

**SCOTTISH LAW COMMISSION**

**Report  
on  
Abolition of the  
Feudal System**

(SCOT LAW COM No 168)

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# **Report on Abolition of the Feudal System**

Laid before Parliament by the Lord Advocate under section 3(2) of  
the Law Commissions Act 1965

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

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SCOTTISH LAW COMMISSION

*Item 6 of our Fifth Programme of Law Reform*

**Abolition of the Feudal System**

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

We have the honour to submit our Report on Abolition of the Feudal System.

*(Signed)*      BRIAN GILL, *Chairman*  
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J G S MACLEAN, *Secretary*  
23 December 1998

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## ABBREVIATIONS

Duff, *Feudal Rights*

A Duff, *Treatise on the Deeds and Forms used in the Constitution, Transmission and Extinction of Feudal Right* (Edinburgh, 1838)

Gordon, *Scottish Land Law*

W M Gordon, *Scottish Land Law* (Edinburgh, 1989)

Halliday Committee

Report on *Conveyancing Legislation and Practice* by a Committee chaired by Professor J M Halliday (Cmnd 3118, 1966)

Halliday, *Conveyancing*

J M Halliday, *Conveyancing Law and Practice* (2nd edn, ed Iain J S Talman) vols I and II (Edinburgh, 1996 and 1997)

McDonald, *Conveyancing Manual*

A J McDonald, *Conveyancing Manual* (6th edn, by Stewart Brymer, Douglas J Cusine and Robert Rennie) (Edinburgh, 1997)

Rankine, *Landownership*

J Rankine, *Landownership* (4th edn) (Edinburgh, 1909)

Reid, *Property*

Kenneth G C Reid *et al*, *The Law of Property in Scotland* (Edinburgh, 1996)

Scot Law Com DP No 93

Scottish Law Commission, Discussion Paper No 93 on *Property Law: Abolition of the Feudal System* (1991)

Scot Law Com DP No 102

Scottish Law Commission, Discussion Paper No 102 on *Leasehold Casualties* (1997)

Scot Law Com DP No 106

Scottish Law Commission, Discussion Paper No 106 on *Real Burdens* (1998)

Scot Law Com No 162

Scottish Law Commission, *Report on the Law of the Tenement* (Scot Law Com No 162) (1998)

Stair Memorial Encyclopaedia

*The Laws of Scotland: Stair Memorial Encyclopaedia* (25 volumes; Edinburgh, 1987-96)

## NOTE ON FEUDAL TERMINOLOGY

The report, unavoidably, uses technical terms of feudal law. This note explains some of the most important.

Feudal land is not owned outright, but is held from another person - rather in the same way that, in a lease, a tenant holds from a landlord. In feudal language the person holding the land is known as the **vassal** (or feuar) and the person from whom the land is held is known as the **superior**. Often there is a chain of superiors and vassals. All chains begin with the Crown, which is the ultimate (or paramount) superior. Sometimes they are quite long. For example, A might hold from B, who holds from C, who holds from the Crown. In such a case A would be vassal of B, and B would be superior of A. But B would also be the vassal of C, and C the superior of B. The pre-fixes “sub” and “over” are used to describe more distant relationships. For example, A is the **sub-vassal** of C, who is in turn the **over-superior** of A.

The person who, in normal language, would be regarded as the owner of land or buildings is, in feudal language, the vassal at the very end of the feudal chain - A in our example. Such a vassal has a special, and qualified, type of ownership, known as *dominium utile* (useful ownership). The other people in the chain also have a type of ownership, known as *dominium directum* (direct ownership). Another word with the same meaning is **superiority**. In any one feudal chain, there may be several superiorities but there can only be one *dominium utile*. General words which can be used to describe both *dominium utile* and superiority are **feu** and **feudal estate**.

A new feu is created by a conveyance which, in this report, is usually referred to as a **grant in feu**. Such a grant can only be made by the vassal with *dominium utile*. The effect of a grant in feu is to add another link to the chain. The person receiving the grant acquires *dominium utile*. The person making it retains a superiority. The former becomes the vassal of the latter.

Today almost all feudal land is held on a type of tenure known as **feu farm tenure**. “Farm” here means rent. The “rent” payable in feu farm tenure is called **feuduty**. Payment is made by a vassal to the superior.

# Part 1 Introduction

## Our remit

1.1 This report is the fourth in a series of reports on property law, a subject which is included in our Fifth Programme of Law Reform.<sup>1</sup> In the Fifth Programme we said that our aim was to submit,

“by the end of 1999, a report with draft legislation to abolish and replace the feudal system”.<sup>2</sup>

Later we brought this date forward by a year.<sup>3</sup> We have already published a discussion paper on non-feudal real burdens<sup>4</sup> and intend to submit a report on that topic by the end of 1999. The two topics are related. We envisage that there will be two Bills but that the respective Acts will be brought into force at the same time.

1.2 It is important to be clear about our remit. Some of those who commented on our earlier discussion paper on the feudal system<sup>5</sup> criticised us for taking a narrow and rather technical approach and for not dealing with more wide-ranging aspects of land law reform. That, however, is not our role. We are a non-political advisory body acting under statutory powers and subject to statutory restraints. Our governing statute is the Law Commissions Act 1965 and our main function under that Act is to keep the law of Scotland under review

“with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law”.<sup>6</sup>

1.3 It is against that background that the item relating to feudal tenure in our Fifth Programme has to be read. It is not our function to consider or make recommendations on more wide-ranging aspects of Scottish land law which might well be politically controversial.

1.4 This report provides a good example of the type of law reform envisaged in the Law Commissions Act. It is concerned with the reform of a legal institution which has fallen into

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<sup>1</sup> Scot Law Com No 159 (1997). The relevant item is Item No 6: Property. The earlier reports were on the law of the tenement (Scot Law Com No 162), on boundary walls (Scot Law Com No 163) and on leasehold casualties (Scot Law Com No 165).

<sup>2</sup> Scot Law Com No 159 (1997), para 2.35.

<sup>3</sup> See our *Thirty-Second Annual Report* (Scot Law Com No 161) para 2.42.

<sup>4</sup> Scot Law Com DP No 106.

<sup>5</sup> Scot Law Com DP No 93.

<sup>6</sup> The Law Commissions Act 1965 s 3(1).

disrepair and disrepute. It paves the way for the systematic development and reform of related areas of the law, including in particular the law on non-feudal real burdens. It eliminates the anomalies which result from having several different forms of ownership-like land tenure. It recommends the repeal of 45 whole Acts, as well as 246 sections, 57 schedules and many obsolete and unnecessary words in other Acts. It would lead to the simplification and modernisation of an important branch of the law of Scotland. In technical law reform terms it is one of the most important reports this Commission has produced.

1.5 Technical law reform has important indirect benefits for the public, especially in the long term. The reforms recommended in this report would, however, also have immediate and direct benefits. There will no longer be any feudal superiors. Although certain types of feudal real burdens, such as those imposed by approved conservation bodies for conservation purposes or those which protect the amenity of a neighbouring plot of land, may continue to be enforceable as non-feudal burdens if those entitled to them so elect, the overwhelming majority of feudal real burdens will simply disappear. With them will disappear the opportunity which they provide for exacting money.

1.6 In October 1997 a Land Reform Policy Group was set up by the Scottish Office with the remit of identifying and assessing proposals for land reform in rural Scotland.<sup>7</sup> We have kept in close contact with the Group so as to avoid unnecessary duplication of work. In most respects our remit is much narrower than that of the Group. In one important respect, however, our remit is wider. We are not concerned solely, or even mainly, with rural Scotland. The feudal system of land tenure is all-pervasive. As well as rural properties, it affects millions of properties in towns and cities.

### **The rise and fall of the feudal system**

1.7 The feudal system of land tenure depended on the theory that all land was ultimately owned by the Sovereign. The Sovereign would feu out lands to be held by vassals in return for military services. The vassals would sub-feu on the same basis to vassals of their own, who might in turn sub-feu, and so on downwards in an ever-widening pyramid. The relationship between superior and vassal was a continuing relationship with reciprocal rights and obligations, originally the rendering of military service by the vassal and the provision of a secure tenure and military protection by the superior. The feudal system of land tenure was not confined to Scotland. Indeed it came to Scotland comparatively late in its development. Its spread over much of Europe was a remarkable phenomenon. It could not have achieved such success if it had not met the needs of the times in an efficient way. But times change. The feudal system has now been abolished and superseded practically everywhere. In France it did not survive the Revolution. In England it was substantially dismantled in the seventeenth century,<sup>8</sup> leaving a complicated system of different kinds of “estates in land” which was later greatly simplified by a series of statutes culminating in the Law of Property Act 1925.

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<sup>7</sup> The Group has published two papers - *Identifying the Problems* (February 1998) and *Identifying the Solutions* (September 1998). Its final report (*Recommendations for Action*) was published in January 1999.

<sup>8</sup> By the Tenures Abolition Act 1660.

1.8 In Scotland the system survived but only because it became commercialised and, eventually, attenuated and debased. The first stage was the disappearance of the military element. Armies were no longer raised by relying on feudal obligations and the overtly military type of feudal tenure was gradually replaced by a type of feudal tenure (known as feu farm) under which the dues to be rendered to the superior were entirely in the form of money or goods. There was a significant reform in 1746 when the Tenures Abolition Act abolished entirely the old, and originally military, form of tenure known as ward holding. Lands formerly held on that tenure from the Crown were to be held on blench holding (for one penny Scots per year, if asked only) and lands formerly held on ward holding from a subject superior were to be held on ordinary feu farm tenure for an annual feuduty in money or goods.

1.9 A series of further reforms in the 19th century<sup>9</sup> removed some obsolescent relics in the feudal system, such as the formal ceremony of the giving of sasine, and did much to simplify the remarkable complexities of feudal conveyancing. Reforms in the present century have improved the vassal's rights and reduced those of the superior. From an economic point of view the vassal with *dominium utile* can virtually be regarded as outright owner. In most cases the rights of superiors are valueless, or at least worth less than the cost of conveying the superiority. As a result, when a superior dies, the heirs may not bother to lay claim to the titles. However, the theoretical structure remains. There is still a notional pyramid of interests in land with the Crown, the paramount superior, at the top and the owner of the *dominium utile* at the bottom. Each intermediate level in the pyramid is a separate estate in land, a mid-superiority or *dominium directum*, owned by a person who is a feudal superior in relation to the owner or owners at the level below and a vassal in relation to the owner or owners at the level above. The system is inherently and unnecessarily complex, involving as it does multiple "owners" of the same piece of land.

1.10 Just as important as the legal reforms have been changes in the functions performed by the feudal system. In the days before building societies, it provided a way of buying property for a reduced capital sum coupled with a substantial feuduty. Superiorities which carried the rights to feuduties came to be regarded as secure and attractive investments at a time when investment opportunities were much more limited than they are now. Many superiorities passed into the hands of financial institutions and other bodies with large investment portfolios.<sup>10</sup> The feudal system also provided a form of private planning control, particularly in urban areas, at a time when other forms of planning control were non-existent. The urban landscape of Scotland owes a great deal to this function of the feudal system. From the vassal's point of view the system offered perpetual tenure, generally regarded as preferable to holding on a long lease which would eventually run out.<sup>11</sup>

1.11 The feudal system of land tenure now exists in only a shadowy form. Most feuduties have been redeemed.<sup>12</sup> Even before the redemption scheme began to extinguish feuduties on a

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<sup>9</sup> In the period 1845-1874. See Gretton in Reid, *Property* at para 87 ff for a full description.

<sup>10</sup> The Church of Scotland was obliged by the Court to secure the stipend of new parishes in the form of feuduties. Because of this the Church became a major holder of superiorities for endowment purposes.

<sup>11</sup> In some parts of Scotland, however, very long leases (eg for 999 years) came to be used as an alternative to feudal tenure. See our report on *Leasehold Casualties* (Scot Law Com No 165).

<sup>12</sup> See para 3.7.

massive scale, feudal superiorities had ceased to be regarded as an attractive investment. Fixed feuduties were at the mercy of inflation and the small sums now due in many cases are often more trouble to collect than they are worth. The town and country planning function of the feudal system has become distorted. The role of the superior is often less that of restraining building than of charging money for allowing it. Privately enforceable restrictions on the use of land in the form of real burdens still have a useful role to play, subject to appropriate restrictions and safeguards, in supplementing the planning law in minor or local matters but such real burdens do not have to be linked to the feudal system.<sup>13</sup> They can be enforceable by the neighbouring owners who have an interest to enforce them. Superiors are often remote. Indeed, they are increasingly unknown to the vassal. Even the minimal link which resulted from the annual payment of feuduty has largely disappeared with the progressive redemption of feuduties.

1.12 Although an empty shell for most practical purposes, the system is still susceptible to abuse. It is also a continuing source of unnecessary complications in Scottish property law.

### **Earlier recommendations for abolition**

1.13 In 1966 the Halliday Committee on *Conveyancing Legislation and Practice*<sup>14</sup> recommended that all existing feus should ultimately be converted into holdings direct of the Crown, all intermediate superiorities being extinguished. The Government later concluded<sup>15</sup> that feudal tenure should be abolished completely<sup>16</sup> subject only to certain rights vested in the Crown.<sup>17</sup> Unfortunately this was not done. The legislation which followed from these deliberations introduced important reforms but stopped short of complete abolition of the feudal system of land tenure. It did, however, pave the way for abolition by (a) providing a mechanism for dealing with outdated or restrictive real burdens (b) prohibiting the creation of new feuduties (c) conferring a right to redeem feuduties voluntarily and (d) providing for the compulsory redemption of existing feuduties on the next sale of the property in question.<sup>18</sup>

### **Our discussion paper**

1.14 Our Fourth Programme of Law Reform contained an item on “property law”. Under this heading the Commission said that its first objective was

“the consideration of land tenure law reform with a view to the completion in due course of statutory reform of feudal tenure”.<sup>19</sup>

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<sup>13</sup> See Scot Law Com DP No 106.

<sup>14</sup> Cmnd 3118, 1966.

<sup>15</sup> See the White Paper on *Land Tenure in Scotland: A Plan for Reform* (Cmnd 4099, 1969) and the Green Paper on *Land Tenure in Scotland* (1972).

<sup>16</sup> Green Paper (1972) para 17.

<sup>17</sup> Green Paper (1972) para 81.

<sup>18</sup> Real burdens were dealt with by the Conveyancing and Feudal Reform (Scotland) Act 1970 (which also introduced many useful conveyancing reforms of a technical nature, including the conferring on vassals of a right to require an allocation of feuduty). The redemption of feuduties was dealt with by the Land Tenure Reform (Scotland) Act 1974.

<sup>19</sup> Scot Law Com No 126 p 1. Property Law is Item No 16.

In pursuit of this objective the Commission published a discussion paper<sup>20</sup> which sought comments on “the formulation of a new system of land tenure in Scotland to replace the existing feudal system and on ways of effecting a transition to the new system”.<sup>21</sup>

1.15 The great majority of the responses to the discussion paper supported the principle of the abolition of the feudal system, although some specialist commentators raised issues, largely of a technical kind, which required further consideration. The responses to the consultation and the further work which had taken place on the preparation of a draft report enabled the Commission to state firmly in its Fifth Programme of Law Reform that its aim was the complete abolition of the feudal system of land tenure and its replacement with a modern system.<sup>22</sup>

### **The case for abolition**

1.16 From the point of view of social policy the main reason for recommending the abolition of the feudal system of land tenure is that it has degenerated from a living system of land tenure with both good and bad features into something which, in the case of many but not all superiors, is little more than an instrument for extracting money. Superiors who have no actual interest in the enforcement of real burdens can extract money from vassals for granting waivers of their right to insist on observance. This practice has continued notwithstanding the power of the Lands Tribunal to vary or discharge unreasonable or unduly burdensome land obligations.<sup>23</sup> A burden on the vassal’s title which is on the face of it enforceable by the superior has a nuisance value even if the burden would in all probability be discharged by the Lands Tribunal. Superiors are still able to charge a sum which takes into account the trouble, delay, expense and uncertainty involved in seeking a variation or discharge from the Tribunal. Indeed even burdens which are manifestly invalid or unenforceable have a nuisance value to the superior which can be turned into money. The practices of many superiors in relation to the charging of fees for waivers have given rise to frequent complaints and demands for reform.

1.17 There are other reasons of a more technical nature for recommending abolition. Even if it were not susceptible to abuse for monetary gain the feudal system would be in need of reform. It now serves no useful function. It has become an anachronism which needlessly complicates the law.<sup>24</sup> Abolition is an essential first step in any more general programme of land reform. No country with any interest in the state of its laws would wish to carry forward such a system into the next century.

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<sup>20</sup> Scot Law Com DP No 93.

<sup>21</sup> At para 1.1.

<sup>22</sup> Scot Law Com No 159 para 2.34.

<sup>23</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1.

<sup>24</sup> “The reason or rule of the fourteenth century becomes the ridiculous fiction of the nineteenth. Our land rights are determined by a series of statutes which indicate the struggle between an oligarchy desirous of retaining the hosts of warlike retainers who gave them power on the one hand, and the commercial spirit on the other hand, which sought to emancipate itself from the trammels of feudalism”: *Cassels v Lamb* (1885) 12 R 722 at 762.

1.18 It has sometimes been suggested that the feudal system should be modified rather than abolished and that all existing feudal holdings of land should be converted into holdings direct of the Crown. It was argued by one respondent to our discussion paper that the abolition of the paramount superiority of the Crown would diminish the constitutional position of the Crown in Scotland. We think that this argument is misguided. There is no reason why complete abolition of the feudal system of land tenure should have any effect on the constitutional position of the Crown. We recommend provisions expressly designed to ensure that the Crown's prerogative rights as sovereign and head of state are undiminished.<sup>25</sup> It would be illogical, inconsistent and artificial to retain the highest element in the feudal system of land tenure while abolishing all the lower elements.

1.19 In short, abolition of the feudal system of land tenure would remove archaic features of the Scottish system of conveyancing and land ownership which either serve no useful purpose or are positively harmful. It would bring legal theory into line with practical reality. It would finally eliminate feuduties from Scottish land law. It would greatly simplify that law and pave the way for further reforms.

### **Some essential definitions**

1.20 **The feudal system of land tenure.** By the "feudal system of land tenure" we mean the system whereby land is held by a vassal (who owns the *dominium utile*) on perpetual tenure from a superior (who owns the *dominium directum*) who may in turn hold from another superior, and so on up to the Crown or Prince and Steward of Scotland. This form of tenure falls to be distinguished from the position of a tenant under a lease. Leases, although sometimes very long, are not perpetual,<sup>26</sup> and do not involve the relationship of superior and vassal. It also falls to be distinguished from allodial tenure where the land is owned outright, without any link to the Crown as ultimate superior. The main example of allodial tenure is the udal system still found in Orkney and Shetland.<sup>27</sup>

1.21 Land which was acquired by the Crown by conquest, feudal custom, annexation or other means, but which has never been feued out by the Crown, is not within the feudal system of land tenure as here defined. Crown rights to such land, even if originally derived from feudal might or feudal custom, are not held of a superior and are not within the feudal system of land tenure as defined for the purposes of this report.

1.22 **Land.** By "land" we mean not only surface land (including land covered by water) and the buildings and other structures which accede to it, but also the separate tenements which are capable of being held on feudal tenure under the present law. These include flats in tenement buildings, minerals under the ground, and the right to fish for salmon, as well as some more esoteric subjects.<sup>28</sup>

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<sup>25</sup> Part 2.

<sup>26</sup> However, some leases in Scotland are for very long periods, such as 999 years or more. See Scot Law Com DP No 102. There are also some anomalous forms of holding by tenants at will and by the Kindly Tenants of Lochmaben which are discussed in Part 8.

<sup>27</sup> See paras 7.19 - 7.23.

<sup>28</sup> See Reid, *Property* paras 207 - 213.

1.23 **The appointed day.** At various points in this report and in the draft Bill reference is made to “the appointed day”. This is the day on which the main provisions of any Act based on the draft Bill would be brought into force. It is the day on which the feudal system of land tenure would be finally abolished. The date would be fixed by the appropriate Minister. For practical reasons it should be either 28 May (Whitsunday) or 28 November (Martinmas) because these are the dates on which feuduties are normally payable. We envisage that the appointed day would be sufficiently long after the date when the Act is passed to give people time to make any necessary arrangements to adapt to the new law. In some cases, for example, provision is made for rights to be reserved by registering a notice.<sup>29</sup> Time would need to be allowed for this to be done. A period of two years would in our view be sufficient but we do not recommend any specific period. It is useful to retain a degree of flexibility at this stage.

### **Our main recommendations**

1.24 In this report we recommend the abolition of the feudal system of land tenure and its replacement by a system of outright ownership.<sup>30</sup> Vassals would become owners. Any feudal estate of *dominium utile* would be converted into simple ownership of the land. All remaining feuduties would be extinguished.<sup>31</sup> Real burdens in grants in feu (such as restrictions on the use to be made of the property) would cease to be enforceable by superiors. Superiors would disappear. However, we recommend<sup>32</sup> that a former superior who owns neighbouring land should be able, subject to restrictions and within time limits, to register a notice preserving real burdens in favour of that land. Such preserved burdens could then be enforced as non-feudal burdens provided that the former superior, as owner of the neighbouring land, had an interest to enforce them. We also recommend that where a feudal real burden provides for the maintenance of a common facility it should be enforceable after the date of abolition of the feudal system by the owners of the benefited properties.<sup>33</sup> Otherwise there would be cases where the only person entitled to enforce the burden was the superior and where, consequently, the burden would cease to be enforceable, to the detriment of all the affected properties. We also recommend the preservation of certain real burdens imposed for conservation purposes by bodies on a list to be established by the Secretary of State; and of certain burdens affecting the sea bed or foreshore.<sup>34</sup> These are important, but also exceptional, cases. Most real burdens would fall with the feudal system itself.

1.25 We recommend that compensation should be payable to superiors for the loss of the right to feuduties and for the loss of the right to certain real burdens which reserve development value to the superior.<sup>35</sup> We do not, however, consider that compensation should be payable for the loss of exploitation rights, by which we mean the right to exact money from

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<sup>29</sup> Parts 4 and 5.

<sup>30</sup> Part 2.

<sup>31</sup> Part 3.

<sup>32</sup> Paras 4.26 - 4.47.

<sup>33</sup> Paras 4.78 - 4.85.

<sup>34</sup> Paras 4.51 - 4.61.

<sup>35</sup> Parts 3 and 5.

vassals by charging for waivers of conditions which the superior has no desire to enforce and which were not imposed in order to reserve development value to the superior.

1.26 In the existing law there are certain forms of tenure and types of payment which are similar to feudal tenure and feuduties. We recommend the abolition of the form of tenure known as Kindly Tenancies.<sup>36</sup> The holding of land on this form of tenure will be converted into ownership, which it already is for practical purposes. We also recommend the abolition of such payments as ground annual, skat, teind, stipend and standard charge.<sup>37</sup> The abolition of teinds, stipend and standard charge cuts away the basis of some statutory provisions and these too will be repealed. The practical effect is to enable some obsolete legislation concerning former methods of funding parish churches to be repealed.<sup>38</sup> We do not, however, recommend the abolition of udal tenure. This is already non-feudal ownership.

1.27 We recommend the abolition of entails, already defunct in practice.<sup>39</sup> This will enable many obsolete statutory provisions to be repealed.

1.28 The abolition of the feudal system of land tenure affects the law on the transfer of land in important ways. The draft Bill appended to this report contains new provisions<sup>40</sup> on the way in which the ownership of land may be transferred and contains many consequential amendments and repeals.<sup>41</sup> It also contains many repeals of obsolete conveyancing provisions. Some of these repeals are not strictly consequential on the abolition of the feudal system. However, abolition has provided a convenient opportunity for clearing out whole areas of obsolete law.

### **Matters not covered**

1.29 We have already mentioned the limited scope of this report. The feudal system of land tenure is sometimes thought to be responsible for features of Scottish land law which have nothing to do with the feudal system. For example, the law on access to open land, or the law on rights of way, is not feudal in nature, but rather is concerned with the relationship between the owner of the land (in feudal terms, the owner of the *dominium utile*) and others seeking to use the land in certain limited ways or asserting a right to do so. This report does not purport to deal, except incidentally, with non-feudal aspects of Scottish property law and it does not purport to deal at all with broad questions of social policy related to the ownership or use of land in Scotland.

1.30 This report also does not purport to deal with the abolition of all feudal elements in Scottish law or life. It does not, for example, deal with Crown rights derived from ancient feudal law or custom which have never entered a feudal chain of ownership containing at least

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<sup>36</sup> Paras 8.4 - 8.9.

<sup>37</sup> Paras 3.51 - 3.55.

<sup>38</sup> Para 9.18.

<sup>39</sup> Paras 9.8 - 9.17.

<sup>40</sup> Clauses 4 - 6.

<sup>41</sup> Scheds 8 and 9.

one superior and vassal. It does not recommend the abolition of all feudal titles or dignities. There are widely differing views on the question of rights, titles and privileges derived from feudal times, but not now directly connected with land tenure. Our concern is only with land tenure and property law. In order to remove all feudal elements from the system of land tenure in Scotland, we make certain recommendations on barony titles.<sup>42</sup> Under these recommendations baronies would become floating dignities, detached from the ownership of land.

### **The discussion paper on real burdens**

1.31 The law on real burdens is unsatisfactory in many respects which have nothing to do with the feudal system. We have published a discussion paper inviting views on options for reform.<sup>43</sup> In this report we are concerned only with the consequences for real burdens of the disappearance of the feudal system of land tenure.

### **The draft Bill**

1.32 A draft Bill to give effect to our recommendations, and to deal with various consequential matters, is annexed to this report.

### **Which Parliament?**

1.33 At the time when this report was sent to the printer the Scotland Act had been passed but nothing was known about the form of Bills for the Scottish Parliament except that they would be called Bills and not draft Acts.<sup>44</sup> The advice of our draftsmen was that the draft Bill had to be framed as a Westminster Bill. We have worked on the assumption, however, that legislation to implement this report would be in the form of an Act of the Scottish Parliament. It seems clear that the reform of the Scottish law on land tenure, and any matters properly incidental thereto, will be within the competence of the Scottish Parliament.<sup>45</sup> The draft Bill appended to this report would, however, have to be modified for purposes of presentation to the Scottish Parliament. In this report<sup>46</sup> and in the notes on the clauses of the draft Bill we draw attention to a few provisions which might perhaps be thought to give rise to questions from the point of view of the competence of the Scottish Parliament.

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<sup>42</sup> Paras 2.31 - 2.42.

<sup>43</sup> Scot Law Com DP No 106.

<sup>44</sup> Section 28(2) of the Scotland Act provides that "Proposed Acts of the Scottish Parliament shall be known as Bills; and a Bill shall become an Act of the Scottish Parliament when it has been passed by the Parliament and has received the Royal Assent."

<sup>45</sup> It is noteworthy that, although the Crown is a reserved matter under sched 5 para 1 of the Scotland Act, this "does not reserve the ultimate superiority of the Crown or the superiority of the Prince and Steward of Scotland" or "property held by Her Majesty in Her private capacity." Sched 5 paras 3(2) and 4(1).

<sup>46</sup> Paras 2.43 - 2.44 (baronies); para 9.1 (consequential amendments of certain United Kingdom statutes); para 9.28 (partnerships and feudal property).

## Acknowledgments

1.34 We are grateful to all those who responded to our discussion paper and who helped us with information.<sup>47</sup> We are also grateful to the members of our advisory group<sup>48</sup> on the feudal system who saw, and commented on, drafts of this report and of the draft Bill appended to it.

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<sup>47</sup> A list of those who submitted written responses to the discussion paper is in Appendix B. We are grateful to all those who provided help, advice or comments as our work proceeded and, in particular, to Mr Alan Cowe, Secretary and Clerk of the Church of Scotland General Trustees; Mr Ian Davis, Registers of Scotland; Mr Robin Edwards WS, Member of the Lands Tribunal for Scotland; W Green & Son Ltd; Professor George Gretton, Faculty of Law, Edinburgh University; Sir Malcolm Innes of Edingight, KCVO, The Lord Lyon King of Arms; Messrs McJarrow and Stevenson, Solicitors, Lockerbie; Lord McGhie, President of the Lands Tribunal for Scotland; Mr Alan Menzies WS, Crown Estate Solicitor (Scotland); Messrs Murray Beith and Murray WS, Edinburgh; Sheriff Principal C G B Nicholson, QC, the Sheriff of Chancery; Mr William Rankin, Registers of Scotland; Mr Neil Tainsh, Clerk to the Lands Tribunal for Scotland; Mr John Wightman WS, Solicitor to Her Majesty the Queen in Scotland; and Mrs Janette Wilson, Solicitor of the Church of Scotland. We are also grateful to the members of the conveyancing committee of the Law Society of Scotland and to those solicitors and members of the public who wrote to us about the feudal system, not in response to our discussion paper but because they knew of our work in this area and wished to draw particular points or problems to our attention.

<sup>48</sup> Mr Stewart Brymer, Professor Douglas Cusine, Mr Ian Davis, Mr Bruce Merchant, Mr William Rankin, Professor Robert Rennie, Mr Roy Shearer WS, Professor John Sinclair and Mr Campbell White.

## Part 2 Abolition

### Introduction

2.1 We have already concluded that the feudal system of land tenure should be abolished.<sup>1</sup> In this part we consider how that should be done. In particular, we consider the effect of abolition on the rights of the Crown and on baronies.

### The proposals in the discussion paper

2.2 In the discussion paper<sup>2</sup> we proposed that the Crown should lose the normal rights of a feudal superior under the feudal system of land tenure. The Crown should no longer be entitled to create new feus, exact payment of feuduty or enforce, as a superior, any land conditions or real burdens.

2.3 However, we made it clear that we had no intention of abolishing the Crown's prerogative rights as sovereign or head of state in relation to such matters as the sea bed, or unowned property or the granting of peerages and other dignities. We noted the difficulty of disentangling such rights from the Crown's position as paramount superior and therefore proposed that the abolition of the feudal system of land tenure should be without prejudice to any other rights, privileges or benefits of, or derived from, the Crown by virtue of the paramount superiority.

2.4 Almost all those who commented on these proposals agreed with them or accepted them. We adhere to them in substance. However, we do not now consider that, as a matter of technique, it is necessary or desirable to preserve the Crown's paramount superiority in order to achieve the objectives set out in the discussion paper.

### Recommendation: complete abolition

2.5 There is, we think, no doubt as to the objectives to be achieved. The feudal system of land tenure should be abolished in its entirety, and the interest of the owner of the *dominium utile* - who for all practical purposes is the owner of the land at present - converted into ownership. All feudal superiorities should cease to exist. The prerogative rights of the Crown as sovereign or head of state should, however, be preserved. It is not necessary to preserve the paramount superiority of the Crown in order to achieve that result. It is not desirable to preserve the Crown's paramount superiority because its preservation would involve the retention, even if only in a theoretical sense, of part of the feudal system of land tenure. It would also mean that there would continue to be a distinction between land owned outright, such as udal land, and land held on feudal tenure. One of the longer term objectives of the

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<sup>1</sup> See our *Fifth Programme of Law Reform* (Scot Law Com No 159) paras 2.32 - 2.34 and paras 1.16 - 1.19 above.

<sup>2</sup> Scot Law Com DP No 93 paras 5.2 - 5.19.

reform of Scottish property law should, in our view, be a unified system of land ownership in Scotland. We therefore recommend that

1. (a) **The feudal system of land tenure should be abolished as from the appointed day.**
- (b) **The *dominium utile* in any land held on feudal tenure immediately prior to abolition should be converted automatically, by operation of law, into ownership and all feudal superiorities in the land should cease to exist.**

(Draft Bill, clauses 1 and 2(1), (2))

### **Conditionality of ownership**

2.6 Under our proposals feudal ownership (*dominium utile*) would become ordinary ownership (*dominium*). Land and buildings would then be owned outright instead of, as at present, being held from another person or from a chain of persons. Historically, feudalism separated immoveable property from moveable, leading, as Bell noted, to “a double system of jurisprudence, in relation to the subjects of property”.<sup>3</sup> Its abolition will bring conceptual unity to the law of property.

2.7 Outright ownership does not mean unrestricted ownership. Erskine’s famous definition of ownership, from the second half of the eighteenth century, was of “the right of using and disposing of a subject as our own, *except in so far as we are restrained by law or paction*”;<sup>4</sup> and in emphasising the restrictions affecting ownership Erskine was merely part of a much longer tradition in European legal thought.<sup>5</sup> Today ownership is more restricted than at any time in the past. Professor Gordon’s work on land law devotes over 300 pages to identifying and analysing the restrictions.<sup>6</sup> These range from voluntary restrictions, arising out of contract or real right, to restrictions based on the common law of nuisance or delict or common interest and conceived in the interest of neighbours. In modern times there has been a large volume of legislation, particularly in the fields of planning, environmental and social law. None of this will be affected by our proposals. After feudal abolition owners will no longer be answerable to feudal superiors. But otherwise ownership will be as conditional as before.

### **No new feus**

2.8 There would be no point in abolishing the existing feudal system if a new one could be erected in its place. It was accepted by almost all of those who commented on our discussion paper that the Crown should not be able to create new feus after the appointed day. Even more clearly, it should not be possible for other landowners to create new feus. We recommend that

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<sup>3</sup> Bell, *Principles* s 636.

<sup>4</sup> Erskine II.1.1. (emphasis added).

<sup>5</sup> Traced by E J H Schrage in G E van Maanen and A J van der Walt (eds), *Property Law on the Threshold of the 21st Century* (1996) pp 35-68.

<sup>6</sup> Gordon, *Scottish Land Law* pp 689-994.

2. **It should not be possible to create any new feudal estate in land after the appointed day.**

(Draft Bill, clause 2(3))

### **Limitation on length of new leases**

2.9 It would not be satisfactory if the feudal system of land tenure were to be replaced by a system based on ultra-long leases which had, or might come to have, many of the same defects as the feudal system. We therefore recommend, later in this report, a limitation on the length of all new leases.<sup>7</sup> There already is a limitation on the length of leases of residential property: in effect such leases cannot exceed 20 years.<sup>8</sup>

### **Purported transfers of non-existent interests**

2.10 As a matter of principle and logic it would no longer be possible after the abolition date to transfer a feudal interest in land. Any purported transfer of a superiority or *dominium directum* (or indeed of a *dominium utile* as such) would be void and of no effect. Officials of the Registers of Scotland expressed some concern, however, as to the practicalities of handling purported transfers of non-existent interests in land after the date of abolition. The problem is that there will after abolition be titles which consist partly of non-existent superiority interests and partly of transferable subjects, such as reserved portions of actual land or reserved minerals. The correct, and indeed the only logical, course would be for any transfer after the abolition date to relate only, and specifically, to the subjects now owned. There is a fear, however, that people will still attempt to transfer the whole subject matter of the old title even although part of it no longer exists and that this could pose practical problems for the Keeper of the Registers.

