

CALEDONIA BRIEFING No. 4

The Abolition of Feudal Tenure etc. (Scotland) Act 2000

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Introduction

This briefing is intended to provide general guidance on how the Abolition of Feudal Tenure etc. (Scotland) Act 2000 affects you as the owner of land or property.

It is written as far as possible in a way which that should make it easy to understand in general (as opposed to strictly legal) terms.

It is not intended as a definitive or comprehensive interpretation of the Act. Rather it is intended to draw attention to the Acts main provisions and what action, if any, you might have to take or might wish to take as a consequence.

As in all such matters, it is intended as a guide only and should not be relied on as the basis of any legal action. It is important that if, having read it, you think that there might be implications for you, you contact your solicitor for detailed advice. Given the nature of the Act, there are certain actions which you may be entitled to takeactions that you may be entitled to take but which have to be dealt with within a set timetable or you will lose such rights. It is thus even more important that you seek legal advice soon if you feel that the Act might affect you in any way.

The Abolition of Feudal Tenure Act is available from Her Majestys Stationary Office and also from their website (see Useful Contacts at the end of this document). In this briefing, parts and sections of the Act are referred to in square brackets.

1. What is this Act?

This Act was passed by the Scottish Parliament on 3 May 2000 and received Royal Assent on 9 June 2000. It effectively abolishes the feudal system of land tenure which tenure that has been in existence in Scotland in various forms since around the 12th century. As far back as 1966, the Halliday Committee recommended the abolition of feudal tenure but despite some partial reform in the intervening years, Government has failed to effect complete abolition.

This state of affairs is partly due to the lack of time that has been available for Scottish legislation at Westminster. The Labour Government, however, which was elected in 1997, established the Scottish Parliament which allows greater time for dealing with Scottish issues. As a result, and in response to increasing public criticism of the way in which the feudal system was being abused, the Government ordered the Scottish Law Commission (who had published a consultation paper in 1991) to bring forward its final proposals on abolishing feudalism. Their report was published in December 1998 and the bill was introduced to the Scottish Parliament in October 1999.

2. What does it do in general terms?

As its title implies, the Act abolishes the feudal system of land tenure. In other words it brings an end to the system whereby title to land is held as part of a chain of hierarchical interests. the The Act introduces a system of simple ownership of land.

3. What exactly is Feudal feudal tenure?

Feudal tenure has its roots in the 11th and 12th century when the Scottish Crown began to assert its authority over the country. It did this by granting feu charters over extensive estates which conferred rightsrights and privileges (usually administrative and legal powers) to the nobility in return for obligations (usually financial and military) to the Crown. Over time this system evolved into the system of land tenure which tenure that we have today.

In simple terms, feudal tenure is a system of landownership where a person - the vassal - does not own land outright but holds it on terms set by another person - their feudal superior. The ultimate Superior (or Paramount Superior) is the Crown which historically derives its authority from God. All land held under feudal tenure (at least in theory) originates from a Crown charter (see Fig. 1).

