1. Introduction

Issues relating to land boundaries are a potent source of legal dispute. Land is usually the most valuable asset one can have, and an asset worth litigating over, unlike many forms of moveable property. Disputes over boundaries usually arise in the context of an alleged encroachment by one neighbour over another neighbour's property. They may also arise during sale and purchase of land where the parties come to establish what exactly is being transferred. Problems sometimes crop up at first registration in the Land Register, the whole of Scotland now being operational for it, when the Keeper decides on the exact extent of land as registered and on the issue of indemnity in respect of it. Disputes as to boundaries often concern residential land but may also arise in commercial contexts. In the latter case, however, matters rarely reach the courts and are settled by means of a cash payment, whereas in the former case they often turn into personal disputes. Good knowledge of this area of law and practice is indispensable to any conveyancer given the great variety of contexts in which such issues may arise.

2. Determination of Boundaries

In the Sasine system, determination of the boundaries of a piece of land necessarily involves the interpretation of a deed. The dispositive clause of every deed contains a description of the land being conveyed as a matter of validity for recording. A distinction must be made between general

---

1 Junior Honours Undergraduate, School of Law, University of Aberdeen. Thanks are owed to Professor RRM Paisley and the Peer Reviewer for their comments.
2 Whilst moveable property quickly depreciates, land appreciates over time.
2 MacDonald v Keeper of the Register of Sasines 1914 SC 854. The First Division upheld the Keeper's decision not to record a deed which was a general testamentary settlement on the grounds that the subjects were not sufficiently identified. They were described by reference to a tenement building without specifying which tenement flat exactly was the subject of the
Boundaries: Determination, Disputes, Structures and Law Reform

descriptions and particular or bounding descriptions. A general description identifies the subjects only by name, for example 'the lands of X', without specifying the extent. This was invariably the case with older titles and is virtually unknown in modern practice. Determination of boundaries sometimes involved an examination of natural features such as burns, marshes or hills that were considered in the common opinion to be boundaries. The best evidence, however, is that of possession. It could consist of artificial features on the ground such as boundary stones or fences, or even of witness statements as to carrying out of certain activities on the particular piece of ground, such as; leasing it out, shooting or even dumping rubbish. Although any indication of possession could explain the boundaries, possession which meets certain standards and subsists for the prescriptive period of ten years can fix the boundaries beyond challenge.

On the other hand, a particular description is one that attempts to specify boundaries in one way or another. It could be a verbal description combining reference to physical features such as walls or fences with measurements of at least some of the boundaries. There are interesting nuances of drafting to be noted: ‘bounded by’ is construed to exclude the deed. In any case, general dispositions, such as wills or trust deeds, are not registrable and may only serve as links in title.

3 Erskine, An Institute of the Law of Scotland (8th edn Butterworths, Edinburgh 1989), II.6.2: ‘Where a charter, without referring to any boundary, describes the lands or baronies by special names or designations, it can only be known by the common opinion of the country which lands fall under the designations expressed in the charter, and by what limits those lands are circumscribed’; Whitson v Ramsay (1813) 5 Pat App 664, where the boundary was held to be a line of marshes in circumstances of contradictory statements as to possession of the disputed area; Lumsden v Gordon (1870) 42 Sc Jur 530, where the boundaries were held to rest on a few streams while possession was uncertain.

4 Buchanan & Geils v Lord Advocate (1882) 9 R 1218. This case concerned operation of prescriptive possession to explain the extent of the possessor's title.

5 Hamilton v McIntosh Donald Ltd 1994 SLT 793. This case, on the other hand, concerned a separate concept of prescriptive possession operating to establish a new title in the possessor rather than to explain an existing one.

6 Baird v Fortune (1861) 4 Macq 127 at 149 per Lord Wensleydale.

7 The Prescription and Limitation (Scotland) Act 1973, s. 1. Possession must be open, peaceable and without judicial interruption.

8 Lord President McNeill in Beneficial Bank plc v McConnachie 1996 SC 119 at 126 and Halliday, Conveyancing Law and Practice in Scotland (2nd edn Sweet & Maxwell, London 1997), para. 33-05, advocate the view that a particular description is one that identifies the boundaries without a need to refer to any extraneous material. However, as has been observed by Brand, Steven and Wortley, Professor McDonald’s Conveyancing Manual (7th edn Tottel Publishing, Edinburgh 2004), para. 8.14, and Gordon, Scottish Land Law (W. Green & Son, Edinburgh 1999), para. 4-04, the McConnachie case was concerned with a general description by address and, in any case, this is too stringent a requirement and a particular description could equally refer to extraneous material such as physical features on the ground or boundaries of neighbouring land.
feature by which the property is bounded;⁹ ‘enclosed with’ is understood to mean the opposite;¹⁰ ‘bounded by a public road Y’ purports to convey to medium filum (middle line);¹¹ and ‘bounded by a non-tidal river or stream Z’ is thought to do the same;¹² while ‘or thereby’ appended after measurements means certain latitude is to be given to these measurements.¹³ A particular description could also include a plan, which is not a part of the deed itself but is adopted by reference in the description. Often a verbal description is dispensed with and the plan is the only particular description of the deed. When there are both and there is a discrepancy it does not invalidate the deed and it is dealt with in the following manner: if the verbal description contains measurements it will prevail over a plan;¹⁴ if it does not contain measurements the plan will prevail; if the verbal description contains measurements that cannot be reconciled with the physical features on the ground they will be adjusted.¹⁵ It is not uncommon for a particular description to identify only some boundaries leaving the remaining ones obscure. In such cases, it is, in fact, a part-general description and rules as to general descriptions apply to the non-identified boundaries. It is possible, both at common law and under statute,¹⁶ to refer to a description in a previous deed concerning the property rather than to repeat it. This is a third type of description to be found in a deed: by reference.