2.11 So far as the Register of Sasines is concerned the problem is not acute. The Keeper has a well-recognised discretion to refuse to register writs which are wholly inappropriate to the Register of Sasines.<sup>9</sup> It would therefore be within the Keeper's discretion to refuse to register any deed which clearly purported to convey only a *dominium directum*. However, if a deed merely included a *dominium directum* along with other matter appropriate for the register it is likely that the Keeper would not reject the deed. We are informed that the Keeper is normally loathe to deprive an applicant of a possible benefit of recording and will normally give the applicant the benefit of any doubt. In some cases it might not be clear that the purported conveyance included a non-existent interest. In such cases the deed would in practice be registered if it was otherwise in order. The Keeper cannot reasonably be expected to investigate titles for the purposes of the Register of Sasines. However, registration would not convert a non-existent interest into an existing interest. The Register of Sasines is simply a register of deeds, not a register of title. It would not matter if an occasional deed included matters which ought not to be on the register. In the course of time the Register of Sasines will in any event be replaced by the Land Register.

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<sup>7</sup> Paras 9.40 - 9.42. We have left the maximum length blank. The decision on this point can be taken by the government in the light of further consultation. We have invited views on the question in our discussion paper on *Real Burdens* (DP No 106).

<sup>8</sup> Land Tenure Reform (Scotland) Act 1974 s 8.

<sup>9</sup> *Macdonald v Keeper of the General Register of Sasines* 1914 SC 854 at 858.

2.12 So far as the Land Register is concerned there could be a problem at the practical level. Section 2(4) of the Land Registration (Scotland) Act 1979 provides that

“There shall ... be registrable ... any transfer of a registered interest in land . . .”

After abolition there will continue to be superiorities which on the face of the register are registered interests in land. In fact they will be registered non-existent interests in land - that is to say, registered nullities. They will not be capable of transfer because there will be nothing to transfer. It would, however, be reasonable to protect the Keeper from arguments of this type with applicants for registration who found on the apparently clear words of the Act. So, while the principle that an interest which cannot exist cannot be transferred is clear, it could be useful to strengthen the hand of the Keeper at the practical level of putting this principle into effect. The appropriate way of doing that, it seems to us, is to add a provision to section 4 of the 1979 Act (which deals with refusals of applications for registration) to make it clear that the Keeper must refuse an application if it relates, in whole or in part, to any interest in land abolished by the proposed new Act.<sup>10</sup> We recommend that

3. **It should be provided that the Keeper must refuse any application for registration in the Land Register if it relates, in whole or in part, to any interest in land abolished by the new legislation.**

(Draft Bill, clause 3(a))

2.13 The effect of this recommendation is that in the course of time the Land Register will be cleansed of mixed titles - that is, titles containing superiorities. Anyone wishing to convey, say, reserved land or reserved minerals still covered by a title purporting also to be a title to the *dominium directum* would have to restrict any post-abolition transfer to the reserved matters. In so far as the application for registration purported to cover the *dominium directum* the Keeper would be bound to refuse it.

### **Crown rights**

2.14 It follows from what has been said above that in general the new legislation should apply to the Crown. The discussion paper made it clear, and it was accepted by consultees, that any proposals for the abolition of the feudal system of land tenure should not affect the prerogative rights of the Crown - by which we mean those rights held by the Crown as sovereign or head of state - even if historically those rights, or some of them, can be traced back to a time when the feudal system was at its height. The draft Bill contains a clause to implement this policy.<sup>11</sup> We have made a careful examination of the various Crown rights and we have consulted those, such as the Crown Estate Commissioners, who have practical knowledge of their operation. This report is not the place for an exhaustive treatment but it is necessary to give a short explanation.

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<sup>10</sup> We considered the alternative of giving the Keeper an option (as opposed to a duty) to refuse to register but consultations with officials of the Registers of Scotland revealed a strong preference for a clear rule requiring the application to be refused if it related to any interest in land abolished by the new legislation.

<sup>11</sup> See clause 52.

2.15 The first point to note is that no special provision is necessary for any private estates owned by the reigning monarch in a personal capacity. Such property will come under the proposed legislation in the ordinary way. Indeed the abolition of the feudal system will make the treatment of such property more simple. Under the feudal system there is an awkwardness in the situation where the reigning monarch holds private property as a vassal of the Crown. A special provision had to be enacted to prevent the two feudal interests from merging and the private estates from reverting to the Crown *jure coronae*.<sup>12</sup> Under the proposed new system of ownership there is no such awkwardness and no need for any special provision.<sup>13</sup> The reigning monarch would simply be owner of his or her private estates in the same way as any other person.

2.16 There is also no need for any special provision for Crown property owned by government departments. The ordinary rules will apply. Any such land held on feudal tenure will, after the appointed day, be owned outright. Again the theoretical awkwardness in the idea of the Crown in one capacity holding of the Crown in another will disappear.

2.17 There is some land which has never passed into individual ownership but which remains Crown land. One example which was drawn to our attention is Edinburgh Castle. Such land is not held on feudal tenure. It has never been feued and has never entered into the feudal system of land tenure. It is allodial.<sup>14</sup> It would be unaffected by our recommendations.

2.18 Certain rights, many of them important and valuable, are vested in the Crown by statute. For example, the property in petroleum existing in its natural condition in strata in Great Britain or beneath the territorial waters of the United Kingdom adjacent to Great Britain was vested in the Crown by statute in 1934.<sup>15</sup> Older statutes regulate the Crown's rights in relation to mines of gold and silver.<sup>16</sup> Rights in wreck are also regulated by statute. Section 241 of the Merchant Shipping Act 1995 provides that

“Her Majesty and Her Royal successors are entitled to all unclaimed wreck found in the United Kingdom or in United Kingdom waters except in places where Her Majesty or Her Royal predecessors has granted the right to any other person.”

It is clear that any rights which have been vested in the Crown by statute and which have not since been disposed of by the Crown on feudal tenure would be unaffected by the abolition of the feudal system of land tenure.

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<sup>12</sup> See the Conveyancing (Scotland) Act 1874 s 60.

<sup>13</sup> Section 60 of the 1874 Act can therefore be repealed. This is done in sched 9 to the draft Bill.

<sup>14</sup> See Menzies, *Conveyancing* (1900) pp 472-473.

<sup>15</sup> The Petroleum (Production) Act 1934 s 1(1). This provision was repealed by the Petroleum Act 1998. Section 2(1) of the 1998 Act provides that “Her Majesty has the exclusive right of searching and boring for and getting petroleum to which this section applies.” Section 2(2) provides that “This section applies to petroleum (including petroleum in Crown land) which for the time being exists in its natural condition in strata in Great Britain or beneath the territorial sea adjacent to the United Kingdom.” The Act also provides (sched 3 para 3) that “The repeal by this Act of section 1(1) of the Petroleum (Production) Act 1934 does not affect the vesting in Her Majesty of property in petroleum which is so vested immediately before the commencement of this Act.”

<sup>16</sup> Royal Mines Act 1424; Mines and Metals Act 1592.

2.19 There are other Crown rights of a miscellaneous character, known as the *regalia majora* and the *regalia minora*, which still depend largely on the common law.<sup>17</sup>

2.20 The *regalia majora* are regarded as held inalienably by the Crown to secure certain public rights such as the right to navigation. The content of the *regalia majora* is not easy to determine. Some rights which were formerly considered to be inalienable, such as rights in the foreshore, have since been held to be alienable.<sup>18</sup> Some rights, which were at one time considered to be alienable at least to some extent, such as rights of criminal and civil jurisdiction,<sup>19</sup> are now regarded as inalienable. Whatever the precise nature of the *regalia majora* in the present law, it is clear that inalienable Crown rights can never have entered into the feudal system of land tenure as it is defined for the purposes of this report. Having always been retained by the Crown they can never have been held of the Crown or of any subject superior. They would be unaffected by the abolition of the feudal system of land tenure.

2.21 The *regalia minora* are capable of alienation. They include

- (a) the sea, sea bed, foreshore and tidal rivers;<sup>20</sup>
- (b) the right of ferry, port, harbour and highway;<sup>21</sup>
- (c) the right of fishing for salmon<sup>22</sup> or for oysters or mussels;<sup>23</sup>
- (d) any property which has become ownerless or which is unclaimed.<sup>24</sup>

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<sup>17</sup> See Gordon, *Scottish Land Law* paras 10-38 - 10-48.

<sup>18</sup> See Reid, *Property* para 514.

<sup>19</sup> See Stair II. 3. 62-64; Bell *Principles* para 749 ff.

<sup>20</sup> See *Colquhoun's Trs v Orr Ewing & Co* (1877) 4 R 344; 4 R (HL) 116; *Lord Advocate v Clyde Navigation Trs* (1891) 19 R 174; *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1976 SC 161, aff'd 1979 SC 156; *Shetland Salmon Farmers Association v Crown Estate Commissioners* 1991 SLT 166.

<sup>21</sup> These matters are now regulated by legislation. See eg the Roads (Scotland) Act 1984; the Harbours, Piers and Ferries (Scotland) Acts 1937 and 1972; and the Harbours (Scotland) Act 1982.

<sup>22</sup> See *Commissioners of Woods and Forests v Gammell* (1851) 13 D 854; aff'd (1859) 3 Macq 419; *Anderson v Anderson* (1867) 6 M 117; *Joseph Johnston & Son Ltd v Morrison* 1962 SLT 322.

<sup>23</sup> See *Parker v Lord Advocate* (1902) 4 F 698; aff'd (1904) 6F(HL) 37 and now the Sea Fisheries (Shellfish) Act 1967, which empowers the Secretary of State to grant rights to fish for certain types of shell fish, including oysters and mussels.

<sup>24</sup> The Crown's right to such vacant property (*bona vacantia*) covers any treasure, the owner of which is not known. See *Lord Advocate v University of Aberdeen and Budge* 1963 SC 533. This prerogative right also lies behind the Crown's rights as *ultimus haeres* in relation to property of a deceased person which is unclaimed by any heirs.

2.22 We have considered all of these rights, and others,<sup>25</sup> in some detail but in the end we have concluded that the problem of alienable Crown rights in or relating to land solves itself. In so far as any such Crown right has not been alienated then it has not entered the feudal system. It is like land which has never been feued out. It is simply unaffected by the abolition of the feudal system of land tenure. If the Crown right has been alienated then it no longer belongs to the Crown and there is no question of preserving a Crown right. If the right has been feued out then it would be affected by the proposed legislation in the normal way. The owner of the *dominium utile* will become the outright owner.

2.23 States have certain rights in public international law. A State, for example, has well recognised rights in relation to its own territories, including its territorial waters. It is clear that the rights in public international law of the United Kingdom, or of the Crown as representing the United Kingdom, would be completely unaffected by the abolition of the feudal system of land tenure in Scotland, which is a matter of internal law affecting only one part of the kingdom.

2.24 The Crown's powers in relation to peerages and other higher dignities may have been regarded at one time as pertaining to the Crown's paramount superiority in the system of land tenure.<sup>26</sup> However, peerages and higher dignities appear to have ceased to be tied to lands from about the 16th century and are now detached from the feudal system of land tenure. The Crown's powers in relation to them are now regarded as prerogative powers. Baronies, by contrast, are still territorial and are linked to the system of land tenure. They are a by-product of the feudal system rather than an aspect of the Crown's prerogative powers. The acquisition of a barony does not involve any exercise of the Royal prerogative in favour of the acquirer or his or her ancestors. It involves buying a plot of land with certain feudal features in its title deeds. We consider baronies separately later.<sup>27</sup>

2.25 For the reasons given above, we do not believe that the complete abolition of the feudal system of land tenure would affect Crown rights other than those manifestly held as a feudal superior, such as the right to feuduties or the right to enforce real burdens in relation to land which had entered the feudal system of tenure. For the avoidance of any doubt, we recommend that there should be a saving provision in the legislation to make it clear that any prerogative powers exercisable by the Crown (including any powers relating to peerages, dignities or other honours and any powers relating to ownerless or unclaimed property) would be unaffected by the provision abolishing the feudal system of land tenure.<sup>28</sup>

2.26 At present there is some doubt as to whether the Crown can dispense land, as opposed to feuing it. We recommend later that this doubt should be removed and that it should be

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<sup>25</sup> Some ancient Crown rights, such as the right to certain Royal fish, relate to moveable property and are outwith the scope of the proposed reform.

<sup>26</sup> Erskine II.2. 6.

<sup>27</sup> Paras 2.31 - 2.45.

<sup>28</sup> See the draft Bill, clause 52. It follows that there would be no change in the law relating to *bona vacantia* or *ultimus haeres*.

made clear that the Crown can grant a disposition, just as any other owner can do.<sup>29</sup> This, coupled with the preservation of the Crown's prerogative powers, would enable a title to be granted to anyone who had an appropriate moral claim to property which had passed to the Crown under the rules on *bona vacantia*.

2.27 We recommend that

4. **It should be provided that the abolition of the feudal system of land tenure does not affect any prerogative power exercisable by the Crown as sovereign or head of state (including any prerogative powers relating to peerages, dignities or other honours or relating to ownerless or unclaimed property).**

(Draft Bill, clause 52)

### **The Prince and Steward of Scotland**

2.28 It has been suggested<sup>30</sup> that there are two paramount superiorities in Scotland - that of the Crown and, in relation to lands within the Principality of Scotland, that of the Prince and Steward of Scotland. The Principality of Scotland comprises the hereditary lands of the Stewarts and the Earldom of Carrick and the Isles.<sup>31</sup> The Prince and Steward of Scotland is the reigning monarch's eldest son. If the reigning monarch has no son, the reigning monarch is Prince and Steward.<sup>32</sup> The lands of the Principality have been feued out to vassals and bring in only a small income.<sup>33</sup>

2.29 The recommendations which we have made for the abolition of the feudal system of land tenure would apply to lands within the Principality as to other lands within Scotland whether or not the Prince has a separate paramount superiority. Accordingly, the owner of the *dominium utile* of any land within the Principality would become the outright owner of the land. Any "principality duties" would be extinguished on the payment of compensation in the same way as ordinary feuduties.<sup>34</sup> Nothing in the Bill would affect the title of Prince and Steward of Scotland.

### **Peers and holders of ancient offices**

2.30 This report is concerned with land tenure. Superiors will disappear and there will be special provisions on baronies<sup>35</sup> but, subject to that, the report is not concerned with any right, title, honour or dignity (even if of feudal origin historically) held by any person. In particular, it is not the purpose of this report to affect any of the feudal elements in constitutional law or practice,<sup>36</sup> any peerages, or any of the ancient offices or positions which may have been feudal

<sup>29</sup> See para 7.37 and the draft Bill, clause 53.

<sup>30</sup> See the *Stair Memorial Encyclopaedia* vol 5 para 706.

<sup>31</sup> *Stair Memorial Encyclopaedia* vol 5 para 706.

<sup>32</sup> *Stair Memorial Encyclopaedia* vol 5 para 707.

<sup>33</sup> *Stair Memorial Encyclopaedia* vol 5 para 709, fn 3.

<sup>34</sup> If the dues are regarded as feuduties they are covered by Part III of the draft Bill. If they are regarded as dues akin to feuduties they are covered by clause 50.

<sup>35</sup> Paras 2.31 - 2.45.

<sup>36</sup> Particularly, any such elements in, or affecting, the House of Lords.

in origin.<sup>37</sup> The draft Bill is framed in such a way that all such matters would be unaffected by it.<sup>38</sup>

## Barons

2.31 **Introduction.** One of the most distinctively feudal features of the system of land tenure in Scotland is that the holding of a feudal estate in land on a particular type of title called a barony title gives rise to certain conveyancing peculiarities and carries with it certain privileges. The estate in land might be no more than the *dominium utile* or even the bare *dominium directum* of a tiny plot of waste ground, of little or no value in itself, which represents the head place or *caput* of the barony.<sup>39</sup> The estate in land can be bought and sold in the normal way. Remarkable as it may seem, ownership of such an estate in land carries with it a barony. It enables the owner to claim ennoblement by the “nobilitating effect” of the “noble quality” of the feudal title on which the land is held. The title of “Baron of So-and-So” or “Baroness of So-and-So” can be adopted. If the holder is granted armorial bearings by the Lord Lyon (which is entirely a matter for the Lord Lyon’s administrative discretion) and if a *prima facie* title to the barony is established there is a right to relevant baronial additaments to the coat of arms. Baronial robes can be worn. The baron can, in theory, hold a baron’s court, appoint a baron baillie to be judge, and exercise a minor civil and criminal jurisdiction.<sup>40</sup>

2.32 In recent years a market in Scottish baronies has developed. We were informed by a dealer in baronies that in June 1997 the expected price for a barony, with no special features and a minimal amount of land of no value in itself, was about £60,000. Information from other sources suggests that the market value of baronies has not decreased since then.

2.33 It is important to be clear about what is meant by a barony title. The term is used in two senses. The first sense refers to the actual title to the land. This must have originally been granted by the Crown by a feudal grant which specifically conferred baronial privileges and responsibilities. The conveyancing terminology varied from time to time but a standard form of wording came to be a grant of all and whole the lands and barony of X to be held in free barony (*in liberam baroniam*). In this sense the term “barony title” simply means a title to land which can, from its nature and wording, be identified by conveyancers as deriving from a Crown grant of land in barony. The land or the estate in land must still be held of the Crown without any intermediate superior but it is possible for the estate to be a mere *dominium directum*. The second sense of “barony title” refers to the right to use the title or appellation “Baron”. This is more of a lay person’s usage than a lawyer’s usage but the idea that the purchaser of a barony acquires a “title” in this sense may well contribute to the value of baronies on the market. In this report we use “barony title” in the conveyancing sense.

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<sup>37</sup> See the *Stair Memorial Encyclopaedia* vol 7 paras 812 ff. Examples of such ancient offices are the offices of The Lord High Constable of Scotland; the Keeper of Holyroodhouse; The Bearer of the Royal Banner; The Bearer of the National Flag of Scotland and other offices in the Royal Household.

<sup>38</sup> See clauses 52 and 57(1).

<sup>39</sup> The seller of the Barony of Houston was reported as saying that the land which went with the barony was “too small for a house, but the new baron will be welcome to put up a tent”. *Sunday Times*, 29 June 1997.

<sup>40</sup> In practice barons’ courts are held now only for ceremonial purposes.

2.34 **Proposals in the discussion paper.** The discussion paper<sup>41</sup> mentioned, but rejected, the possibility of allowing the “noble aspects of the barony title” to lapse along with the abolition of the feudal relationship on which the ennoblement of the baron is based. It noted that the abolition of entitlement to the title “baron” was not a necessary part of feudal land reform and might well give rise to justifiable claims for compensation. The discussion paper also mentioned, but rejected, the possibility of separating the title from the ownership of the barony lands. The preferred approach in the discussion paper was the minimalist one. Barony titles to land would be allowed to continue to carry with them the distinctive<sup>42</sup> privileges and pertinents attaching to them under the existing law.<sup>43</sup> The discussion paper did not mention the problem of baronies which are attached to a mere superiority or *dominium directum*. The implication of the proposal for the abolition of all superiorities was that such baronies would disappear with the superiority to which they were attached.

2.35 **Responses to discussion paper.** There is a Convention of the Baronage of Scotland which submitted comments on our discussion paper. The constitution of the Convention provides for a Committee of the Baronage of Scotland and associate members. The Committee consists of

“(a) those who have recorded Armorial Bearings with the addition of a red chapeau in the Public Register of All Arms and Bearings in Scotland;

(b) inheritors of such Arms whether Peers or otherwise who can demonstrate ownership of the barony lands and/or *caput* of a baronial title;

(c) owners of barony lands and/or *caput* who have not recorded Armorial Bearings but who have produced evidence of such ownership and possession on a baronial title.”

The constitution provides that “Only the Committee of the Baronage of Scotland should have the right to ... represent the interests of the Baronage of Scotland”. Associate members of the Convention “have a variety of interests in the baronage or in baronial houses and estates”.<sup>44</sup>

2.36 In their comments on the discussion paper the Convention said that full membership of the Convention was “open only to the feudal barons of Scotland” and that members had “pride in their heritage as successors of those who formed one of the Estates of the Scottish Parliament”. They were determined to “preserve the special form and advantages of their title to land and the historic ‘Scotch titles’ which are fully recognised by the Court of St. James<sup>45</sup> ... , H M Government (on official documents such as passports) and by the Lord Lyon King of Arms”. They said that they would “deplore the termination of the legal relationship between the Crown, representing the people of Scotland, and those individuals

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<sup>41</sup> Scot Law Com DP No 93 para 5.12.

<sup>42</sup> It is not the normal rights of any feudal superior in relation to such matters as feuduties and enforcement of real burdens.

<sup>43</sup> Proposition 31(iii) was that “All pertinents of land held on Barony titles, including any rights to salmon fishings and rights in respect of the noble title of Baron, should continue to be transmissible with the title to the land”.

<sup>44</sup> Submission by the Convention of the Baronage of Scotland p 1.

<sup>45</sup> The Convention observed that “four Barons bore the Canopy of State at the Queen’s Accession Service in St Giles in 1953”.

who hold noble estates granted by the Crown”. They claimed to be a surviving element of the old Scottish Parliament - one of the Three Estates - along with the Church of Scotland and the Convention of Scottish Local Authorities. They said that the “essence of the nobiliary effect of the ownership of an estate erected by the Crown into a barony is the feudal relationship with the Crown” and that “the essential feature of a barony title is the noble quality of the feudal grant”.<sup>46</sup> They were concerned that if the feudal link were to be severed then “the nobilitating effects of holding land on a barony title will be lost”. They claimed that “the Feudal Baron’s rights within his own barony are very comparable - on a smaller scale - to the Royal rights of Paramount Superior over the land of the nation”. They recommended that both the paramount superiority of the Crown and the equivalent right of barons should be preserved.

2.37 Most other consultees supported the provisional proposal in the discussion paper. However, some favoured the complete abolition of barony titles, including the noble aspects. The Keeper of the Registers of Scotland referred to the practical inconveniences of having separate conveyancing rules for barony titles and suggested that, if baronies were not abolished altogether, the noble title should be separated from the title to land.

2.38 **Assessment.** There are three special features of barony titles. First, certain conveyancing peculiarities attach to them. Secondly, the holder of land on a barony title still has, in theory but not in practice, the right to hold a baron’s court. Thirdly, the holder of land on a barony title has the right to use the title of baron and, if granted armorial bearings by the Lord Lyon,<sup>47</sup> to add certain special baronial features to the coat of arms.<sup>48</sup>

2.39 The main conveyancing specialities of land held on a barony title are that (1) a barony can be conveyed by its general name<sup>49</sup> and (2) the barony title suffices for the acquisition of salmon fishings by prescription, even if they have not been expressly granted in the title.<sup>50</sup> We agree with the Keeper’s suggestion, which attracted support at a meeting of our advisory group, that these aspects of barony titles should be removed. The new Scottish system of landownership should, in our view, be free of feudal peculiarities. Land which is owned outright under the new system of landownership should be conveyed in the same way, and should be subject to the same rules, no matter what the nature of the feudal holding was under the former law. In fact, the issue is no longer of much practical significance. New salmon fishing rights are unlikely to be acquired today, and existing rights would not be affected by our proposals. Once land is entered on the Land Register, the conveyancing privileges cease to have a distinctive role.

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<sup>46</sup> A quotation from Lord Clyde in *Spencer-Thomas of Buquhallie v Newell* 1992 SLT 973 at 979A.

<sup>47</sup> As noted above, the grant is entirely a matter for the Lord Lyon’s administrative discretion. The ownership of a barony does not entitle a person to matriculate arms. A person with a criminal conviction for serious fraud would not, for example, be granted armorial bearings even if undoubtedly in right of a barony at the date of the petition for armorial bearings.

<sup>48</sup> See Grier, “Barony Title” 1992 JLSS 306; Bruce “Barony Title”, 1993 JLSS 156.

<sup>49</sup> See *Lord Advocate v Cathcart* (1871) 9 M 744 at 749 - “A general conveyance of a barony carries all parcels of land which belong to the barony, or have been prescriptively possessed, without the necessity of special enumeration.”

<sup>50</sup> See *Duke of Richmond v Earl of Seafield* (1870) 8 M 530.

2.40 The right to the title and dignity of baron is the right which gives baronies the value which they have over and above the actual value of the lands themselves. Indeed the barony as such is often attached to a residual plot of land, with little or no intrinsic value, which is recognised as the *caput baroniae*. Baronies have a considerable commercial value and to abolish the so-called noble element in them, as was strongly urged by some consultees and members of our advisory group, would give rise to substantial claims for compensation. We see no need to do this. Although baronies are a feudal relic, the abolition of baronies is not a necessary feature of the abolition of the feudal system of land tenure. We do however consider that the social, ceremonial and armorial aspects of baronies should be severed from landownership. Baronies should become non-territorial dignities. There should be no change in the jurisdiction of the Lord Lyon in relation to questions of precedence and arms. If the Lord Lyon were not satisfied, on the evidence produced, that an applicant for a coat of arms with baronial additaments was entitled to a barony, and refused the application in relation to the additaments, then it would be open to the applicant to seek a declarator of entitlement to the barony in the ordinary courts and, if successful, to return to the Lord Lyon with that declarator. The courts already have sufficient jurisdiction to decide questions relating to heritable right and title. There is no need to create any special new jurisdiction.

2.41 The surviving rights or privileges of barons (which can all be covered by the term “the dignity of baron”)<sup>51</sup> would no longer have a connection with an interest in land. The dignity of baron would become a “floating” right or privilege. It would no longer be possible to transfer it as an incident of the transfer of the land to which it was formerly attached. It would cease to be an appropriate matter for the Register of Sasines or the Land Register. We have considered whether some alternative registration system should be established for baronies in their new form but have concluded that this would be neither necessary nor appropriate. The dignity of baron would be, and would be transferable as, incorporeal heritable property.<sup>52</sup> For the avoidance of any doubt, and to protect the Keeper of the Registers from attempts to continue to register baronies or deeds relating to them in the land registers, there should be a provision in the legislation making it clear that baronies are not interests in land for the purposes of the Land Registration (Scotland) Act 1979 and that deeds relating to them cannot be recorded in the Register of Sasines. A barony could be sold along with a plot of land if that were desired but the effect would be like selling a valuable painting along with the land. From the Keeper’s point of view the selling of the painting, or the barony, would be a separate transaction of no relevance to the land registers. We have no doubt that conveyancers will be able to devise a suitable form of document for transferring baronies as incorporeal heritable rights from one living person to another. In other respects, including succession on death, the law applicable to the preserved barony rights would be unchanged. In cases of intestacy it would be the old pre-1964 law of succession to heritable property, with its preference for males and its rule of primogeniture, which would apply.<sup>53</sup>

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<sup>51</sup> See the draft Bill, clause 57.

<sup>52</sup> It should be described as incorporeal “heritable” property so as to avoid altering the rules of succession to baronies on the death of the baron.

<sup>53</sup> This is because the barony would be incorporeal heritable property (see the draft Bill clause 57(2)) and because s 37(1)(a) of the Succession (Scotland) Act 1964 preserves the pre-1964 rules for “any title, coat of arms, honour or dignity transmissible on the death of the holder”.

2.42 The civil and criminal jurisdiction of barons was preserved by the Heritable Jurisdictions (Scotland) Act 1746<sup>54</sup> but was limited to cases of a minor nature. The criminal jurisdiction was restricted to cases of “assaults, batteries and smaller crimes” and the powers of punishment were limited to a fine of up to £1 or confinement in the stocks for up to three hours “in the daytime”.<sup>55</sup> The civil jurisdiction was limited to cases with a value of up to £2 and cases for the recovery of rents or other dues of a like nature.<sup>56</sup> A privately owned criminal and civil jurisdiction, even if limited and fallen into disuse,<sup>57</sup> is such an anachronistic and objectionable relic of feudalism that it must clearly be abolished. The jurisdictional rights of barons have no value and compensation for their abolition would be inappropriate and unnecessary.

**2.43 Competence of the Scottish Parliament.** In our view it would be within the competence of the Scottish Parliament to deal with feudal baronies. The only reserved matter which might be relevant is that specified in paragraph 1 of Part I of Schedule 5 to the Scotland Act 1998. This comes under the heading “The Constitution” and it reserves, among other “aspects of the constitution”,

“the Crown, including succession to the Crown and a regency”.

It cannot, in our view, reasonably be argued that feudal baronies are an “aspect of the constitution” coming under the heading of “the Crown”. Barons of this type have no constitutional position. They are not members of the House of Lords. They are an aspect of the feudal system of land tenure. Feudal baronies go with land which can be bought and sold in the ordinary way. Anyone can buy a barony.

2.44 The Queen’s prerogative functions are not in general reserved by paragraph 1 of Part I of Schedule 5<sup>58</sup> but this does not apply to the prerogative functions in relation to honours and dignities.<sup>59</sup> In so far as such functions are reserved by paragraph 1 they remain reserved. It is this mention of honours and dignities in an exception to an exception to a reservation which might be thought to give rise to a doubt as to the competence of the Scottish Parliament. However, the Queen has no prerogative functions in relation to feudal baronies. There is no exercise of the Royal prerogative involved. Any function of the Crown in relation to baronies of this kind is as paramount feudal superior. The Scotland Act 1998 makes it clear that the reservation of those aspects of the constitution coming under the heading of “the Crown” does not include

“the ultimate superiority of the Crown or the superiority of the Prince and Steward of Scotland”.<sup>60</sup>

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<sup>54</sup> Even where a baron lost greater jurisdictional rights as a result of the Act the lesser barony jurisdiction was preserved. See s 24 (now repealed by the Statute Law (Repeals) Act 1993, s 1(1), Sch 1, Part I).

<sup>55</sup> Section 17 (now repealed by the Statute Law Revision Act 1948).

<sup>56</sup> Section 17.

<sup>57</sup> There is a difference of opinion as to whether the jurisdiction of the barony courts still survives. See the letters in the JLSS for October, November and December 1992 (at pp 389, 429 and 476 respectively) and February 1993 (at p 49).

<sup>58</sup> Sched 5 Part I para 2(1).

<sup>59</sup> Sched 5 Part I para 2(2).

<sup>60</sup> Sched 5 Part I para 3(2).

In our view the Scottish Parliament could, if it wished, abolish feudal baronies altogether as part of a reform of the feudal system of land tenure. If that is so then it is even more clear that it can take baronies out of the system of land tenure and land registration, while allowing the dignity of baron, derived from the former connection with the Crown as feudal superior, to continue as a floating dignity.

2.45 **Recommendation.** We recommend that

5. (a) **Any surviving criminal or civil jurisdiction of barony courts should be abolished.**
- (b) **Any conveyancing privileges incidental to barony titles to land should be abolished.**
- (c) **The new legislation should not abolish the dignity of baron or any other dignity (whether or not of feudal origin). Accordingly barons should retain the right to call themselves baron and should retain any precedence and ceremonial or heraldic privileges deriving from their barony.**
- (d) **The dignity of baron should no longer be attached to land. It should be, and should be transferable only as, incorporeal heritable property.**
- (e) **It should be provided that after the appointed day a barony will not be an interest in land for the purposes of the Land Register and no deed relating to a barony can be recorded in the Register of Sasines.**

(Draft Bill, clause 57)

### **Protection for Keeper of the Registers**

2.46 Feudal abolition creates a number of difficulties for the Keeper of the Registers. The first is volume of work. With the feudal system will perish superiorities, feuduty and feudal real burdens. All three will need to be removed from the Land Register, and until this can be done the Register will be inaccurate. When and how this can be accomplished will depend largely on the resources available to the Keeper. The appropriate method of removing an inaccuracy is by the process known as rectification,<sup>61</sup> but rectification on this scale will take some considerable time. Later we make recommendations to deal with the particular problem of real burdens.<sup>62</sup>

2.47 The next difficulty is power to rectify. Usually rectification is barred if it would prejudice a proprietor in possession.<sup>63</sup> The Register must then remain inaccurate. In practice

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<sup>61</sup> Land Registration (Scotland) Act 1979 s 9. See *Brookfield Developments Ltd v Keeper of the Registers of Scotland* 1989 SLT (Lands Tr) 105. It is arguable that the Register could also be amended by an application for registration under s 2(4)(c), on the basis that feudal abolition is an “event” within that provision.

<sup>62</sup> Paras 4.21 - 4.25.

<sup>63</sup> Land Registration (Scotland) Act 1979 s 9(3). Four exceptions are set out in that subsection.

rectification following on from feudal abolition is unlikely to prejudice a proprietor in possession, either because abolition has taken away the status of proprietor (as in the case of superiors) or because the rectification will confer actual benefit on the proprietor (as in the case of the deletion of feuduties and real burdens). Nonetheless there may be cases where prejudice may arise. We suggest that, for these cases, the legislation should declare that rectification to take account of feudal abolition should be deemed not to prejudice a proprietor in possession.

2.48 Thirdly, there is the risk of mistakes. Not all alterations will be straightforward. Sometimes it will be difficult to determine which part of a mixed estate title relates to former *dominium utile* (and should be preserved) and which relates to former superiority (and should be deleted). Similar kinds of problem may arise with real burdens.<sup>64</sup> Given the scale of the changes, mistakes seem unavoidable. Mistakes may also occur in relation to the notices provided for in Parts 4 and 5 of this report. A notice might be invalid for reasons which are not apparent to the Keeper, and effect might be given to it on the Register notwithstanding its invalidity. The Register will then be inaccurate. Unless the Keeper is given power to rectify in cases like this, feudal abolition will impair the reliability of the Register.

2.49 Finally, there is the question of indemnity. On rectifying, the Keeper must usually indemnify any person who suffers loss,<sup>65</sup> and on one view of the law indemnity is due even without rectification, or a request for rectification, merely on the ground that the Register is inaccurate.<sup>66</sup> There would be no point in giving power to rectify if the Keeper was then made liable for payment of indemnity. It seems clear that indemnity should not be payable in such cases.

2.50 We recommend that

**6. It should be made clear**

**(a) that any rectification of the Land Register which is required to take account of the abolition of the feudal system of land tenure, or of anything done under or by virtue of the legislation on abolition, is not to be regarded as prejudicing any proprietor in possession and**

**(b) that there is no entitlement to indemnity under section 12 of the Land Registration (Scotland) Act 1979 as a result of any such rectification or as a result of any inaccuracy in the register resulting from the abolition of the feudal system of land tenure, or of anything done under or by virtue of the legislation on abolition.**

(Draft Bill, clause 3 (b) and (c))

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<sup>64</sup> Para 4.23.

<sup>65</sup> Land Registration (Scotland) Act 1979 s 12(1)(a).

<sup>66</sup> *MRS Hamilton Ltd v Keeper of the Registers of Scotland* 1998 GWD 25-1267. This view is based on s 12(1)(d).