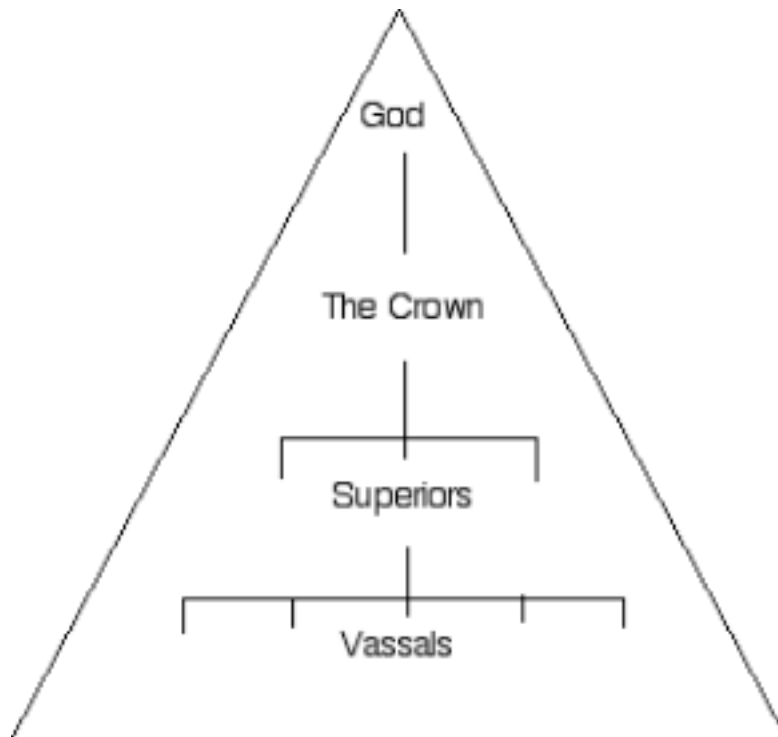


Fig. 1. The Feudal Pyramid

Over time the land (or parts of it) which was the subject of the charter will have been sold to others. (see Figure 2. overleaf). This can be done by a simple sale of land, by disposition, whereby A sells land to B and A ceases to have any interest in that land. Alternatively it can be done by means of a feu disposition whereby A sells land to B but imposes feudal conditions in the title which B must observe. The typical relationship that then emerges is illustrated in Figure 2 using the examples from Box 1.

Box 1. Examples of feudal arrangements.

Read in conjunction with Fig. 2.

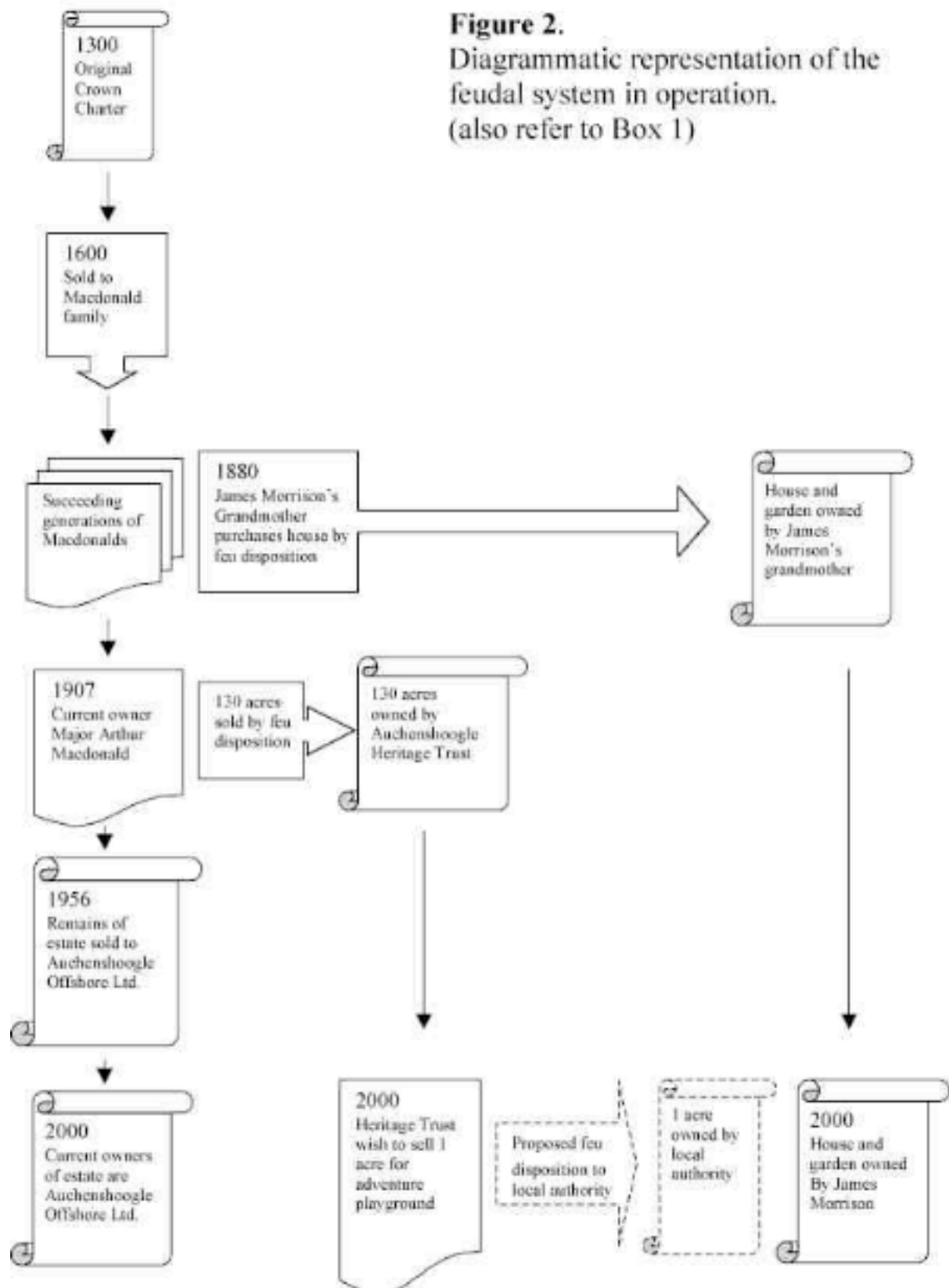
James Morrison owns a house and garden that his grandmother bought from Auchenshoogle Estate. The property was sold to Mr Morrison's grandmother by feu disposition thus making the owner of the estate the feudal superior of Mr Morrison. The feuing conditions include the stipulation that the property shall be used solely for residential purposes and that the consent of the superior is required for any external alterations to the appearance of the building.