A. Land Registration

Much of what is said above has been swept away by the introduction of the land registration system. Because it is based on registration of interest in land and not on recording of deeds, the boundaries of a piece of land are

---

⁹ Smyth v Allan (1813) 5 Pat App 669. This case concerned a wall.
¹⁰ McDonald's Conveyancing, (n 8) para. 8.16.
¹¹ Magistrates of Hamilton v Bent Colliery 1929 SC 686. Halliday, Conveyancing, (n 8) para. 33-11, maintains this is only the case where there is a disposition of two pieces of ground on both sides of the road. He argues that in a normal case ‘bounded by a public road Y’ would exclude the road: Logie v Reid’s Trs. (1903) 5 F 859.
¹² Gibson v Bonnington Sugar Refining Co Ltd (1869) 7 M 394. But ‘bounded by a tidal, navigable body of water Z’ only carries to the low-water mark: Todd v Clyde Trs. (1840) 2 D 357. Bounded by ‘sea’ or ‘seashore’, however, would only carry to the high-water mark: Cadell v Allan (1905) 7 F 606.
¹³ Hetherington v Galt (1905) 7 F 706. Such latitude means the description is not strictly bounding and permits explanation by prescriptive possession to a certain extent. A detailed account of these and other rules as to drafting of descriptions can be found in Halliday, Conveyancing, (n 8) para 33-11.
¹⁴ Ure v Anderson (1834) 12 S 494.
¹⁵ McDonald’s Conveyancing, (n 8) para 8.18.
¹⁶ The Conveyancing (Scotland) Act 1874, s. 61; The Conveyancing (Scotland) Act 1924, s. 8 & sch. D.
determined by its title sheet. The Land Register is map-based and upon first registration the Keeper requires to be provided with sufficient information about the piece of land to enable him to identify it on the Ordnance Survey Map.\textsuperscript{17} Such information could take the form of a previous deed containing a particular description. If there is only a general description this will be insufficient and a new plan will have to be prepared. Whatever is submitted to the Keeper will be thoroughly checked against neighbouring titles and the Ordnance Map before the Keeper accepts the application for registration and issues indemnity. To avoid difficulty it is advisable at an early stage to obtain a P16 report from the Keeper. This will compare the legal boundaries in the titles and any plans submitted with the occupational boundaries on the Ordnance Map. If the boundaries correspond the applicant should get a title with full indemnity covering the whole land. If there is a discrepancy the first step should be an on-site comparison between the occupational boundaries on the Ordnance Map and those on site. There is always a possibility that the Map is out-of-date and the area actually occupied corresponds to the area as described in the titles.\textsuperscript{18} The application for registration should contain information on this. If the legal boundaries are larger than the occupied area the applicant has a choice between relinquishing the unoccupied area or claiming it, usually with exclusion of indemnity given that someone else may have a title \textit{habile} to include that area fortified by prescription.\textsuperscript{19} If the applicant is a purchaser under missives the title may not, depending on its terms, be good and marketable.\textsuperscript{20} If this is the case the purchaser can demand that the seller secures his title to the unoccupied part, or pull out of the deal by rescinding the contract.

There is also a possibility that the legal boundaries are smaller than the area actually occupied. In such a case the applicant will get no title to the additional area given that he has no right to it, and prescription cannot operate contrary to title. If the applicant is a purchaser under missives it is

\textsuperscript{17} The Land Registration (Scotland) Act 1979, s. 4(2)(a). One standard exception made by the Keeper is tenement flats, which require only a verbal description, usually by address. The title sheet of the flat will depict only the ground on which the tenement building is standing and a verbal description will state which flat it is.

\textsuperscript{18} The Ordnance Survey Map is regularly updated for the Keeper but the face of the ground is in constant change. With walls, hedges, fences and buildings appearing and disappearing, it is impossible to keep the Map fully up-to-date.

\textsuperscript{19} The Keeper will probably not inquire as to the strength of another party's claim but will exclude indemnity as a rule of thumb. If the applicant wishes to regain possession he must seek judicial consideration which will assess the competing claim. Should the applicant regain possession and maintain it for the prescriptive period of ten years he may then apply to have the exclusion of indemnity removed.

\textsuperscript{20} Missives may provide for a material discrepancy, in which case the title is still good and marketable if the discrepancy is within such latitude.
unlikely that he will have any claim against the seller, as he is trying to get something which is not due to him under missives.\textsuperscript{21} His only viable option is to get a third party to grant him an \textit{a non domino} disposition of the area in question. It is likely the Keeper will not refuse to register such a disposition but will exclude indemnity.\textsuperscript{22} If the applicant then maintains his possession for a further ten years he can apply to have the exclusion removed owing to operation of positive prescription.