## Saving for jurisdiction of Lord Lyon

2.51 There is a risk that the abolition of feudal interests in “land” might have inadvertent effects on the jurisdiction of the Lord Lyon in relation to coats of arms. This is because arms have been regarded as an incorporeal fief and have been held to be feudal heritage.<sup>67</sup> It is not our intention to interfere in any way with the jurisdiction of the Lord Lyon<sup>68</sup> and, for the avoidance of any doubt on this point, we recommend that

7. **It should be made clear that the statutory provisions abolishing the feudal system of land tenure do not supersede or impair the jurisdiction or prerogative of the Lord Lyon King of Arms.**

(Draft Bill, clause 56)

Coats of arms may be matriculated in names containing a territorial designation derived from a bare superiority.<sup>69</sup> After the appointed day it will no longer be possible to register a new coat of arms on this basis alone. Clearly, however, the disappearance of superiorities would not affect existing coats of arms matriculated before the appointed day. The word “supersede” in our recommendation<sup>70</sup> is designed to make it clear that the Lord Lyon retains full jurisdiction and control over coats of arms and that there is to be no room for any argument that, as a result of the new legislation, coats of arms can no longer be matriculated. The word “impair” is designed to make it clear that arms which have already been matriculated by the Lord Lyon are not affected by the new Act.

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<sup>67</sup> *Stair Memorial Encyclopaedia* vol 6 para 1017 (at note 4 and text). *Maclean of Ardgour v Maclean* 1941 SC 613.

<sup>68</sup> This jurisdiction is partly pre-feudal in origin but contains substantial feudal elements. See *Stair Memorial Encyclopaedia* vol 6, paras 1010 to 1021.

<sup>69</sup> See *Cowan of Blackburn and Others* 1996 SLT (Lyon Court) 2.

<sup>70</sup> And in clause 56 of the draft Bill.

## Part 3 Feuduty

### Introduction

3.1 Feudalism was conceived as creating a reciprocal relationship between superior and vassal. The superior provided land and protection. In exchange the vassal made payments (*reddendo*) to the superior. The type of payment depended on the type of tenure on which the land was held.<sup>1</sup> Payment might be in cash or in kind, in labour or in military service. And payments would be due both at regular intervals and also on the occurrence of certain events, such as the entry of a new vassal. Of this elaborate system little remains today. Payments irregularly due, known as casualties, were abolished by the Feudal Casualties Act of 1914.<sup>2</sup> The only surviving regular (or periodic) payment<sup>3</sup> is feuduty - a sum of money usually payable twice yearly, at Whitsunday and Martinmas. With inflation most feuduties are small and some are derisory.<sup>4</sup>

3.2 In this part of the report we consider how to remove such feuduties as still remain. We also consider whether our recommendations on feuduties should apply to other payments which, although non-feudal in nature, have similar characteristics.

### Cumulo feuduties and allocated feuduties

3.3 In a simple case feuduty is payable by a single vassal in respect of a single feu. But the position is often more complicated. Many feus date from the nineteenth century or earlier. Typically they have come to be divided into smaller parts. If the division was effected by subinfeudation, the original feu remains intact, at the level of mid-superiority, and the feuduty continues to be due by its owner. From the point of view of the subvassals such a payment would then be classified as an over-feuduty.<sup>5</sup> If, however, subdivision was effected by ordinary disposition, the original feu would be fragmented into different parts.<sup>6</sup> What then

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<sup>1</sup> The main tenures were wardholding, feu farm, blench and burgage. Today almost all land is held on feu farm tenure, although blench tenure also survives.

<sup>2</sup> They were, however, to have a curious afterlife in ultra-long leases, with some unexpected consequences. The subject is explored in our report on *Leasehold Casualties* (Scot Law Com No 165), which recommends their abolition.

<sup>3</sup> Other than blench duty, found in blench tenure. Blench duty is a nominal payment, due on request only. Traditionally it is not requested.

<sup>4</sup> For feuduty generally, see Gordon, *Scottish Land Law* paras 22-03 - 22-28; Halliday, *Conveyancing* vol 2 paras 32-17 - 32-63; McDonald, *Conveyancing Manual* chap 16.

<sup>5</sup> For overfeuduties, see para 3.43.

<sup>6</sup> The difference between proceeding by subinfeudation and by disposition can be explained by an example. Suppose that B holds the *dominium utile* of land which he wishes to sell in four parts. His superior is A, and the feuduty £100. If B proceeds by disposition, the purchasers take his place in the feudal chain. A now has four vassals in place of one, and the £100 is their joint responsibility. If, conversely, B proceeds by subinfeudation, he remains in the feudal chain, although his *dominium utile* is transformed into *dominium*

becomes of the feuduty? There are two possibilities. One is that the feuduty is formally allocated among the fragmented parts, so that each separate vassal is liable for a share and no more. Each part is then treated as if it were a separate feu. The other possibility is that the feuduty forms an unallocated *cumulo* affecting the whole feu. In that case the superior is entitled to recover the full amount of feuduty from any one vassal, leaving that vassal with the unenviable task of persuading neighbours to contribute a rateable share.

3.4 Allocation prejudices the superior by substituting multiple small debts for a single large debt. For that reason allocation could not, until 1970, take place without the superior's consent, and in practice consent was not usually given without the feuduty being increased. The position was changed by the Conveyancing and Feudal Reform (Scotland) Act 1970. By section 3 of that Act a vassal of part of the feu can achieve allocation in respect of that part simply by serving an appropriate notice on the superior. The only ground of objection open to the superior is that too little (or, improbably, too much) feuduty has been allocated on the part in question. Disputes are resolved by the Lands Tribunal for Scotland.<sup>7</sup>

### **Apportioned feuduties and collectors**

3.5 In practice, even where a *cumulo* has not been allocated, it would be unusual for the superior to pick on a single vassal. Usually there is an informal understanding, sometimes expressed in the original dispositions which effected the subdivision, that each vassal will pay only a certain share of the whole. In such cases the *cumulo* is said to be "apportioned". But apportionment is a limited protection for the vassals for, by contrast with allocation, the superior is free to disregard the arrangement. Apportionment can, however, lead to allocation. Once a feuduty has been apportioned, the provisions of the 1970 Act on allocation become available.

3.6 With apportioned feuduty the superior does not always collect directly from the individual vassals. Sometimes this is done by an intermediary - a "collector" - who acts as agent for the vassals. This may mean that the superior has little idea as to the identity of the vassals. Later we make a recommendation about the disclosure of information by the collector to the superior.<sup>8</sup>

### **Feuduties already extinguished**

3.7 The Land Tenure Reform (Scotland) Act 1974<sup>9</sup> forbade the imposition of new feuduties and introduced a scheme for the buying out ("redemption") of all feuduties then in existence. Feuduty was to be redeemed on the first occasion on which property was sold after the coming into force of the legislation. In addition, feuduty could be redeemed at other times on a voluntary basis. The success of these provisions has greatly simplified our task. Most feuduties have been extinguished. Probably less than 10% of properties remain subject to feuduty. Where feuduty does survive it is usually because it is an unallocated *cumulo*. Few

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*directum*. B then continues to be liable to A for the £100. The four purchasers are vassals of B (and not of A) and are liable only for the feuduty created in their own individual subinfeudations.

<sup>7</sup> See generally ss 3 - 5 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

<sup>8</sup> Paras 3.16 and 3.22 and recommendation 11.

<sup>9</sup> Part I.

allocations take place now, and redemptions under the 1974 Act have fallen steeply. What is left comes close to an irreducible core.<sup>10</sup> The problem, therefore, is not a large one. We have to provide for (mainly) small sums of money due in respect of a small number of properties. This has influenced our approach, which is simpler and more direct than was possible in 1974.

### **Extinction of remaining feuduties**

3.8 Feuduty could not outlive the feudal system itself. Hence all remaining feuduties require to be extinguished on the appointed day (that is, the day on which the feudal system is abolished).<sup>11</sup> No feuduty should be due for any period starting with that day, but arrears would be recoverable. Our recommendation is that

**8. All remaining feuduties should be extinguished on the appointed day.**

(Draft Bill, clause 7)

Extinction would not affect the use of feuduty as a method of apportioning maintenance and repair costs, a matter anticipated in our report on the law of the tenement.<sup>12</sup>

### **The scheme proposed in the discussion paper**

3.9 In our discussion paper<sup>13</sup> we proposed that on the appointed day any feuduty still unredeemed would become a personal debt due by the former vassal to the former superior, the sum due being calculated in accordance with the existing statutory formula for redemption. A collector of unallocated *cumulo* feuduty would be liable to pay the whole sum due, subject to a right of recovery from the payers of that feuduty. An apportionment which was collected directly by a superior would from the date of the legislation be regarded as an allocation. We invited views on whether small feuduties under 25 pence per annum should be abolished without compensation and proposed the introduction of an instalment scheme. Finally we proposed that no special redemption provisions should be made for cases where the superior was untraceable.

3.10 The majority of consultees supported the proposals for allocated and unallocated feuduties. Some had reservations about treating the sum due as a personal debt. Others had doubts about making the collector liable to pay the redemption sum for a *cumulo* feuduty and suggested that the onus should be on the superior to collect from individual vassals on the basis of the informal apportionments paid by them. Everybody agreed that where the superior collected the apportioned feuduty direct the apportionment should be treated as an allocation. There was a wide range of views on whether small feuduties should be abolished without compensation.

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<sup>10</sup> Our conclusions are based in part on a small consultation exercise carried out in December 1996 among parties who have traditionally been regarded as major superiors and legal firms who act for major superiors; namely Messrs Brodies WS, the Church of Scotland, George Heriot's Trust, Mr Alexander Ledingham WS, Messrs Ledingham Chalmers, Solicitors, The Merchant Company, and the Scottish Landowners' Federation. We are grateful for their assistance.

<sup>11</sup> Para 1.23.

<sup>12</sup> See Scot Law Com No 162 para 5.62.

<sup>13</sup> Paras 4.2 to 4.22 and propositions 22 to 25.

3.11 In the scheme described below we adhere to some of the proposals made in the discussion paper but depart from others.

### **Basis of compensation**

3.12 When redemption takes place under the 1974 Act, full compensation is paid by the vassal to the superior. The same principle should apply here. Further, there seems no reason to depart from the familiar formula used in the 1974 Act. This means that the vassal would be required to pay that sum of money which, if invested in 2.5% Consolidated Stock at the middle market price at the close of business last preceding the appointed day, would produce an annual sum equivalent to the feuduty. In practice a redemption factor equivalent to so many years purchase of feuduty is drawn up unofficially from the statutory formula. Multiplication of the annual feuduty by the factor then produces the sum due on redemption. Currently the factor is around 20.

3.13 In the case of an unallocated *cumulo* the sum of individual apportionments may often exceed the total feuduty. But for the purpose of calculating compensation the relevant figure should be the annual amount of the feuduty. That is the amount a superior is entitled to receive. The difference generally represents a collector's administrative expenses and a profit element.

### **Compensation due only where claimed**

3.14 Feuduty will be extinguished on the appointed day, but a former vassal should be bound to pay only on being requested to do so. If no request is made, no liability arises. More precisely, our scheme would require the former superior to serve a notice in statutory form calling for payment.<sup>14</sup> The notice would be accompanied by an explanatory note, again in statutory form, explaining its purpose in simple language. The former superior would have two years from the appointed day in which to serve the notice. Service would constitute the debt and trigger liability. Failure to serve within the two year period would extinguish any right to compensation.

3.15 The idea that a creditor must claim the debt, or lose it, is a familiar principle of law. It is also an inevitable principle in circumstances where - by contrast to the position in 1974<sup>15</sup> - vassals may have no idea as to the identity of their superiors, and where superiorities often lie vacant. Lack of knowledge can of course work both ways. If the vassal does not know the superior, the superior may not know the vassal. Here, however, our scheme seems self-regulating. A superior who collects feuduty as it falls due will know the vassals. For such a person our scheme will present no difficulties. But for a superior who does not collect feuduty, abolition confers a windfall benefit. In place of a small annual payment, deemed unworthy of collection, there is a single capital sum. It seems not unreasonable that some work may be required before this windfall can be claimed. The means are readily to hand. In

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<sup>14</sup> See clauses 8(1) - (3) and scheds 1 and 2.

<sup>15</sup> The Land Tenure Reform (Scotland) Act s 5 imposed liability on the vassal whether or not the sum was claimed by the superior. But even in 1974 it was not always possible to identify the superior: see para 3.39.

most cases the title of the vassal will be registered in the Register of Sasines or Land Register.<sup>16</sup>

3.16 The notice must stipulate the amount due. In the case of a standard feu this will be the annual feuduty multiplied by the feuduty factor mentioned earlier. But with *cumulo* feuduties there is the difficulty that the sum is payable by a number of different vassals.<sup>17</sup> We do not think it fair to preserve the rule of joint and several liability. Compensation payments may be substantial, and a former vassal of part of a feu should not have to pay more than the share attributable to that part. The difficulty then lies in determining that share. We propose that, in the case of a *cumulo* feuduty, a former superior should be required to allocate the compensation in such proportions as are reasonable in all the circumstances, but coupled with a presumption that an allocation is reasonable if it accords with an existing apportionment. Most unallocated *cumulos* are in fact apportioned. If the superior collects directly, the apportionment will be familiar. If collection is carried out by a third party (such as one of the vassals, or a factor), the third party should be placed under a statutory duty to disclose the apportionment to the superior. We do not persist here with the suggestion made in the discussion paper that liability for payment might be placed on the collector, subject to a right of relief against the former vassals.<sup>18</sup>

3.17 The approach adopted recognises that in a substantial majority of cases a *cumulo* feuduty will already have been apportioned. It also recognises the role of existing apportionments under the 1970 Act scheme for allocation and in the jurisprudence of the Lands Tribunal, and the consequential effect on the practice of superiors. At the same time it recognises that a former superior may not know whether there are apportionments, and allows compensation to be allocated in some other way.

3.18 The discretion given to the former superior is tempered by the presumption in favour of existing apportionments. In practice, if apportionments exist, they are likely to be used. If, taken together, these exceed (or fall short of) the *cumulo* feuduty, some scaling down (or up) will be required. The statutory presumption is of course rebuttable, but challenges are likely to be rare. Former vassals will have been paying on the basis of existing apportionments for many years. Usually they will be content.

3.19 Sometimes there will be no apportionments, or the superior may choose to depart from them. In such a case the allocations may be vulnerable to challenge. The statutory form of notice<sup>19</sup> to be served by the superior shows, not merely the amount claimed, but also the amounts allocated on the other parts of the same feu. It would be a defence to an action for payment that the allocation is unreasonable. A superior who allocates too little on some former vassals and too much on others runs the risk of a successful challenge, and a corresponding loss of compensation, for the vassals who were allocated too little would have no liability to make up the shortfall.

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<sup>16</sup> For the main case where the title will not be registered, see para 3.33.

<sup>17</sup> For *cumulo* feuduties, see paras 3.3 - 3.6.

<sup>18</sup> Scot Law Com DP No 93 paras 4.11 and 4.12, and proposition 23(ii).

<sup>19</sup> See sched 1 of the draft Bill.

## **Time scale**

3.20 There will be a gap, perhaps of two years, between the passing of the legislation and the appointed day. This will give a superior time to investigate *cumulo* feuduties and to make the necessary administrative arrangements for serving notices. The obligation on the collector to provide information<sup>20</sup> will be in force from this time. Feuduty is abolished on the appointed day itself, and claims for compensation can then be made at once. Well-prepared superiors are likely to serve a notice as soon as possible after the appointed day, for late service means late payment, and there is no provision for interest. But in any event all notices must be served within two years of the appointed day. Service constitutes the debt. Thereafter the former vassal must pay within 8 weeks, except in a case (described below)<sup>21</sup> where an instalment scheme is in operation.

## **Enforcement**

3.21 As well as being a personal debt of the vassal, feuduty is secured, both on the land itself and also (through the superior's hypothec) on moveables brought on to the land. Further, a vassal who does not pay for five years forfeits the entire feu, without compensation, if the superior chooses to bring an action of irritancy.<sup>22</sup> However the irritancy is avoided by paying the debt, even at the last minute.<sup>23</sup> These draconian remedies can be explained historically, but they are plainly out of place today. We propose that the compensation due by the former vassal should be an ordinary, unsecured debt. This has the advantage of taking the payment out of the system of land tenure, and making a clean break with the feudal past. After abolition, feuduty will cease to be a matter of concern to a purchaser of land.

3.22 Summing up our proposals, we recommend that

9. (a) **Compensation should be payable by a former vassal to a former superior for the extinction of feuduty, provided that a notice is served on the former vassal within two years of the appointed day.**
- (b) **The notice for a *cumulo* feuduty should**
  - (i) **specify the amount of the *cumulo* feuduty**
  - (ii) **identify the property in respect of which it was paid**
  - (iii) **state the total compensation due for the extinction of that feuduty**
  - (iv) **show how the total compensation has been allocated among the former vassals and the compensation due by each former vassal,**
  - (v) **require payment of the compensation by the former vassal on whom the notice is served**

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<sup>20</sup> Mentioned in para 3.16.

<sup>21</sup> Paras 3.23 - 3.27.

<sup>22</sup> Feuduty Act 1597 (as amended by s 15 of the Land Tenure Reform (Scotland) Act 1974).

<sup>23</sup> Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 s 4.

- (vi) state to whom payment should be made, and
  - (vii) have explanatory notes attached.
- (c) In other cases the notice should
- (i) specify the amount of the feuduty
  - (ii) identify the property in respect of which it was paid
  - (iii) state the compensation due for the extinction of that feuduty
  - (iv) require payment of the compensation
  - (v) state to whom payment should be made, and
  - (vi) have explanatory notes attached.
- (d) Subject to Recommendation 12 a former vassal on whom a notice has been served should pay the compensation within 8 weeks of service of the notice.
- (e) Compensation should be an ordinary, unsecured debt.  
(Draft Bill, clause 8)
10. (a) Compensation for the extinction of a feuduty should be that sum of money which, if invested in two and one half per cent Consolidated Stock at the middle market price at the close of business last preceding the appointed day, would produce an annual sum equal to the feuduty.
- (b) In the case of a *cumulo* feuduty a former superior should allocate the sum determined under (a) among the former vassals in such proportions as are reasonable in the circumstances. An allocation should be presumed reasonable if it accords with an existing apportionment. The amount so allocated should be the compensation due by the former vassal to the former superior.  
(Draft Bill, clause 9)
11. A collector of a feuduty or part of a feuduty should be under a duty to disclose to the superior or the former superior on request at any time after commencement of the legislation the identity and address of each vassal from whom the collector has collected the feuduty or part and in the case of a *cumulo* feuduty the amount collected from that vassal.  
(Draft Bill, clause 14)

### Payment by instalments

3.23 In the discussion paper<sup>24</sup> we proposed that compensation for feuduties over £20 should be capable of being paid by instalments, with interest at 10%, over a maximum period of 5

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<sup>24</sup> Paras 4.17 to 4.20 and proposition 24.

years from the appointed day. We asked for views on the figure of £20 and the rate of interest. The majority of consultees agreed with the proposal to allow instalments but there were different views on the amount of the feuduty and the rate of interest. We adhere to the view that a former vassal should be able to pay by instalments. Not everyone will regard the ending of feudalism, and of feuduty, as a benefit. In some cases a requirement to pay compensation will cause financial hardship. An instalment scheme provides an obvious means of relief.

3.24 Our suggested scheme is as follows. Any compensation of £100 or more will qualify for payment by instalments. With a feuduty factor of around 20, this equates to a feuduty (or a share of a *cumulo* feuduty) of £5. This is less than the figure originally proposed, but the current low level of interest rates has increased the feuduty factor. The instalment scheme is tiered. Where the compensation is between £100 and £500 there would be 5 instalments payable on the next 5 term days of Whitsunday (28 May) and Martinmas (28 November) (i.e. over a period of two and a half years); where it is between £501 and £1000 there would be 10 instalments payable on the succeeding 10 term days (5 years); where it is between £1001 and £1500 there would be 15 instalments payable on the succeeding 15 term days (7½ years); and where it is more than £1500 there would be 20 instalments payable on the succeeding 20 term days (10 years). The instalments would be equal instalments or as equal as can be. To provide for interest would be to turn a simple scheme into a complex one; but in recognition of the administrative and other costs for the former superior we propose a surcharge amounting to 10% of the total compensation. This would be payable at the time when the former vassal elects to pay by instalments, and could not be recovered if the scheme were later abandoned.

3.25 Where the payment requested is £100 or more a former superior must serve with the notice an instalment document.<sup>25</sup> Failure to do so will invalidate the notice and (unless the correct documents are re-served) excuse payment by the former vassal. Prior to service the former superior must complete the document with details of the compensation, the number of instalments, the amount of each instalment, the dates of payment, and the amount of the surcharge. Explanatory notes (in a statutory form) should be attached to the document.<sup>26</sup> On receipt the former vassal must sign, date and return the instalment document, along with the 10% surcharge. If this is not done within the period allowed for payment - 8 weeks<sup>27</sup> - there is no entitlement to pay by instalments.

3.26 Once an instalment scheme is in place, the former vassal must make the stipulated payments on each succeeding term day. If an instalment is late by more than 14 days, the scheme is deemed abandoned and payment is due in full. There is of course nothing to stop the former vassal from paying in full at any time.

3.27 We recommend that

- 12. (a) Where the compensation due is £100 or over, the former superior should serve with the notice an instalment document. If this is not done, the notice should have no effect.**

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<sup>25</sup> See clause 10(1) and sched 3.

<sup>26</sup> See clause 10(1) and sched 3.

<sup>27</sup> Para 3.20.

- (b) The document should specify -**
- (i) the compensation due**
  - (ii) the number of instalments**
  - (iii) the amount of each instalment**
  - (iv) the date of the first and subsequent payments**
  - (v) the amount of the surcharge, and**
  - (vi) have explanatory notes attached.**
- (c) A former vassal who wishes to pay by instalments should sign, date and return the instalment document along with payment of the surcharge within 8 weeks of the date of service.**
- (d) The instalments should be determined in accordance with the following table -**
- | <b>Compensatory Payment</b> | <b>Number of instalments</b> |
|-----------------------------|------------------------------|
| between £100 and £500       | <b>5</b>                     |
| between £501 and £1000      | <b>10</b>                    |
| between £1001 and £1500     | <b>15</b>                    |
| more than £1500             | <b>20</b>                    |
- (e) The instalments should be equal instalments payable half yearly at Whitsunday and Martinmas beginning at the next term day.**
- (f) If an instalment is unpaid for 14 days the balance of unpaid compensation should immediately become due and payable.**
- (g) A former vassal should be able to pay the outstanding balance at any time.**

(Draft Bill, clause 10)

## **Service**

3.28 Liability to pay depends on service of a notice; and once a notice is served, the date of service is the starting point both for the 8-week period allowed for payment (or return of the instalment document), and for the quinquennial prescription.<sup>28</sup> But while it is necessary to be clear about the date of service, the method by which service is achieved can be left fairly flexible. We suggest that service should be effected by delivery or by post. Delivery might include handing the documents personally to the former vassal, or putting them through the letter box. If post is used, the notice should be posted to the former vassal's home, place of business or ordinary postal address (or to the most recently known such address). In some circumstances the superior might consider it prudent to use the recorded delivery service.

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<sup>28</sup> For prescription, see para 3.38.

3.29 A feu, or part of a feu, may have been held by two or more vassals as common property. Where they live at the same address or have a common business address the notice should be delivered to one of the former vassals, or sent by post or delivered to that place addressed to them all. In other cases the notice should be served on each former vassal in accordance with the rules set out in the previous paragraph.

3.30 The date of service of a notice is the day of delivering or posting the notice to the former vassal in accordance with the relevant rules.

3.31 Where a notice is delivered or posted to the wrong person or to the wrong address it will have to be served again. There is no reason why a notice cannot be re-served on a number of different occasions provided the two year time limit has not expired.

3.32 We recommend that

**13. (a) The rules on serving notices should make it possible for them to be served by delivery or by post to the former vassal's place of residence, place of business or ordinary postal address (or at the most recently known such address).**

**(b) Where former *pro indiviso* vassals have a common place of residence or business a notice should be regarded as duly served if it is delivered to one vassal or posted or delivered to that place addressed to all the vassals.**

**(c) The date of service should be the date of delivering or posting the notice in accordance with paragraphs (a) or (b).**

(Draft Bill, clause 11)

### **Crystallisation of liability**

3.33 Compensation is payable by the person who was vassal immediately prior to feudal abolition. In feudal law "vassal" means a person who has entered with the superior by registering title in the Land Register, or by recording a conveyance in the Register of Sasines.<sup>29</sup> However, this meaning leaves out of account property which is in the process of changing hands, and so is too narrow for our purposes. Where property changes hands, completion of the purchaser's title is beyond the control of the seller. If a strict definition of "vassal" were to be adopted, a purchaser could avoid liability for compensation simply by delaying registration until after the appointed day. The seller would then be left with the bill. This difficulty is met by extending the definition of "vassal" to include a person who has right to the feu but has not completed title.<sup>30</sup> The concept of "having right" to land is familiar from the legislation on deduction of title,<sup>31</sup> and signifies a person holding on an unregistered conveyance. If more than one person comes within the definition as so extended - as for

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<sup>29</sup> Conveyancing (Scotland) Act 1874 s 4.

<sup>30</sup> This is similar to the solution proposed for liabilities arising under the law of the tenement or under real burdens. See Scot Law Com No 162 paras 8.27 and 8.28; Scot Law Com DP No 106 para 4.25.

<sup>31</sup> Conveyancing (Scotland) Act 1924 ss 3 - 5.

example in cases with a sequence of uninfert proprietors - the latest such person should be treated as the vassal. Under the general law, liability would attach to the estate of a vassal who has died before the appointed day.<sup>32</sup>

3.34 A uniform approach requires that the same extended definition be used for “superior”; and this also meets the practical problem that superiors are sometimes uninfert and that, after the appointed day, no mechanism would be available for completing title.

3.35 In some cases our proposals may cause difficulties for superiors. A superior who relies on the property registers will, occasionally, be misinformed as to where liability lies. But it may be assumed that a person on whom a notice is wrongly served will not be slow to dispute liability, and a superior who has not left everything to the last minute should have ample opportunity to re-serve on the right person.

3.36 A feu (or, in the case of a *cumulo*, part of a feu) may be co-owned. In that case all the co-owners will be “vassals”, and all will be liable for payment of compensation. We suggest that, in a question with the former superior, liability ought to be joint and several, but with an underlying liability based on size of *pro indiviso* share. Any co-owner could be called upon to pay the former superior, but would then have a right of relief against fellow owners.

3.37 We recommend that

**14. (a) For the purposes of payment of compensation, “vassal” and “superior” should mean the person who, on the day before the appointed day, has right to the feu (or, as the case may be, to the immediate superiority) whether or not on a completed title (and where more than one person comes within this description, the person who has most recently acquired such right).**

**(b) Where a feu is held by two or more vassals as common property**

**(i) any liability to pay compensation should be their joint and several liability; but**

**(ii) as among themselves they should be liable in the proportions in which they hold the feu.**

(Draft Bill, clause 15(1), (4))

### **Negative prescription**

3.38 Feuduty prescribes after five years. The same rule should apply to the obligation to pay compensation. It will be necessary to amend the Prescription and Limitation (Scotland) Act 1973 to make this clear. Under section 6(3) of that Act prescription begins to run when

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<sup>32</sup> If by the appointed day an executor had already been confirmed, he would “have right” to the feu by virtue of s 14(1) of the Succession (Scotland) Act 1964 and so would be a vassal within our definition.

the obligation becomes enforceable, which in this case would be the date when the notice is served by a former superior.

3.39 In responding to the discussion paper a number of consultees, including the Law Society, drew attention to the substantial sums of redemption money under the 1974 Act still held on deposit receipt for the benefit of untraceable superiors. Such sums must continue to be held until the debt is extinguished by negative prescription, currently twenty years,<sup>33</sup> and only then can they be returned to the original seller of the property. After so long a time the original seller may be difficult to trace. We suggest that the period of negative prescription be reduced to five years. As well as solving the administrative problems just mentioned, this would introduce a uniform five-year prescription for all matters relating to feuduty. Our proposal would apply to any obligation to pay redemption money that is still extant. It will enable money which may have been on deposit receipt for many years to be returned if the five year period has already elapsed.

3.40 We recommend that

**15. There should prescribe after five years -**

- (i) the obligation to pay compensation for extinction of feuduty, and**
- (ii) the obligation to pay feuduty redemption money under ss 5 and 6 of the Land Tenure Reform (Scotland) Act 1974.**

(Draft Bill, clauses 12 and 51)

**Disputes as to liability**

3.41 We considered, but in the end rejected, the idea of giving a former vassal a right to appeal to the Lands Tribunal against allocation or other aspects of liability. The scope for dispute is limited, and there seems no particular reason for treating this debt in a different manner from other personal debts. There will be the possibility of negotiating a compromise with a former superior. If the superior raises an action for payment a former vassal would be able to argue that the payment demanded was not due on the grounds that the statutory criteria had not been followed. The superior could also be put to a proof of title. In theory, the closure of superiority title sheets on the Land Register might cause difficulties here, but in practice such closure is unlikely to be an administrative priority and may take many years to complete. In any event the superior would still retain the land certificate, or a copy of the certificate.

**Blench duty**

3.42 The *reddendo* payable by a vassal is not always feuduty. Some land is held on blench tenure where the *reddendo* “is a small elusory rent, as being rather an acknowledgement of, than profit to, the superior ... as a rose, a penny money, or the like”.<sup>34</sup> In practice blench duty is rarely exacted. We recommend that

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<sup>33</sup> Prescription and Limitation (Scotland) Act 1973 s 7.

<sup>34</sup> Stair II.3.33.

**16. Blench duty should be extinguished at the same time and on the same terms as feuduty.**

(Draft Bill, clause 15(1))

**Over-feuduty**

3.43 Just as under the 1974 Act scheme, feuduty includes over-feuduty (that is to say, feuduty payable by a superior to a superior further up the feudal pyramid). Thus former over-superiors will be able to recover compensation from their former immediate vassals for the extinction of the over-feuduty. Naturally, sub-vassals will not be liable.<sup>35</sup> In practice, over-feuduty seems largely to have disappeared.

**Receipts**

3.44 A common criticism of the feuduty provisions in the 1974 Act was the absence of a requirement for a receipt.<sup>36</sup> But since compensation, under our proposals, is merely a personal debt and purchasers are not affected, there seems no reason for making special provision. Any party who thinks it important to do so will be able to preserve evidence as to what has been demanded and what has been paid.

**Transitional arrangements**

3.45 **Unpaid feuduty.** Unpaid arrears of feuduty will be unaffected by our proposals. A person who was liable for arrears before the appointed day will continue to be liable after that day. In most cases there will in fact be arrears, because feuduty is not usually paid in advance. Our model notices include a space for claiming arrears.<sup>37</sup> Any feuduty which has accrued but is not yet due should be deemed to become due on the appointed day itself. Thereafter there would be no further liability for feuduty.

3.46 **Ongoing redemptions.** In a few cases the appointed day may cut across redemptions which are taking place under one of the provisions of the 1974 Act. But unless the redemption has actually been completed before that day, the feuduty will still be in place and so will be automatically extinguished under the new legislation.

3.47 Under section 6 of the 1974 Act (redemption on compulsory purchase) responsibility for payment of the redemption money is on the acquiring authority. This means that where redemption is under way before the appointed day but has not been completed, the effect of the new legislation would be to transfer liability to the former vassal. We think that this is a matter which can safely be left to negotiation between the parties.

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<sup>35</sup> A sub-vassal has no personal liability for over-feuduty, except to the extent of his own unpaid feuduty. See *Sandeman v Scottish Property Investment Co Building Society Ltd* (1881) 8 R 790.

<sup>36</sup> At least in relation to compulsory redemption under s 5 of the Land Tenure Reform (Scotland) Act 1974.

<sup>37</sup> Draft Bill, scheds 1 and 2.

3.48 **Abolition of securities.** Arrears of feuduty are secured on the feu as a *debitum fundi*. So too, in some circumstances, is unpaid redemption money due under s 5 of the 1974 Act. The security does not confer a right of sale, and the remedies are real adjudication and poinding of the ground. Both are unknown in modern practice. Nonetheless the theoretical risk that they might be used means that, even after abolition, a purchaser would have to check that the debts in question had been paid in full.<sup>38</sup> This seems unsatisfactory. In the interests of a clean break with the feudal past, we suggest that the security be abolished on the appointed day. At the same time we suggest the abolition of the corresponding security which exists over moveable property - the superior's hypothec - which has been described as "wholly obsolete in practice".<sup>39</sup> The former superior could continue to recover arrears as a personal debt in the usual way.

3.49 **Ongoing allocations.** Most feuduty which is likely to be allocated has already been allocated. Today allocations are unusual, and it is some years since a case was brought to the Lands Tribunal. If an allocation happened to be in progress at the appointed day but had not been completed, the feuduty would remain a *cumulo* on that day and would be subject to the rules for extinction of *cumulo* feuduties. This means that it would be for the former superior to allocate the compensation among the former vassals.<sup>40</sup> An allocation under the 1970 Act takes effect on the first term day occurring not less than three months after service of the notice of allocation (or, in the case of an allocation by the Lands Tribunal, after the Tribunal order).<sup>41</sup>

3.50 We recommend that

17. (a) **Feuduty should continue to be payable for any period prior to the appointed day and, if any feuduty so payable has not fallen due before that day, it should fall due on that day.**
- (b) **Unpaid feuduty should cease to be a *debitum fundi* on the appointed day, as should any amount secured in favour of the former superior by s 5 of the Land Tenure Reform (Scotland) Act 1974.**
- (c) **The superior's hypothec should be extinguished on the appointed day.**

(Draft Bill, clause 13)

### **Payments analogous to feuduties**

3.51 The 1974 Act scheme applies not only to feuduty but also to

"ground annual, standard charge, skat or any other perpetual periodical payment in respect of the tenure, occupancy or use of land or under a land obligation, not being a

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<sup>38</sup> After 5 years the debts would normally be extinguished by negative prescription.

<sup>39</sup> *Stair Memorial Encyclopaedia* vol 8 para 392.

<sup>40</sup> Paras 3.16 - 3.19.

<sup>41</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 5(5).

payment of teind or stipend, or in defrayal of or contribution towards some continuing cost related to land, or under a heritable security.”<sup>42</sup>

On consultation there was no opposition to the proposal in our discussion paper that the new legislation should have a similar application, and that it should be extended to include teind and stipend.<sup>43</sup> Teinds are in theory still exigible although many have been surrendered or the surplus sold to the heritor. They are not redeemable under the 1974 Act. With the standardisation of stipend, teinds are thought to be of little or no value.<sup>44</sup> A stipend was the remuneration of the parish minister which, prior to becoming a standard charge under the Church of Scotland (Property and Endowments) Acts 1925 and 1933, was based on teinds. The Acts provide for the Clerk of Teinds to prepare a Teind Roll for each parish specifying the total teind, the amount applicable to the lands of each heritor, the value of the stipend payable to the minister out of the teinds and the proportion of stipend payable by each heritor. The stipend of a standard value - “standard charge” - exigible from lands comprising a single entry in the Teind Roll is constituted a real burden on those lands in favour of the General Trustees of the Church of Scotland and is payable at Whitsunday and Martinmas. A standard charge can be redeemed compulsorily under the 1974 Act and voluntarily under the 1925 Act.