The Auchenshoogle Heritage Trust is a local body consisting of residents of the parish who own 130 acres of woodland on the outskirts of the village. Major Arthur Macdonald, a former owner of Auchenshoogle Estate gifted the woodland to the Trust, in 1907. The land was subject to a feu disposition that prohibited the construction of any buildings on the woodland. Major Macdonald died in 1956 and his family then sold the estate including the superiority interest in it. The new owner is Auchenshoogle Offshore Ltd., an offshore trust that is proving difficult to deal with.

Auchenshoogle Heritage Trust wishes to sell an acre of the woodland adjacent to the school to the local authority to provide an adventure playground. In order to do so, they have to contact Auchenshoogle Offshore Ltd. in order to obtain their consent to waiving the feudal conditions (prohibiting buildings). The Trust, however, are keen to ensure that the land continues to be used as a playground and in turn imposes a burden to the effect that the land shall be used for these purposes in all time coming.

In this example, the offshore trust becomes the feudal superior of both James Morrison and Auchenshoogle Heritage Trust. Land sold in such a way is referred to as having been feued or sold by feu disposition. B (Auchenshoogle Heritage Trust) can then sell land to C (the local authority) and in turn impose the further conditions it feels appropriate on the sale thus creating a new feudal relationship whereby C (the local authority) is the vassal of B (the Trust) whilst B (the Trust) is the superior of C (the local authority). Thus is created the feudal pyramid of interests in land. If land is sold by feu disposition, a new feudal estate is created and a new superior and vassal relationship is established.

Figure 2.
 Diagrammatic representation of the
 feudal system in operation.
 (also refer to Box 1)



The most common form of feudal condition is the obligation to pay a sum of money annually to the superior - the feu duty. Other conditions can also exist relating to constraints on what the land or property can be used for (see Box 1). In such cases if the vassal wished to do anything which contravened these conditions they would have to obtain the permission of their superior who could then grant them a Minute of Waiver (usually in return for payment of a further sum of money).

The person who, in effect, owns the land or property is the vassal at the end of the chain (James Morrison and Auchenshoogle Heritage Trust in Figure 2). In both cases the owner of the Estate is the feudal superior and retains certain interests in the land but does not have what in legal terms is described as the dominium utile or useful ownership of the land.