After registration, the title to a piece of land is bounding and the boundaries are easily ascertainable from the title sheet. Any subsequent dispositions of registered land need only include the relevant title sheet number as its description.\textsuperscript{23} On the Ordnance Map, boundaries resting on a structure or other feature such as a fence or wall are depicted by a black line. Arrows across the black line indicate the boundary is to \textit{medium filum} of the structure. Arrows pointing at one side of the black line mean the boundary is on that side of the structure. Boundaries resting on no visible physical features are depicted by a dotted line.

3. Disputes

An encroachment is a permanent or quasi-permanent intrusion into land owned or lawfully possessed by another person without his consent.\textsuperscript{24} It is always an intrusion by property of another, typically buildings or walls, and not by a person which would constitute trespass. Encroachment may take various forms such as: building of a wall wholly or partially on another person's land;\textsuperscript{25} attaching signposts on another person's wall;\textsuperscript{26} leaving

\textsuperscript{21} The purchaser could have a claim under missives if they were drafted so as to include the area occupied to which there was no title, for example, by attaching a plan to the missives. Most missives would, however, be framed in terms of the legal boundaries.

\textsuperscript{22} I Davis & A Rennie (eds), \textit{Registration of Title Practice Book} (2\textsuperscript{nd} ed. 2000) para. 6.4, indicates that the Keeper will do so if satisfied that the scheme is not 'speculative'. The applicant will need to demonstrate good reasons for the application. Aberdeen College Board of Management v Youngson 2005 1 SC 335, is an example of an unsuccessful attempt to do this. In 1993 the defender granted himself an \textit{a non domino} disposition of land belonging to the pursuer. The deed was accepted by the Keeper for recording in the Sasine Register. In 2005 the pursuer raised an action for reduction of the disposition. They were successful on the grounds that the deed was \textit{ex facie} invalid for the purposes of positive prescription because the disponer and the disponee were the same person. Had it not been for this apparent defect, the deed would have been \textit{ex facie} valid and prescriptive possession would have fortified the title beyond challenge.

\textsuperscript{23} S15(1) Land Registration (Scotland) Act 1979.

\textsuperscript{24} Reid, \textit{The Law of Property in Scotland} (Butterworths, Edinburgh 1996), para. 175.

\textsuperscript{25} Macnair v Cathcart (1802) Mor 12832.

\textsuperscript{26} Reid (n 24) at para. 175.
goods on another's land;\(^{27}\) having a tree growing on one's land that has branches extending over to another's land;\(^{28}\) or having such a tree that has roots extending to another person's land.\(^{29}\) Encroachments almost invariably involve a dispute as to boundaries. If an encroachment is about to take place or building works have already started an interdict is available to the aggrieved proprietor, even if demolition of what has already been built is to follow. However, when the encroaching structure is completed and it is either impossible to remove it or such removal would cause a loss disproportionate to any benefit the court may use its equitable power to allow the structure to remain and award damages instead.\(^{30}\) It is, perhaps, worth to have a look at some important cases on the subject.

In *Griffin v Watson*,\(^ {31}\) back gardens of two properties were separated by a wall built entirely on one side of the boundary, which formed part of a garage of the proprietor on the other side of the boundary. This wall had been built under a verbal agreement between the defender and the pursuer's predecessor in title. The defender argued the pursuer was bound by this agreement and, in any case, the encroachment was minimal. The pursuer sought to have the wall removed. The court found in favour of the pursuer. It is notable in this case that the argument of a binding agreement had no force as it was considered personal to the pursuer's predecessor in title. Further, the court did not consider that the loss to the defender would be disproportionate to the benefit for the pursuer and did not use its equitable power to allow the wall to remain.

The later case of *Craig v Powrie*\(^ {32}\) also involved an encroachment by building of an extension to the rear of a semi-detached house and a dispute as to the location of boundaries. Before deciding on the question of the extension, the court heard conflicting evidence from two expert witnesses acting as architects for the pursuer and the defender respectively. The sheriff preferred the opinion of the architect for the pursuer. He had been involved in preparing the original break-off dispositions of both properties and based

---

\(^{28}\) Halkerston v Weederburn (1781) Mor 10495.  
\(^{30}\) Jack v Begg (1875) 3 R 35. In that case, a proprietor erected a four-storey gable wall in the place of a demolished dwarf wall on the boundary line, following unsuccessful negotiations with the other proprietor, and proceeded with building floors supported by the gable wall. The Court held he was encroaching upon his neighbour's land but refused to order demolition of a largely completed building on equitable grounds and granted damages instead.  
\(^{31}\) 1962 SLT (Sh Ct) 74.  
his view on the location of a fence that had been erected on the boundary line at the time of these dispositions. As a result the court awarded damages based on an agreement between the parties that removal of the structure would be unreasonable. The reality of this case emphasises that exact boundaries may be difficult to ascertain even from detailed titles or the Ordnance Map. Professional advice should be taken before any building works on the boundary line are started, and photographic evidence should be taken beforehand and preserved.