3.52 The Church of Scotland collect payments known as Dunkeld Deanery dues and St Andrews Archdeanery dues. We think that these payments and other like payments fall within the scope of the redemption provisions in the 1974 Act and so will also be covered by our proposals.

3.53 Extinction of a periodical payment is not intended to, and will not, affect the underlying right to hold, occupy or use the land. The rule was the same under the 1974 Act scheme.<sup>45</sup>

3.54 Ground annual is not itself a form of tenure. A ground annual is no more than a perpetual payment secured on the land and due to a person not otherwise connected with that land. The owner does not hold from the creditor in a ground annual in the same way as a vassal holds from a superior. On the contrary, most land subject to ground annual is itself held on feudal tenure. Extinction of a ground annual will extinguish the security for payment, and leave the land unencumbered.<sup>46</sup>

3.55 We recommend that

- 18. (a) Ground annual, skat, teind, stipend, standard charge, dry multures and any other perpetual periodical payment in respect of the tenure, occupancy or use of land or under a land obligation should be extinguished on the appointed day in the same way as feuduties.**

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<sup>42</sup> Land Tenure Reform (Scotland) Act 1974 s 5(12) (implementing s 4(7) for compulsory redemptions). For the purposes of s 4 (voluntary redemption) the definition excludes standard charge: see s 4(7). In recommendation 18(a) we also add dry multures (for which see para 9.23).

<sup>43</sup> Scot Law Com DP No 93 paras 5.23 - 5.25 and propositions 34 and 35. For teinds and stipend, see further Gordon, *Scottish Land Law* paras 10.50 - 10.76.

<sup>44</sup> McDonald, *Conveyancing Manual* para 18.9.

<sup>45</sup> Land Tenure Reform (Scotland) Act 1974 ss 4(3) and 5(3).

<sup>46</sup> New ground annuals were prohibited by s 2 of the Land Tenure Reform (Scotland) Act 1974.

**(b) This rule should not, however, apply to any payments in defrayal of, or as a contribution towards, some continuing cost related to land or to payments made under a heritable security.**

**(c) Extinction of a payment should not affect the underlying right to hold, use or occupy the land.**

(Draft Bill, clause 50)

### **Mines of gold and silver**

3.56 Gold and silver mines are reserved to the Crown by the Royal Mines Act 1424. The Mines and Metals Act 1592<sup>47</sup> provides that such mines may be feued to “every erle, lord, barroun and vther frehalder” for a royalty payable to the Crown of “the Juft tent part” of the gold and silver found and provides for disposition of the mines “in few or tak or vtherwyis” to other persons willing to work them, should the landholder refuse or delay to work the mines after notice to do so.<sup>48</sup> To meet concerns expressed on behalf of the Crown Estate Commissioners we propose to make it clear that the Crown’s right to a proportion of the minerals extracted is not a feuduty or a perpetual periodical payment relating to land. It is in the nature of a royalty and is not intended to be extinguished on feudal abolition. We recommend that

- 19. The periodical payment due to the Crown in respect of the produce of a gold and silver mine, of an amount which is calculated as a proportion of that produce, should not be a feuduty for the purposes of recommendations 8 to 17 or a perpetual periodical payment for the purposes of recommendation 18.**

(Draft Bill, clause 55)

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<sup>47</sup> APS III, 556.

<sup>48</sup> See further Gordon, *Scottish Land Law* paras 6.13 - 6.14.

## Part 4 Real Burdens

### Real burdens and feudalism

4.1 Real burdens were not in common use until after 1820, although scattered examples can be found before that date.<sup>1</sup> Hence real burdens have nothing to do with pure or medieval feudalism, and in the long history of the feudal system they form one of the final episodes.

4.2 Real burdens were a means of regulating the rapid urbanisation which accompanied the Industrial Revolution. In England restrictive covenants developed at much the same time and for much the same reasons.<sup>2</sup> Through the use of real burdens a landowner was able to control the future of any land sold. Real burdens regulated what could and could not be built on the land, and the use to which that land could be put. In principle the restrictions were perpetual, and an owner who chose to disregard them ran the risk that the land might be forfeited under the procedure known as irritancy. On the whole real burdens worked well. Without them it is unlikely that the development of towns and cities in Victorian Scotland would have proceeded in so controlled and orderly a fashion. At a time when there was no planning legislation and when public control over land was still in its infancy, real burdens provided a highly effective method of private regulation. In modern times, too, the real burden has proved of considerable use in the regulation of tenements, of housing estates, and of specialised ventures such as sheltered housing.

4.3 Real burdens were - and are still today - created as a term of a deed conveying land.<sup>3</sup> These deeds were not always feudal conveyances. Many of Scotland's towns and cities were royal burghs, and within the boundaries of the burgh the system of tenure<sup>4</sup> did not permit subinfeudation. The celebrated case of *Tailors of Aberdeen v Coutts*,<sup>5</sup> in which the House of Lords acknowledged for the first time the enforceability of real burdens, concerned burdens created in a non-feudal disposition. In modern times subinfeudation has become uncommon, and most new real burdens are non-feudal. The ratio of feudal to non-feudal real burdens is not known for certain, but it would probably not be far from the truth to say that roughly one half of surviving burdens are feudal and one half are non-feudal.

4.4 The feudal system owes more to real burdens than real burdens to the feudal system. The idea of real burdens was not of itself feudal; and feudal conveyancing was no more than a mechanism for giving effect to such burdens. But for the feudal system the introduction of real burdens was of decisive importance. At a time when feudalism was being abolished throughout Europe it survived, uniquely, in Scotland as a method of controlling the

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<sup>1</sup> Reid, *Property* paras 376 - 385.

<sup>2</sup> A W B Simpson, *A History of the Land Law* (2nd edn, 1986) pp 256 ff.

<sup>3</sup> As a result of s 17 of the Land Registration (Scotland) Act 1979 they can also now be created in a deed of conditions.

<sup>4</sup> Known as burgage tenure. See paras 8.1 - 8.2.

<sup>5</sup> (1840) 1 Rob 296.

development of towns and cities. In modern times real burdens have become the sole justification for the continued existence of the feudal system, and at the same time the greatest obstacle to its abolition.

### **The nature of real burdens**

4.5 **General characteristics.** A real burden is an obligation on the owner of land owed to the owner of other land.<sup>6</sup> The land which is burdened by the obligation is sometimes called the “servient tenement”, and the land which receives the benefit of the obligation the “dominant tenement”. A real burden must relate in some way to the servient tenement, and must confer some distinctive advantage on the dominant tenement. A typical real burden would be a prohibition on building, conceived of in favour of the property next door. Today real burdens, or their close equivalents, are found in the legal systems of many other countries, including the countries of Continental Europe, North America and the Commonwealth.<sup>7</sup>

4.6 In principle real burdens are perpetual, so that a real burden created in 1820 remains enforceable today. A person coming to own the servient tenement is subject to the burden only as owner, and when the land is sold the purchaser becomes liable instead. Similarly, the right to enforce the burden runs with the dominant tenement. Sometimes there is more than one dominant tenement with a right to enforce the same burden.

4.7 **Neighbour burdens.** As already mentioned, real burdens have often no connection with the feudal system. A standard example is where A divides land and sells half to B, imposing real burdens in the disposition. The land sold to B is then the servient tenement, while the land reserved to A is the dominant tenement.<sup>8</sup> There is no feudal superior involved. Such burdens may be described as “neighbour burdens”.<sup>9</sup> They are enforceable by one neighbour against another, and they operate in a single direction only, so that the owner of the dominant tenement has rights but without corresponding obligations. A neighbour burden resembles another non-feudal restriction on property, the servitude.

4.8 **Community burdens.** There is also a second type of non-feudal burden. If the same burdens are imposed on two or more properties, the owners of those properties may often have mutual rights of enforcement. In that case the burdens are “community burdens”, regulating the community which is formed by the properties. The distinguishing characteristic of a community burden is reciprocity of right and obligation. Each owner is subject to the burden, but each can enforce the burden against the other owners. Community burdens are widely used for the self-regulation of discrete communities, such as tenements, housing estates, and sheltered housing developments. Typically, they preserve amenity, control change, and provide for the maintenance and use of common parts and facilities.<sup>10</sup>

4.9 **Feudal burdens.** Like neighbour burdens, feudal real burdens are non-reciprocal in nature. The superior has rights, but rarely<sup>11</sup> corresponding obligations. Unlike both neighbour and community burdens the dominant tenement is not a separate piece of land but rather the superiority interest reserved by the granter of the constitutive deed. If A feus land to B, the

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<sup>6</sup> See generally Gordon, *Scottish Land Law* chaps 22 and 23; Reid, *Property* paras 375 - 438.

<sup>7</sup> Scot Law Com DP No 106 para 2.28.

<sup>8</sup> The facts of *Braid Hills Hotel Co Ltd v Manuels* 1909 SC 120 are an example.

<sup>9</sup> Scot Law Com DP No 106 para 1.5.

<sup>10</sup> Scot Law Com DP No 106 para 1.6.

<sup>11</sup> But see paras 4.92 - 4.98.

effect is for A to become the superior of B; and if in that feudal grant A imposes real burdens, then the burdens are enforceable by A and A's successors as superiors against B and B's successors as vassals. A may or may not be a neighbour; but has title to enforce by virtue of being a superior. In feudal real burdens the dominant tenement is not physical but metaphysical.

4.10 In practice the same person is often superior over a wide area, so that a large number of properties are subject to identical burdens conceived for the benefit of a single person. These are not community burdens in the sense mentioned above; for while the burdens regulate a discrete community of properties, the power of enforcement lies in the hands of the superior alone. The superior is not subject to the burdens, is not a member of the community, and may not live in the neighbourhood at all. The ability of a single person so to regulate the lives of others is the feature of the feudal system which is most commonly criticised and which has most fuelled calls for its abolition. This is control from, and for, a bygone age, rendered obsolete in many cases by modern legislation on planning and the environment.<sup>12</sup>

4.11 Of course the picture is not entirely negative. Feudal burdens can benefit the community which they regulate by controlling development in a manner more careful than is possible under public law. But this is often a matter of perception. The owners in a quiet cul-de-sac who are incensed by a neighbour's proposal to turn a house into a nursery will welcome the fact that the proposal is blocked by a feudal burden. But the neighbour will chafe at the restriction; and even those who objected to the nursery will be less welcoming when they find they need a minute of waiver to add a front porch, put up a garden shed, or to park a caravan.

4.12 In practice real burdens which are conceived for the benefit of a discrete community are often mutually enforceable by members of the community as well as by the superior. In that case they are community burdens as well as feudal burdens, and will survive feudal abolition.<sup>13</sup> There is an obvious difference between self-regulation and regulation by a third party from outside the community. It is the former which will survive.

## **Reform**

4.13 The law of real burdens is in need of reform. Real burdens last too long, and are too difficult to dislodge. Some real burdens are inappropriate or out of date. Others are unduly restrictive. Problems exist also at a technical level. It is often unclear who has title to enforce a burden; there are doubts about the kinds of obligations a burden can encompass; and the liability of an incoming owner is uncertain in relation to the unfulfilled obligations of predecessors. Reform of the law of real burdens could not be undertaken as part of the present exercise, not only because of the size of such a project, but because many real burdens are non-feudal in nature. A separate exercise is required. To this end we published in October 1998 a discussion paper on real burdens containing proposals for fundamental reform.<sup>14</sup> Following consultation, which is taking place at present, we intend to submit our final

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<sup>12</sup> By contrast, community and, probably, neighbour burdens retain an important and distinctive role: see Scot Law Com DP No 106 part 2, and especially paras 2.21 - 2.27.

<sup>13</sup> In our discussion paper on real burdens we ask whether there should be a rule that burdens conceived for the benefit of a community should, in some cases at least, be mutually enforceable within that community even where such enforcement rights do not exist at present. See Scot Law Com DP No 106 paras 3.33 and 3.34. If this view found favour, such burdens would then survive feudal abolition.

<sup>14</sup> Scot Law Com DP No 106.

recommendations by the end of 1999. These will include draft legislation, in the usual way. It is our hope that any legislation in implement of these recommendations would be brought into effect at the same time as the legislation abolishing the feudal system.

4.14 It is possible to go further still and argue for the abolition of all real burdens on the basis that, with modern legislation on planning and the environment, they have ceased to be necessary. The issue is canvassed fully in our discussion paper,<sup>15</sup> but currently we are not persuaded by this view. On the contrary, we conclude that community burdens in particular are well suited to modern forms of urban development, both residential and commercial, and that socially important enterprises such as sheltered housing<sup>16</sup> would scarcely be possible in the absence of real burdens.

4.15 In one sense, however, the present report is a contribution to the reform of real burdens. On the day when the feudal system is abolished a large number of real burdens will be extinguished for ever. To that subject we now turn.

### **Extinction of feudal burdens**

4.16 The abolition of the feudal system means the abolition of superiorities, and hence of the dominant tenements in feudal real burdens. Therefore, unless some special provision is made, former superiors will lose any rights which they now have to enforce real burdens, and feudal real burdens will disappear as a category. Many of those who responded to our discussion paper were sanguine at this prospect. They argued that superiors often had no proper connection with the land, and no proper interest in the compliance with burdens. Most superiors were inactive, except in the granting of minutes of waiver. In practice burdens were rarely enforced; and in deciding whether or not to grant a waiver, superiors were more likely to be influenced by the price offered than by the merits of the proposal being made by the vassal. Whatever the position may have been at one time, superiors today were rarely interested in controlling the development of land. In their hands real burdens were often no more than a private tax on development.<sup>17</sup> Indeed for many consultees this was the single most objectionable feature of the feudal system. For example, the Faculty of Solicitors of the Highlands commented that:

“We are aware of numerous examples of superiors extorting considerable grassums from vassals for the waiving of feuing conditions. In those cases the observance or non-observance by the vassal of the title condition is of no consequence whatsoever to the superior. The superior simply uses his status in a purely commercial way to raise cash. Clients are informed that this could usually be avoided by recourse to the Lands Tribunal for Scotland. The time that this would take however and the expense involved, dissuades most clients who just pay up for the sake of expediency, to get the transaction in question settled.”

4.17 Sometimes such cases do in the end reach the Lands Tribunal, which since 1970 has had power to vary or discharge real burdens.<sup>18</sup> *Harris v Douglass*<sup>19</sup> concerned a modern feu disposition, of 1985, of flatted property in Buckie which provided that:

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<sup>15</sup> Part 2.

<sup>16</sup> For sheltered housing see paras 4.98 and 4.99.

<sup>17</sup> This problem is not, of course, unique to Scotland. See eg Stewart E Sterk, “Freedom from freedom of contract: the enduring value of servitude restrictions” [1985] 70 Iowa Law Rev 615 at 628-9.

<sup>18</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 ss 1 and 2.

“the Feuars are prohibited from erecting on any part of the subjects any new building or any external extension of any existing buildings or any walls, fences, posts, gates or other structures whatsoever and from making any alterations to the exterior of any existing buildings including without prejudice to the foregoing generality the roof, gutters, chimneys, walls, windows and doors thereof unless the plans, elevations and specifications of such new buildings, extensions, walls, fences, posts, gates or other structures or such alterations shall have been previously approved in writing by the Superiors.”

The owner of one of the flats added a porch, re-sited a calor gas tank, and replaced a garden wall. The owner of another flat built a conservatory on top of a former garage. In neither case was the superiors' consent sought. Subsequently the owners sought to negotiate with the superiors, who by this time lived in England, for a minute of waiver. They were willing to pay £50 each, but the superiors refused to accept less than £500. When the superiors raised an action of irritancy, the owners sought discharge by the Lands Tribunal. In granting the discharge the Lands Tribunal, exceptionally, awarded expenses against the superiors on the basis that they had acted unreasonably and vexatiously.<sup>20</sup>

“The tribunal consider that the superiors' course of action was both vexatious and unreasonable being wholly designed to extract money payments. This is confirmed by the complete lack of prior specification of what precise alterations the superiors were complaining about ... [One of the superiors] maintained that he acted on professional advice and was merely trying to obtain the 'local going rate' for minutes of waiver.”

4.18 This is far from being the whole story. There are many conscientious superiors who act in what they conceive to be the interests of the community as a whole. Further, the introduction of the Lands Tribunal jurisdiction in 1970, as well as providing an alternative route to discharge, has had a moderating effect on the cost of minutes of waiver. The Lands Tribunal does not usually award compensation to the superior.<sup>21</sup> Research suggests that minutes of waiver are almost always discharged for less than £1000, and sometimes for much less.<sup>22</sup> Nonetheless the overall position seems impossible to justify. Even where there is no actual abuse of rights, there is no good reason why superiors should have control over land which they do not own, except in the most technical sense,<sup>23</sup> and in which they may have little real interest. There would be little point in abolishing the feudal system if Parliament did not at the same time abolish the power of superiors. Our general conclusion is that feudal real burdens should be extinguished.

4.19 Some exceptions seem necessary. In limited circumstances a superior should be given the opportunity to convert a feudal burden into a neighbour burden<sup>24</sup> or a conservation

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<sup>19</sup> 1993 SLT (Lands Tr) 56.

<sup>20</sup> 1993 SLT (Lands Tr) 56 at 59J.

<sup>21</sup> In terms of s 1(4) of the Conveyancing and Feudal Reform (Scotland) Act 1970 compensation may be paid only (i) where the dominant proprietor has suffered substantial loss or disadvantage or (ii) where the land had been acquired more cheaply because of the existence of the burden.

<sup>22</sup> 80%, in a sample of 237 minutes of waiver. See D J Cusine & J Egan, *Feuing Conditions in Scotland* (The Scottish Office Central Research Unit, 1995), Table 4.8.

<sup>23</sup> Technically, of course, a superior does have a form of ownership - *dominium directum* - in the land. But in the moribund feudalism of the late twentieth century it is only the vassal who holds the reality of ownership.

<sup>24</sup> Paras 4.26 - 4.47.

burden;<sup>25</sup> and feudal burdens which operate for the common benefit by regulating the maintenance and use of a common facility ought to continue to be enforceable, although not by the former superior.<sup>26</sup> These exceptions are discussed below. But otherwise feudal real burdens should be extinguished. In some cases compensation may be available to the superior.<sup>27</sup> Mention was made earlier<sup>28</sup> of burdens which have the dual character of feudal burdens and community burdens - or in other words of burdens affecting a number of properties, typically in a housing estate or block of flats, which are enforceable both by the superior and also, reciprocally, by the owners themselves.<sup>29</sup> After the appointed day (ie the day of feudal abolition)<sup>30</sup> the superior's right will be extinguished, but the burdens themselves will continue, as community burdens. This means that the community will not be left unregulated. Indeed in practice little may have changed. Except in sheltered housing,<sup>31</sup> the superior was usually inactive in matters of enforcement and such enforcement as there was was already dependent on the vigilance of neighbours.

4.20 We recommend that

**20. (a) A former superior should have no right to enforce real burdens; and accordingly all burdens which were enforceable only by a superior should be extinguished.**

**(b) This rule should be subject to the exceptions contained in recommendations 22, 24, 25 and 31.**

(Draft Bill, clause 16)

### **Removal of burdens from the Land Register**

4.21 There are currently 500,000 title sheets on the Land Register, and the numbers are rising as more counties are brought on to the Register. It would be unrealistic to expect the Keeper to go through these one by one, striking out those burdens which have been extinguished by feudal abolition. Nor, even assuming that resources could be made available, would this be a sensible use of public money. Striking out is far from being a mechanical task. In the first place it is necessary to identify which burdens were originally created in, or in association with, a grant in feu. Next a decision must be reached on whether there are third party enforcement rights - whether, in other words, the burdens are also community burdens. Third party rights often arise by implication and can be difficult to trace.<sup>32</sup> Finally, it is necessary to determine whether one of the exceptions described below applies. Only once all those matters have been considered is it possible to make a decision on whether burdens may safely be deleted. Quite often the Keeper will not have ready access to all the information required.

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<sup>25</sup> Paras 4.52 - 4.61.

<sup>26</sup> Paras 4.78 - 4.85.

<sup>27</sup> Paras 5.14 - 5.57.

<sup>28</sup> Para 4.11.

<sup>29</sup> The right of the owners to enforce is often attributed to the doctrine of *jus quaesitum tertio*.

<sup>30</sup> Para 1.23.

<sup>31</sup> For sheltered housing see paras 4.98 and 4.99.

<sup>32</sup> Scot Law Com DP No 106 paras 3.5 ff.

4.22 A more gradualist approach seems unavoidable. The Keeper should retain a discretionary power to delete burdens,<sup>33</sup> but should be bound to do so only on request. Under the Land Registration (Scotland) Act 1979 a request is likely to come in one of two ways. First, an owner can ask the Keeper to rectify the Register or rectification can be ordered by a court. This arises because the continuing presence on the Register of an extinguished real burden is an “inaccuracy” within section 9(1) of the 1979 Act.<sup>34</sup> Secondly, if more speculatively,<sup>35</sup> an owner can seek to extinguish the burden by registration on the basis that feudal abolition constitutes an “event” within section 2(4)(c) of the Act. In practice freestanding requests are likely to be rare. The natural time to request deletions will be when property changes hands, and a fresh application for registration is being made. Consideration should be given to altering the application forms to make space for such a request.<sup>36</sup> It will be for the applicant to demonstrate why a particular burden or set of burdens should be deleted. In this way, and over a period of time, the Land Register will gradually be cleansed of burdens extinguished by feudal abolition.

4.23 Difficult decisions will require to be made. The Keeper may question the accuracy of information provided, or may be in doubt as to whether the exception for common facilities applies,<sup>37</sup> or whether third party rights exist. As a result a wrong decision may sometimes be made. Earlier we recommended that special protections be put in place.<sup>38</sup> If a burden is deleted in error, the Keeper would be empowered to reinstate it, by rectification, even where this was prejudicial to a proprietor in possession; and there would be no liability for indemnity. At one level such special provision is undesirable. A purchaser or other third party should be able to rely on the Register, and should not be vulnerable to the reappearance of burdens which were previously deleted. But this is a transitional rule only. In its absence the Keeper would be bound to be cautious and leave on the Register many burdens which feudal abolition had extinguished but in relation to which there was insufficient evidence. It seems better to delete too many burdens than too few.

4.24 A transitional provision of a different kind is also necessary. In our discussion paper on real burdens we proposed a period of five years during which those holding implied enforcement rights could register those rights. At the end of this period, subject to exceptions, all implied rights would be extinguished. In this way it would be possible to assemble an accurate picture of enforcement rights.<sup>39</sup> This proposal has implications for the current exercise. The Keeper cannot delete burdens unless satisfied that no implied enforcement rights exist (ie enforcement rights held by people other than the former superior); and cannot be so satisfied until the expiry of the five year period. It is our intention that the legislation on real burdens should come into force on the day on which the feudal system is abolished. The period for registration of implied rights would expire five years later. The case for transitional relief seems self-evident. Until the expiry of the five year period it should not be possible for an owner to request the deletion of real burdens, whether by rectification or registration.

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<sup>33</sup> Section 9(1) of the Land Registration (Scotland) Act 1979 empowers the Keeper to rectify any inaccuracy in the Register “whether on being so requested or not”.

<sup>34</sup> *Brookfield Developments Ltd v Keeper of the Registers of Scotland* 1989 SLT (Lands Tr) 105.

<sup>35</sup> *Short’s Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14.

<sup>36</sup> The applications forms are forms 1-3 of sched 1 to the Land Registration (Scotland) Rules 1980 (SI 1980/1413). The Rules may be altered under powers contained in s 27 of the Land Registration (Scotland) Act 1979.

<sup>37</sup> This exception is described at paras 4.78 - 4.85.

<sup>38</sup> Para 2.50.

<sup>39</sup> Scot Law Com DP No 106 paras 3.31 ff.

During the same period the Keeper should be entitled to enter burdens on the Register, in cases of first registration, notwithstanding the fact that they may have been extinguished by feudal abolition. This will require amendment to the statutory obligation to enter on the Register only burdens which are “subsisting”.<sup>40</sup> At the end of the five-year period deletions may be requested at any time, and the cleansing of the Register can begin.

4.25 We recommend that

**21. (a) The Keeper should not be required to remove from the Land Register a real burden extinguished on the appointed day unless requested to do so in an application for registration or rectification or ordered to do so by the court.**

**(b) For a period of 5 years after the appointed day -**

**(i) it should not be possible for an application or order to be made under paragraph (a);**

**(ii) for the purposes of s 6(1)(e) of the Land Registration (Scotland) Act 1979 a real burden extinguished on the appointed day should continue to be treated as “subsisting”.**

(Draft Bill, clause 40)

### **Converting feudal burdens to neighbour burdens**

4.26 **The need for special provision.** Special provision seems justified for the superior who owns neighbouring land.<sup>41</sup> By contrast with the absentee superior, such a person may have a genuine interest in the enforcement of the burdens<sup>42</sup> and is likely to adopt a more sensitive policy on waiver.<sup>43</sup> In practice there is little difference between enforcement by a neighbour under a non-feudal burden, and enforcement by a neighbour who happens also to be the superior. But while the non-feudal burden will survive feudal abolition, the feudal burden will not, unless special provision is made. As one consultee<sup>44</sup> pointed out, this result may often be inequitable:

“An example of the inequity would be a person who had sold part of the garden ground of a house for the erection of a separate house, subject to conditions, but had created these conditions in a feu writ rather than in a disposition. It seems unreasonable that any successor to the superior/proprietor of the original house should be unable to enforce these conditions.”

In the type of case mentioned here, sellers often do proceed by a feu writ. But with feudal abolition, the choice of conveyancing deed will be shown, with hindsight, to have been unwise.

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<sup>40</sup> Land Registration (Scotland) Act 1979 s 6(1)(e).

<sup>41</sup> In the case of feudal land, this is intended to mean *dominium utile*.

<sup>42</sup> In feudal burdens interest to enforce is often shown by reference, not to the superiority, but to ownership of neighbouring land. See Reid, *Property* para 408.

<sup>43</sup> It is not in the interests of a resident superior that the value of neighbouring land should decline because too restrictive burdens prevent its sensible use. See S French, “Toward a modern law of servitudes: reweaving the ancient strands” (1982) 55 S Cal Law Rev 1261 at 1287.

<sup>44</sup> A working party comprising four members of the WS Society.

If the seller had used an ordinary disposition, the dominant tenement in the burden would have been the seller's original house,<sup>45</sup> and the right to enforce would be unaffected. Neighbour burdens will survive feudal abolition. But by using a feu disposition the dominant tenement became the superiority - and, it seems, the superiority alone.<sup>46</sup> Hence with the disappearance of the superiority there would also disappear the right to enforce. We do not think that this difference in result can be justified.

4.27 In our discussion paper we suggested that a person who was superior at the time of abolition and who owned neighbouring property should be allowed to continue to enforce real burdens as owner of such property.<sup>47</sup> But a successor as owner would have no right to enforce. On consultation this suggestion was received without enthusiasm, with fewer than half of those responding expressing themselves as being in favour.

4.28 On further consideration, we have come to the view that the proposal goes too far in one respect and yet does not go far enough in another. The proposal goes too far because it operates indiscriminately without regard to the type of burdens in question and to the importance which the former superior might, or might not, attach to their enforcement. Many former superiors would qualify, and the effect of the proposal would be to save a large number of burdens. But in many, perhaps even in most, cases the former superior would be indifferent to their survival.

4.29 There is also a practical difficulty. The Keeper of the Land Register could not be expected to investigate which former superiors own neighbouring land and which do not. In practice there would be no choice but to leave on the Land Register all feudal real burdens. On the face of the Register, land would remain as heavily burdened after abolition as it was before. An owner could find out the true position only by strenuous investigation.<sup>48</sup> Thus an owner who, after abolition, was contemplating a breach of a formerly feudal real burden would require to (i) identify the person who was superior at the time of abolition (ii) determine what neighbouring land (if any) that person owned at that time, and (iii) determine the identity of the current owner (or if the land has since been subdivided, owners) of that land. This would not be easy, and after 20 or 30 years might be almost impossible. By contrast with the Register of Sasines, the Land Register does not provide a historical record of ownership. The Land Register discloses who is owner today, but not who was owner yesterday. Much work and expense would be involved in trying to find the relevant information.

4.30 In one respect, however, the proposal did not go far enough. In so far as the rights of former superiors are worth preserving, they are worth preserving properly. Surviving feudal real burdens should be assimilated to neighbour burdens. The neighbouring land should replace the superiority as the dominant tenement in the burden, and thereafter the burden should be enforceable by all future owners of that neighbouring land who can show an interest to do so.

4.31 Accordingly, we propose that a superior who owns land in the neighbourhood should have no automatic right to continue to enforce real burdens. But it should be possible to convert a feudal burden into a neighbour burden if two conditions are met.

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<sup>45</sup> *J A Mactaggart & Co v Harrower* (1906) 8 F 1101.

<sup>46</sup> Para 4.87.

<sup>47</sup> Scot Law Com DP No 93 para 4.52 and proposition 29(ii).

<sup>48</sup> See paras 4.21 - 4.25 for further discussion of issues involving the Land Register.

4.32 **The first condition: registration of a notice.** In the first place, the superior would require to register a notice in the Land Register or Register of Sasines.<sup>49</sup> The notice would (i) set out the entitlement to the superiority (ii) nominate as the new dominant tenement land which is owned by the superior, and (iii) identify the burdens (including any counter-obligations),<sup>50</sup> and the servient tenement or tenements which the burdens affect. In practice a superior might choose to confine the nomination to those burdens which are of continuing interest and relevance. In conformity with our proposals on real burdens generally,<sup>51</sup> the notice would be registered against the title sheet (or search sheet) of the dominant as well as of the servient tenements.<sup>52</sup> A future purchaser of either tenement would then be left in no doubt as to the position. Registration would be possible only during a period beginning with the coming into force of the legislation and ending with the appointed day (ie the day on which the feudal system is abolished). We suggested earlier that this period might be two years.<sup>53</sup> The notice would take effect on the appointed day, and until then the burden would continue as an ordinary feudal burden.

4.33 **The second condition: building within 100 metres.** A superior who was neighbour to a large number of vassals might seek to register a notice in respect of each feu. The result would then be feudalism by other means: after abolition a former superior would be able to control the land use of whole communities. If this result seems unacceptable, as it does, there is more than one way in which it can be avoided. Our first thought was to rely on interest to enforce. Registration will involve both work and expense. A superior, we concluded, would not go to such trouble unless confident of having an interest to enforce; and, except in the case of feus in the immediate vicinity, such confidence was likely to be misplaced. But on further reflection we decided that there were dangers in this approach. A superior might choose to disregard interest and to register a large number of notices. On the face of the Register the real burdens would be preserved, and in practice they would probably continue to be complied with. A former vassal who wished to be relieved of such a burden would be more likely to negotiate a price with the former superior than to take the risk of litigating on interest to enforce. The income stream from minutes of waiver might remain much as before.

4.34 A more direct approach is to impose a distance restriction. Later, special provision is made for burdens concerned with the maintenance and use of common facilities,<sup>54</sup> for rights of pre-emption and redemption,<sup>55</sup> for burdens concerned with conservation,<sup>56</sup> and for burdens which involve making use of the servient tenement.<sup>57</sup> Most other burdens worth preserving are concerned with amenity, and in matters of amenity distance is a crucial factor. By stipulating a distance beyond which a burden cannot be preserved, it would be possible to include those cases where protection is most essential whilst excluding those cases where the real interest of the superior is likely to be income from minutes of waiver. There are, of course, obvious difficulties. The appropriate distance will depend both on the type of activity which the burden prohibits, and on the location and topography of the properties. Some

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<sup>49</sup> This builds on a suggestion originally made by a working party comprising four members of the WS Society.

<sup>50</sup> For counter-obligations on the superior, see paras 4.92 - 4.99.

<sup>51</sup> Scot Law Com DP No 106 paras 3.43 and 7.4.

<sup>52</sup> This is consistent with our policy for new real burdens: see Scot Law Com DP No 106 para 7.4.

<sup>53</sup> Para 1.23.

<sup>54</sup> Paras 4.78 - 4.85.

<sup>55</sup> Para 4.37.

<sup>56</sup> Paras 4.52 - 4.61.

<sup>57</sup> Para 4.38.

activities would affect only immediate neighbours. Others might have a wider impact. In built-up areas, distant neighbours are less affected than in open countryside where there are no intervening buildings to provide a shield. It should not be forgotten that a rural superior with a large estate is likely to own land adjacent to most, if not all, of the feus. For such a person a restriction based merely on distance would make little difference. This last example suggests an important refinement. Open fields have little need for protection. If a special exemption from feudal abolition is to be justified, a stronger case seems required. In our view the only strong case is the presence of a building which is used for human habitation or resort. A dwellinghouse is the obvious, but not the only, example, for amenity considerations arise wherever buildings are routinely used by people, whether for work, recreation or habitation. By contrast, buildings used for animals, or for storage, have no measurable amenity needs and should not be included. We suggest no restriction as to size, but the structure would require to be a proper building, of a permanent nature. It would also require to be owned outright by the superior and not merely as common property.<sup>58</sup>

4.35 There remains the question of the distance. Any fixed distance is to some degree arbitrary, and will exclude some deserving cases. Nonetheless we consider that essential amenity interests are likely to be met by a rule that the building is within 100 metres of the servient tenement. 100 metres is sufficient to encompass a dwellinghouse with a substantial garden or, in areas of greater building density, a number of different properties. In this way the subdivided property - the main justification for the exception in the first place<sup>59</sup> - is properly catered for. The 100 metres would be measured on a horizontal plane, on the hypothesis that both properties were on the same level. So in the case of a block of flats, any flat directly above any other flat would fall within the 100-metres rule regardless of the distance which lay between them on a vertical plane; and in measuring the distance between flats on opposite sides of the building differences in level would be disregarded.

4.36 It is intended that the 100-metres rule would operate only during the transition from feudalism to post-feudalism. Once the time for notices expires, on the appointed day, the rule would have no further part to play, although the normal requirements of interest to enforce would remain.<sup>60</sup>

4.37 **Rights of pre-emption and redemption.** A right of pre-emption is a right of first refusal in the event that the vassal is willing to sell. A right of redemption is a right of repurchase, whether at the option of the superior, or at some fixed point in time, or on the occurrence of some future event. Both are capable of being constituted as real burdens; but since neither protects amenity, a requirement of a building within 100 metres would be out of place. In practice, two factors will make a superior hesitate before registering a notice in respect of a right of pre-emption or redemption. First, both rights are subject to statutory restrictions.<sup>61</sup> More particularly, the modern rule for pre-emptions is that the superior is given only a single chance. A superior who is offered the property must either buy or lose the right. Many rights of pre-emption still on the property registers have already been extinguished under this rule. Those which remain are unlikely to have a long life. Secondly, in our discussion paper on real burdens we propose further restrictions on pre-emptions and

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<sup>58</sup> However, there is no objection to land being owned *pro indiviso* if the superiority is also owned *pro indiviso* by the same people.

<sup>59</sup> Para 4.26.

<sup>60</sup> Para 4.86.

