of individual units own the part of the gable adjoining their units to the extent of one half of its thickness and have a common interest in the other half. We have not proposed any change in this rule except insofar as the nature of the ownership of the one-half thickness of the gable wall built on the solum of a tenement will change. We took the view that, as the gable is located only to the extent of one-half on each of the adjoining areas of ground, any change in the rules would be beyond the scope of our exercise in relation to tenement property. We do, however, recognise that there might be some merit in extending our approach in respect of common parts lying wholly within the area of a tenement to parts shared with adjoining proprietors such as common gables and other similar parts. If such an approach was adopted, the whole gable would be the common property of the proprietors on each side and subject to the rights and obligations outlined at paragraph 2.16 above.

---

[1] The Common law provides for mutual gables erected on the boundary between two urban building lots to belong to the proprietors of the benefit'ng lots to the extent that the wall is erected on their respective lots. The right of ownership is q. alified to the extent that where the titles provide for the erection of such walls, the proprietor who builds the gable is entitled to recover one half of the cost of erection from the proprietor of the adjoining lot exercising his entitlement to use the gable.

PART 3

3.1 We have identified areas of the current law in its application to mutual boundary walls which require clarification. The reasoning adopted by Lord Jauncey in his decision in *Thom* has been examined and we have also considered whether our preferred approach to common property in the context of our review of the law of the tenement might have some bearing on the issue. The matters on which we have concluded that consultees views should be sought are whether -

(i) a statutory statement of the law is required and

(ii) any such statement should be based on the approach adopted in *Thom* or on the approach we have preferred for the law of the tenement.

The need for a statutory statement

3.2 As we understand it, following *Thom*, where a boundary wall is erected to the extent of one half on each side of the boundary and it is provided in the titles that the wall should be "mutual property", each proprietor will have an exclusive right of ownership in his half and an interest in the other half which would prevent it being used in such a way that the structure of the wall would be adversely affected. While the precise nature of each proprietor's maintenance obligations may be prescribed by individual titles, it seems that the rights and liabilities in respect of ownership of the two parts of such a wall will be as defined in *Thom*.

3.3 It seems likely that many titles which make provision for boundary walls may not be drawn in terms which are unequivocal and which could avoid the possibility of future disputes. There may, accordingly, be a case for enacting statutory guidance as to how such provisions should be interpreted.

What should the law be?

3.4 We have indicated at paragraph 2.12 above why we are not attracted to a solution based on common property unless the titles make specific provision to that effect. We are concerned with the need to provide, for cases where titles are insufficiently explicit as to the nature of owners' rights in a mutual boundary wall, a rule which will put such rights beyond doubt. We do not seek to change the law with regard to ownership and

liability, merely to clarify it in circumstances when clarification is needed. Although the number of boundary disputes which come before the courts may be small, it appears that they are frequently waged with great bitterness and may take up many days of court time.

3.5 We have formulated the following questions to establish consultees' support, or otherwise, for the enactment of a statutory rule and whether that rule should be based on the decision in *Thom* or on our proposals in relation to common walls erected on the *solum* of a tenement. The most significant difference between these approaches would be that under the *Thom* approach one owner could extend upwards his or her half of the wall without requiring to consult the other if the interest of the other in the structure of the wall would not, thereby, be adversely affected. Under the alternative approach, as such operations could not be classed as "minor" the adjoining proprietor's consent would be required. We would be interested to consider any alternative approach, which consultees might wish to suggest, which would achieve certainty as to ownership but preserve the ability of one owner to effect minor works on a mutual boundary wall without the need to obtain the consent of his or her neighbour.

1. **Should statutory provision 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 the 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 (paras 2.3-2.8); 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 (paras 2.14-2.16);

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.

Note: Commissioners would welcome an indication from respondents as to their experience of current practices in making provisions in title deeds for ownership and maintenance of boundary walls.

APPENDIX

The following is an extract from a much larger work on law of property by Kenneth G C Reid. This work will appear as part of volume 18 of *The Laws of Scotland: Stair Memorial Encyclopaedia* to be published by the Law Society of Scotland and Butterworths in 1993. The extract reproduced here is in draft form only and the final published version may be slightly different.