A significant case for the issue of encroachments specifically is *Anderson v Brattisanni*s. It concerned a dispute between tenants running a fish and chip restaurant in the basement of a tenement building and the proprietor of the top-floor flat. An intrusion occurred when a pipe, extracting smells and fumes from the basement, was attached to the back, blind wall of the tenement, the upper part of which was owned by the pursuer. The First Division decided to use its equitable remedy and permitted the structure to remain as it was necessary for the basement business to operate. It was held that the pipe caused the pursuer no detriment to the enjoyment of his property as neither smells nor fumes got into the pursuer’s flat nor did it obstruct any view. The wall upon which it was attached was blind and the pursuer did not indicate that he wished to develop it. The unresolved question remains, however, as to the ownership of the encroaching structure. On one hand, it should accede to the *solum* and become the property of the proprietor encroached upon. If so he should have the right to remove it. On the other hand, he obviously cannot do so by virtue of the Court decree. Further, it is equally uncertain what the position is as regards successors of either party concerned. The rules of property law and the decision in this case seem somewhat irreconcilable, highlighting the exact difficulty inherent in the nature of such disputes.

A final case for consideration is *Hetherington v Galt*. Two plots of land with particular descriptions in their titles supplemented by plans and measurement, but qualified with the words ‘or thereby’, were divided by a line of trees planted under agreement by both proprietors at their mutual expense. They did not precisely correspond to the boundaries in the titles. A singular successor of one of these proprietors challenged the arrangement

---

33 It could be noted that, in the case of Land Register titles, the most detailed scaling of the Ordnance Map, 1:1,250, used for urban areas, leaves a latitude of nine inches, in respect of which there is no indemnity: s 12(3)(d) Land Registration (Scotland) Act 1979. In the *Craig* case the parties were litigating over between two and six inches of ground.

34 Paisley and Cuisine (n 32) at p. 19.

35 1978 SLT (Notes) 42.

36 (1905) 7 F 706.
given that the titles gave him more land. The Second Division held that, whilst normally an agreement such as this could not bind singular successors if unequivocally contrary to titles, in this case the arrangement could not be said to be contrary to titles. Given that the titles were qualified by the words ‘or thereby’, the arrangement simply explained the titles further, and the exact route was fixed by operation of positive prescription.

If a concise conclusion is to be drawn from these cases, it would be that before any building works are to be started near or on the boundary line a meticulous check of titles to both properties and features on the ground should be carried out, coupled, if possible, with written consent to the proposed construction of the neighbouring proprietor, especially if titles disclose any ambiguity. Otherwise, there is a risk of encroachment.

A. Boundary Agreements

If titles disclose a discrepancy as to the common boundary and there is sufficient good will on part of the proprietors, they may make an agreement as to the boundary and, along with a plan, register it either in the Sasine Register or the Land Register. Strictly speaking, ‘discrepancy’ means a discrepancy of legal boundaries as specified in the titles, usually an overlap of claims to a strip of land. On one view, this provision would also cover a discrepancy between legal boundaries and occupational boundaries disclosed in an on-site inspection or on the Ordnance Map, but this has been doubted. A discrepancy of legal boundaries usually arises when at least one of the titles is a Sasine title. It has been said that this may also be the case with two Land Register titles and, because such titles are bounding and depicted on the Ordnance Map, it seems that may arise only when at least one of the titles has indemnity excluded in respect of the discrepancy. In such a case it is less likely that an agreement can be reached because the proprietors are in active competition over the area of ground in question. The broad definition of ‘land’ in the *Land Registration (Scotland) Act 1979*, also means that an agreement could regulate boundaries of tenement flats, bodies of water or even minerals. As soon as an agreement is registered it is

---

37 The Land Registration (Scotland) Act 1979, s. 19(1). If both titles are Sasine titles the agreement must be registered in the Register of Sasines: s. 19(2). If both titles are Land Register titles the agreements must be registered there: s. 19(3). If the titles are of both types registration must proceed in both registers.
38 Reid (n 24) paras. 219 & 220.
40 Ibid.
binding on all parties having an interest in the properties and their successors. Questions remain about the impact of such agreements on persons having subordinate real right in the lands such as tenants or servitude holders, though on strict reading of the relevant provision it would appear their consent is not necessary. It has been suggested, however, that their consent would be prudent.\footnote{Paisley (n 39) para. 4.23. The author also points out that tenants under short leases may not be bound by the agreement as their real right in the subjects is not included in the definition of ‘interest in land’ in s. 28(1).}

An alternative to the boundary fixing agreement found in the 1979 Act can be found in the March Dykes Act 1669. It permits an owner of rural land to alter a boundary where there is no present enclosure and a wall or fence is to be erected and the existing boundary is uneven or unsuitable for the new enclosure. This is done by an application to a Sheriff who must make a visit to the site, unless that is dispensed with by both parties. He then issues a decree altering the boundary, which can be registered in either of the registers, followed by an award of damages if there is an imbalance in value. As a general observation, it should also be noted that there may be a lot of difficulty in selling land tainted with a boundary ambiguity or involved in a boundary dispute. Lenders will also be unwilling to lend money on security over such land.