<sup>61</sup> Conveyancing (Scotland) Act 1938 s 9 (pre-emptions); Land Tenure Reform (Scotland) Act 1974 s 12 (redemptions).

redemptions.<sup>62</sup> If implemented, these would affect all pre-emptions and redemptions, including those preserved by a former superior.

**4.38 Burdens conferring a right of use.** Occasionally real burdens mirror positive servitudes and confer a right to make use of the servient tenement.<sup>63</sup> Burdens reserving sporting rights are one example.<sup>64</sup> There seems no reason to apply the 100 metres limit to burdens which are so different in character from amenity burdens. We propose no restriction based on distance in such cases. In practice the need to prove an interest to enforce would encourage superiors to nominate land in the neighbourhood as the dominant tenement.

**4.39 Burdens for the benefit of minerals or salmon fishing.** Even more rarely burdens may be conceived for the benefit of a mineral estate, or of one of the incorporeal separate tenements, particularly salmon fishings. Typically these would place restrictions on the use, respectively, of the surface of the land above the minerals or of the river in which the fishings were exercised. The requirement that the dominant tenement include a building has no place here and should not be an objection to the preservation of burdens of this kind. Again we propose no restriction based on distance. A neighbourhood requirement will be almost automatically satisfied in the case of these burdens.

**4.40 A discretion beyond 100 metres?** A 100-metres rule has the merits of simplicity and of certainty. It leaves no doubts as to potential rights and liabilities. And the rule will work well most of the time. But inevitably there will be hard cases where it does not work well. Sometimes a former superior will find that valued amenity interests can no longer be protected. We have considered carefully what might be done about this.

**4.41** The only solution seems to lie in some measure of judicial discretion. A possible scheme which we considered was the following. The 100-metre rule would remain but a superior who owned property beyond its limit would be able to apply to the Lands Tribunal for an order nominating that property as a dominant tenement. This would be an exceptional procedure. In order to succeed, the superior would require to satisfy the Tribunal that the extinction of the burden would result in either (i) a substantial loss of amenity or (ii) a substantial reduction in the value of the dominant tenement. A possible variant, narrower in scope, would require the superior to show substantial loss of amenity to a dwellinghouse on the land to be nominated as the dominant tenement. The criteria are such that the Tribunal would not be easily satisfied. And no doubt it would take into account such protection as is already afforded by planning law, the possibility that the burden might survive as enforceable by others (for example as a community burden), and the likelihood of future discharge in the event of an application by the servient proprietor.

**4.42** With some hesitation, we have decided against recommending such a scheme. There are several objections. First, there is the expense and worry for the vassals affected. If a superior made an application to the Lands Tribunal, the vassal would want to take legal advice. Probably the advice would be that the vassal should be represented at the Tribunal hearing. The services of an expert witness might also be required on questions of value. There might be psychological as well as financial costs for a vassal drawn unwillingly into litigation in this way.

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<sup>62</sup> Scot Law Com DP No 106 part 8.

<sup>63</sup> The validity of burdens in this form is reviewed in Scot Law Com DP No 106 paras 7.66 and 7.67.

<sup>64</sup> Paras 6.22 - 6.35.

4.43 Secondly, there are the resource implications for the Lands Tribunal. Each application would require a hearing, even if it was unopposed. There might be valuation issues as well as legal issues to consider. Among the legal issues would be the validity of the burden itself. Even quite a small number of applications would be a considerable drain on resources; and on any view there would be little prospect of disposing of all of the applications before the appointed day.

4.44 Finally, there is the fact that a successful application would give the burden an enhanced status, which in practice might make it difficult to challenge in the future. A former vassal, having lost once in the Lands Tribunal, would be reluctant to risk losing a second time in an application for variation and discharge under the 1970 Act.<sup>65</sup> The price of a minute of waiver would go up accordingly. The former vassal would have been better off if the feudal system had never been abolished.

4.45 In the end the choice is between certainty and flexibility, between a mechanical rule and a discretionary one, between a solution which is simple but unrefined and a solution which is more responsive to individual circumstances but which might involve the parties in considerable expense. In matters of property rights certainty is usually to be preferred. In our view it is to be preferred in the present case.

4.46 **Effect of conversion.** On the appointed day any burden in respect of which a notice had been properly prepared and registered would be converted into a neighbour burden. It need hardly be said that the burden must have been valid and enforceable by the superior immediately before the appointed day. If the burden is already extinguished, no notice could revive it. Interest to enforce would continue to be required, and would not be presumed.<sup>66</sup> Converted burdens - with one exception, discussed later<sup>67</sup> - would be indistinguishable from other neighbour burdens, and in time both will be subject to any legislation implementing the reforms proposed in our recent discussion paper.<sup>68</sup> These include limits on duration, and a number of changes designed to make discharge easier and cheaper.

4.47 We now summarise our proposals in the form of a recommendation.

**22. (a) Where -**

**(i) a feudal estate of *dominium utile* of land (“the servient tenement”) is subject to a real burden enforceable by a superior of that estate; and**

**(ii) at least one of the conditions set out in paragraph (b) is satisfied**

**the superior should be entitled, prior to the appointed day, to execute and register a notice nominating other land of which the superior has sole**

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<sup>65</sup> Ie under ss 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

<sup>66</sup> Para 4.86.

<sup>67</sup> Paras 4.48 - 4.50.

<sup>68</sup> Scot Law Com DP No 106.

*dominium utile* (or, as the case may be, allodial ownership) as the new dominant tenement in the real burden.

(b) The conditions are -

(i) that the proposed dominant tenement has on it a permanent building which is in use wholly or mainly as a place of human habitation or resort, and that building is within 100 metres of the servient tenement;

(ii) that the real burden comprises a right to enter, or otherwise make use of, the servient tenement, or is a right of pre-emption or redemption;

(iii) that the proposed dominant tenement comprises minerals or salmon fishings or other incorporeal property, and that it is apparent from the terms of the real burden that it was created for the benefit of that tenement.

(c) The notice would have to -

(i) set out the entitlement to the superiority

(ii) sufficiently describe the proposed dominant tenement and the servient tenement

(iii) identify the burden, and

(iv) identify any obligations on the superior which (as mentioned in recommendation 36) are a direct counterpart of the burden.

(d) The notice should be registered in the Register of Sasines or Land Register against both tenements.

(e) On the appointed day land nominated in the notice in accordance with this recommendation would become a dominant tenement in the burden.

(f) In this recommendation “superior” and “superiority” include “over-superior” and “over-superiority”.

(Draft Bill, clause 17)

### **Converted neighbour burdens: division of dominant tenement**

4.48 Under the general law, where the dominant tenement in a real burden is divided, both parts of the former whole become dominant tenements in their own right. If further subdivision then takes place, each subdivided part becomes a dominant tenement in turn. This

occurs automatically, and does not require a clause in the conveyance of the subdivided part.<sup>69</sup> Such multiplication of dominant tenements would not be acceptable in the case of converted neighbour burdens. Prior to conversion the dominant tenement was the superiority, and superiorities are indivisible.<sup>70</sup> This prevented the vassal from being faced with multiple superiors all of whom would require to be approached for a minute of waiver. Feudal abolition should not make the position of the former vassal worse.<sup>71</sup>

4.49 We suggest therefore that in cases where a dominant tenement is divided,<sup>72</sup> the right to enforce the burdens should be capable of attaching to one only of the divided parts. The other part would then cease to be a dominant tenement. It should be for the person carrying out the division to make the election. If the break-off conveyance is silent,<sup>73</sup> no election is made and the right to enforce would be extinguished and could not be revived. In deciding where the right should lie, parties would no doubt have regard to respective proximity to the servient tenement. While the 100-metres rule would no longer apply, electing for a part which was more distant might make it difficult to establish an interest to enforce.

4.50 We recommend that

**23. (a) If land which became a dominant tenement under recommendation 22 is divided, the right to enforce the burdens should be capable of attaching to one only of the divided parts, and the other part should cease to be a dominant tenement.**

**(b) The same rule should apply in respect of any further divisions.**

**(c) The right should attach to the part which is nominated for that purpose in the conveyance by which the division is effected; and if no part is nominated, the burden should be extinguished.**

(Draft Bill, clause 20(2), (3))

## Maritime burdens

4.51 While the sea bed is for the most part owned by the Crown, some parts have passed into private ownership and are held from the Crown as superior. By contrast, the foreshore is quite frequently in private ownership. In both cases there may be real burdens, conceived in the public interest and enforceable by the Crown as superior. Unless special provision is made, these burdens would usually be lost.<sup>74</sup> We suggest therefore that, on the appointed day, burdens on the sea bed or foreshore enforceable by the Crown as superior should continue to be enforceable by the Crown. These would then be real burdens in favour of a person rather than in favour of a property.<sup>75</sup> For convenience they may be termed “maritime burdens”.

<sup>69</sup> Reid, *Property* para 409.

<sup>70</sup> *Maxwell v McMillan* (1741) Mor 8817 and 15015; *Duke of Montrose v Colquhoun* (1781) Mor 8822 affd (1782) 6 Pat 805; *Cargill v Muir* (1837) 15 S 408.

<sup>71</sup> For a discussion of this problem in a different context, see Scot Law Com DP No 106 paras 8.42 - 8.47.

<sup>72</sup> This would apply also whether the division occurred after the registration of a notice but before the appointed day. See clause 20(2) of the draft Bill.

<sup>73</sup> In conveyancing terms the easiest way to make an election will often be to refer to the original notice, which describes the original dominant tenement, and then to nominate and describe the modified dominant tenement.

<sup>74</sup> It would only be rarely that the Crown could satisfy the conditions in recommendation 22.

<sup>75</sup> See further Scot Law Com DP No 106 paras 2.53 - 2.55.

Maritime burdens would not be capable of assignation. The Lands Tribunal should have jurisdiction in their variation and discharge. We recommend that

24. (a) **Any real burden affecting the sea bed or foreshore and enforceable by the Crown as superior should, after the appointed day, continue to be enforceable by the Crown.**
- (b) **Such burdens should be known as “maritime burdens”.**
- (c) **Maritime burdens should not be capable of assignation.**
- (d) **Maritime burdens should be capable of variation and discharge by the Lands Tribunal under sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970.**

(Draft Bill, clause 54 and sched 8 para 32(2), (3))

### **Converting feudal burdens to conservation burdens**

4.52 **The need for special provision.** In a small number of cases superiors may be viewed as exercising their rights, to some degree at least, in the public interest. Superiors falling into this category might include local authorities, the National Trust for Scotland, and conservation trusts. For example, in selling a building which it has recently restored, a conservation trust might wish to impose real burdens in order to prevent inappropriate alteration and to ensure future standards of maintenance. Since the trust will rarely own neighbouring land, it is likely to sell by feu disposition, and its right to enforce the burdens will then be tied to the reserved superiority. Arrangements of this kind will not survive feudal abolition, unless a special saving is put in place.<sup>76</sup>

4.53 When we considered this issue in our discussion paper we reached the provisional conclusion that a special saving could not be justified.<sup>77</sup> On consultation that view was strongly challenged by the bodies most directly affected. Such bodies, it was argued, did valuable work in the conservation of buildings and the environment. Real burdens were an important means of furthering that work. If a restored building could not be preserved for the future by real burdens, there might be little point in carrying out the restoration process at all. Grant-making organisations might draw the same conclusion and decline to make funding available. Yet in the modern world conservation was more important than ever before. On balance we are persuaded by these arguments. Other countries have also shown interest in conservation burdens. A leading model is the Uniform Conservation Easement Act of 1981, which has been adopted by a number of jurisdictions in the United States.<sup>78</sup> In our discussion paper on real burdens we set out provisional provisions which would allow the creation of new conservation burdens in the future.<sup>79</sup> In this paper we are concerned with the saving of existing conservation burdens which were created through the feudal system.

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<sup>76</sup> However, in some cases there may be neighbouring land available which can be nominated as a dominant tenement in the manner suggested in paras 4.26 - 4.47.

<sup>77</sup> Scot Law Com DP No 93 paras 3.30 - 3.32, and 4.34.

<sup>78</sup> For a discussion of this Act, see Jeffrey A Blackie, “Conservation Easements and the Doctrine of Changed Conditions” (1989) 40 Hastings Law Jo 1187.

<sup>79</sup> Scot Law Com DP No 106 paras 2.56 - 2.60.

4.54 The representations to us were mainly about buildings. But conservation is an issue for open land as well. Such land may be of local, or occasionally even of national, importance because of its distinctive flora or fauna. Or it may be important merely because it is open and unbuilt-on. Burdens protecting such features should also be viewed as conservation burdens.

4.55 **Conservation bodies and conservation burdens.** Our proposal is this. The Secretary of State<sup>80</sup> would be empowered to designate bodies as conservation bodies and would have a discretion whether to use this power and, if so, how extensively. A body could be so designated if and only if one of its objects was to protect or preserve for the benefit of the public the architectural, historical or other special interest of land or buildings. In the case of a trust (which is not a juristic person) the conservation body would be the trustees.<sup>81</sup> Any conservation body which was also a superior would then be able to save a real burden by executing and registering a notice in the Register of Sasines or Land Register. The burden must itself be valid and enforceable by the superior, and must continue to be valid and enforceable up to the appointed day. The notice would (i) state that the superior is a conservation body (ii) set out its title to the superiority, and (iii) identify the burdens (including any counter-obligations)<sup>82</sup> and the servient tenement to which they relate. Not all real burdens could be included. Here the criteria mirror those for conservation bodies. In order to qualify a burden must have as its purpose the preservation or protection in the public interest of the architectural, historical or other special interest of land or buildings. Registration of the notice must take place before the appointed day. This assumes that the Secretary of State will issue an initial list of conservation bodies soon after the legislation first comes into force. Subsequent additions and deletions could be made, and we would expect the list to be monitored and adjusted over time.<sup>83</sup> Following registration the feudal burden would, on the appointed day, be converted into a conservation burden, enforceable by the conservation body.

4.56 We recommend that

**25. (a) Where**

**(i) a feudal estate of *dominium utile* of land (“the servient tenement”) is subject to a real burden enforceable, as superior, by a conservation body, and**

**(ii) the real burden has the purpose of preserving or protecting, for the public benefit, the architectural, historical or other special interest of the servient tenement or any buildings thereon**

**the conservation body should be entitled, prior to the appointed day, to execute and register in the Register of Sasines or Land Register a notice converting such burden into a conservation burden.**

**(b) The notice would have to -**

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<sup>80</sup> Or, it may be, a minister in the Scottish executive. See para 1.33.

<sup>81</sup> See clause 21(3) of the draft Bill.

<sup>82</sup> For counter-obligations on the superior, see paras 4.92 - 4.99.

<sup>83</sup> This is provided for in clause 21(4) of the draft Bill.

- (i) state that the superior is a conservation body
  - (ii) set out the entitlement to the superiority
  - (iii) sufficiently describe the servient tenement, and
  - (iv) identify the burden, and
  - (v) identify any obligations on the superior which (as mentioned in recommendation 36) are a direct counterpart of the burden.
- (c) The notice would take effect on the appointed day.
- (d) A conservation burden would be enforceable by the conservation body in whose favour the notice was registered.
- (e) In this recommendation “conservation body” means a body nominated as such by the Secretary of State by regulations; and the Secretary of State may nominate only bodies which include among their objects the preservation or protection, for the benefit of the public, of the architectural, historical or other special interest of land or buildings.

(Draft Bill, clauses 21 - 23)

4.57 **Assignment.** A conservation burden is a burden in favour of a person and not property.<sup>84</sup> There seems no reason why a conservation burden should not be assigned by its holder, provided that the assignee is another conservation body.<sup>85</sup> A conservation burden is incorporeal heritable property. It seems unnecessary, and probably unhelpful, to prescribe a statutory style of assignment. The assignment would be completed by registration, and intimation would not be required. In practice it would be difficult for the Keeper of the Land Register to determine whether intimation had taken place. A cedent who held on an unregistered title could deduce title, in cases where deduction of title is required under the present law.<sup>86</sup> No deduction of title would be required once the burden was registered in the Land Register.<sup>87</sup>

4.58 **Holder ceasing to be a conservation body.** If the holder of a conservation burden ceased to be a conservation body, the burden should be extinguished. Conservation burdens have special privileges which should not be made available to a wider class.

4.59 **Standard securities.** A standard security over a conservation burden would be of little value. A conservation burden is not, or not usually, income-producing; restrictions on assignment restrict the market for sale; and the heritable creditor could not foreclose unless, improbably, it too was a conservation body. The temptation, such as it is, seems worth

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<sup>84</sup> For burdens in favour of a person, see Scot Law Com DP No 106 paras 2.53 - 2.55. Maritime burdens (para 4.51 above) are another example.

<sup>85</sup> This reproduces the rule for conservation easements created under the US Uniform Conservation Easement Act 1981 (s 4(2)).

<sup>86</sup> See generally Conveyancing (Scotland) Act 1924 s 3. The cedent would also be able to expedite a notice of title: see clause 25(b) of the draft Bill.

<sup>87</sup> Land Registration (Scotland) Act 1979 s 15(3).

removing. It should not be possible to create a standard security over a conservation burden. This disposes of the argument that a conservation burden is extinguished on a security being called up by a creditor which is not itself a conservation body.<sup>88</sup>

**4.60 Variation or discharge by the Lands Tribunal.** A feudal burden can be varied or discharged by the Lands Tribunal.<sup>89</sup> After the appointed day the former vassal should not be in a worse position than before. It follows therefore that the Lands Tribunal should be given jurisdiction to vary or discharge conservation burdens.

**4.61** Summing up the last few paragraphs, we recommend that

- 26. (a) It should be possible to assign or otherwise transfer a conservation burden to another conservation body.**
- (b) In appropriate cases an assignation should contain a clause of deduction of title.**
- (c) An assignation or other transfer should not take effect until registered in the Register of Sasines or Land Register.**
- (d) It should not be possible to create a standard security over a conservation burden.**
- (e) A conservation burden should be extinguished if its holder ceases to be a conservation body.**
- (f) Conservation burdens should be capable of variation and discharge by the Lands Tribunal under sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970.**  
(Draft Bill, clauses 24 - 27 and sched 8 para 32(2), (3))

These rules are expressed in general terms and would apply also to any new conservation burdens which might be created under the proposals contained in our discussion paper on real burdens.

### **One choice**

**4.62** Under our proposals superiors may sometimes have choices to make.

- If certain conditions are satisfied,<sup>90</sup> the superior can register a notice converting the burden into a neighbour burden.
- If the superior is a designated conservation body it can register a notice converting the burden into a conservation burden.<sup>91</sup>

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<sup>88</sup> Scot Law Com DP No 106 para 3.59.

<sup>89</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 ss 1 and 2.

<sup>90</sup> See para 4.47.

<sup>91</sup> Paras 4.52 - 4.61.

- If the burden reserves development value, the superior can register a notice reserving a right to claim compensation.<sup>92</sup>

In many cases none of these options will be available. The real burdens will then be extinguished with the feudal system itself, and without payment of compensation.<sup>93</sup> In many other cases the superior will not take the trouble to register the relevant notice, with the same end result. Occasionally there may be a choice of options. The superior might both own a building within 100 metres and also be a conservation body or have rights to a burden which reserves development value. In such cases only one option can be selected. A superior cannot both preserve a burden and claim compensation for its extinction; or convert a burden into both a neighbour burden and a conservation burden. A choice must be made. The choice would not necessarily be final. A different option could be pursued later provided that the notice first sent is formally discharged. But this must be done before feudal abolition. After abolition it is too late to register notices.

4.63 We recommend that

- 27. Where a notice has been registered under recommendations 22, 25 or 41, it should not be possible to register another notice in relation to the same burden unless the earlier notice has been discharged and the discharge registered.**

(Draft Bill, clause 36(1))

## Notices

4.64 In these sections we consider some procedural and other matters which are common to most or all of the notices available to a superior (ie to the notices listed in paragraph 4.62 above).

4.65 **Oath or affirmation.** The notices contain a number of assertions by the superior, the accuracy of which will not always be easy to check. This is especially true of the notice reserving a right to compensation.<sup>94</sup> In those circumstances there seems value in requiring notices to be sworn or affirmed before a notary public. The oath or affirmation would be that the statements in the notice were true to the best of the superior's knowledge and belief. This would require to be done by the superior personally, and not through a solicitor or other agent.<sup>95</sup> In the case of a juristic person, the oath or affirmation would be given by a person authorised by law to sign on its behalf.<sup>96</sup> The sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true. However, a requirement to use notaries can be waived in the case of notices for conservation burdens, where the information provided is straightforward and easily verified.

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<sup>92</sup> Paras 5.14 - 5.57.

<sup>93</sup> Paras 4.16 - 4.20.

<sup>94</sup> Para 5.27.

<sup>95</sup> However, where an individual is unable to swear or affirm by reason of a legal disability (such as nonage) or incapacity (caused, for example, by mental disorder), this could be done by a guardian, a curator bonis, a person acting under a continuing power of attorney or other similar legal representative. See clauses 17(5)(a) and 28(5)(a) of the draft Bill.

<sup>96</sup> The principal rules here are set out in sched 2 to the Requirements of Writing (Scotland) Act 1995.

4.66 **Service.** Service here does not assume the crucial importance which it has in some areas of law. The notice does not require the servient proprietor to do anything. It preserves existing rights. The servient proprietor is not worse off than before. A notice could be challenged, but in general<sup>97</sup> a challenge later is as good as a challenge now. The existence of the notice appears from a public register and will come to light, at latest, when the proprietor sells. Nonetheless we think that, wherever possible, the servient proprietor should be informed of the notice. Accordingly, we propose a general duty on the superior to send a copy of the notice. The notice should be accompanied by an explanatory note in the form prescribed in our draft legislation.<sup>98</sup> This explains the background to the notice and its implications for the recipient. Our first thought was that the copy should be sent by registered post or recorded delivery, so that a receipt could be produced at the time of registration. On further reflection, however, we concluded that ordinary post was sufficient, and indeed could hardly be avoided in cases where the owner lives abroad. Further, the duty to send should be waived in the exceptional case where sending is not reasonably practicable. The model notices in our draft legislation require the superior to state either that a copy was sent or that sending was not reasonably practicable. In the normal case we imagine that the copy will be sent to the servient tenement. If the name of the servient proprietor is not known, it will be sufficient to address the envelope to “the proprietor”.

4.67 **Separate notices and combined notices.** Often a number of different properties were feued subject to the same burdens; or alternatively there was a single grant in feu followed later by division into smaller plots, whether by disposition or feu disposition. In both<sup>99</sup> cases the result is the same: the superior has identical rights over a number of separate properties. Nonetheless it seems clear that a separate notice should be required for each such property, if only because the 100-metres rule<sup>100</sup> must be separately satisfied in each case. However, there is no objection to using the same notice for different burdens which affect the same property.

4.68 We recommend that

28. (a) **Notices (other than notices relating to conservation burdens) should be sworn or affirmed before a notary public. This should be done by the superior personally or, where the superior is a juristic person, by someone authorised to sign documents on its behalf.**

(b) **Except where it is not reasonably practicable to do so, the superior should, before registration, send a copy of the notice (and explanatory note) to the owner of the servient tenement by post.**

(c) **A separate notice should be required for each servient tenement.**

(Draft Bill, clauses 17(4), (5), 28(4), (5), 35 and 36)

4.69 **Invalidity.** Most notices will be valid. But a notice might be invalid for a number of different reasons. The superior’s building might be 101 metres from the servient tenement.

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<sup>97</sup> But subject to the long negative prescription.

<sup>98</sup> The notices are contained in scheds 4 - 6.

<sup>99</sup> In the second case there is, strictly, only a single feu which has come to be divided. But for all purposes connected with this part of the report, any part of a feu held in separate ownership is treated as a wholly separate property. See clause 36(2) of the draft Bill. This means, for example, that the 100-metres rule applies separately to each such part.

<sup>100</sup> Paras 4.33 - 4.36.

The superior's title might be radically defective, whether to the superiority or to the neighbouring land. The real burden might itself be invalid. The superior might be *incapax*, or he might fail to sign properly. Doubtless there are other possibilities. An invalid notice is not validated merely by registration.<sup>101</sup> It is true that a notice will not take effect, on the appointed day, unless it has been registered. But registration is only one of the conditions that must be satisfied.

**4.70 Refusal of registration.** The Keeper has a discretion to refuse registration, both in the Land Register<sup>102</sup> and, to a more limited extent, in the Register of Sasines.<sup>103</sup> In relation to the latter, we understand that the Keeper's concern is limited to whether the deed presented for recording is of a type appropriate to the register and whether it is formally valid. If the deed is satisfactory on both counts, it will be accepted for recording. The Keeper does not seek out other forms of invalidity. It follows that a notice is likely to be accepted for recording without further inquiry provided that it is signed and all the relevant parts appear to be completed. Land Register practice is different. In the interests of maintaining the accuracy of the Register, all deeds are carefully examined. If necessary the Keeper calls for further information or evidence. A notice would be rejected if the Keeper was not satisfied as to its validity.<sup>104</sup> To some extent, however, notices raise issues which are novel, and there are three matters which the Keeper could not reasonably be expected to check. These are:

- whether a copy of the notice has been duly sent to the servient proprietor<sup>105</sup>
- whether, in the case of notice converting feudal burdens to neighbour burdens, the requirement of a building within 100 metres of the servient tenement has been met<sup>106</sup>
- whether, in the case of a notice reserving a right to claim compensation, the statements made about development value, reduction in consideration, and the absence of a heritable security are true.<sup>107</sup>

It should be made clear that the Keeper has no duty in relation to these matters. Other checks exist. The superior is on oath to tell the truth.<sup>108</sup> The servient proprietor may be expected to scrutinise any notice received and will be in a much better position than the Keeper to check the information in it. As explained below,<sup>109</sup> an invalid notice can be challenged, whether at once or later, in the event of an attempt to enforce.

**4.71** If registration is refused, the superior may litigate the refusal, either in the Lands Tribunal<sup>110</sup> or the ordinary courts.<sup>111</sup> Since a notice must normally be registered before the appointed day, special provision needs to be made for late registration in the event that the

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<sup>101</sup> This seems true even of the Land Register. Usually the effect of registration is to create real rights, and hence to overcome defects in the deed. See s 3(1)(a) of the Land Registration (Scotland) Act 1979. But in the present case registration will precede the appointed day, and the notice will be effective, not by virtue of the 1979 Act, but by virtue of the legislation abolishing the feudal system.

<sup>102</sup> Land Registration (Scotland) Act 1979 s 4(1).

<sup>103</sup> *Macdonald v Keeper of the General Register of Sasines* 1914 SC 854.

<sup>104</sup> Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 12.

<sup>105</sup> Para 4.66.

<sup>106</sup> Paras 4.33 - 4.36.

<sup>107</sup> Para 5.27.

<sup>108</sup> Para 4.65.

<sup>109</sup> Paras 4.73 - 4.76.

<sup>110</sup> Land Registration (Scotland) Act 1979 s 25.

<sup>111</sup> *Short's Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14.

litigation is successful but does not finish until after that day. To minimise difficulties for parties relying on the register, registration should require to take place no later than five years after the appointed day.<sup>112</sup> The registration should be backdated to the appointed day, to avoid a gap during which the land would be free of the burden.

4.72 We recommend that

**29. (a) The Keeper should not be required to verify -**

**(i) that a copy of the notice has been sent to the owner of the servient tenement;**

**(ii) that, in the case of a notice under recommendation 22, the dominant tenement has on it a permanent building which is in use wholly or mainly as a place of human habitation or resort, and that building is within 100 metres of the servient tenement; or**

**(iii) that, in the case of a notice under recommendation 41, the statements made about development value, reduction in consideration, and the absence of a heritable security are accurate.**

**(b) Where a notice submitted for registration is rejected by the Keeper but is subsequently determined by the court or the Lands Tribunal for Scotland to be registrable, it should be possible to register the notice at any time during a period of five years after the appointed day, and the effect of such registration should be backdated to the appointed day.**

(Draft Bill, clauses 37 and 39)

4.73 **Challenges.** An invalid notice may be challenged. Three methods are available.

4.74 *Application to the Lands Tribunal.* Notices ought to be judicially challengeable. This is particularly important in the case of compensation notices, which depend on subjective assertions which are difficult to prove or disprove in the absence of extrinsic evidence. A compensation notice is accepted for registration without a consideration of its merits. It is more likely to be invalid than any other notice. The obvious forum for a challenge is the Lands Tribunal. Accordingly we recommend that

**30. (a) The Lands Tribunal should be empowered to make an order discharging or restricting a notice on cause shown.**

**(b) An extract of the order should be capable of registration, and on registration should take effect as respects third parties.**

(Draft Bill, clause 38)

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<sup>112</sup> Five years is the period suggested in our discussion paper on real burdens for registration of implied rights to enforce. See Scot Law Com DP No 106 para 3.54. See also para 4.24.

Under this recommendation an order would enter the Land Register by registration rather than by rectification, thus avoiding the protection against rectification given to proprietors in possession.<sup>113</sup>

4.75 *Application for rectification.* An obvious defect does not require to be declared by judicial process. Instead, in Land Register cases, a direct application can be made to the Keeper for rectification of the Register. The protection for proprietors in possession would not apply, under recommendations made earlier, and no indemnity would be due.<sup>114</sup> Thus the Keeper would be free to correct the error by making the appropriate amendment to the Register.

4.76 *Challenge to the burden itself.* Notices (other than compensation notices) have short lives. On the appointed day the notices operate to convert feudal burdens into, respectively, neighbour and conservation burdens. Thereafter their task is done. Thus after abolition another way of attacking a notice is to attack the burden itself, whether in the ordinary courts or in the Lands Tribunal. In our discussion paper on real burdens we suggest that the Lands Tribunal should have jurisdiction to determine the validity of burdens.<sup>115</sup> An application under such a jurisdiction could challenge the burden on all available grounds and not merely on the ground that the notice was invalid. Alternatively, an application could be made to the Tribunal under its existing jurisdiction for the variation and discharge of burdens.<sup>116</sup>

4.77 **Restriction or discharge.** The superior (or, after abolition, former superior) may agree to restrict or discharge a notice, whether because of invalidity or for some other reason. Only compensation notices are likely to be discharged or restricted with any frequency, and our draft legislation contains a statutory style.<sup>117</sup> The other notices, in effect, expire with the feudal system. What is to be discharged or restricted thereafter is the real burden itself, and a minute of waiver can be granted in the usual way.

### Common facilities

4.78 One further saving seems to be required. Feudal burdens sometimes provide for the maintenance and use of what may be termed common facilities - that is to say, facilities which are of benefit to another property<sup>118</sup> or, more usually, properties. A common facility in this sense may be a whole building or structure (such as a garage or outhouse), or a part of a building (such as the roof of a tenement), or a piece of land (such as garden or recreational ground), or again a private water or drainage system. However, the benefit must be intentional and not adventitious. A garage erected in my garden may protect my neighbour from the prevailing wind, and from a view of the municipal waste ground, but that was not my

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<sup>113</sup> Land Registration (Scotland) Act 1979 s 9(3). And see *Short's Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14.

<sup>114</sup> Para 2.50.

<sup>115</sup> Scot Law Com DP No 106 paras 6.62 - 6.66. Our intention is that legislation implementing our proposals on real burdens should come into force on the same day as the abolition of the feudal system.

<sup>116</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1. Our discussion paper on real burdens contains a number of proposals for widening the grounds and for simplifying the procedure. See Scot Law Com DP No 106 part 6.

<sup>117</sup> Sched 7. See further paras 5.54 - 5.56.

<sup>118</sup> Strictly, where a facility benefits one property alone, it is not really "common". But the terminology is convenient. An example of a real burden relating to a one-property facility would be an obligation on the dominant proprietor in a servitude to maintain a septic tank situated on the servient tenement.

purpose in erecting it. The garage is for my benefit and not for the benefit of my neighbour. It is not a common facility in the sense intended here.

**4.79 Maintenance.** Burdens requiring the maintenance of common facilities are frequently encountered. The burden may take the form either of a direct obligation to maintain, or of an obligation to contribute to the cost of maintenance.<sup>119</sup> It seems self-evident that burdens of this kind should survive feudal abolition. The 1972 Green Paper on *Land Tenure Reform in Scotland*<sup>120</sup> suggested that

“... a saving might be made for conditions which relate to the upkeep and repair of property in which more than one proprietor has an interest and which are enforceable only by the superior (and not directly by co-vassals). Conditions of this type, providing a basis for agreement on necessary repairs and apportionment of expenditure, are to be found, for example, in tenement property. It could be to the disadvantage of the proprietors themselves if such conditions were permitted to lapse, and they might therefore be preserved on the basis that the affected proprietors would be given the right of enforcement.”

Without such burdens there would often be disputes about liability for maintenance and the common facility might be allowed to deteriorate, with damaging long-term consequences. Common facilities in housing estates and tenements would be particularly at risk.<sup>121</sup> Of course in many cases those who own or benefit from the common part will already have a right to enforce such burdens, as community burdens. Here feudal abolition would make no difference. But in a case where the right to enforce lies only with the superior, the burden would disappear unless special steps are taken.

**4.80** We suggest therefore that, following feudal abolition, feudal burdens to maintain common facilities should survive but be enforceable by the owners<sup>122</sup> of any property which they benefit.<sup>123</sup> Neighbours would replace the superior, and the properties which they own would become the new dominant tenements. Existing enforcement rights (other than those of the superior) would be undisturbed. In practice those who benefit and those subject to the burden will often be the same people. A typical case is a feudal burden on all owners in a tenement or housing estate to maintain a wall or a road or a shared garden. Here the effect of our proposals will be to convert the feudal burden into a community burden, mutually enforceable within the tenement or housing estate.<sup>124</sup> A former superior who was also a member of the community would acquire a right under this principle.

**4.81** In practice obligations to maintain often include an obligation to rebuild in the event of damage or destruction, and such obligations should also fall within the saving.

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<sup>119</sup> For the enforceability of obligations to contribute to the cost of maintenance, see Scot Law Com DP No 106 paras 7.20 - 7.24.

<sup>120</sup> Para 38.

<sup>121</sup> However, the difficulty for tenements would be largely removed if our report on the law of the tenement (Scot Law Com No 162) is implemented.

<sup>122</sup> Our proposal is confined to the owners of that or other property and would not extend to those with lesser rights, such as tenants or heritable creditors in possession. However, in our discussion paper on real burdens (Scot Law Com DP No 106 paras 3.56 - 3.64) we canvass the more general question of whether enforcement rights should be extended beyond the class of owners.

<sup>123</sup> A parallel proposal is made at para 3.35 of Scot Law Com DP No 106 as an exception to the abolition of implied enforcement rights.

<sup>124</sup> For community burdens see para 4.8.

4.82 Maintenance obligations which have since been assumed by a local authority or some successor body should not be included. This is commonplace. In the titles of Victorian properties the owners are often taken bound to build and to maintain public facilities such as sewers and roads. Usually the local authority has long since taken over liability for maintenance, and the burden has become a dead letter. It should not be revived under our proposals.