Typically in a rural situation, land and property will be owned by individuals who are the vassals of the original owners of the long-established estate which state that originally sold the land land they now own. This is frequently the case in villages that were developed by large landed estates and where small plots of land have been sold as former parts of a larger property.

In towns and cities it is common to find that ones feudal superior is the descendant of the individual or organisation which originally owned and (frequently) developed the land. Thus in Edinburgh the original owners (now in the form of trusts) of the New Town are today the feudal superiors. Elsewhere it is common to find corporate bodies such as insurance companies owning portfolios of superiorities. This was done as part of their investment strategy in the days when the payment of feu duties still represented a significant source of income to feudal superiors. Other bodies such as the Church of Scotland have extensive superiority interests in property that which has been developed on former glebe land (which involves large numbers of tenement flats and other buildings in the cities).

4. I thought feudalism had been abolished a long time ago!

In all other European countries it has been. In England, for example, it was abolished in 1290. Not at all. There has been a long-standing commitment by previous Labour and Conservative Governments to abolish feudalism but the complexities of doing so and the lack of parliamentary time at Westminster have meant that only partial reforms have been made. The change most often noticed by people was the abolition of feu duty as a result of the Land Tenure Reform (Scotland) Act 1974. This gave vassals the opportunity to pay off their feu duty by means of a once and for all payment, prohibited the creation of new feu duties and required that when land was next sold that feu duties must be redeemed. Feu duties which were not redeemed (either because the land was not sold or the vassal chose not to redeem them) continued to be payable.

The 1974 Act did not, however eliminate the relationship between superiors and vassals. Feudalism survived although with the breaking of the financial link it was well on the way to being redundant. The Abolition of Feudal Tenure etc. (Scotland) Act is thus the final step in abolishing feudal relationships between superiors and vassals for all time.

5. What about the Crown interest in land?

There was some controversy during the passage of the Act in the Scottish Parliament regarding the future of the Crown. Some critics argued that abolishing the Crown, as the ultimate owner of land would diminish the direct stake that society had in the ownership of land in Scotland. This would, they argued, promote the notion of a more absolute form of land ownership, eliminate the public interest in the tenure system, and weaken the ability of Parliament to legislate on land in

future.

Such concerns have been addressed to an extent by the preservation of the key Crown rights of prerogative including the interests of the Crown in ownerless property and the regalia majora (those rights in land must be forever retained by the Crown).

It remains unclear to what extent the public interest is still represented in the new land tenure arrangements.

6. What does the Act do?

The Act abolishes the system of feudal tenure. In other words:-

- existing vassals will cease to be vassals and will become straightforward owners of land.
- existing superiorities will be abolished
- no feudal relationship will be permitted in future

The Act also covers other matters related to land tenure.

- It abolishes entail¹. [Part 5]. This was the means by which land could be protected against claims by creditors and was introduced in 1685 in order to secure a pre-determined line of succession and to protect landed estates from being broken up if an heir become bankrupt. The Entail (Scotland) Act of 1914 prohibited the creation of new entails but those existing at that time have survived.
- The Act also allows [Section 70] a firm (a business partnership) to be the legal owner of land provided that such firms have a separate legal identity from those who compose them². Previously title had to be taken collectively in the names of some or all of the partners as trustees of the firm. This measure does not affect other forms of business association such as Companies under the Companies Act.
- There are further miscellaneous provisions [Part 6] relating to thirlage, baronies, the Crown, liferent etc. which, which are probably not relevant to most landowners³.

7. So how does it affect me?

The Act affects you if you (or the organisation you are involved in) own land held under feudal tenure. In practice this means most land with the most obvious exceptions being land in Orkney and Shetland which are held under Udal tenure. You will be affected if, :-

- as a vassal, your title contains feudal burdens.

You will also be affected if, as well as owning land, you are the feudal superior of

¹ See Part 5 of the Act.

² See Section 70 of the Act.

³ See Part 6 of the Act.

other land.