\section*{4. Structures}

The last aspect of the law on boundaries for consideration is the problems associated with boundary structures.\footnote{The law on common gables (common walls between two buildings) is not included here because it is a development of the Victorian era made for the purposes of building practices then prevalent. It has little significance today. A good account can be found in Reid (n 24) para. 218.} When a wall or fence is to be constructed entirely within one's own property then he has absolute freedom to do so\footnote{Dunlop v Robertson (1803) Hume 515, where the defender erected a sixteen-feet-high boundary wall on his own ground but merely three feet from the pursuer's house, thus blocking the supply of daylight to two floors. He was held entitled to do so. This position could, however, be altered by real burdens prohibiting building. Such burdens are often imposed by a developer to preserve the overall character of the development or by a proprietor wishing to preserve his view or the amount of sunlight received by his property. Bachoo v George Wimpy & Co Ltd 1977 SLT (Lands Tr.) 2, is an example of an unsuccessful challenge to such a burden in the Lands Tribunal.} and must bear the full expense of the work.\footnote{Ord v Wright (1738) Mor 10479.} An exception to this is provided by the March Dykes Act 1661. It permits an
owner of rural land\textsuperscript{46} to construct a boundary structure on his own land\textsuperscript{47} and recover half of the cost from the neighbouring proprietor. This is done by obtaining consent from the other proprietor or by application to either the Sheriff Court or the Court of Session. The grounds of refusal may be that the project is ‘visionary or absurd’\textsuperscript{48} or that the cost of it is disproportionate to any benefit.\textsuperscript{49}

When a wall or fence is to be constructed on the boundary line the consent of both proprietors is necessary to prevent the structure being considered an encroachment. In some cases, such as housing developments, the position will be governed by reciprocal real burdens obliging the proprietors to erect and maintain walls or fences on the boundary line at mutual expense.\textsuperscript{50} Even if consent as to erection of a structure is given by the adjoining proprietor it does not mean he is obliged to contribute to the cost unless he consents to that too. A wall or fence construed on the boundary line was once thought to be common property,\textsuperscript{51} but now it is regarded as having acceded to both pieces of land and is owned by both proprietors to \textit{medium filum}.\textsuperscript{52} This rule cannot be altered by contract as the rules of accession are not open to control by agreement.\textsuperscript{53} A wall or fence owned to \textit{medium filum} is subject to the rules of common interest, obliging each proprietor to maintain it and preserve its overall stability.\textsuperscript{54} Each proprietor must maintain his side of the wall and is solely responsible for the cost. If the other proprietor neglects his side and endangers the stability of the wall he may be required by the first proprietor to carry out repairs. The first proprietor may not, however, carry out these repairs himself. When it comes to alterations, similarly each proprietor may carry out such alterations to his

\begin{itemize}
\item \textsuperscript{46} The land must also be at least five acres in superficial area: \textit{Penman v Douglas and Cochrane} (1739) Mor 10481.
\item \textsuperscript{47} The Act does not sanction encroachments: \textit{Graham v Irving} (1899) 2 F 29 at 34 per Lord M'Laren.
\item \textsuperscript{48} Hume, \textit{Lectures}, III, p. 415.
\item \textsuperscript{49} \textit{Earl of Peterborough v Garioch} (1784) Mor 10497, where the defender successfully argued that the land she owned was mountainous and yielded little income and the burden of contributing half of the cost of enclosure would be too heavy for her.
\item \textsuperscript{50} E.g. \textit{Thom v Hetherington} 1988 SLT 724. Reid (n 24) para 217, expresses doubt as to validity of such burdens, permitting one to build on another’s land and to recover half of the cost.
\item \textsuperscript{51} \textit{Law v Monteith} (1855) 18 D 125.
\item \textsuperscript{52} \textit{Robertson v Scott} (1886) 13 R 1127. Reid (n 24) para 223, notes that the concept of a boundary wall being common property was inconsistent with the doctrine of accession and some rights of common owners such as the right of veto or of division and sale were unsuitable for such a structure.
\item \textsuperscript{53} \textit{Shetland Island Council v BP Petroleum Developments Ltd} 1990 SCLR 48.
\item \textsuperscript{54} \textit{Cochran’s Trustees v Caledonian Rly Co} (1898) 25 R 572 at 597 per Lord M’Laren.
\end{itemize}
side of the wall as he pleases provided the stability of the wall is not impaired.\textsuperscript{55}

A wall or fence constructed on one's own land is one’s own property and accedes to the land.\textsuperscript{56} The proprietor is also solely responsible for maintenance of the structure and may alter it as he pleases, subject to any agreement with the adjoining proprietor.

5. Summary

Let us now consider a hypothetical scenario.

In 1930 A, an Aberdeenshire laird, divided up his land. He retained the northern slice as his family residence and sold the south-western part to B, a farmer, and the south-eastern part to C, also a farmer. The disposition to B was prior in time. The description therein contained measurements, a plan and a title condition obliging B to erect and maintain a four feet, stone wall on the eastern boundary of his property. This disposition also provided for a servitude of vehicular access through B’s land in favour of A, on the route of

\textsuperscript{55} Thom \textit{v} Hetherington 1988 SLT 724, where one of the proprietors of a wall owned to \textit{medium filum} erected a fence along the wall that interfered with the foundations of the wall but otherwise did not impair its stability. He was held entitled to do so.