4.83 Roads and sewers aside, many other maintenance obligations would also fall outside our proposals and so would perish with the feudal system. For maintenance real burdens are by no means confined to common facilities. An absolutely standard feudal burden is an obligation to construct and maintain on the feu buildings to a certain value, usually with the intention of securing the superior's claim to feuduty.<sup>125</sup> No special case can be made for burdens of this kind. Owners who wish to neglect their own property should be free to do so,<sup>126</sup> within the limits allowed by the general law.

4.84 **Use.** Real burdens may also control the use to be made of a common facility. For example, it may be provided that a shared garden is to be used only for recreational purposes, or that cars should not be parked on a shared access road. Sometimes such burdens are found in isolation, but more usually they form part of a package of burdens which also regulates maintenance.<sup>127</sup> There seems no reason for treating burdens which control use in a different manner from burdens which control maintenance. In practice use can be just as important as maintenance. If the common facility is owned in common by those using or benefiting from it, the burdens will act as a useful supplement to the rudimentary rules of use provided by the common law.<sup>128</sup> If, conversely, the common facility is the property of one person only, the use or benefit held by the others may depend exclusively on the continued existence of the burdens.<sup>129</sup>

4.85 We recommend that

- 31. (a) Where, immediately prior to the appointed day, a real burden regulating the maintenance or use of a common facility was enforceable by a superior, that burden should, following abolition, be enforceable by -**
- (i) the owner or owners of that facility, and**
  - (ii) the owner or owners of any other property served by that facility.**
- (b) For the purposes of this recommendation -**
- (i) a “common facility” is property which serves (and is intended to serve) other property;**

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<sup>125</sup> *Wyllie v Dunnett* (1899) 1 F 982. The obligation to pay feuduty is secured on the feu.

<sup>126</sup> This is sometimes referred to as the owner's *jus abutendi*.

<sup>127</sup> Where maintenance is not regulated, it is usually because the common facility is common property, and the conveyancer has been content to rely on the maintenance regime provided under the general law of common property (for which see Reid, *Property* para 25).

<sup>128</sup> For an account of those rules, see Reid, *Property* paras 23 and 24.

<sup>129</sup> Alternatively use or benefit may be conferred by servitudes and so would be unaffected by feudal abolition.

(ii) “property” means land or a building or other heritable structure (or a part of such building or structure); and

(iii) “maintenance” includes reinstatement but does not include a liability which has been assumed by a local or other public authority.

(Draft Bill, clause 18)

### Interest to enforce

4.86 Under the general law, a dominant proprietor must show interest as well as title. That requirement would remain. However, the interest of a former superior would not be presumed, as it is at present.<sup>130</sup> Interest to enforce means praedial benefit to the dominant tenement,<sup>131</sup> and in the two cases where, exceptionally, there is no dominant tenement (conservation burdens<sup>132</sup> and maritime burdens<sup>133</sup>) interest should be presumed. We recommend that

**32. (a) A dominant proprietor must demonstrate interest to enforce a real burden.**

**(b) In the case of conservation burdens and maritime burdens (only), interest to enforce should be presumed.**

(Draft Bill, clauses 19, 23(b) and 54(1)(b))

### Miscellaneous

4.87 **Neighbouring land as implied dominant tenement.** In *J A Mactaggart & Co v Harrower*<sup>134</sup> it was held that, where A disposes part of A’s land to B imposing real burdens, and the disposition is silent as to enforcement rights, it is implied that the land retained by A is the dominant tenement in the real burdens. The equivalent rule for grants in feu makes the retained superiority the dominant tenement.<sup>135</sup> Although the point has not been expressly decided,<sup>136</sup> it is thought that, in a grant of feu, retained *land* does not form a second dominant tenement. So if part of an estate is feued, imposing burdens, the granter can enforce as superior but not as neighbour - unless of course the grant in feu expressly nominates neighbouring land as a dominant tenement. Our proposals for reform are prepared on that assumption. If neighbouring land owned by a superior were already a dominant tenement, there would be no need to provide a notice procedure to convert the feudal burden into a neighbour burden.<sup>137</sup> The law, however, should be put beyond doubt. Accordingly we recommend that

<sup>130</sup> Reid, *Property*, paras 407-08 and 430.

<sup>131</sup> Scot Law Com DP No 106 paras 4.1 - 4.11.

<sup>132</sup> Paras 4.52 - 4.61.

<sup>133</sup> Para 4.51.

<sup>134</sup> (1906) 8 F 1101. See further Scot Law Com DP No 106 paras 3.5 and 3.16.

<sup>135</sup> Reid, *Property* para 398.

<sup>136</sup> See however *Stevenson v Steel Co of Scotland Ltd* (1899) 1 F(HL) 91, where the issue was raised, albeit indirectly and inconclusively.

<sup>137</sup> Paras 4.26 - 4.47.

- 33. Where a real burden is created in a grant in feu, there should be no implication that adjacent land the *dominium utile* (or allodial ownership) of which is held by the superior is a dominant tenement in that burden.**  
(Draft Bill, clause 42)

**4.88 Real burdens as contractual terms.** A conveyance of land is, among other things, a contract between the parties, and the obligations which are to be constituted as real burdens are among the terms of that contract.<sup>138</sup> Our recommendations will do nothing to disturb the contractual status of obligations.<sup>139</sup> Thus while, on feudal abolition, a superior's rights to enforce the obligations as real burdens will go, any purely contractual rights will remain. This is a limited and temporary saving. Only the original<sup>140</sup> parties to a deed are in contractual relations;<sup>141</sup> and, since the obligations in question are intended to bind the grantee and future owners only in their capacity as owners, it is thought that the original grantee must cease to be bound on ceasing to be owner.<sup>142</sup> Certainly the obligations have little meaning when applied to a person who does not own the property which it is sought to regulate. This means that the original grantee of a feu disposition, while continuing to own the original property, will be bound by the burdens, as a matter of contract. But once the property is transferred, the original grantee's own obligations will cease, and the incoming owner will not be bound.

**4.89 Irritancy.** There is no legal irritancy for failure to comply with real burdens, but conventional irritancies are often stipulated for. Most will disappear as an automatic consequence of the abolition of the feudal system. The legal irritancy for non-payment of feuduty will disappear also.<sup>143</sup> But in some cases feudal burdens will survive and be converted into non-feudal burdens. Should the rights of irritancy survive with them? Departing here from the provisional proposal in our discussion paper,<sup>144</sup> we think that they should not survive. The remedy of irritancy is out of all proportion to the obligations which it is designed to police. An owner who makes a minor deviation from the title conditions is vulnerable to the total loss of the property, without compensation.<sup>145</sup> Our discussion paper on real burdens proposes a more general extinction of irritancies.<sup>146</sup> For present purposes it is sufficient to say that the legislation abolishing the feudal system should not seek to perpetuate what is a quintessentially feudal remedy.<sup>147</sup> Accordingly we recommend that

- 34. From the date of the coming into force of the legislation, any irritancy clause enforceable by a superior should cease to have effect.**  
(Draft Bill, clause 47)

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<sup>138</sup> Reid, *Property* para 392.

<sup>139</sup> This is expressly provided for by clause 69 of the draft Bill.

<sup>140</sup> Feudal abolition will dispose of the (rather dubious) doctrine of the perpetual feudal contract, which was said to bind successive superiors and vassals.

<sup>141</sup> In theory, however, it would be possible for the creditor in the obligation to assign to a third party, although the obligation would last only for as long as the debtor's ownership of the land.

<sup>142</sup> See Scot Law Com DP No 106 paras 7.73 - 7.77. There we suggest that, once a real burden is constituted, the burden should cease to be enforceable as a contractual term.

<sup>143</sup> The Feuduty Act 1597 is repealed in sched 9 to the draft Bill.

<sup>144</sup> Scot Law Com DP No 93 para 5.31.

<sup>145</sup> See generally R Rennie, "The theory and ethics of irritancy" 1994 JR 283.

<sup>146</sup> Scot Law Com DP No 106 para 4.41.

<sup>147</sup> It is at least open to doubt whether irritancy is competent in the case of non-feudal real burdens. See Reid, *Property* para 424.

4.90 **Pecuniary real burdens.** A pecuniary real burden is a right in security created by reservation in a conveyance, and has no close connection with real burdens in the sense discussed here. Our proposals on real burdens do not apply to pecuniary real burdens.<sup>148</sup>

4.91 **Transitional provisions.** When, under our proposals, feudal burdens are extinguished, it should cease to be possible to sue in respect of past breaches. For otherwise the feudal system would live long into the future.<sup>149</sup> Under the general law an obligation, once extinguished, is extinguished for all purposes, and the same principle should apply to the extinction of real burdens.<sup>150</sup> More precisely, we recommend that

**35. Where, under recommendation 20, the right of a former superior to enforce a burden has been extinguished -**

- (i) it should not be possible to bring new proceedings for enforcement;**
- (ii) any current proceedings should be deemed abandoned; and**
- (iii) any decree or interlocutor already pronounced (except insofar as relating to the payment of money) should be deemed reduced.**

(Draft Bill, clause 16(2), (3))

Paragraph (iii) is of particular importance. A year before abolition the superior might have obtained an interdict, or an order for specific implement. These should fall with the extinction of the burden to which they relate. But a decree for the payment of money - in respect of a common repair, for example - should continue to be enforceable.

### **Superiors' obligations**

4.92 **General abolition.** In every grant in feu a series of standard obligations are imposed on the superior, whether expressly or by implication. Thus the superior grants warrandice; undertakes to give entry coupled, usually, with vacant possession; undertakes to free and relieve the grantee of over-feuduties and public burdens;<sup>151</sup> and undertakes to make title deeds and searches forthcoming to the grantee.<sup>152</sup> Other obligations are rare but not unknown.<sup>153</sup> Sometimes a superior makes an undertaking which is the direct counterpart of a real burden on the grantee. For example the superior might undertake to maintain some facility in exchange for an obligation on the grantee to pay the cost. More usually, superiors' obligations are, like the standard obligations, free-standing. For example a superior might assume an obligation to impose the same real burdens on future acquirers of different parts of the same estate, or might undertake to construct an access road, or to convey common amenity ground to the trustees of a residents' association.

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<sup>148</sup> For further discussion of pecuniary real burdens, see paras 6.13 - 6.15.

<sup>149</sup> It is a disputed point whether negative prescription applies to feudal real burdens: see Reid, *Property* para 431.

<sup>150</sup> This principle was applied to feudal burdens in *Fraser v Church of Scotland General Trustees* 1986 SC 279.

<sup>151</sup> Land Registration (Scotland) Act 1979 s 16(3)(b).

<sup>152</sup> Land Registration (Scotland) Act 1979 s 16(2).

<sup>153</sup> In addition to consulting those with particular experience in this area, we have also examined over 200 selected deeds of conditions and 50 feudal writs, drawn mainly from the registration counties of Aberdeen, Ayr, Fife, Barony and Regality of Glasgow, and Kincardine.

4.93 The status of superiors' obligations is uncertain. On the one hand, it is well established that such obligations are capable of running with the superiority and of binding successors - even if the legal basis of such a rule is uncertain and controversial.<sup>154</sup> In effect, although not in law, they are real burdens on the superiority. But on the other hand there is doubt as to which obligations do and which do not run with the superiority, and no clear principles have emerged. For example, while an obligation to impose real burdens in subsequent grants does, it seem, run with the superiority,<sup>155</sup> the obligation of warrandice does not.<sup>156</sup> Doubtless one reason why the law is not clearer is that the issue very rarely arises in practice. For whether the obligation runs with the superiority, it is at least binding on the original superior as a matter of contract;<sup>157</sup> and a successor of the original vassal has title to sue by virtue of the assignation of writs in the disposition.<sup>158</sup> Since in practice superiors are often solvent, prominent, and (in the case of trusts or bodies corporate) long-lived, the question of pursuing successors does not often arise.

4.94 Fortunately it is not necessary to reach a concluded view as to which obligations run with a superiority. It is enough to know that some obligations at least can run. With respect to such obligations, the way forward seems clear enough. If the former superior is to lose rights against the former vassal, then the former vassal should also lose rights against the former superior. Obligations running with the superiority should be abolished.<sup>159</sup> Practical considerations reinforce this conclusion. If the superiority is to be abolished, it is difficult to see how obligations which were attached to the superiority could survive. As with real burdens, however, abolition should not disturb the enforceability of such obligations as a matter of contract.<sup>160</sup>

4.95 One qualification seems necessary. Under our proposals a former superior will sometimes be able to continue to enforce real burdens.<sup>161</sup> In such a case it seems self-evident that the former superior should also continue to be bound by any obligations which are a counterpart of those burdens. The position should be the same for a person who takes the place of a former superior, as will happen in the case of burdens relating to common facilities.<sup>162</sup> Hence if, under the feudal system, a superior could exact the cost of maintaining a facility only subject to an obligation to carry out the necessary work, any successor, post-abolition, should not be in a better position. In practice counter-obligations of this kind are rare. Like the real burden itself, the counter-obligation would attach to the replacement dominant tenement, and would bind successive owners of that property. In conservation burdens<sup>163</sup> and maritime burdens<sup>164</sup> the counter-obligation would be due, respectively, by the conservation body and the Crown. While the counter-obligation would not be independently enforceable, the real burden could not be enforced in the absence of compliance. If the real burden came to be extinguished, the counter-obligation should automatically fall also.

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<sup>154</sup> Reid, *Property* para 394.

<sup>155</sup> *Leith School Board v Rattray's Trs* 1918 SC 94.

<sup>156</sup> *Stewart v Duke of Montrose* (1860) 22 D 755 at 803.

<sup>157</sup> See para 4.88.

<sup>158</sup> G L Gretton & K G C Reid, *Conveyancing* (1993) pp 185-7.

<sup>159</sup> Any residual superiors' rights (ie rights other than those relating to feuduty and real burdens) should be abolished also. See clause 48 of the draft Bill.

<sup>160</sup> See clause 69 of the draft bill.

<sup>161</sup> Paras 4.26 - 4.61.

<sup>162</sup> Paras 4.78 - 4.85.

<sup>163</sup> Paras 4.52 - 4.61.

<sup>164</sup> Para 4.51.

4.96 We recommend that

**36. (a) Obligations due only because they have run with a superiority should cease to have effect.**

**(b) However, the enforcement of -**

**(i) a real burden reallocated under recommendations 22 and 31**

**(ii) a conservation burden, and**

**(iii) a maritime burden**

**should be subject to compliance with any obligation which was binding on the superior immediately before the appointed day and which was the direct counterpart of the real burden.**

**(c) An obligation mentioned in (b) should be extinguished on the extinction of the real burden to which it is the counterpart.**

(Draft Bill, clauses 20(1), 23, 41, 48 and 54(1))

4.97 **Obligation to deliver title deeds.** The abolition of superiors' obligations would remove the duty of former superiors to make available title deeds, except where the duty exists as a matter of contract. There is, however, no reason why the duty should be confined to former superiors, and there would be advantages in expressing it in more general terms. Demand for deeds will usually stop when the title to land has become registered in the Land Register, for title then flows from the Register and not from the deeds. But it may still be necessary to inspect prior deeds from time to time, whether to check the accuracy of the Register or to determine the existence of rights at a particular time in the past. Thus the duty to make deeds available should also apply to Land Register titles.<sup>165</sup> We recommend therefore that

**37. A possessor of title deeds or searches which relate to land should be under a duty to make them available to a person who has, or is entitled to acquire, a real right in the land, at that person's expense.**

(Draft Bill, clause 60)

4.98 **Sheltered housing.** Finally, special mention may be made of private sheltered housing for the elderly. Owner-occupied sheltered housing dates only from the early 1980s but in recent years has become popular. In a typical development, the individual houses have been subfeued and the developer remains as feudal superior. The owners are placed under a number of burdens, and sole management rights are reserved to the superior or to a factor selected by the superior. From the point of view of the superior there is a mixture of right and obligation. The superior has the right of exclusive management; but is placed under an obligation to exercise that right. It seems unlikely that provisions of this kind are enforceable in a question with successors. A permanent surrender of management rights encroaches too

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<sup>165</sup> Cp. the Land Registration (Scotland) Act 1979 s 3(5).

far on ownership to qualify as a real burden;<sup>166</sup> and if the owners are not bound, the correlative obligation on the superior to exercise management is not binding either. Sheltered housing is feudalism in its final mutation; but by and large it is not equal to the task.

4.99 Feudal abolition will have some impact on sheltered housing. Superiors' rights and obligations will disappear, although that which is already unenforceable is necessarily unaffected. Proper real burdens, however, will survive as community burdens, enforceable within the community by its members;<sup>167</sup> and under proposals contained in our real burdens discussion paper a majority of those members can then agree a new management structure which, by contrast with what went before, will be binding on successors.<sup>168</sup> The proposed new legislation will thus provide, for the first time, a stable legal framework for the development of sheltered housing in Scotland.

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<sup>166</sup> Reid, *Property* para 391.

<sup>167</sup> The owners of units in the development may have express enforcement rights; but even where they do not, enforcement rights would be conferred by the proposals for deeds of conditions in para 3.33 of Scot Law Com DP No 106.

<sup>168</sup> Scot Law Com DP No 106 paras 7.53 - 7.54 and 7.79 - 7.88.

# Part 5 Compensation

## Introduction

5.1 In this part of the report we consider the question of the compensation, if any, which should be payable to superiors by vassals for the loss of superiors' rights on the abolition of the feudal system of land tenure. It is important to observe at this stage that compensation is not the only way of protecting the interests of superiors. We have already recommended that in certain cases superiors should be able to protect their interests by opting to preserve burdens.<sup>1</sup> The draft Bill ensures that pecuniary real burdens (which are really a form of heritable security) will survive.<sup>2</sup> Our proposals on compensation should be seen as part of a larger package of protections.

## Treatment in discussion paper

5.2 Our discussion paper on abolition of the feudal system<sup>3</sup> proposed that there should be compensation for the loss of the right to feuduty, the mechanism being a statutory redemption scheme, and, as noted above,<sup>4</sup> this proposal was widely supported.

5.3 The discussion paper proposed that there should be no compensation for the loss by superiors of those rights to enforce real burdens which would be swept away by the proposed reforms.<sup>5</sup> It noted that since 1970 the Lands Tribunal for Scotland had had the power to vary and discharge land obligations on application and that, although it had power to award compensation, it had rarely used its powers to compensate superiors.

5.4 The discussion paper also noted that, although a superior was presumed to have an interest to enforce real burdens, it was always open to the vassal to prove that there was no such interest to enforce, in which case the burden would be unenforceable.<sup>6</sup> There would be cases where superiors who owned no land in the neighbourhood of the burdened property could be shown to have no interest to enforce.<sup>7</sup> Where the Lands Tribunal for Scotland had awarded compensation it was usually possible to identify potential harm to the benefited proprietor's interests in lands and to quantify any loss which might be suffered as a result of a variation or discharge of the land obligation.<sup>8</sup>

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<sup>1</sup> Paras 4.26 - 4.61.

<sup>2</sup> See the definition of "real burden" in clause 43. The nature of pecuniary real burdens is explained more fully at paras 6.13 - 6.15.

<sup>3</sup> Scot Law Com DP No 93 paras 4.2 - 4.22.

<sup>4</sup> *Ibid*, para 3.10.

<sup>5</sup> *Ibid*, paras 4.37 - 4.49.

<sup>6</sup> *Ibid*, para 4.43, citing *Howard de Walden Estates Ltd v Bowmaker Ltd* 1965 SC 163.

<sup>7</sup> *Ibid*, para 4.43.

<sup>8</sup> *Ibid*, para 4.42, citing *Leney v Craig and Others* 1982 SLT (Lands Tr) 9.

5.5 In relation to the loss of superiorities as such, the discussion paper proposed that there should be no compensation<sup>9</sup> because, once remaining feuduties had been redeemed, bare superiorities would have no value worthy of compensation.

5.6 The discussion paper took the view that if all aspects of barony titles, including in particular the entitlement to be called “baron”, were to be swept away this might well give rise to justifiable claims for compensation.<sup>10</sup> This was the main reason why the paper adopted a conservative approach in relation to barony titles.

### **Results of consultation on discussion paper**

5.7 Most consultees who commented on the issues supported the provisional proposals on compensation as set out above. However, a few drew attention to the potential injustice of depriving former superiors of all rights to claim compensation in cases where the property had been sold at a lower price, or even given away, because of the imposition of a feudal real burden intended to reserve development value to the superior. The Court of Session judges, for example, said in their comments that

“It does not seem unreasonable that the person who gives or sells lands at less than their value for a charitable purpose should retain, in some form, the right to participate in any increased value of the land if the charitable use ceases.”

Similar concerns about sales at a discount and express reservations of development value were expressed by the Convention of Scottish Local Authorities and by private practitioners. Some consultees suggested that special provisions to deal with such cases might have a limited duration of, say, ten or twenty years.

### **Supplementary consultation**

5.8 In 1994 we carried out a special supplementary consultation on the question of compensation for former superiors where there had been a sale at a discount designed to reserve development value. The responses<sup>11</sup> provided us with a great deal of valuable information. Most respondents considered that there should be some provision for compensation to be payable in this special type of situation. We return to this question later.

### **General approach**

5.9 The general principle which we have adopted is that compensation should be payable where, as a result of abolition, the superior loses rights having a clear financial value and where the vassal makes a corresponding gain. However, for reasons which we explain later, we consider that no compensation should be payable for the loss of the right to exact fees for waivers of real burdens.

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<sup>9</sup> *Ibid*, paras 4.59 - 4.62.

<sup>10</sup> *Ibid*, para 5.12.

<sup>11</sup> From the Law Society of Scotland; the Society of Writers to H. M. Signet; Professor A J McDonald; Mr S Brymer; Mr C Graham; Mr S M Notley; Messrs Anderson Strathern WS; the Church of Scotland; Scottish Homes; and COSLA.

5.10 It goes without saying that compensation should be payable only for what is lost. Some rights provided for in feudal deeds, which might be loosely thought of as feudal rights because of the context in which they appear, would survive abolition of the feudal system of land tenure. This is most obviously true of contractual provisions regulating non-feudal matters. Any rights or obligations created by such provisions would survive as matters of contract law, but would not pass with the land to succeeding owners.<sup>12</sup>

5.11 It is clear too that any valid security created over land would survive even if the creditor happened to be the superior. A standard security granted by the vassal to the superior to secure a personal obligation to pay a sum of money, such as a deferred part of the price of the land, would be unaffected by abolition of the feudal system. At one time it was not uncommon to have a heritable security created over the land by reservation to the superior of a so-called pecuniary real burden. The creditor would be the seller as an individual and not as owner of the superiority.<sup>13</sup> It is clear that any valid pecuniary real burden, conceived in favour of the superior personally, and not in favour of the superior and succeeding superiors as such, should and would survive abolition of the feudal system just as a standard security would survive.<sup>14</sup> Any invalid security would be invalid anyway even before abolition. In neither case is there any question of compensation. Other rights reserved in grants of feu are considered in Part 6.

5.12 Just as no compensation will be payable for what survives, so no compensation will be payable for what did not exist as a valid and enforceable right before the abolition of the feudal system. The rules for the creation and enforcement of real burdens are notoriously strict and many apparent real burdens in feudal deeds are invalid or unenforceable against singular successors to the original contracting party.<sup>15</sup>

### **Compensation for loss of right to feuduty**

5.13 The most obvious financial right which is lost by the superior on abolition of the feudal system of land tenure is the right to feuduty. The loss is easily measurable. There is a clear corresponding gain to the vassal. Full compensation should be payable. We have described our recommended scheme for achieving that result in an earlier part of this report.<sup>16</sup>

### **Compensation for loss of development value real burden**

5.14 **The nature of the problem.** A feudal real burden may have been used deliberately to secure the reservation of development value to the superior. A property may have been feued for a heavily discounted consideration, or even for no consideration, on the understanding that a further financial return is to be available to the superior later if the land is freed for some use prohibited by the burden - typically, if land feued for charitable, religious, public or amenity purposes is later freed to be sold on the open market or used for other purposes.

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<sup>12</sup> See clause 69 of the draft Bill.

<sup>13</sup> See further para 6.13.

<sup>14</sup> This result is secured by the definition of real burden in clause 43 of the draft Bill.

<sup>15</sup> The leading case is *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296. See Reid, *Property* paras 386 - 91.

<sup>16</sup> Part 3.

5.15 An example of the use of the feudal law to secure development value for the superior would be the following. A landowner (who might not necessarily own any neighbouring land) sells a piece of ground to a charitable association for use, say, as a community hall at a low initial price provided that a further capital return is to be available to the superior if the ground is ever used for another purpose. So long as any question arises between the original parties to the contract it is likely that ordinary rules of contract law would be sufficient, if care has been taken, to secure the rights of the parties. The position is different if the land changes hands. The contract would not bind the new owner. To provide protection against the effect of changes in ownership the landowner may therefore have conveyed the property by means of a feudal writ and inserted a condition in the title, possibly fortified by a right of irritancy, forbidding any use other than use as a community hall, the clear understanding and expectation of both parties being that the superior, or any successor in the superiority, would thereby be able to realise the development value of the property.

5.16 The grant of a feu at a substantial undervalue to a charitable or public body might have been combined with a pre-emption clause obliging the vassal to offer the property to the superior, perhaps at a fixed price, before selling it to anyone else.<sup>17</sup> A right of pre-emption can be constituted as a real burden if the requisites for a real burden are met. Pre-emption clauses are valid although their exercise has been restricted by statute.<sup>18</sup>

5.17 Another method of preserving the superior's interest would be a redemption clause enabling the superior to buy back the property at a certain price if, for example, it ever ceased to be used for the designated purpose. Again such clauses are valid, subject to certain statutory restrictions,<sup>19</sup> and can be constituted as real burdens.<sup>20</sup>

5.18 A striking example was given to us by the Church of Scotland. The Church had a redundant church building in a small town. It sold it to another religious body for £1 stipulating in the feu writ that in the event of the building ceasing to be used as a church by that body it would be bound to sell the property back to the Church of Scotland as superiors for £1. In 1988 the building ceased to be required by the other religious body, was re-acquired by the Church for £1 and sold for £31,500. In this case the original parties to the arrangement had not changed and so, quite apart from the feudal system, the arrangement

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<sup>17</sup> *Preston v Dundonald's Creds* (1802) 4 Pat 331. See Halliday, *Conveyancing* vol II paras 32-69 to 32-80. The more usual type of pre-emption clause would give the superior first refusal at the price offered by an intending purchaser. For an example, see *Banff and Buchan District Council v Earl of Seafield's Estate* 1988 SLT (Lands Tr) 21. (Land feued to local authority as "amenity and recreation ground for the use of the inhabitants of Banff and Others in the neighbourhood"; feu charter reserved a right of pre-emption to the superiors.)

<sup>18</sup> See the Conveyancing Amendment (Scotland) Act 1938 s 9, as amended by the Conveyancing and Feudal Reform (Scotland) Act 1970, s 46. Essentially, the superior only gets one shot at the right of pre-emption.

<sup>19</sup> See the Land Tenure Reform (Scotland) Act 1974, s 12. This provides that in certain cases the right is only exercisable within 20 years of the date of its creation.

<sup>20</sup> See *McElroy v Duke of Argyll* (1902) 4 F 885; Halliday, *Conveyancing* vol II para 32-81. In the *McElroy* case, land had been feued for the purpose of building a pier. A clause said that the superior was to be entitled "to repurchase and reacquire" the land and pier at Whitsunday 1851 or at any term of Whitsunday or Martinmas thereafter at a price to be fixed by arbiters, but not to exceed £650 (which was the cost of erecting the original pier).

could have taken effect as a matter of contract. However, it is easy to imagine similar cases where contract law would not be available to achieve the agreed result.

5.19 Since 1970 it would be rare for feuing conditions alone to be used to protect the seller's interests in development value.<sup>21</sup> However, the information given to us when we consulted specifically on this question in 1994 suggests that, particularly in pre-1970 deeds, feudal real burdens alone may sometimes have been used to reserve development value to the superior. If, by the date of abolition, ordinary rules of contract law were no longer sufficient to deal with the position because the property had been sold by the original vassal, the result would be that the superior<sup>22</sup> would lose and the vassal would make a windfall gain. Having bought for a low price because of the real burden, the former vassal would be able to sell the property at a higher price because the burden had disappeared with the feudal system.

5.20 **Need for compensation.** It would not, in our view, be appropriate to enable the superior to preserve a personal right to enforce a development value real burden by registering a notice. This system is appropriate where there is a strong element of public interest, as in the case of conservation burdens and burdens relating to the seabed and seashore, and where the superior is an approved conservation body or the Crown.<sup>23</sup> It would not be appropriate for private development value burdens. The superior's interest in such burdens is personal and financial. It can be adequately recognised by provisions for financial compensation. We would not favour preserving such burdens for ever, as quasi-feudal restrictions on the use of land. We think that they should come to an end on the abolition of the feudal system. However, we also think that it would be unjust to make no provision for compensation in this type of case. We therefore recommend that

**38. Compensation should be payable for the loss of development value real burdens.**

(Draft Bill, clauses 28 - 34)

5.21 **Criteria to be satisfied.** The first difficulty lies in delimiting the type of case in which compensation ought to be payable. It would be dangerous to make the provision too wide. It is not our intention to enable compensation to be claimed by opportunistic superiors whose only interest has been to claim fees for the waiver of perfectly ordinary real burdens which they may have no real interest to enforce as such and which were not deliberately inserted to reserve development value for the superior. We suggest three limitations. First, compensation should be payable only where the imposition of the real burden has resulted in a substantial reduction in the consideration (if any) paid by the vassal. Secondly, compensation should be payable only where the real burden was a development value real burden - that is to say, a burden which was designed to ensure that any significant increase in the value of the land due

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<sup>21</sup> The 1970 Act enables land obligations to be varied or discharged by the Lands Tribunal for Scotland, which from the superior's point of view introduces an unwelcome element of insecurity. Perhaps more importantly, it has been clear since the public discussion which preceded the 1970 Act that the feudal system of land tenure was likely to be abolished.

<sup>22</sup> Assuming that the superior does not own neighbouring land which could be nominated as the dominant tenement in accordance with the "opt in" procedure described in Part 4.

<sup>23</sup> See paras 4.51 - 4.56.

to its being freed for development for a purpose other than those permitted under the feudal grant will accrue to the superior. Ordinary real burdens, of the kind found in thousands of properties, designed to secure adherence to a common building plan or preserve amenity are not intended to be within the scope of the special provisions on development value real burdens. Thirdly, compensation should be payable only where the superior's rights in relation to development value are not wholly secured by a heritable security.<sup>24</sup> The reason for this last requirement is simply that a superior who is fully protected by a heritable security will suffer no loss as a result of the abolition of the feudal system. Where there is no loss there should be no compensation. We recommend that

**39. Compensation should be payable only where**

- (a) the imposition of the real burden resulted in a substantial reduction in the consideration (if any) paid by the vassal**
- (b) the burden was designed to ensure that any significant increase in the value of the land due to its being freed for development for a purpose other than those permitted under the feudal grant would accrue to the superior, and**
- (c) the superior's rights in relation to the reserved development value are not protected by a heritable security.**

(Draft Bill, clause 28)

It is important to note that it is not the increase due to the development which constitutes the development value. It is the increase due to the fact that the land is freed for the development. For example, if land feued for use only as a sports field can, as a result of the Act, now be used for a supermarket and is used for that purpose, it is not the added value due to the construction of the supermarket on the land which is the development value. That could be millions of pounds too much because it would include the value of the actual buildings. It is the increase in value due to the fact that land which could formerly only have been used as a sports field can now be used for the construction of a supermarket that constitutes the development value.

5.22 It goes without saying that compensation would be due only if the extinguished real burden had been valid and enforceable by the superior immediately before the date of abolition. Particular difficulty arises from the requirement that the superior must have a legally recognised interest to enforce a real burden.<sup>25</sup> Interest will be presumed in the case of a superior but the presumption can be rebutted.<sup>26</sup> If it were possible to conclude with confidence that a superior who had no neighbouring land could never have a legally recognised interest to enforce a real burden then special provision for compensation for development value real burdens would be less necessary. A superior who had an interest could often opt in to the preservation of the burden under the rules for neighbouring property discussed above. A superior who had no interest would lose nothing. However, in the present state of the law we do not think it would be justifiable to take such a confident view. There

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<sup>24</sup> A pecuniary real burden is a heritable security.

<sup>25</sup> See Reid, *Property* para 408 and cases there cited.

<sup>26</sup> The leading case is *Earl of Zetland v Hislop* (1882) 9R (HL) 40.

are conflicting statements in the cases and suggestions that special considerations may apply as between superior and vassal. What we do not want to do is to cut off the possibility of arguments that the requirement of interest to enforce on the part of the superior should be interpreted strictly.

5.23 A real burden might also be invalid for another reason. An indispensable condition of validity is praedial benefit, that is to say, benefit to the superior in his capacity as owner of property.<sup>27</sup> Some burdens designed to reserve development value will not meet this condition. Much depends on the approach taken. An obligation which confines use to certain purposes will usually succeed as a real burden, provided at least that the superior owns neighbouring property. But an obligation to pay the superior a stipulated amount in the event that certain uses are departed from is likely to fail.<sup>28</sup> Here the benefit is personal only, and not praedial.

5.24 The serious possibility that a purported development value real burden may be invalid means that it must be a condition of the reserved rights proposed in this part of the report that the real burden was enforceable by the superior immediately before abolition. Our intention is that all arguments as to invalidity or lack of enforceability, including arguments based on lack of a proper interest to enforce or lack of a praedial benefit, should remain open.

5.25 **Timing of claim for compensation.** There are two possibilities. Compensation could be claimable and assessable within a short period, say a year, after the date of abolition. Alternatively, compensation could be claimable and assessable only if an act or event which would have been a breach if the real burden had remained in force<sup>29</sup> takes place within a certain period, say 20 years, after the date of abolition.<sup>30</sup> The first approach would have the serious practical disadvantage of requiring compensation to be awarded in many cases where there might never have been a “breach”. Even if actual payment of compensation were deferred until there was a “breach”, and secured by a statutory security over the land in the meantime, there would still be many cases where compensation would have to be assessed and awarded even although it might never be payable. After consultation with our advisory group we have concluded that the second approach - enabling compensation to be claimed only if and when a “breach” takes place - is preferable. We accordingly recommend that

**40. Compensation should be payable only when an act or event takes place which would have been a breach of the real burden if it had not been extinguished.**

(Draft Bill, clause 30(2)(c))

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<sup>27</sup> See Reid, *Property* para 391.

<sup>28</sup> Although there may be an argument that the burden succeeds as a pecuniary real burden.

<sup>29</sup> We refer to such an act or event as a “breach” in the following paragraphs even although technically there is no breach because there is no longer a burden. We intend “breach” to cover, for example, breach of a requirement to offer the property to the superior at a certain price before selling it or using it for a prohibited purpose. It is also intended to cover any breach of a prohibition which would have triggered a right of redemption by the superior if the burden had remained in force.

<sup>30</sup> The superior might realise the development value by, for example, activating a mechanism in the deed or by exercising a right of redemption.