In a few situations land that you own may not be owned under feudal tenure - the most obvious example being land in Orkney and Shetland which is held under Udal tenure. If this is the case the Act has no effect.

Feudal abolition will eliminate the superior-vassal relationship. However, these provisions do not come into effect until the 'Appointed Day'. This is a date, yet to be determined, which will be set by Scottish Ministers and will most likely be sometime in 2002. Until then there are certain procedures laid down by the Act which allow superiors and vassals to make the transition to a post-feudal world. These procedures mainly concern arrangements for dealing with feuduty and feudal burdens.

8. Who is my feudal superior and how do I contact them?

If you are unaware of the identity of your feudal superior it might be possible to find out by carrying out a legal search in the Registers of Scotland (see Useful Contacts at the end of this document). However, the onus is on the superior to contact the vassal if they want to preserve burdens or claim payment of feuduty.

9. What about Feuduty?

Any feuduty which has not been redeemed by the appointed day shall be abolished and no feuduty will be payable for any period following the appointed day. Feudal superiors will, however, be entitled to compensation (along the same lines as the one off payment under the 1974 act) for the abolition of feuduty payments so long as notice is served by them on the vassal within 2 years after the appointed day. Such payment will have to be made within 56 days of being served with such a notice or arrangements can be made to pay in instalments.

Any feuduty which remains unpaid for any period of time before the appointed day shall be payable on that day and will remain recoverable by the former superior for a stipulated period after that day.

10. Burdens What exactly are burdens?

Burdens are conditions set out in title deeds which deeds that constrain the freedom of the vassal by imposing by imposing certain conditions and obligations. Historically these have taken all manner of various forms and many, many of which may well now be redundant and useless. Burdens are very common in urban titles and some examples include:-

- a prohibition on the use of residential property for commercial purposes
- the imposition of obligations to maintain common areas (stairs and backyards)
- restrictions on a vassals right to make alterations to a building (often in order to harmonise the appearance of a street or housing development)

Burdens also exist in rural areas and can be far more variable, for example:-

- a prohibition on built development
- an obligation to restrict the use of land and property in certain ways (e.g. land must continue to be used for agricultural purposes or must not be used for tourism).

The seller can place burdens on land in one of two ways.

- They can be imposed by means of a feu disposition whereby the seller retains the ability to enforce such conditions by becoming the feudal superior of the property that they are selling. Such burdens are known as feudal burdens.
- Alternatively they can be imposed by a simple disposition where the seller does not become the feudal superior.

The essential difference is that in the former case (feudal burdens), the superior and his or her successors can continue to exercise their rights over the burdened property even although they may long have ceased having any meaningful connection with it. They can, for example, emigrate to Australia but they remain the feudal superiors of the property. The latter type (non-feudal) are contractual obligations between the seller and the buyer and are enforceable by them and their successors as owners of the relevant properties.

Where there is no feudal relationship between the persons concerned (i.e. where no one creates himself or herself a feudal superior), *the burdens that exist will continue and will remain unaffected by feudal abolition*. Such burdens exist in the title deeds and run with the property which is to say that the owners of the relevant properties inherit the rights and obligations when they buy the property - they form part of the deal when a sale is agreed.

Feudal burdens, on the other hand, whilst they continue to burden the affected property, are enforceable not, for example, by who happens to be the owner of another neighbouring property, but by the original feudal superior who sold the land or by their successors.

It is unknown what proportion of burdens are feudal and what proportion are non-feudal but it is estimated that perhaps each accounts for around half of the total.

11. What will happen to feudal burdens?

There are two main points to note.

- Non-feudal burdens (where the person with the right to enforce is not the feudal superior) will be unaffected by the Act.
- Feudal burdens will be extinguished by the Act on the appointed day unless a superior takes action to preserve them.

They Feudal burdens can only be preserved in certain circumstances, namely: -

- can only preserve them if certain conditions are met⁴ [Section 18] or
- if the vassal and superior come to a mutual agreement that they should⁵ (Section 19) or
- if they the superior convinces the Land Tribunal that they he or she will suffer

⁴ See Section 18 of the Act.