\textsuperscript{56} Strang \textit{v} Steuart (1864) 2 M 1015.
a road used by A before the sale (light grey). The description in the disposition to C did not contain measurements or a plan but only a sketch and a proviso that the western boundary of C’s land would rest on the stone wall erected by B. Not long after, A died leaving his estate to his son D. B proved a successful farmer and on his death his son E took up the land and his father’s occupation. C’s land however, proved infertile and in 1970 he sold it to F, who would keep horses and open a horse riding school. B and then E failed in their obligation to maintain the stone wall. By 1970 the condition of the stone wall had deteriorated and it collapsed and the remains were covered by soil and grass. F, wishing to use the western part of his property as graze land for his horses, erected a six feet fence by the road running through E’s land, one hundred feet further west. This intrusion went unopposed as E did not use this strip of land at all. In 2010 E wishes to retire and sell his land in order to move to Spain and buy a house there. He entered into missives with a purchaser offering the whole of his interest in the land. Aberdeenshire became operational for land registration on 1st April 1996 and the purchaser will need to present his disposition for first registration. E obtained a P16 report from the Keeper which disclosed that the stone wall no longer exists and a fence has been erected one hundred feet into E’s land. An on-site comparison confirmed the position. E’s title is not good and marketable because a third party, F, may have a claim to the disputed area between the road and the place of the former stone wall (dark grey). This claim is probably valid because F’s title is no longer bounding as the stone wall has disappeared and F has possessed the area by grazing horses for more than ten years thus fortifying his claim by positive prescription. The Keeper will not refuse to register the disputed area in favour of the purchaser but will exclude indemnity. The purchaser threatens to get out of the deal unless E puts matters right. E has the option of negotiating with F a return of the disputed area and reconstruction of the wall or making a revised offer to the purchaser, excluding the disputed area. On learning that E sold his land to the purchaser, who is in fact a property developer, D decides to build his own stone wall on his side of the boundary between his land and the developer’s. The wall takes three months and £10,000 to complete. However, D miscalculates the exact position of the boundary line and the developer’s surveyors state that D has build three feet into the developer’s land, the wall lying entirely within the latter’s property. The developer may try to remove the wall himself or seek a court order to have D remove the wall, but that is likely to be refused due to the cost and

57 This self-help remedy would mean that D has to seek an interdict against removal of the wall.
effort involved in its construction, unless the developer can show that the encroachment is a material impediment to his plans for development. Otherwise damages will be awarded.\textsuperscript{58} Instead, the developer could negotiate with D an agreement to alter the boundaries and register it, along with a plan, in the Land Register (if one takes the view that a boundary agreement is competent to solve only a discrepancy of legal boundaries an ordinary conveyance will be appropriate here). If negotiations are unsuccessful and the wall remains even after a court decision, the three feet wide strip of land will not positively prescribe after ten years to become part of D's land. His title is probably bounding in respect of the boundary with the developer on the basis of the break-off disposition by A to B which contained detailed measurements and a plan.\textsuperscript{59} Should D wish to register his

\textsuperscript{58} There is also the question as to the ownership of the encroaching wall. Rules of accession would dictate that the wall accedes to the developer’s land but it may not be removed if the court uses its equitable power to allow the structure to remain. The power will not be lightly exercised but if it is, an odd position follows. The developer may not remove the wall built three feet into his land but may prevent D from gaining possession of the three feet wide strip of land beyond the wall by other means, such as by constructing a fence on the actual boundary. If the developer’s solicitor thinks that it is possible that the special equitable power will be used, he should advise the developer to remove the wall himself as quickly as possible.

\textsuperscript{59} The position of D’s title may be complex. On A’s death, whether testate or intestate, his executor transferred A’s land to D. He could have done this by means of an ordinary disposition, in which case D will be registered as proprietor in the Sasine Register. That disposition, by the executor to D, will use, as link in title, the executor’s confirmation to A’s estate. Another way to effect the transfer could have been for the executor to endorse on the confirmation a docket entitling D to A’s land and to give a copy of it to D: s15(2) Succession (Scotland) Act 1964. Yet another way, applicable only to testate succession, a method which should be strongly discouraged, would be for the executor merely to hand over A’s testamentary disposition, \textit{ie} the will, to D, which would then act as a title deed: ‘Opinion of the Professors of Conveyancing’ (1965) 10 JLS. In the latter two cases, A remains the registered proprietor, not D, who holds on the basis of the docket or the will, which are what may be termed ‘general dispositions’, title deeds not in themselves registerable. It would have been advisable for D however, to convert his personal right against the executor into a real right by either a notarial instrument, a document executed by a notary public, setting out the terms of the unregisterable deed presented to him, which is then recorded in the Sasine Register: \textit{Sutherland v Garrity} 1941 SC 196, or, more likely, by means of a notice of title, a statutory procedure to the same effect: s4 Conveyancing (Scotland) Act 1924. What is the relevance of all this? It becomes apparent when one realises that the answer to the question of whether D’s title is bounding in respect of the boundary with the developer depends on what basis D holds the land, or more specifically, what description does the title deed contain. Ideally, the title deed would contain a description of A’s land minus the land conveyed to B, possibly by referring to the disposition by A to B. It would be easy to expect the ordinary disposition, the confirmation (along with the inventory) and the docket on it, to contain such a proper conveyancing description. Not so readily with the will, or a notarial instrument or a notice of title proceeding on the will. In the latter case, the deed could refer to the deed upon which A held the land initially, ignoring that part of it had been broken off in favour of B. D’s title would then not be bounding in respect of the boundary in question and he could benefit from this fact as far as positive prescription is concerned. If A and D had been seller and purchaser, D would ensure that the description
interest in the Land Register or sell his land so that a purchaser registers, that strip of land will not be registered by the Keeper as there is no title to it. The only option is to get a third party, perhaps a secretary at D's solicitor's office, to grant to D an *a non domino* disposition of the ground in question. The Keeper will not refuse registration of this deed but will exclude indemnity. After ten years D may apply to have the exclusion removed which will also have the effect of altering the developer's (or his successors') title sheet to remove the strip of land from his title.