This extract is reproduced by kind permission of Mr Reid and the joint publishers.

(c) Ownership and Maintenance

399. **Wall built on one side of the boundary only.** Except where the titles provide otherwise[67], a wall or fence built entirely on one side of a boundary belongs to proprietor of the land on which it is built. This is because the wall or fence accedes to the land[68].

400. **Wall built on both sides of the boundary.** The rules of accession would suggest that a wall or fence built on both sides of a boundary belongs to each proprietor to the extent, but only to the extent, that it lies on his or her land. For a long time, however, this view was resisted. The overwhelming burden of judicial opinion in the nineteenth century was that walls bestraddling a boundary were owned by both proprietors as common property[69]. Quite apart from the question of accession[70], however, this was a difficult doctrine to maintain. For the rights associated with common property - for example, the right of veto and the right to division - are plainly unsuited to a boundary wall[71]; and there is the further difficulty that anything attached to the wall by one proprietor would become, by accession, the property of both. The turning point was the case of Robertson v Scott[72] decided by the Second Division in 1886. Since Robertson v Scott it has come to be accepted that walls and fences accede to the land on which they are built and that accession determines ownership[73]. The modern law is not now in doubt[74]. Consequently, in the common situation of a wall being built on the precise line of the boundary, each proprietor owns ad medium filum (to the mid-point). It has also come to be accepted that the part not owned is subject to reciprocal common interest rights in respect of alterations[75], of repair[76], and, in the case of common gables only, of the cost of erection[77].

The question of whether it is competent to contract out of the rule just stated is considered in the immediately following paragraph.

401. **Contracting out.** Although in at least one case on boundary walls the court was prepared to entertain the idea that parties could make their own rules[78], it must now be taken as settled that the rules of accession cannot be altered by contract[79] and, in particular, that an agreement making a boundary wall common property would be ineffectual to alter ownership of the wall[80]. The position might be different if the provision were contained in the titles. After all, it is recognised that tenement buildings may be owned separately from the ground on which they are erected, and there may be an argument that the same is true of boundary walls. However, the point never appears to have been the subject of decision.

If it is accepted that boundary walls may be separated from the ownership of the ground, then they are subject to the usual rules of conventional separate tenements[81]. In terms of these rules the status of separate tenement is won only by express grant or reservation. What is required is an express declaration in the break-off conveyance that the wall is to be owned as common property[82]. The expression 'mutual wall', which is not a technical term and is consistent both with ownership ad medium filum and with common property, is not sufficient for this purpose[83].

402. **Alteration of boundary walls or fences.** The right to perform acts of maintenance or alteration to a boundary wall or fence without the consent of one's neighbour depends upon the ownership of the wall or fence. Here there are three possibilities.

(a) Ownership by one proprietor only. One who has sole ownership of a boundary wall or fence may make whatever alterations he pleases[84]. He may even demolish the wall. Conversely, his neighbour, who does not own the wall or fence, has no entitlement to interfere with that which is not his.

(b) Ownership by both proprietors ad medium filum. The ownership of each party is subject to an obligation in common interest to maintain that part of the wall which is his[85] and to do nothing to impair the strength and stability of the wall as a whole[86]. Subject to this obligation each proprietor can make alterations on his own side of the wall. In Thom v Hetherington[87], the leading modern case, the defender was held entitled to erect a fence close to and along the length of a boundary wall although the fence posts interfered to some extent with the foundations of the wall and also increased the wind loading. The test to be applied in cases of this kind was set out by Lord Jauncey as follows[88]:

> 'The presence of the fence up against the wall would only have been actionable if such presence impaired the strength or interfered with the stability of the wall.. Such impairment or interference must in my view be measurable and not merely negligible. It is beyond dispute that the owner of one side of a garden wall would be entitled to insert nails or rose ties into the mortar for the purpose of training roses up it. Theoretically every intrusion into the mortar must weaken the bond which it creates between the bricks, but it is equally clear that the court would not restrain the owner from so acting.'

In application of this principle it has been held that a proprietor may build up his own side of a boundary wall in order to support an extension to his house[89].