⁵ See Section 19 of the Act.

substantial loss or disadvantage if the burden is lost⁶ [Section 20] or

- if such a burden serves to regulate the maintenance and management of some common facility such as a tenement stair or common area* [Section 23] or
- where such a burden may be regarded as being in the public interest in terms of conserving the architectural, historical or environmental characteristics of land or property⁷ [Section 26].

Two aspects of this are worth highlighting in further detail.

Under the terms of Section 18 of the Act, the superior can nominate land that they own to become the benefited land (the ownership of which confers the right to enforce the burden). Such land must have a permanent building which is used wholly or mainly as a place of human habitation or resort and which is within 100 metres of the burdened property. Such a burden then becomes a non-feudal burden which runs with the land affected, which runs with the land affected, and not the individual who owns the land.

Under Section 26 of the Act, any burden which can be construed as a conservation burden, which can be construed as a conservation burden, can be retained. To qualify, the body which is the superior must satisfy Scottish Ministers that they have as their objects or functions to preserve or protect for the benefit of the public:

- (a) *the architectural or historical characteristics of any land; or*
- (b) *any other special characteristics of any land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of any land).*

Section 26(2)

Such burdens must also be for the purpose of preserving or protecting such characteristics.

It is important to emphasise once more *that only burdens that are feudal are being abolished*. Furthermore, in future it will still be possible to impose burdens on land and property. The way in which this will be done and the kinds of burdens that will be permissible are to be the subject of further legislation known as the Title Conditions (Scotland) Bill which is due to be published at the end of 2000.

ANY ACTION TO RETAIN BURDENS MUST BE TAKEN BY THE SUPERIOR BEFORE THE APPOINTED DAY.

12. Will feudal superiors be entitled to Compensation?

In certain circumstances compensation will be available to feudal superiors for losing the right to enforce feudal burdens. There are two stages to this process. The first first [Section 33] involves the registration of a notice reserving the right to claim compensation⁸. This must be done before the appointed day and in circumstances where:-

⁶ See Section 20 of the Act.

⁷ See Section 23 of the Act.

⁸ See Section 26 of the Act.

- land was sold by feu disposition subject to a burden which reserved for the superior the whole or any part of the development value of the land and
- either the land was sold at a significantly lower price as a consequence or where no money was paid at all as a consequence.

So, for example, a field might have been sold by feu disposition on the condition that if, in future, planning permission was granted, the original seller would be entitled to some share of the development value. If planning permission were to be granted and the field then sold to a house-building company, the seller (who is the feudal superior of the field) would be entitled to a specified part of the enhanced value.

It is important to stress, however, that such an entitlement only exists if the land was originally sold cheaper than it would have been had the burden not been imposed. In other words, someone who sold land which only had an agricultural value at the time of sale will only be entitled to compensation *if they sold it at a significantly lower price than would have been the case had they not reserved any future share of the development value.*

The second stage of the process [Section 35] involves the claiming of such compensation⁹. A landowner is entitled to claim compensation where they have registered a notice reserving if they have reserved the right to do so (as above) and where there has been a breach of the burden within the 5 years *before* the Appointed Day. Compensation can also be claimed or where, during a period of 20 years *after* the Appointed Day, there is an occurrence which, if something happens had the burden not been extinguished, which *would* have been a breach of the burden.

Compensation will be restricted to any effect the burden had (at the time that it was imposed) on the sum of money which money that was then paid for the land.

13. What about pre-emption?

Rights of pre-emption exist where the seller of a property enjoys the right of first refusal to re-purchase it when it next comes to be sold. The right is a once-only right which right that the original owner must choose to exercise or lose. Rights of pre-emption, where they exist as a feudal burden in the title, will disappear as part of feudal abolition but are, as with other feudal burdens, capable of being retained retained [Section 18].¹⁰

However, if the right has been imposed as part of a simple disposition where the original owner is not the feudal superior of the new owner, then the right will remain as a form of contract between the two parties. It will still be possible in future to create rights of pre-emption over property

14. Appeals and Disputes

Any disputes as to notices registered under the Act (e.g. claiming compensation or retaining burdens) can be referred to the Lands Tribunal (Section 44 of the Act).