6. Law Reform

The Scottish Law Commission has recently published a report on land registration, which proposes a major overhaul of the whole system. Two topics discussed there have a special significance to the issues relating to boundaries: mapping and *a non domino* dispositions.

A. Mapping

Under the present system, each registered interest in land has a title sheet which contains a detailed plan of the property based on the Ordnance Survey Map. The 1979 scheme envisaged that there would be a separate micro-map for each title sheet and a master map, the Index Map, of all title plans. As the Report points out, that would give for the present moment nearly two million micro-maps as there are close to two million title sheets. In reality, the Keeper never kept two million separate sheets of paper with micro-maps but worked with existing paper Ordnance Map prints by drawing on them, often by hand, those properties that came to be registered. Whenever a title sheet or an office copy needed to be made, an extract from these prints would be given as the micro-map. Since 1993 geospatial data has been kept in electronic format, the Digital Mapping System (DMS), which is nothing more than the Ordnance Map in electronic form. Instead of drawing properties on various Ordnance Map prints, they are entered into the system. Whenever a title sheets needs to be prepared, an extract from the system is given. The Index Map, now a digital layer on the base

takes account of the break-off disposition to B. For a recent example of a boundary dispute with such background see: *Welsh v Keeper of the Registers of Scotland* 2010 WL 2131305.

60 Scottish Law Commission, *Report on Land Registration* (Scot Law Com No 222, 2010).

61 ibid. Parts 5 and 16 of the Report respectively.
geographical map, is best viewed by comparison to a political map of the world, a layer on its geographical map.\textsuperscript{62}

One of the main proposals of Part 5 of the Report is to give legal recognition to the system outlined above, which already exists \textit{de facto}.\textsuperscript{63} The DMS and the Index Map would continue to operate but would be renamed to ‘Cadastral Map’, an internationally recognised name for such devises. It is thus a change of form, rather than substance. Another proposal is that the Ordnance Map could be replaced or supplemented with another reliable map, the ‘base map’, at the Keeper’s discretion.\textsuperscript{64} The Report gives examples of new mapping technologies, such as aerial or satellite imaging, but it is unlikely that the power would be exercised any time soon. The main criticism of the Ordnance Map is that it may be unsuitable for some legal purposes, because it is not always up-to-date; it may be inaccurate; the scale may be too small or that the seabed is not depicted. On the other hand however, as the Report observes, relying on the Ordnance Survey Map gives the system a high standard of mapping that may not easily be replaced. The publication also recommends that the Keeper’s present practice as to tenements, such as flats or minerals, should continue. An application for registration will not require a plan and only the \textit{solum} of the ground will be depicted on the Cadastral Map and its extracts.\textsuperscript{65}

The Report also proposes an important change to the substantive law. The Keeper will not register an area to which another title sheet relates, even with exclusion of indemnity.\textsuperscript{66} It was thought that having two title sheets overlap in respect of one area of ground is illogical and the question of indemnity is quite irrelevant to the problem. This provision may prevent many boundary disputes from arising.\textsuperscript{67} Another change to the substantive

\textsuperscript{62} The Ordnance Map never attempted to show title boundaries. All it shows are detailed geographical features and public law boundaries, such as constituency boundaries
\textsuperscript{63} Para. 4.43; Draft Bill, ss. 2, 3(1)(a) & (b), 5(2), 7(1)(a)(i).
\textsuperscript{64} Para. 5.8; Draft Bill, s. 4(5).
\textsuperscript{65} Para. 5.11; Draft Bill, s. 15(1). The Report does allow a possibility that the base map becomes three-dimensional in the future, but the Draft Bill does not require it now: para 5.43.
\textsuperscript{66} Paras. 5.26 & 5.27; Draft Bill, s. 4(3) & (4).
\textsuperscript{67} The mechanism of registration works in close conjunction with the mechanism of rectification. Suppose Black and White are neighbours. There is a boundary dispute between them: both have titles \textit{habile} to include an area of ground in dispute. Black has a title registered in the Land Register with full indemnity and is in possession of the disputed ground. White wishes to register and wants to have the disputed area included in his title. Presently, the Keeper will register it, but will exclude indemnity. If White wishes to have the exclusion removed he must regain possession, keep it for ten years and then apply to have the exclusion removed. This will also have the effect of removing the disputed ground from Black’s title, \textit{ie} rectification. The new regime proposes a different order of matters. White will get no title to the ground in question in the first place. He will get a title with full indemnity only to the land to which Black has no title. Then he will have to go to court to
law will be the repeal of s19 Land Registration (Scotland) Act.\textsuperscript{68} Boundary agreements will no longer be competent. It was thought that whatever benefit may flow from them can be achieved by other means, in particular, an ordinary conveyance or an excambion (exchange of land).