(c) Ownership by both parties in common. Here the usual rules of common property apply, so that alterations by one proprietor without the consent of the other are unlawful[90]. To this rule there is an exception for necessary repairs[91], and, in the case of common gables only, for such alterations as may be required for the normal enjoyment of a gable[92].

The full cost of alterations falls to be met by the party who instructed them. Nothing can be recovered from the adjoining proprietor. But there are special rules for repairs[93] and for alterations which can be brought within the March Dykes Act 1661[94].

403. **Maintenance.** The right to carry out acts of maintenance and repair has already been considered[95]. A party who repairs a boundary wall or fence is able to recover a share of the cost from his neighbour if, and only if, one of the following applies:

(a) Agreement. It is not enough for the other party to agree to the work being carried out, for that may not of itself import an obligation to contribute part of the cost. Express agreement as to payment should also be obtained.

(b) Real burden. Frequently titles contain real burdens by which both parties are bound to contribute to maintenance on an equitable basis. Depending on how the burden is worded, there may be no requirement to show that the repairs are essential, as opposed to merely prudent or desirable.

(c) Wall owned ad medium filum. Where a boundary wall or fence is owned ad medium filum the ownership of each party is subject to a common interest obligation to preserve the overall stability of the wall[96]. It is thought (although the point has been expressly decided only in relation to common gables[97]) that this includes a positive obligation to carry out necessary acts of maintenance[98]. So if a boundary wall is endangered by the failure of one party to carry out essential acts of maintenance on the side of the wall which he owns, the other party can require that the work be undertaken[99].

(d) Wall owned in common. The usual rules of common property apply, by which either party may carry out essential[100] repairs and look to the other party for a pro rata contribution to the cost[101].

(e) March Dykes Act 1661 (c 41). The 1661 Act, as interpreted, provides special rules for walls and fences coming within its terms. It has been held that the maintenance provisions of the Act apply (i) to walls or fences originally erected at joint expense by order of the court made under the Act (ii) to walls and fences for which the Act was available but which were erected at joint expense by agreement, and (iii) to other walls and fences which have been treated from time immemorial as march fences within (i) and (ii)[102]. Briefly, the provisions of the Act are as follows. Either proprietor may require his neighbour to meet half the cost of repairing, or where necessary, of rebuilding the wall[103].

Ownership of the wall is irrelevant. The same procedure must be followed as for the original construction[104], so that an application to the court is necessary[105]. The court will not authorise the repair where its cost is markedly disproportionate to any benefit to the defender[106]

(f) Statutory powers of local authorities. A local authority[107] may, by notice in writing, require the owner or owners of any building to bring the building into a reasonable state of repair, regard being had to its age, type and location[108]. 'Building' is defined sufficiently widely to include a boundary wall or fence[109]. If the owners fail to comply with the statutory notice, the council is empowered to carry out the work itself and to recover the cost[110].

---

67. When the rule may perhaps be different. See para 401.

68. Strang v Steuart, (1864) 2 M 1015 (affd (1866) 4 M(HL) 5); Sanderson v Geddes (1874) 1 R 1198.

69. See especially Law v Monteith (1855) 18 D 125 and Rodger v Russell (1873) 11 M 671. And see also Hume Lectures III, 416.

70. One way out of the difficulty was to say that the solum on which the wall was built was itself common property. But this did not explain how the solum came to be common property. Clearly the mere erection of the wall was not sufficient: as Lord McLaren pointed out in Cochran's Trs v Caledonian Rly Co (1898) 25 R 572 at 579, (1898) 5 SLT 341 at , several ownership could be converted into ownership in common only by a duly registered disposition. In general the view that the solum is common property is not supported by authority. See Stewart v Sangster (1849) 11 D 1176 (incorrect rubric); Rodger v Russell (1873) 11 M 671; but compare Wallace v Brown June 21 1808 FC.

71. This difficulty led Lord President Inglis into special pleading; 'a gable is the subject of common property in a somewhat different way from any other thing' (Lamont v Cumming (1875) 2 R 784 at 787).

72. (1886) 13 R 1127.

73. This was the view adopted in Robertson v Scott by Lords Craighill and Rutherfurd Clark, but not by Lord Justice-Clerk Moncreiff who maintained the traditional view.