15. How is crofting affected?

Crofting is a form of tenancy rather than ownership and crofters will be unaffected by the abolition of feudalism. The relationship between crofters and their landlord

⁹ See Section 33 of the Act.

¹⁰ See Section 35 of the Act.

is governed by the crofting acts not by feudal land tenure. Where a crofter has purchased croft land he or she will, as landowners, be affected by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 just as much (or as little) as any other landowner.

16. Do I need to do anything?

If you are a vassal you might care to check out what burdens exist in your title. The onus is on the superior however, to take any action to preserve them. If they do not then, on the appointed day, they are extinguished. If you wish them to go then it would be advisable not to draw attention to their existence in the hope that the superior will not take any action. If you feel that there is something worth preserving then it might be advisable to contact the superior to discuss a mutual agreement to preserve them [Section 19].*

BEFORE DOING ANYTHING IT IS RECOMMENDED THAT YOU CONTACT YOUR SOLICITOR FOR ADVICE

If you are a feudal superior, the onus is on you to take action to check what rights you have over land which has been sold by you or by past owners of your land to see whether there are any conditions which have been placed on property which you would like to preserve or whether there is any feuduty which will be extinguished on the appointed day and for which you wish to be compensated. You will then need to determine whether you can, under the terms of the Act preserve such conditions. As a general rule if you do not take any action by the appointed day or within a specified period afterwards, you will lose any rights to take such action.

BEFORE DOING ANYTHING IT IS RECOMMENDED THAT YOU CONTACT YOUR SOLICITOR FOR ADVICE

17. Is this the end of land law reform?

Not at all. There is more to come in the form of: -

- new legislation governing burdens (or what are now being referred to as title conditions)
- legislation to reform leasehold casualties
- proposals to reform the law of the tenement
- possible changes to the law on compulsory purchase
- a review of the law of the foreshore and seabed
- various reforms to crofting law
- various reforms to agricultural tenancy law
- land reform measures, in particular the introduction of a right of responsible access to land and water and a community right-to-buy land.

TERMS

appointed day

The Feudal Abolition Act is now law but most of its provisions will only take effect on the appointed day. This will be set by Ministers and will be either a Whitsunday (28 May) or a Martinmas (28 November) since those are the days on which feuduty is normally payable. The appointed day is likely to be sometime in 2002 or 2003. Sufficient time will be needed to allow people to make the necessary arrangements to adapt.

burdens a condition contained in the title deeds to land which obliges the

owner to observe certain conditions. Such a burden can be a feudal burden or a non-feudal burden depending on whether it was created by feuing land (and thus creating a new superior - vassal relationship) or by simply transferring land to a new owner via a simple disposition.

superior a person who has the right to enforce feudal burdens.

vassal a person who, in effect, is the owner of land but who is constrained in their use of that land by the feudal burdens in their title which are capable of being exercised by their feudal superior.

USEFUL CONTACTS

Registers of Scotland (for information relating to the ownership of land)

Meadowbank House
153 London Road
EDINBURGH
EH8 7AU
Tel: 0131 659 6111
website: www.ros.gov.uk

Scottish Law Commission

140 Causewayside
Edinburgh
EH9 1PR
Tel: 0131 668 2131

Law Society of Scotland

26 Drumsheugh Gardens
Edinburgh
EH3 7YR
Tel: 0131 226 7411
website www.lawscot.org.uk

HMSO

71 Lothian Road
Edinburgh
EH3 9AZ
Tel: 0870 606 5566
website www.hmso.gov.uk

The Abolition of Feudal Tenure etc. (Scotland) Act is available on the HMSO website at www.scotland-legislation.hmso.gov.uk/legislation/scotland/acts2000/20000005.htm