B. A non domino Dispositions

A non domino dispositions is the second of many aspects of the Report to be summarised here. As the work observes, there is a significant legitimate role for such dispositions despite the fact that a paradigm case has a nature of ‘fraud’ and the Keeper should not further it. The standard example of positive use of these devices given in the Report is that of regularising irregular titles, for example the title to a farm passed down in the family through generations without any deeds. The present ‘owner’ may wish to regularise his title. He would then use the vehicle of an a non domino disposition, granted by his solicitor’s secretary, and registered by the Keeper with exclusion of indemnity. After ten years he could apply to have the exclusion removed and get a valid title. Another highly relevant example is to clean up boundary irregularities. The publication emphasises that there must be room for the operation of positive prescription in the Land Register and a non domino dispositions are an element of it. The present practice of the Keeper is to reject applications that are ‘speculative’.\textsuperscript{69} The Report proposes a legislative provision stating that such dispositions should be rejected by the Keeper as a general rule, unless they are ‘legitimate in their purpose’.\textsuperscript{70} The test for acceptance should rely on two filters. Firstly, the true owner should not have been in possession of the land in question (including civil possession) for the past seven years on the day of presenting the a non domino disposition for registration.\textsuperscript{71} This is to reflect the idea that the true owner no longer ‘asserts title’.\textsuperscript{72} Secondly, the person presenting the application should have been in possession of the land for one year on the day of presenting the application.\textsuperscript{73} This requirement will bar purely

\textsuperscript{68} Para. 5.32; Draft Bill, s. 98 & sch. 9.
\textsuperscript{69} See (n 21).
\textsuperscript{70} Para. 16.10.
\textsuperscript{71} Para. 16.16; Draft Bill, s. 21(1) & (13)(a) read with s. 20.
\textsuperscript{72} This term appeared in a similar proposal by the Commission: Discussion Paper 128, para. 4.57.
\textsuperscript{73} Para. 16.17; Draft Bill, s. 21(1) & (13)(a) read with s. 20.
speculative applications and will ensure the applicant’s position is secure enough to merit an expectation that it will subsist for the full prescriptive period. The standard of possession required for these provisions will have to be ‘open, peaceable and without judicial interruption’.\textsuperscript{74} which ties them to the standard required for prescriptive possession. One further point requires comment. Registration of an \textit{a non domino} disposition will no longer confer title, albeit with exclusion of indemnity.\textsuperscript{75} The entry will be a provisional one and no existing title sheets will be permanently altered as a result of the registration. Only upon completion of the prescriptive period will the entry become permanent and relevant title sheets will be rectified. Up to that time the provisional entry itself will be a rectifiable inaccuracy.

Assuming that the new law as to \textit{a non domino} dispositions was in force in 2010, it would apply to D’s position in our scenario above in the following manner. Firstly, the Keeper would have to decide whether D’s application is legitimate in purpose. As it is intended to clean up a boundary irregularity, the Keeper should accept it. Secondly, D may apply for registration in 2017 at the earliest because the developer ceased to be in possession in 2010. Thirdly, at that time D will have to have been in possession since at least 2016. Fourthly, if the Keeper accepts the application, the developer’s title sheet will contain a provisional exclusion of the three feet wide strip of land. This exclusion will be an irregularity that could, at least in principle, be rectified by the developer. At the same time, D will get a provisional title sheet to the strip of land. Fifthly, the prescriptive clock will start to run for D on the day of registration and the seven-year period of possession prior to then may not be included in the computation of the prescriptive period. Provided possession is maintained, D may apply for a full title sheet in 2027, which would also have the effect of rectifying the developer’s (or his successors’) title sheet to remove the strip of land in question permanently from his title. Under the present regime, D would have a good prospect of receiving a valid title in 2020.

\textsuperscript{74} Para. 16.19; Draft Bill, s. 21(1)(b)(ii).
\textsuperscript{75} Para. 16.27; Draft Bill, s. 21(7).
7. Conclusion

Readers are strongly encouraged to familiarise themselves with the whole *Report on Land Registration*. Many issues discussed therein are directly relevant to the law of boundaries but have not been included here due to the volume of this, already lengthy, work. Other issues may have a relevance which is not readily apparent. If not for the sake of the law of boundaries, readers should go through the Report because the Bill is presently before the Scottish Parliament and may soon become a cornerstone statute of Scottish land law.