5.26 **Need for notice.** It is important that there should be something on the registers to alert purchasers to the fact that there will be a potential claim for compensation by a former superior. What is needed is a procedure whereby a superior could register a notice reserving the right to claim compensation.

5.27 We propose that a superior who wishes to have the right to claim compensation for the loss of a real burden reserving development value, where there has been a feu for substantially less than full consideration, should be required to register a notice before the appointed day<sup>31</sup> in the Land Register (if the property is on that Register) or in the Register of Sasines (if it is not). The notice would have to (a) specify the property in question, (b) set out the superior's entitlement to the superiority, (c) specify the real burden in respect of which the right to claim compensation is reserved,<sup>32</sup> (d) state that the real burden is a development value real burden, as that term is defined in the legislation and set out any facts relied on in support of that claim,<sup>33</sup> (e) set out the amount by which the consideration was reduced because of the imposition of the burden, (f) state that the superior's right to the reserved development value is not wholly secured by a heritable security and (g) state that the superior reserves the right to claim compensation in terms of the legislation.

5.28 The notice procedure is designed for ascertainable development value real burdens. It is not intended for use in any case where the superior claims that a mixture of miscellaneous real burdens has led to a discount in the consideration. It will be up to the superior to identify the particular real burden, if any, which qualifies as a development value real burden and to specify that particular real burden in the notice. If there are several distinct development value real burdens, each of which has led to a diminution in the original consideration, then each should be set out distinctly in the notice and the amount of the diminution caused by each should be clearly and separately indicated.

5.29 We recommend that

41. **Compensation should be payable only if the superior has, before the appointed day, registered a notice reserving the right to claim compensation.**

(Draft Bill, clauses 28 and 30(1))

5.30 Members of our advisory group were concerned that some superiors might register notices which were false or speculative simply in order to charge former vassals money for having them removed from the register. Such notices, even if they could be successfully challenged on the basis of factual inaccuracies or inadequacies, could have a nuisance value

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<sup>31</sup> This means that the notice would have to be registered in the interval between the date when the Act is passed and the appointed day, which would be some time later. See para 1.23 above.

<sup>32</sup> For the position where there are two or more development value real burdens affecting the same property, see the following paragraph.

<sup>33</sup> The purpose of this requirement is to deter the registration of notices, backed up by nothing more than speculation, so that they can be exploited for their nuisance value.

from which unscrupulous superiors could profit. It was suggested that there could be value in a requirement that the notices be sworn or affirmed before a notary. We adopt that suggestion.<sup>34</sup>

5.31 A copy of the notice and accompanying explanatory notes would, where reasonably practicable, have to be served on the owner of the *dominium utile* and the superior would have to state in the notice sent for registration that this had been done. The rules on service and other formal and procedural matters have been discussed above.<sup>35</sup>

5.32 The notice would have to be in a prescribed form and would have to be noted in the Land Register in the case of land on that register or registered in the Register of Sasines in other cases. We have already made recommendations in Part 4 on these matters and as to the duties of the Keeper in relation to such notices.<sup>36</sup>

5.33 A superior should not be able to register both a notice preserving the real burden<sup>37</sup> and a notice reserving the right to claim compensation under the rules now being considered. The two notices are incompatible. The first preserves the burden. The second proceeds on the assumption that it is extinguished. We have dealt with this problem of overlap, and have made recommendations on it, in Part 4.<sup>38</sup> Here we merely recommend that

**42. The formal and procedural requirements relating to notices reserving the right to claim compensation should be the same as those for notices converting feudal burdens to neighbour burdens.**

(Draft Bill, clauses 35 - 39)

5.34 **Effect of notice.** The notice would not preserve the real burden. The real burden would cease to have effect as such on the appointed day. The notice would simply enable compensation to be claimed if a development took place, or something else occurred, which would have been a breach of the burden had the feudal system of land tenure not been abolished.

5.35 **Right to claim compensation.** The claim for compensation would be made by the former superior. In order to discourage the development of a market in reserved claims, which might in turn encourage the registration of false or speculative notices, we recommend that the right which vests in the superior should not be transmissible by voluntary assignation. It would, however, be transmissible by will or by operation of law or by court decree. We recommend that

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<sup>34</sup> See para 4.65.

<sup>35</sup> Paras 4.65 - 4.68.

<sup>36</sup> Paras 4.70 - 4.72.

<sup>37</sup> See paras 4.26 - 4.61.

<sup>38</sup> Paras 4.62 - 4.63.

- 43. The right to claim compensation should not be transmissible by voluntary assignment but it should be transmissible by testamentary disposition, by court decree, or by operation of law.**

(Draft Bill, clause 29)

5.36 The claim for compensation would be made against the person who was the owner of the land at the time of the act or event triggering the claim.<sup>39</sup> The draft Bill regulates questions relating to the service of a notice of claim.<sup>40</sup> The obligation to pay compensation would be a personal obligation on that person.<sup>41</sup> It would not run with the land.

5.37 **Time limits.** We recommend that the right to claim compensation should not be available in relation to any occurrence taking place more than twenty years after the date of abolition of the feudal system, notwithstanding the registration of a notice by the superior. There are two reasons for this recommendation. First, there is a general argument for placing a time limit on any privately imposed restriction on the use of land. It is undesirable as a matter of general policy that such restrictions should last indefinitely.<sup>42</sup> It was this policy which led to the demise of entails and, in our discussion paper on real burdens,<sup>43</sup> we seek views on other possible applications of it. In the present context it is likely, because of the changes introduced by the Conveyancing and Feudal Reform (Scotland) Act 1970, that any purely feudal burdens designed to enable a superior to recover development value date from before 1970. The superior will have had the benefit of the burden for 30 years or more by the date of abolition. To bring the benefit to an end after a further twenty years does not seem unreasonable. Secondly, it is undesirable as a matter of policy that abolished feudal restrictions should continue indefinitely in a shadow form.

5.38 There may be cases where a triggering event occurs shortly before the appointed day. The superior may not have had time to enforce the real burden and would lose enforcement rights on the appointed day.<sup>44</sup> It is necessary therefore to allow the superior who has registered a notice to claim compensation in relation to such occurrences. However, there is no need to allow superiors who have had adequate time to complete enforcement proceedings to make compensation claims in relation to pre-Act events. We suggest that a date five years before the appointed day would provide ample time for these transitional cases.

5.39 We also recommend that any claim would have to be made within three years after the act or event giving rise to the claim - which might be, for example, the cessation of a particular use, or a sale of the property, or the commencement of a development in breach of the former restriction. In the case of an occurrence before the appointed day the claim would have to be

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<sup>39</sup> The draft Bill contains provisions to deal with the case where the person having right to the land has an uncompleted title. See clause 33.

<sup>40</sup> See clauses 30(3) and 31.

<sup>41</sup> In the case of owners in common, liability would be joint and several. See the draft Bill clause 33(2).

<sup>42</sup> For discussions of the policy arguments in a more general context, see Simes, "The Policy against Perpetuities" (1955) 103 U Pa L Rev 707 and Sterk, "Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions" (1985) 70 Iowa L R 615.

<sup>43</sup> Scot Law Com DP No 106, paras 5.63 ff and 7.6 ff.

<sup>44</sup> See clause 16 of the draft Bill.

made within three years after the appointed day.<sup>45</sup> The date when the superior could have exercised enforcement rights had the real burden remained in force would have to be determined by reference to the provisions in the feu deed. If the provisions in the deed are such that it could, during the subsistence of the real burden, have been determined when a breach occurred then there is no problem. If they are so vague that this could not have been determined then the real burden was probably invalid and unenforceable in any event. Real burdens are construed very strictly. The vassal has to be able to tell from the terms of the title deeds precisely what would constitute a breach.<sup>46</sup> In the case of a continuing breach the time should run from the start of the breach as that would be when the superior could have taken action had the burden still subsisted.

5.40 Our recommendations on time limits are as follows.

**44. (a) Compensation should be payable only if**

**(i) the event giving rise to the claim occurred within the period beginning five years before and ending twenty years after the appointed day, and**

**(ii) a claim for compensation is made to the owner of the land within three years after the occurrence of the event or (in the case of an occurrence before the appointed day) within three years after the appointed day.**

**(b) In the case of a continuing course of action which would have constituted a breach if the burden had still subsisted, the period referred to in paragraph (a) should run from the commencement of the course of action.**

(Draft Bill, clause 30(2), (4), (5))

5.41 **Amount of compensation.** The mischief at which the provisions on compensation are aimed is the situation where the superior suffered a loss by selling the land at a low price, or giving it away, and the former vassal, because of the disappearance of the burden, is able to realise development value and make a windfall gain. It is the significant loss suffered by the superior at the time of the initial feu grant which distinguishes this type of case from the normal type of case. The basic principle is that the amount of compensation should be the lesser of the former superior's loss and the former vassal's gain. That leaves three problems - how to define the loss, how to define the gain and how to define the relationship between total loss and successive small gains.

5.42 So far as the superior's loss is concerned, section 1(4)(ii) of the Conveyancing and Feudal Reform (Scotland) Act 1970 provides a formula for assessing compensation in the type

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<sup>45</sup> The underlying obligation to pay compensation would prescribe in 20 years under the Prescription and Limitation (Scotland) Act 1973 s 7. So there would be adequate time for negotiations and, if necessary, proceedings before the Lands Tribunal, after the notice of claim had been made.

<sup>46</sup> Eg *Lothian Regional Council v Rennie* 1991 SC 212.

of case with which we are here concerned. It provides that the Lands Tribunal for Scotland, on granting an order varying or discharging a land obligation, may direct the applicant to pay such sum as the Tribunal may think it just to award under the following head

“(ii) a sum to make up for any effect which the obligation produced, at the time when it was imposed, in reducing the consideration then paid or made payable for the interest in land affected by it.”<sup>47</sup>

There would be advantages in using this established formula in the new legislation. It would enable the existing law and practice under the 1970 Act to be used.<sup>48</sup>

5.43 The owner’s gain for this purpose should be limited, in relation to each claim for compensation, to such part of the total development value resulting from the burden being extinguished or unenforceable as corresponds to the actual breach or occurrence. A right to compensation for the whole development value should not be triggered by a small development. For example, if the burden prohibited all building on land feued for use only as a sports field and the owner, 3 years after the appointed day, builds a small house for a groundsman the gain should be the increase in the value of the land which would have resulted from a modification of a burden in those terms<sup>49</sup> so that a groundsman’s house could be built - not the whole increase in development value resulting from the fact that there is no restriction at all on building and that it could be used for the development of a supermarket.

5.44 So far as the relationship between total loss and successive gains is concerned the maximum total compensation payable in respect of all breaches within the relevant period (ie the period from 5 years before to 20 years after the appointed day) should be such a sum as is sufficient to make up for any effect which the burden produced, at the time when it was imposed, in reducing the consideration then paid or made payable for the feu grant. This is the sum which represents the superior’s total loss and the superior should never recover more than that.

5.45 Subject to this overall maximum, the compensation payable **in relation to each breach or occurrence** should be the increase in the value of the land which would have resulted from a modification of the burden (or of a burden on the land in the same terms as the extinguished burden) so as to permit that breach or occurrence.

5.46 The rule derived from section 1(4)(ii) of the 1970 Act would not, if the existing practice of the Lands Tribunal<sup>50</sup> were to be applied in future in this new context, give the

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<sup>47</sup> For an example of the use of this provision, see *Cumbernauld Development Corporation v County Properties and Developments Ltd* 1996 SLT 1106.

<sup>48</sup> See eg *West Lothian Co-operative Society Ltd v Ashdale Land and Property Co Ltd* 1972 SLT (Lands Tr) 30; *Manz v Butter’s Trs and Others* 1973 SLT (Lands Tr) 2; *Gorrie and Banks Ltd v Musselburgh Town Council* 1974 SLT (Lands Tr) 5; *Highland Regional Council v Macdonald-Buchanan* 1977 SLT (Lands Tr) 37; *Cumbernauld Development Corporation v County Properties and Developments Ltd* 1996 SLT 1106.

<sup>49</sup> The actual burden would have been extinguished. So we have to suppose that the modification is of a burden affecting the land and in the same terms as the extinguished burden.

<sup>50</sup> See *Manz v Butter’s Trs and Others*, 1973 SLT (Lands Tr) 2.

superior any benefit from the effects of inflation. This is justifiable on policy grounds. To build in an allowance for inflation for the benefit of the former superior would lead to great practical difficulties and unacceptable results in the case of old burdens. To leave inflation out of account automatically takes account of the age of the burdens. Three other points may be mentioned. First, in the case of old burdens the superiority may well have changed hands, perhaps several times. It is unlikely that its price would have been materially affected by a development value real burden. Secondly, there may well have been other benefits, not mentioned in the deeds, accruing to the superior at or around the time of the grant. In the case of old burdens the motives of the original parties for agreeing to a discount will generally not be ascertainable. Thirdly, in the case of an old burden the superior will have had the benefit of the restriction on use for a considerable time already. For the reasons just mentioned, some members of our advisory group advocated that the entire compensation scheme for development value real burdens should be automatically disappplied in the case of a burden imposed more than, say, twenty years before the appointed day. We have not gone so far, because we think that in some exceptional cases that could lead to unfair results, but we do not think it wrong that the rule has the effect of a built-in allowance for the age of the burden. We recommend that

**45. (a) The amount of compensation payable on any one claim under the Act in relation to a development value real burden should be the amount of the development value which, at the time of the breach or occurrence, would have accrued to the owner if a valid burden, in the same terms as the extinguished burden, had been modified so as to permit the breach or occurrence founded on in that claim.**

**(b) The maximum total amount of any compensation payable in relation to a development value real burden on a claim or claims under the Act should be such a sum as is sufficient to make up for any effect which the burden produced, at the time when it was imposed, in reducing the consideration then paid or made payable for the feu grant.**

(Draft Bill, clause 32(1), (2))

**5.47 No double claim.** It is not the intention to enable superiors to obtain double compensation. The superior should not be able to claim compensation by virtue of the reserved right if, for example, the reserved development value could be recovered by virtue of a contractual claim, as might well be possible if the two parties involved were the two original parties to the contract in question. The principle is that the compensation should not exceed the amount of the superior's actual loss, taking into account any other rights available for recovering development value. We recommend that

**46. In assessing the amount of any compensation payable, any entitlement of the former superior to recover the whole or part of the development value by virtue of a contractual claim or other means should be taken into account.**

(Draft Bill, clause 32(3))

5.48 **The role of the Lands Tribunal.** We recommend that

**47. Any dispute as to liability for, or the amount of, compensation should be dealt with by the Lands Tribunal for Scotland.**

(Draft Bill, clause 38(2))

5.49 It may be of interest to give some examples of the practice of the Tribunal in relation to compensation under section 1(4)(ii) of the Conveyancing and Feudal Reform (Scotland) Act 1970.

5.50 A recent example is provided by the case of *Cumbernauld Development Corporation v County Properties and Developments Ltd.*<sup>51</sup> In 1987 land had been feued by the Corporation to developers for the purpose of building and operating an ice rink. There was a condition in the title, supported by an irritancy clause, that the land could be used only for an ice rink. If the land had not been subject to the condition that it could be used only as an ice rink the consideration would have been £650,000 more than it was. The ice rink was duly constructed and operated for a time but it ran into financial difficulties. In 1993 it was closed and a receiver was appointed to the company which then owned it. The receiver sold the subjects for £2,250,000 to a company which wanted to use them for a bingo hall. The Corporation refused to vary the real burden to allow this use and the company applied to the Lands Tribunal to have the feuing condition discharged. This was done, on the ground that it impeded a reasonable use of the land.<sup>52</sup> The Tribunal awarded compensation under section 1(4)(ii)

“to make up for any effect which the obligation produced, at the time when it was imposed, in reducing the consideration then paid...for the interest in land affected by it.”

5.51 Normally in such a case, in the absence of special considerations, the expectation might have been that compensation of £650,000 would have been awarded on the application of the quoted rule<sup>53</sup> but in this case there were special factors which, in the view of the Lands Tribunal, justified an award of only £206,000.<sup>54</sup> One factor which the Tribunal took into account was that the original discount was on the basis that the alternative to an ice rink would be retail use. Here the new use was to be as a bingo hall and only leisure use was likely to be permitted in the foreseeable future.<sup>55</sup> The Tribunal’s decision on compensation was affirmed on appeal.

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<sup>51</sup> 1996 SLT 1106.

<sup>52</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(3)(c). The Tribunal also discharged the condition on other grounds but the discharge under s 1(3)(c) was the only one to survive appeal.

<sup>53</sup> The superior being supposed, in the absence of provision to the contrary, to have voluntarily given up not only the amount of the discount but also interest on it so long as the approved use continued.

<sup>54</sup> Much of the argument in this case turned on the effect of a special “escape clause” in the title.

<sup>55</sup> The Tribunal noted that the area was zoned for leisure use and that the Corporation was itself the planning authority.

5.52 Another example is *Gorrie and Banks Ltd v Musselburgh Town Council*.<sup>56</sup> A piece of ground had originally been feued in 1888 for a feuduty of £19.12 with no special restriction on development. In 1920 a real burden was imposed on the ground in terms of an earlier agreement between the superior and the vassal. It restricted use to use as an open space. The feuduty was reduced to £9.12. Eventually circumstances changed to such an extent that it was no longer reasonable to maintain the ground as an open space. Planning permission had been granted for the erection of two houses but the houses could not be built because of the real burden. The Lands Tribunal discharged the real burden. It awarded compensation to the superior by taking the difference of £10 a year in the feuduty, which resulted from the imposition of the real burden, and capitalising it at 15 years purchase. The compensation awarded was therefore £150.

5.53 A case in which no compensation was awarded but which contains valuable observations on the approach to be adopted in applying section 1(4)(ii) is *Manz v Butter's Trs and Others*.<sup>57</sup> In 1924 a feu charter of land in the High Street of Pitlochry required the proprietor to use the subjects only as a temperance hotel. By 1973 Pitlochry had become a major tourist centre and the High Street was almost entirely given over to shops, restaurants and other tourist facilities. The Lands Tribunal discharged the condition on the ground that it had become unduly burdensome to the proprietor compared with any benefit to the superior and that it impeded a reasonable use of the subjects. The superior claimed compensation and led rather speculative evidence (based on the possibility of increased hotel profits if there had been no restriction and the assumption that the superior would have sought 10% of those additional profits) as to the amount which might have been charged as feuduty had the restriction not been included in the title. The hypothetical discount was then doubled by the superior's expert witness to take account of the change in the value of money between 1924 and 1973. The superior also argued that it was relevant to consider what would have been charged for a waiver of the restriction at the time when it was imposed. There was no evidence of any actual discount. In fact there was some evidence that the feuduty charged was in line with standard feuduties with or without such a restriction. The Lands Tribunal held that the onus was on the superior to prove that the consideration was actually reduced because of the restriction and that the superior had not discharged this onus. The Tribunal said that it was

“a wrong approach to calculate what would have been an appropriate payment, at the time when the restriction was imposed, for lifting the veto.”

In the Tribunal's view the correct approach would be to take the difference between the reduced feuduty actually charged and the amount of feuduty which would (as a matter of proof, not mere speculation) have been charged but for the restriction and then capitalise that sum, using the multiplier appropriate at the date of the claim for compensation. The Tribunal did not favour the making of any adjustment for the change in the value of money over the years. It pointed out that this would create great difficulties if the Tribunal were to be faced with the discharge of an obligation created at the beginning of the nineteenth century.

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<sup>56</sup> 1974 SLT (Lands Tr) 5.

<sup>57</sup> 1973 SLT (Lands Tr) 2.

5.54 **Clearing the registers.** It is important that the proprietor of the property should have the right to challenge the notice from the moment it is registered. It may be, for example, that the proprietor disputes the superior's assertion that the property was feued at a discount or claims that the real burden is not within the statutory definition of a development value real burden or considers that the real burden founded on by the superior is invalid or unenforceable. We do not think that there should be any time restriction on the right to challenge. It would be unfortunate if invalid burdens could be given a sort of posthumous validity and false claims given force and effect merely by the lapse of time. The method of challenging a notice would be to apply to the Lands Tribunal for Scotland for an order discharging the notice on cause shown. The normal "cause" would be that the proprietor could not in the future be liable to pay compensation under the legislation because the statutory conditions were not, and could never be, fulfilled.

5.55 It may happen that a notice, although initially valid, becomes obsolete because the right to claim compensation no longer survives. This could come about in various ways. For example, the parties may agree that in exchange for a payment by the proprietor of the subjects the former superior will waive the right to claim compensation. Or full compensation may be paid in respect of a development, leaving no room for a further claim. Or the former superior may fail to claim compensation within the three year period allowed for this purpose after the relevant act or event. To deal with such cases we recommend (a) that it should be possible to register a discharge or restriction of the right to claim by the former superior or other person having the right<sup>58</sup> and (b) that the proprietor of the subjects should have the right to apply to the Lands Tribunal for Scotland for an order discharging or restricting the notice on cause shown. The normal "cause" would be that compensation could no longer be claimed in the circumstances covered by the notice.

5.56 We recommend that

48. (a) **The person having the right to claim compensation should be able at any time to grant a discharge or restriction of the right to claim, and such discharge or restriction should be registrable.**

(b) **The proprietor of the property should have the right at any time to apply to the Lands Tribunal for Scotland for an order discharging or restricting the notice on cause shown.**

(Draft Bill, clauses 34 and 38(1))

5.57 **Burden of proof.** It would be unfair, and an invitation to abuse, if the superior, by simply registering a notice, could impose on the vassal the burden of proving that a burden was not a development value real burden, or that there had been no reduction in the original consideration because of its imposition, or that there had been no infringement warranting the payment of compensation. We therefore recommend that

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<sup>58</sup> A form is provided in sched 7 to the draft Bill.

49. In any application to the Lands Tribunal on any of the above matters relating to compensation the burden of proving any disputed question of fact should be on the superior, former superior or person having for the time being the right to claim compensation.

(Draft Bill, clause 38(3))

#### **No compensation for loss of right to enforce other restrictions**

5.58 We do not think that any compensation should be payable for the loss of the right to enforce feudal restrictions or conditions other than those which meet the criteria set out above.

5.59 Where the superior owns no land in the immediate neighbourhood (and so could not opt to preserve the burden) and where the case is not one of a deliberately reserved development value (so that there is no option to reserve a right to compensation) there will very often be a question whether there can have been, prior to abolition, any legitimate interest to enforce the restriction. In such cases the superior's interest in actual enforcement (as opposed to exacting money for waivers) would often have been of a nebulous character. One of the justifications for the non-neighbouring superior's rights to enforce feuing restrictions was that they preserved the value of the land and therefore the value of the security which the superior had for the payment of feuduty.<sup>59</sup> The weight of this justification has been reduced by the progressive redemption of feuduties and the small value of many of those which remain.

#### **No compensation for loss of right to exact fees for waivers**

5.60 In practice one of the most valuable adjuncts of feudal superiorities in recent years has often been the income which could be obtained by charging for waivers of feudal restrictions. In many cases the restriction in question would have been varied or discharged by the Lands Tribunal for Scotland, without compensation, if an application had been made. The fee demanded for a waiver would be set at such an amount as would make it worthwhile for the vassal to pay in order to avoid the trouble, delay, expense and inherent uncertainty of an application to the Tribunal. This has been one of the abuses of the feudal system which has led to demands for reform.<sup>60</sup> We do not consider that compensation should be payable for the loss of a right to obtain money in such circumstances.

#### **No compensation for loss of bare superiority**

5.61 We do not consider that there ought to be any compensation payable for the loss of a bare superiority as such. A bare superiority has no compensatable value when stripped of the incidental financial advantages discussed above. The value of a vassal's property would not be measurably increased by the mere conversion of a feudal *dominium utile* into non-feudal ownership.

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<sup>59</sup> See eg *Howard de Walden Estates Ltd v Bowmaker Ltd* 1965 SC 163.

<sup>60</sup> The practice of demanding money for the discharge of a restriction on the use of land which the entitled party has no longer any interest to enforce has been described in the United States as "blackmail". See Reichman, "Towards a Unified Concept of Servitudes", 55 S Cal L Rev (1982) 1177 at 1233.

## **No compensation for change in nature of baronies**

5.62 Our main recommendation on baronies is that they should cease to be part of the system of land ownership but that they should continue as free floating dignities, with their social, ceremonial and heraldic aspects left intact. We do not think that this change justifies compensation. The value of baronies lies in the aspects left intact. Barons would not be forced to separate the ownership of the *caput* from the ownership of the barony. They could retain both and could, if they so wished, dispose of both together to the same person, who would in turn have the same options. There is nothing strange or unusual in the idea of a non-territorial dignity of feudal origin. Most major peerages of the realm are of that nature.

5.63 We have also recommended that any surviving criminal and civil jurisdiction of baron courts should be abolished. This jurisdiction is already obsolete and clearly contrary to public policy. It seems clear that no compensation should be payable for this long overdue reform of the law.

5.64 We have recommended the abolition of the conveyancing peculiarities of barony titles. One of these - the common law facility of conveying the lands under a general name - is rapidly becoming obsolete because of registration of title. A similar facility is, in any event, available by statute in relation to all land.<sup>61</sup> Another peculiarity - the ability to acquire a right to salmon fishings by prescription even if fishings have not been expressly mentioned in the title deeds - has now little if any role left to play. Any salmon fishings which could have been acquired by prescription will already have been acquired. It was represented to us by one consultee concerned about the effect of feudal abolition on baronies that the baron within the barony had, like the Crown within the kingdom, the right to land not owned by anyone else. It seems to us, however, that this is not a special right or a peculiarity of barony titles. Anyone who has obtained a conveyance of a large area of ground, and who has sold off parts of it, will own everything undisposed of. It will be within the terms of the title and that will be so whether the title is by reference to a general baronial name ("the lands and barony of such-and-such") or by reference to an ordinary description. Forgotten plots or strips of ground within the area covered by the title, which it was generally assumed had been sold off but which have not in fact been disposed of at all, will still be covered by the original title.

## **Human rights**

5.65 Human rights questions have a greater prominence in the United Kingdom because of the Human Rights Act 1998 and the Scotland Act 1998<sup>62</sup> but the basic question is still whether something infringes the European Convention on Human Rights or the Protocols to the Convention.

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<sup>61</sup> Titles to Land Consolidation (Scotland) Act 1868 s 13.

<sup>62</sup> An Act will be beyond the competence of the Scottish Parliament if it is incompatible with the European Convention on Human Rights (including its Protocols). See the Scotland Act 1998 s 29 (2)(d).

5.66 Article 1 of the First Protocol to the Convention provides as follows.

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

5.67 The reform of the feudal system of land tenure is clearly in the public interest. It is clear from the case law of the European Court of Human Rights that, while each Contracting State enjoys a large measure of discretion in assessing what is in the public interest or in accordance with the general interest, it is necessary to preserve a fair balance between the public and private interests involved.<sup>63</sup> The Convention does not prevent modernisation of a country’s system of land tenure or the control of oppressive feudal or quasi-feudal exactions.<sup>64</sup> Nor does it require the payment of full compensation for every right which is restricted or removed in the course of such modernisation or control.<sup>65</sup> The absence of legitimate expectations can also be taken into account: a person who acquires an asset in the knowledge that it is likely to be short-lived is not in a strong position to claim compensation for its loss within the expected time.<sup>66</sup>

5.68 In this report we are recommending the payment of full compensation for the loss of the right to feuduty, which is the most obvious financial loss to superiors resulting from the abolition of the feudal system of land tenure. We are also recommending a scheme to enable superiors to opt to preserve certain types of real burden, as non-feudal burdens, where there is a good policy reason for allowing this to be done. And we are recommending a scheme whereby former superiors, if they opt in by notice, will continue for twenty years after abolition to be able to claim compensation in cases where, in the case of a feu at an undervalue, a feudal real burden was imposed in order to reserve the development value to the superior. We are not recommending compensation for the loss of the right to exact payment from vassals for waivers of restrictions which the superior has little or no interest in enforcing as such. And we are not recommending compensation for the loss of what has no value, such as a bare superiority itself, or the link between a barony and a particular plot of land or the conveyancing and jurisdictional peculiarities of barony titles. We consider that these recommendations are in conformity with the European Convention on Human Rights.

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<sup>63</sup> See Harris, Warbrick and O’Neill, *The Law and Practice of the European Court of Human Rights* (1995) 522 and 532.

<sup>64</sup> Indeed, as we noted in our Report on *Leasehold Casualties* (Scot Law Com No 165) para 4.4, if the Convention had been drawn up a century earlier one of its main concerns might well have been to protect citizens from oppressive feudal exactions.

<sup>65</sup> See *James v United Kingdom*, ECHR, 21 February 1986, Series A No 98; *Mellacher and Others*, ECHR, 19 December 1989, Series A No 169. On the adequacy of compensation, see also *Lithgow and Others*, ECHR, 8 July 1986, Series A No 102 esp at para 121.

<sup>66</sup> See *Fredin*, ECHR, 18 February 1991, Series A No 182.

## Part 6 Other Rights held by Superiors

### Introduction

6.1 Today almost the entire value of superiorities lies in the twin rights to exact feuduties and to enforce real burdens. These were discussed earlier.<sup>1</sup> Occasionally other rights were also reserved in grants of feu. These were a mixture of personal rights, and rights which transmitted against successors.<sup>2</sup> The former will survive abolition, at least in a question with the original parties,<sup>3</sup> and our concern here is only with the latter.

6.2 Although transmissible rights might appear in grants of feu, they were rarely feudal in character. Some, such as the right to fish for salmon or the right to minerals, were simply freestanding rights - or in other words, separate tenements, held without reference to other land. Others, for instance pecuniary real burdens, were subordinate real rights. Others still - servitudes, for example - attached, not to the superiority, but to some neighbouring land of which the superior also happened to be owner at the time of the initial grant. It need hardly be said that non-feudal rights will be unaffected by the recommendations in this report. The only reserved feudal right of significance was sporting rights, which seem best characterised as a form of real burden and which will fall to be treated in the same way as other feudal real burdens.<sup>4</sup>

6.3 A number of reserved rights merit fuller consideration.

### Minerals

6.4 Superiors usually reserved minerals. But this was a reservation of *dominium utile* rather than *dominium directum*. In other words, the superior came to hold a mixed estate, part superiority (in respect of the land feued) and partly *dominium utile* (in respect of the minerals reserved). Feudal abolition will extinguish the superiority, while converting *dominium utile* in the minerals into outright ownership. In a practical sense nothing will have changed. The former vassal will continue to own the surface, and the airspace above the surface, and the former superior will continue to own the minerals, as a separate tenement. But in both cases the right will be post-feudal - a right of ownership rather than a right of *dominium utile*.

6.5 Often mineral grants or reservations are accompanied by related rights and obligations. For example, liability for subsidence may be conceded, or excluded; or the mineral owner may be given the right to work from the surface, or to lower the surface. While conditions of this kind are enforceable, and run with the land, their juridical nature is problematic.<sup>5</sup> Plainly they are not servitudes. But nor are they real burdens, partly on grounds of content, and partly

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<sup>1</sup> Parts 3 and 4 respectively.

<sup>2</sup> Reid, *Property* para 382.

<sup>3</sup> Clause 69 of the draft Bill expressly saves contractual rights.

<sup>4</sup> See Part 4 for our recommendations on real burdens.

<sup>5</sup> Reid, *Property* paras 264-6.

because they may fail to appear in the title of the property affected (ie the servient property). Probably they are best regarded as an integral and unseverable part of the grant or reservation of minerals. At any rate they are not feudal, and will not be affected by feudal abolition. They are obligations due by one estate of *dominium utile* to another estate of *dominium utile*. Nothing turns on the relationship of superior and vassal. And since they are not real burdens, there will be no need for the superior, under recommendations made earlier,<sup>6</sup> to transfer their benefit from the superiority to the mineral estate.

6.6 Occasionally there may also be real burdens. For example, a restriction on building imposed on the owner of the surface may be conceived - or conceived in part - for the benefit of the mineral estate. Such burdens, if created in a grant in feu, will fall with feudal abolition. This is because they are enforceable by the superior *qua* superior, and, unless the grant states otherwise, the mineral estate is not a dominant tenement.<sup>7</sup> However, under a recommendation made earlier,<sup>8</sup> it will be possible to preserve the burdens by registering an appropriate notice in which the minerals are nominated as a new dominant tenement.

### Salmon fishings

6.7 Salmon fishings, although incorporeal, are also separate tenements, held separately from the waters in which they can be exercised. Other examples of incorporeal separate tenements are also found (for example the right to gather mussels and oysters) but are uncommon in practice. Unlike minerals, salmon fishings do not pass without express conveyance.<sup>9</sup> Hence a superior who owned but wished to keep salmon fishings would not require to make an express reservation. If the grant in feu was silent, the salmon fishings would remain with the superior. In practice, superiors often did not own the salmon fishings, so that the issue did not arise. Salmon fishings not owned by the superior might continue to be reserved by the Crown, as *regalia minora*, or might have been feued by the Crown to some third party.

6.8 At present salmon fishings are held feudally, in the same manner as land, and exercise of the right is restricted to the person with *dominium utile*. As with land proper, the effect of feudal abolition will be to extinguish any estates of superiority, and to convert *dominium utile* into outright ownership. The status as a separate tenement will be preserved.<sup>10</sup>

6.9 Earlier we recommended that salmon fishings could be nominated by a superior as a replacement dominant tenement in real burdens, provided that the burdens were conceived for the benefit of the fishings.<sup>11</sup>

### Mixed estate

6.10 Many superiors hold the *dominium utile* of other land in the neighbourhood. A typical pattern would be the landed estate from which small plots have been feued over many years. In feudal law, the granter remains an owner of the whole estate; but while ownership in respect of the plots still unfeued is *dominium utile*, in respect of the rest of the estate it is

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<sup>6</sup> Paras 4.26 - 4.47.

<sup>7</sup> Para 4.87.

<sup>8</sup> Para 4.39.

<sup>9</sup> This is because they are 'legal' rather than 'conventional' separate tenements. See Reid, *Property* para 209.

<sup>10</sup> Paras 7.14 - 7.18.

<sup>11</sup> Para 4.39.

*dominium directum*. An estate which comprises a mixture of *dominium utile* and *dominium directum* is known as a mixed estate. Feudal abolition will unscramble the mixture, extinguishing *dominium directum* and converting *dominium utile* into outright ownership.

6.11 Matters may be more difficult on the ground. Since the descriptions in older feudal grants are often hard to interpret, an owner may have no precise idea as to what land has been retained as *dominium utile*. This problem is already addressed at first registration in the Land Register, when the holder of a mixed estate must provide the Keeper with the means to identify separately those parts which have been feued and the residue which has not. Similarly, in first registration cases occurring after abolition it will be for the parties to identify and convey only property in respect of which ownership still subsists. In order to formalise this system, we have already recommended that no application for registration in the Land Register should be accepted by the Keeper if it relates in whole or in part to a feudal estate which has been abolished.<sup>12</sup> This recommendation, if implemented, would oblige the Keeper to reject an application which failed to distinguish former *dominium directum* from former *dominium utile*. Only an application in relation to the latter (now converted to ownership) could be accepted. One effect of abolition will be to make the Register inaccurate in relation to such mixed estates as are already registered, for the title will continue to include land which was formerly held as *dominium directum*. This inaccuracy will not be cured overnight. The Keeper will be empowered to rectify such inaccuracy, free from the risk of claims for indemnity,<sup>13</sup> but is unlikely to use staff resources for this purpose. This means that matters will probably remain as they are until the first dealing in relation to the estate.