74. Berkeley v Baird (1895) 22 R 372, (1895) 2 SLT 497; Cochran's Trs v Caledonian Rly Co (1898) 25 R 572, (1898) 5 SLT 341; Trades House of Glasgow v Ferguson 1979 SLT 187; Thom v Hetherington 1988 SLT 724.

75. para

76. para

77. para 395.

78. Cochran's Trs v Caledonian Rly Co (1898) 25 R 572, (1898) 5 SLT 341. That at least was the view of Lords Adam and Kinnear although not of Lord McLaren.

79. Para

80. As Lord McLaren pointed out in Cochran's Trs v Caledonian Rly Co (above) only a conveyance could bring about a change in the ownership.

81. Paras 386 and 389.

82. An alternative interpretation of such a declaration is that both the wall and the ground on which it is built is to be regarded as common property. This avoids the problem of separate tenements.

83. Thom v Hetherington 1988 SLT 724. In Thom it seems to have been assumed that 'mutual wall' and 'mutual property' were synonymous with ownership ad medium filum, whereas in fact (see eg Cochran's Trs v Caledonian Rly Co (1898) 25 R 572, (1898) 5 SLT 341) they can refer equally to common property. For this reason the terms are best avoided.

84. Subject however to the same restrictions, eg with respect to servitudes of light, which affected the initial building of the wall. See para 392.

85. For maintenance see para

86. Cochran's Trs v Caledonian Rly Co (1898) 25 R 572 at 597, (1898) 5 SLT 341 per Lord McLaren; Trades House of Glasgow v Ferguson 1979 SLT 187 at 191 per Lord Justice-Clerk Wheatley.

87. 1988 SLT 724.

88. 1988 SLT 724 at 728C-E. The case contains a useful review of the authorities, albeit somewhat impaired by an apparent failure to realise (see para 400) that in the nineteenth century boundary walls were regarded as common property by the courts.

89. Gray v Macleod 1979 SLT (Sh Ct) 17; Gill v Mitchell 1980 SLT (Sh Ct) 48.

90. Warren v Marwick (1835) 13 S 944; Dow and Gordon v Harvey (1869) 8 M 118. For common property see paras

91. Bell Principles s1075 & 1078.

92. Lamont v Cumming (1875) 2 R 784; Faichney v Cameron (1900) 16 Sh Ct Rep 283. In Lamont one of the proprietors was allowed to increase the height of the common gable by several feet and to insert joists, fireplaces and vents. Today common gables are usually regarded as owned ad medium filum, which largely avoids the difficulty.

93. Para 403.

94. Cadell v Wilson (1865) Guthrie's Sel Sh Ct Ca I, 450. For the 1661 March Dykes Act see para 393.

95. Para 402.

96. Para 402(b).

97. Crisp v McCutcheon 1963 SLT (Sh Ct) 4; Trades House of Glasgow v Ferguson 1979 SLT 187.

98. An analogy can be drawn with the law of the tenement, where the upper proprietor is under a positive obligation to provide shelter, and the lower proprietor under a positive obligation to provide support. See paras

99. What he cannot do, however, is to carry out the work himself, for the property is not his.

100. For the meaning of essential repairs in this context, see para

101. Bell Principles s1078; Maclean v Burton-Mackenzie's Trs (1913) 29 Sh Ct Rep 334.

102. Strang v Steuart (1864) 2 M 1015 (affd (1866) 4 M(HL) 5). The fence under consideration in Strang originally divided two fields within the same estate and so did not come within (i) and (ii), and it was held (Lord Benholme dissenting) that there was insufficient evidence of use to bring it within (iii). Lockhart v Seivewright (1758) Mor 10,448 may be an example of (iii).

103. Paterson v Macdonald (1880) 7 R 958.

104. For which see para 393.

105. Duncan v Ramsay (1906) 23 Sh Ct Rep 181.

106. Blackburn v Head (1903) 11 SLT 521.

107. In the Highland, Border and Dumfries and Galloway regions this is the regional council. Otherwise it is the district or island council. See Civic Government (Scotland) Act 1982 (c), s87(6).

108. Civic Government (Scotland) Act 1982, s87(1).

109. Ibid, s87(2).

110. Ibid, s