6.12 On abolition, any heritable security (or other subordinate real right) over mixed estate would automatically be restricted to the land formerly held as *dominium utile*. In practice heritable creditors are unlikely to suffer prejudice. Superiorities are usually of little or no value. No creditor today would lend money on the security of a superiority alone; and in the case of mixed estate the security is accepted only because of the parts which are *dominium utile*.

### **Pecuniary real burdens**

6.13 A pecuniary real burden is a right in security created by reservation in a conveyance of land.<sup>14</sup> As the name suggests, the obligation secured is almost always the payment of money. A pecuniary real burden requires to be distinguished from a real burden in the more normal sense of a condition running with the land.<sup>15</sup> On one view it has not been possible to create pecuniary real burdens since 1970, when the standard security was introduced,<sup>16</sup> but the matter has not been judicially tested. In our recent discussion paper on real burdens we suggest that the position be clarified and that new pecuniary burdens be expressly disallowed.<sup>17</sup> Existing burdens would be unaffected.

6.14 In feuing land superiors sometimes reserved real burdens, for example as security for a promised contribution to the cost of making up a road or sewer. Even in modern times real

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<sup>12</sup> Para 2.12.

<sup>13</sup> Paras 2.46 - 2.50.

<sup>14</sup> Gordon, *Scottish Land Law* paras 20-103 - 20-112; Reid, *Property* para 383; Halliday, *Conveyancing* vol II paras 50.02 - 50.08.

<sup>15</sup> Reid, *Property* para 375.

<sup>16</sup> Halliday, *Conveyancing* vol II para 50.01.

<sup>17</sup> Scot Law Com DP No 106 paras 9.14 and 9.15.

burdens have been in occasional use, sometimes by accident. Thus, depending on the wording, a condition designed to reserve a specified sum as development value to the seller might fail as a standard real burden - for example, as being insufficiently praedial - but succeed as a pecuniary real burden.<sup>18</sup>

6.15 Pecuniary real burdens are invariably secured over the *dominium utile*. Hence, like other such rights in security, they will be untouched by feudal abolition.<sup>19</sup> The creditor's right is not held as feudal superior.

## Reversions

6.16 A reversion is a right to the return of property which has been feued or disposed on the occurrence of a particular event, such as the property ceasing to be used as a school or church. Reversions can be created under the Reversion Act of 1469, still in force, and until 1945 they could also be created under the School Sites Act 1841. While the 1841 Act was restricted to land granted for the building of schools and schoolhouses, the 1469 Act can be used for any purpose, although exercise of the reversion probably requires the payment of money.<sup>20</sup> Unlike a right of redemption, which it otherwise resembles, a reversion is a freestanding right and does not attach to the superiority.<sup>21</sup> In our discussion paper on real burdens we propose the repeal of the 1469 Act, but existing reversions would be unaffected.<sup>22</sup> They will not be affected by the abolition of the feudal system.<sup>23</sup>

## Servitudes

6.17 It has always been competent for servitudes to be created in a grant in feu.<sup>24</sup> For example, in *Stewart v Steuart*<sup>25</sup> feuars were taken bound to pay an annual amount for a water supply from another part of the estate which was being retained by the superior. It was held that a servitude of *aquaehaustus* had been created, in which the dominant tenements were the areas which had been feued and the servient tenement the remainder of the estate. In the words of Lord President Inglis:

“It does not matter in the least that [the servitude] is constituted by feu-charter. It is constituted by writ under the hand of the person capable of subjecting the remainder of the . . . estate to the burden, and he subjected it in consideration of a continuous

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<sup>18</sup> On compensation for the loss of valid development value real burdens which are not pecuniary real burdens, see Part 5.

<sup>19</sup> Subordinate real rights over the *dominium utile* will continue to affect the land. See clause 2(1) of the draft Bill.

<sup>20</sup> The 1469 Act refers to “payand the mone”. The original transaction must also be a sale and not a donation.

<sup>21</sup> For rights of redemption, see para 4.37.

<sup>22</sup> Scot Law Com DP No 106 paras 8.17 and 8.19 - 8.21 (on the 1469 Act) and 8.53 - 8.70 (on other statutory provisions).

<sup>23</sup> Except that, in the case of the 1841 Act, it may become harder to identify the person entitled to the reversion. See Scot Law Com DP No 106 para 8.56.

<sup>24</sup> Gordon, *Scottish Land Law* para 24-28, n 97. The general rule is that a servitude may be created, among other ways, by express grant or reservation contained in the title deeds of either the dominant or servient tenement: Duff, *Feudal Rights*, p 137; Rankine, *Landownership*, pp 426 f; Halliday, *Conveyancing* vol II, para 35-04.

<sup>25</sup> (1877) 4 R 981.

payment to himself and his successors, not as mere superiors of the subjects feued but as proprietors of the whole . . . estate”.<sup>26</sup>

Therefore, the rule is that where the superior retains the *dominium utile* of neighbouring land, it is the neighbouring land which forms the servient tenement in the case of a servitude being granted or the dominant tenement in the case of a servitude being reserved.<sup>27</sup> The abolition of the feudal system will not affect such servitudes.

6.18 There remains the question of whether a servitude can be constituted on, or in favour of, a mere superiority (ie the *dominium directum* of the land which is being feued).<sup>28</sup> Since a superiority confers no right to natural possession, it seems clear that it could not form the *servient* tenement in a servitude.<sup>29</sup> Whether it could form the *dominant* tenement may seem a more open matter.<sup>30</sup> At a practical level, however, it is not easy to think of reasons why a superior would reserve a servitude in favour of the superiority alone. One possibility might be a right of access in order to check that the conditions of the feudal grant are being adhered to by the vassal. Nevertheless, we are not aware of this being done in practice.

6.19 In fact, it seems that the law rejects the idea of a superiority as a dominant tenement. Hume states that “a servitude is considered as acquired . . . to the lands themselves. It attaches as a quality and pertinent of theirs.”<sup>31</sup> Pertinents always run with the *dominium utile* and not the *dominium directum*.<sup>32</sup> The main, perhaps only, exception to the rule that the dominant tenement must be a piece of land is the case of a servitude right of access in favour of the proprietor of the incorporeal heritable right of salmon fishings over land adjoining the river.<sup>33</sup> But even here the right is one of *dominium utile* rather than *dominium directum*.

6.20 Two other factors may be mentioned. First, servitudes require to be for the “praedial” benefit of the dominant tenement.<sup>34</sup> This requirement could not easily be satisfied in the case of *dominium directum*. In the absence of a right to natural possession, it is difficult to see how a superiority could benefit from such traditional servitude rights as those to draw water, extract peat or bleach clothes.

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<sup>26</sup> At 984.

<sup>27</sup> On the express creation of servitudes in general, see Gordon, *Scottish Land Law* paras 24-28 - 24-33 and Reid, *Property* paras 450-451 (A G M Duncan).

<sup>28</sup> The issue is discussed by D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 1.06(1).

<sup>29</sup> Gordon, *Scottish Land Law* para 24-13, however, apparently does not rule out the possibility when he considers “whether one of the tenements, and most usually, the dominant tenement, can be incorporeal”.

<sup>30</sup> See D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 1.49.

<sup>31</sup> Hume, *Lectures* III 265.

<sup>32</sup> On pertinents generally, see Reid, *Property* paras 199-206; Gordon, *Scottish Land Law* pp 59-60.

<sup>33</sup> Even here the point does not seem to have been authoritatively decided : see Rankine, *Landownership* pp 421-422; Gordon, *Scottish Land Law* para 24-13; Reid, *Property* para 443 (A G M Duncan); *Berry v Wilson* (1841) 4 D 139; *Lord Advocate v Sharp* (1878) 6 R 108; *Maxwell v Lamont* (1903) 6 F 245; *Middletweed Ltd v Murray* 1989 SLT 11. See also D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 1.47.

<sup>34</sup> Rankine, *Landownership* pp 421-425; N M L Walker in *Green’s Encyclopaedia of Scots Law*, (3rd edn), vol XIII, (1932), para 1223; Gordon, *Scottish Land Law* paras 24-18 - 24-19; Reid, *Property* para 444 (A G M Duncan); Halliday, *Conveyancing* vol II para 35-02; *Irvine Knitters Ltd v North Ayrshire Co-operative Society Ltd* 1978 SC 109.

6.21 Secondly, a servitude in favour of a superior would seem to contravene the rule that the owner of property cannot have a servitude over it (*res sua nemini servit*).<sup>35</sup> In the only case in which the matter appears to have been discussed, Lord Craighill took the view that:

“A superior has an estate in the lands feued to his vassal, but a servitude for his own benefit over these would be a contradiction of the rule *res sua nemini servit*. There is not in the books any authority for the defender’s proposition [that this would be a valid servitude].”<sup>36</sup>

The reasoning is that the superior, having ownership, albeit only *dominium directum*, cannot also have a servitude over the same property.

### Fishing and game rights

6.22 In feuing land superiors sometimes reserved fishing and game rights.<sup>37</sup> As mentioned earlier,<sup>38</sup> salmon fishings were in a special position, as a separate tenement capable of ownership on their own. Here we are concerned only with other freshwater fishings, such as trout fishings, and with game rights.

6.23 **Express grant.** Where fishing and game rights were not being reserved, it was at one time common to make an express grant to the vassal, rather as in the case of salmon fishings.<sup>39</sup> The right of hunting, fowling and fishing within the ground feued was granted by means of the clause *cum aucupationibus, venationibus, piscationibus*.<sup>40</sup> The right simply to fish was granted by the clause *cum piscationibus*.<sup>41</sup> Similarly, the right merely to hunt was granted by the clause *cum venationibus et aucupationibus*.<sup>42</sup> The vast majority of institutional authority is to the effect that such clauses were not actually necessary to confer the relevant right on the vassal. Craig states that “it has never been doubted that the rights of fowling, hunting and fishing pass with the lands.”<sup>43</sup> Similarly, Erskine’s view is that “the right of hunting, fowling and fishing within one’s own ground . . . naturally arises from one’s property in the lands”.<sup>44</sup> Likewise Hume writes that:

“[I]t would appear that for long, in our practice . . . no heritor, even the most inconsiderable, in order to kill game on his own lands, stood in need of any personal

<sup>35</sup> Erskine II.9.36; Rankine, *Landownership* p 421; Gordon, *Scottish Land Law* paras 24-09 - 24-13; Reid, *Property* para 443 (A G M Duncan); *Innes v Stewart* (1542) Mor 3081; *Hemming v Duke of Athole* (1883) 11 R 93; *McTavish’s Trs v Anderson* (1900) 8 SLT 80; *Hamilton v Elder* 1968 SLT (Sh Ct) 53.

<sup>36</sup> *Hemming v Duke of Athole* (1883) 11 R 93 at 99.

<sup>37</sup> See, for example, *Macdonald v Farquharson* (1836) 15 S 259; *Hemming v Duke of Athole* (1883) 11 R 93; R Paisley, “Development Sites and Purchasers of the Superiority”, 1996 JR 331 at 331-332.

<sup>38</sup> Para 6.7.

<sup>39</sup> Stair II.3.75 describes the clause *cum aucupationibus, venationibus, piscationibus* as one “of the specialities, ordinarily insert in infeftments”.

<sup>40</sup> Stair II.3.76; Erskine II.6.6.

<sup>41</sup> Stair II.3.69.

<sup>42</sup> Hume, *Lectures* IV 259.

<sup>43</sup> Craig, *Jus Feudale* II.8.13. (trs J A Clyde, 1934).

<sup>44</sup> Erskine II.6.6. He criticises Stair II.3.69 which may be interpreted as saying that the public at large have the right to fish. It is not altogether clear that Stair meant to say this and in any case such a view has been definitively rejected. See *Fergusson v Shirreff* (1844) 6 D 1363.

licence, or separate grant, or even of a clause *cum venationibus* in the charter of his lands from the King”.<sup>45</sup>

He goes on to state that the clause was introduced in later times because the right to hunt became seen as a distinct part of the right of property in the land, like the right to cut wood or gather wild fruits.<sup>46</sup> However, he does not suggest that in the absence of the clause that the right was not conferred on the vassal. Stair thought that an express grant was required with respect to the right to hunt deer,<sup>47</sup> but his opinion was later rejected.<sup>48</sup>

6.24 Case law is to the same effect. For example, in *Carmichael v Colquhoun*<sup>49</sup> the court held unanimously “that the right of trout-fishing in a river, [is] naturally inherent in the property of the adjacent banks, so as to accompany lands as part and pertinent”.<sup>50</sup> In *Pollock, Gilmour & Co v Harvey*<sup>51</sup> Lord Corehouse stated: “By the law of Scotland, the right of killing game, considered as a real right is an incident of landed property.”<sup>52</sup> Textbook writers concur.<sup>53</sup>

6.25 **Express reservation: exclusive rights.** Whilst fishing and game rights are normally implied in the grant to the vassal, the superior may decide to reserve them. The important question is what effect is to be given to such a reservation, and whether the answer is affected by whether the right being reserved is exclusive or non-exclusive. We begin with exclusive rights.

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<sup>45</sup> Hume, *Lectures* IV 259.

<sup>46</sup> Hume, *Lectures* IV 260. And see also Bell, *Principles* ss 747 and 952.

<sup>47</sup> Stair II.3.68.

<sup>48</sup> *Duke of Athole v Macinroy* (1862) 24 D 673.

<sup>49</sup> (1787) Mor 9645; 2 Hailes 1033.

<sup>50</sup> At 9646. Lord Braxfield stated at 2 Hailes 1034 : “As to trout fishing, from the nature of property, the heritor *ex adverso* has that right . . . Fishings may be separated from the lands : then the Crown will have a right to *all* fishings. But if the Crown feus out, either *cum piscationibus* or with parts and pertinents, this will carry inferior fishings [i.e. not salmon]”. See also *Fergusson v Shirreff* (1844) 6 D 1363 and Lord Cringletie in *Mackenzie v Rose* (1830) 8 S 816 at 818 : “I am satisfied that a party having a right to the banks of a river has a right to fish for trout. This right accompanies the lands”; Lord President Inglis in *Patrick v Napier* (1867) 5 M 683 at 698 describing the right of angling for trout “as a mere incident of property. That is beyond all dispute. It is a thing that naturally and necessarily belongs to the proprietor through whose grounds the stream of water flows”; Lord Neaves in *Maxwell v Copland* (1868) 7 M 142 at 149 f: “A right of trout fishing is an incident to the right of property. . . [It] is a privilege to the proprietor of the soil”, words approved by Lord Westbury on appeal in *Copland v Maxwell* (1871) 9 M (HL) 1 at 4; and the Lord President in *Earl of Galloway v Duke of Bedford* (1902) 4 F 851 at 861 : “[A] right of trout-fishing . . . is merely an incident of the ownership of property”.

<sup>51</sup> (1828) 6 S 913.

<sup>52</sup> (1828) 6 S 913 at 914. See also *Birkbeck v Ross* (1865) 4 M 272. Similarly, in *Campbell v McLean* (1870) 8 M (HL) 40, Lord Hatherley LC at 44 described the right of killing game as “a mere right or privilege”. See too *Beckett v Bisset* 1921 2 SLT 33 at 34 where Lord Blackburn stated that the right of shooting was “a purely personal privilege”, and *Wemyss and District Water Trs v Lawson* 1924 SLT 162 at 165.

<sup>53</sup> For example, Rankine, *Landownership* pp 581 f states that white fishing “whether originally a public franchise or not . . . is now part and pertinent of the riparian lands requiring no special grant or a general clause *cum piscationibus*”. (In fact only Stair seems to have suggested it was a public franchise: see para 6.23 above.) See too Gordon, *Scottish Land Law* paras 8-132 and 9.04 ff; Reid, *Property* para 280; S Scott Robinson, *The Law of Game Salmon and Freshwater Fishing in Scotland* (1990) pp 4 and 226; *Stair Memorial Encyclopaedia* vol 11 para 48; Halliday, *Conveyancing* (2nd edn) vol II paras 33-27 and 33-29.

6.26 An exclusive reservation might be interpreted in one of two ways. In the first place, it could be viewed as elevating fishing and game rights into separate tenements. Alternatively it could be regarded as an inherent condition of the feu.

6.27 (1) *Separate tenements.* In the eighteenth and early nineteenth centuries it was believed that trout fishings, like salmon fishings, could form a separate tenement.<sup>54</sup> Bell, for example, stated that trout fishing “may be reserved, or even transferred to a stranger”. Similar judicial views were expressed at around the same period.<sup>55</sup> Later authority, however, moved away from this position. In *Macdonald v Farquharson*<sup>56</sup> a superior had reserved the rights of “hunting, hawking, fishing, fowling, as used and wont”. The reservation was not regarded as that of a separate tenement but as of a non-exclusive right. In *Copland v Maxwell*<sup>57</sup> the right to fish for trout was described as merely a “privilege”.<sup>58</sup> The point was developed to its natural conclusion in *Earl of Galloway v Duke of Bedford*<sup>59</sup> where Lord Kinnear said of trout fishing “that disjoined from the ownership of land, it is not recognised by the law as a separate tenement which can be constituted by infestment or by tack”.<sup>60</sup> Subsequently, legislation was introduced in order to make possible a lease of trout fishings.<sup>61</sup>

6.28 Something of the same pattern can be seen with game rights. Stair viewed the right to hunt deer as *inter regalia minora*.<sup>62</sup> Hume’s statement that the right to hunt “was sometimes specially reserved by a charter, while it bestowed the full right of property in all other respects”<sup>63</sup> suggests a separate tenement. So too does Rankine’s statement that the right of game “may be imparted to others absolutely or in lease, or may be reserved in disposing of the land.”<sup>64</sup> However, the cases cited by Rankine do not justify the implication that the right can be constituted as a separate tenement.<sup>65</sup> Later writers treat the right to hunt and shoot as a

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<sup>54</sup> On separate tenements in general see Reid, *Property* paras 207-212.

<sup>55</sup> In *Carmichael v Colquhoun* (1787) Mor 9645 at 9646 (reported also at 2 Hailes 1033) the court was unanimous that the right to fish for trout might “be reserved from the grant, or transferred to a third party, either expressly or by prescription.” In *Mackenzie v Rose* (1830) 8 S 816 at 818, Lord Cringletie said that “unless precluded by a superior right, the proprietor of the lands is entitled” to fish for trout. In *Fergusson v Shirreff* (1844) 6 D 1363 at 1374 f, Lord Cockburn stated: “Trout-fishing, as a subject of property, is familiar to the law, and often of great patrimonial value, and liable to be sold as a distinct estate . . . A man may sell his estate, reserving the trout-fishing”.

<sup>56</sup> (1836) 15 S 259. The same reservation was the subject of the litigation in *Threipland v Rutherford* (1848) 10 D 1062, which discussed the technical matter of whether it had been validly inserted in the vassal’s title deeds.

<sup>57</sup> (1871) 9 M (HL) 1.

<sup>58</sup> At 4 approving (1868) 7 M 142 at 149.

<sup>59</sup> (1902) 4 F 851.

<sup>60</sup> At 865. See too Lord Dundas in *Don District Board v Burnett* 1918 SC 37 at 43: “Salmon-fishings are a separate legal estate in heritage . . . Trout-fishing, on the other hand, is not an estate in land, but an incident of the ownership of land.” See also *Johnstone v Gilchrist* 1934 SLT 271. Compare Rankine, *Landownership* p 582, who relies on the older authorities.

<sup>61</sup> Freshwater and Salmon Fisheries (Scotland) Act 1976 s 4. See the Current Law Annotation of the provision: “The section now abolishes the distinction formerly drawn between trout fishings and salmon fishings and brings a lease of either type of fishings within the Leases Act 1449 and consequently effective as against singular successors.”

<sup>62</sup> Stair II.3.68. This view was rejected in *Duke of Athole v Macinroy* (1862) 24 D 673.

<sup>63</sup> Hume, *Lectures* IV 260. But compare Bell, *Principles* s 952.

<sup>64</sup> Rankine, *Landownership* p 148.

<sup>65</sup> *Earl of Aboyne v Innes* 22 June 1813 FC 384 aff’d 6 Pat App 444 concerned a non-exclusive right of hunting over a neighbouring forest. *Carnegie v Lord Kintore* (1829) 8 S 251 concerns a non-exclusive right of shooting, again over neighbouring property. In *Carnegie v Mactier* (1836) 14 S 1079, the subject of the action was who had title to the land in question, not whether one party had game rights over the other’s estate. *Jeffryes v Evans* (cited by Rankine as *Jeffreys v Evans*) (1865) 19 CB (NS) 246; 144 ER 781 is an English

personal privilege of the owner of the *dominium utile*, and as incapable of being constituted as a separate tenement.<sup>66</sup> The case law is indeed clear. In *Pollock, Gilmour & Co v Harvey*<sup>67</sup> Lord Corehouse stated that the right to kill game “never appears disjoined from the ownership of land, as a separate tenement”.<sup>68</sup> Similarly, in *Beckett v Bisset*<sup>69</sup> Lord Blackburn said: “I am quite clear that shootings cannot be conveyed as a separate tenement”.

6.29 (2) *Inherent conditions of a feudal grant.* Professor W M Gordon suggests that “in principle it would seem possible for the superior to reserve all the fishings, so diminishing the *dominium utile* and extending the *dominium directum*,”<sup>70</sup> and that the same might also be true of game rights.<sup>71</sup> Such authority as exists, however, does not support this view.<sup>72</sup> In *Hemming v Duke of Athole*<sup>73</sup> a feu charter of certain lands, sheallings and grassings contained a reservation to the superior of “all the deer that may be found at any time hereafter within the bounds of the said sheallings.” The court, however, was not prepared to concede an exclusive right to the deer.<sup>74</sup> Similarly in *Macdonald v Farquharson*<sup>75</sup> a reservation of fishing and shooting rights was interpreted as being non-exclusive in character.

6.30 **Express reservation: non-exclusive rights.** Non-exclusive rights to fishing and game might be regarded as servitudes, as real burdens, or, according to some authorities, as “privileges”.

6.31 (1) *Servitudes.* Statements can be found in the case law to the effect that fishing and game rights may be constituted as servitudes.<sup>76</sup> The weight of authority, however, is against such a view.<sup>77</sup> The main reason given is that these are not servitudes traditionally recognised by our law (the list of such servitudes being effectively closed).<sup>78</sup> Even if the law were prepared to recognise such servitudes, it would still not be possible to view a reservation to

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lease case (which defines “shooting and sporting” as not being limited to game, rather including the right to shoot all animals that “are in common parlance understood to be the subject of sport”).

<sup>66</sup> *Green's Encyclopaedia of the Laws of Scotland* (3rd edn) vol VII (1929) para 1069; Gordon, *Scottish Land Law* paras 9-11 and 9-12; Halliday, *Conveyancing* vol II para 33.50; S Scott Robinson, *The Law of Game Salmon and Freshwater Fishing* (1990) p 36.

<sup>67</sup> (1828) 6 S 913; (also reported as *Pollock, Gilmour & Co v Harvie* (1828) 3 Fac Dec 968).

<sup>68</sup> (1828) 6 S 913 at 914; 3 Fac Dec 968 at 970. Similarly Lord Gillies stated at 3 Fac Dec 972 that the right “was not a feudal right, nor could it be acquired in property as a separate tenement; and it was of great advantage that it always was conjoined with the right of property.”

<sup>69</sup> 1921 2 SLT 33.

<sup>70</sup> Gordon, *Scottish Land Law* para 8-142.

<sup>71</sup> Gordon, *Scottish Land Law* para 9-12.

<sup>72</sup> As Professor Gordon concedes, concluding (para 9-12) that “there must therefore be some doubt whether the theoretical possibility would in fact be admitted”.

<sup>73</sup> (1883) 11 R 93.

<sup>74</sup> At most the court was prepared to interpret the reservation as a right to deer killed and not a right to hunt. In fact, it was held that the reservation was too unclear to be enforced.

<sup>75</sup> (1836) 15 S 259.

<sup>76</sup> See for example Lords Craigie and Glenlee in *Earl of Aboyne v Innes* 22 June 1813 FC 384 (game); Lord Corehouse in *Pollock, Gilmour & Co v Harvey* (1828) 6 S 913 at 914 (trout fishing).

<sup>77</sup> See D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) paras 3.08, 3.25, 3.28, 3.59, 3.63 and 3.86.

<sup>78</sup> *Patrick v Napier* (1867) 5 M 683 (but note the dissent of Lord Deas), followed in *Harper v Flaws* 1940 SLT 150 (trout fishing); *Hemming v Duke of Athole* (1883) 11 R 93 (game); *Marquis of Huntly v Nicol* (1896) 23 R 610; Rankine, *Landownership* p 421; Reid, *Property* para 280 and para 444 (A G M Duncan); Halliday, *Conveyancing* vol II para 35-01. See, however, the discussion in Gordon, *Scottish Land Law* para 8-143. Sometimes praedial benefit has been questioned, and it is clear that in some cases at least there will be no such benefit.

the superior in this way because, as has already been seen, servitudes cannot be constituted in favour of bare superiorities.<sup>79</sup>

6.32 (2) *Real burdens*. There is more support for the idea that fishing<sup>80</sup> and game<sup>81</sup> rights may be reserved as real burdens. But only non-exclusive rights are permitted. The owner will also be able to fish and to shoot game. Thus in *Beckett v Bisset*,<sup>82</sup> the court refused to uphold an “exclusive right of shooting”, Lord Blackburn observing that:

“What has been attempted in this case really amounts to the creation of the shootings into a separate tenement under the disguise of a real burden . . . I am quite clear that the shootings cannot be conveyed as a separate tenement either by grant or as a real burden”.<sup>83</sup>

6.33 (3) *Privileges*. Occasionally the courts have been prepared to admit the right of fishing or hunting game as a “privilege” running with the lands, similar to but distinct from a servitude. In the Forest of Birse cases,<sup>84</sup> a right of hunting granted to a feuar over a neighbouring estate was held to be a personal privilege, but one which ran with the lands and could be communicated to others, such as friends, tenants and gamekeepers. Similarly in *Duke of Richmond v Duff*<sup>85</sup> the proprietor of an estate disposed the salmon and other fishings in part of the River Spey but “reserving always to me and my successors in the said lands and estate the privilege of fishing with the rod for our amusement only”. The reservation was upheld, and was agreed to run with the lands. The precise nature of the right is unclear. In the last of the Forest of Birse cases Lord McLaren commented that: “I am at a loss to understand what species of right the Court and the House of Lords<sup>86</sup> intended to award to Mr Nicol’s predecessor”.<sup>87</sup>

6.34 None of these cases involves superiors, and none involves freestanding rights. But if a dominant tenement is required there seems nothing to be gained by inventing a new class of right. It is suggested that reservations of sporting rights are properly interpreted as real burdens.

6.35 **Conclusion.** With respect to the reservation of fishing and game rights in general, we conclude (a) that only non-exclusive rights can be reserved, and (b) that such rights are

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<sup>79</sup> Para 6.17 - 6.21.

<sup>80</sup> In *Patrick v Napier* (1867) 5 M 683 at 699, Lord President Inglis said : “[I]t may be quite possible to make this liberty and privilege of angling the subject of a good personal contract. That I do not doubt, and I think it may be made a question whether it could not also be made a real burden. It is not worthwhile to inquire in what form that would require to be done, but I shall assume that it is possible.” See also Lord Deas at 704. In *Harper v Flaws* 1940 SLT 150 at 153 Lord Robertson stated : “[T]he personal nature of a franchise of rod-fishing would not appear from what is laid down in [*Tailors of Aberdeen v Coutts* (1840) 1 Rob App 296] to render it incapable of being made a real burden.”

<sup>81</sup> *Hemming v Duke of Athole* (1883) 11 R 93; *Beckett v Bissett* 1921 2 SLT 33.

<sup>82</sup> 1921 2 SLT 33.

<sup>83</sup> At 36.

<sup>84</sup> *Earl of Aboyne v Innes* 22 June 1813 FC 384; (1819) 6 Pat App 444; *Earl of Aboyne v Farquharson* 16 Nov 1814, FC 10; *Marquis of Huntly v Nicol* (1858) 20 D 374; *Marquis of Huntly v Nicol* (1896) 23 R 610.

<sup>85</sup> (1867) 5 M 310.

<sup>86</sup> In *Earl of Aboyne v Innes*, above.

<sup>87</sup> *Marquis of Huntly v Nicol* (1896) 23 R 610 at 616.

properly to be regarded as real burdens. On feudal abolition they will fall to be treated in the same way as other real burdens.<sup>88</sup>

### Church seats

6.36 When churches were built, local heritors who bore the cost were entitled to an allocation of the pews. The right so acquired was not feudal in nature. On the contrary, the right to a church seat attached to (the *dominium utile* of) the heritor's land, as a pertinent.<sup>89</sup> Thereafter it could not be severed from the land, for otherwise "a church might soon be made the property of strangers to the utter exclusion of the inhabitants of the parish".<sup>90</sup> In the course of the present century parish churches have been taken out of the ownership of heritors and transferred to the Church of Scotland General Trustees.<sup>91</sup>

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<sup>88</sup> See in particular para 4.38. Clause 43 of the draft Bill defines real burdens so as to include fishing and game rights.

<sup>89</sup> Duff, *Feudal Rights* p 63; Halliday, *Conveyancing* vol II para 33-50. And see also *Paterson v Brown* 1913 SC 292.

<sup>90</sup> Erskine II.6.11.

<sup>91</sup> Church of Scotland (Property and Endowments) Act 1925. And see *Stair Memorial Encyclopaedia* vol 3 paras 1580 and 1585.

## Part 7 Transfer of Ownership

### Infefment and transfer

7.1 In feudal law, the process of transfer is completed by the infefment of the transferee. “Infefment” (or “investiture”) means to be clothed in the feu or, in other words, to be entered as vassal with the superior.<sup>1</sup> An owner of land is sometimes referred to as an “infef proprietor”. At the commencement of the transfer process, the land is held by transferor A from superior S; and the transfer is not complete until transferee B has replaced A as the entered vassal of S. Hence a transfer of land - unlike a transfer of moveables - involves three parties and not two.

7.2 In high feudalism, a transfer proceeded in the following way.<sup>2</sup> A could not transfer directly to B. Only the superior, S, could make B infef. Hence a necessary first step was for A to resign the land back to S. This was a temporary resignation only (*in favorem* as opposed to *ad remanentiam perpetuam*), for the sole purpose of making a new grant to B. The new grant took the form of a charter of resignation. There then followed the ceremony of sasine.<sup>3</sup> This took place on the land itself and involved the delivery of a symbol by S (or more usually an agent or “baillie” of S) to B (or B’s agent) in the presence of a notary public and witnesses. The symbol to be used depended on what was being transferred. The symbol for land and buildings was earth and stone. But the feudal system was not confined to land and a number of other symbols were in use also, for example net and coble for salmon fishings and grass and corn for teinds. The whole ceremony was then recorded in a notarial deed, known as an instrument of sasine. From 1617 onwards instruments of sasine were registered in a special register, called the Register of Sasines.

7.3 Since it was not always possible to secure the immediate co-operation of the superior,<sup>4</sup> conveyancers gradually developed a method of transfer in which the superior’s role was postponed, sometimes indefinitely. This was the conveyance *a me vel de me*, also known as the alternative manner of holding. In brief, what happened was this. A granted B a conveyance in a form capable of operating both as a feu disposition (*de me*), giving rise to subinfeudation, and as an ordinary disposition (*a me de superiore meo*) giving rise to substitution. At first the deed operated as a feu disposition. B took sasine from A, and not from S, and, on the registration of the instrument of sasine, B became infef as the vassal of A. Later S confirmed the transaction by granting to B a charter of confirmation. At that point A dropped out of the feudal chain and B was treated as entered as the vassal of S. The charter of confirmation was not, and could not be, registered.

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<sup>1</sup> Reid, *Property* (G L Gretton) para 93.

<sup>2</sup> Ibid, paras 99 - 102.

<sup>3</sup> “Sasine” is the symbolic giving of possession.

<sup>4</sup> And even when possible it was not always desirable, since the casualty of composition was payable on entry with the superior. Thus B had to pay twice - once to A and once to S.

7.4 The conveyance *a me vel de me* was the standard method of transferring land in the two centuries prior to 1874, when it was finally abolished by the Conveyancing (Scotland) Act of that year.<sup>5</sup> The 1874 provisions were the culmination of a series of reforms which began in 1845<sup>6</sup> with the abandonment of the ceremony of sasine and continued in 1858,<sup>7</sup> when instruments of sasine ceased to be necessary and it became possible to register conveyances directly in the Register of Sasines. Together these enactments introduced the method of transfer which survives to this day. This requires merely that A grant a disposition of the land to B, and that B then register the disposition in the Register of Sasines or Land Register.<sup>8</sup> There is no longer an active role for the superior. The theory of feudal entry remains, but entry is achieved, by implication, through the act of registration.<sup>9</sup> The outgoing vassal must serve a notice of change of ownership on the superior in order to be free of the obligations of the feu, but, with the disappearance of feuduty, such notices have in practice ceased to be sent.

7.5 An effect of these changes has been to make registration the central feature of land transfer. For without registration there is no feudal entry; nor is there sasine, because registration is the equivalent of sasine.<sup>10</sup> Hence, until the disposition is registered in the Register of Sasines or Land Register, the transferor remains the undivested owner.<sup>11</sup> Recently, in *Sharp v Thomson*,<sup>12</sup> it was decided that land ceases to be part of a transferor's "property" once the disposition is delivered and the price paid even although registration has not taken place. But this decision of the House of Lords was restricted to the interpretation of the legislation on floating charges and receivers<sup>13</sup> and did not advance a general theory of transfer.<sup>14</sup> Except in cases involving receivers,<sup>15</sup> the primacy of registration remains undisturbed. We have no proposals to disturb that primacy here. If ownership could be transferred without registration, the value of the registers would be much diminished.<sup>16</sup> More particularly, there would be an undermining of the new system of registration of title, the very basis of which is public disclosure of the ownership of land. Under that system the Land Register forms an accurate, and guaranteed, record of the real rights affecting land, so that in general<sup>17</sup> a person whose name is not on the Register cannot be the owner of land. It seems self-evident that this system should be preserved.

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<sup>5</sup> Conveyancing (Scotland) Act 1874 s 4(1). Strictly, what was abolished was the charter of confirmation, but without the charter, conveyances *a me vel de me* could no longer proceed.

<sup>6</sup> Infefment Act 1845 s 1.

<sup>7</sup> Titles to Land (Scotland) Act 1858 s 1, later re-enacted as s 15 of the Titles to Lands (Consolidation) (Scotland) Act 1868.

<sup>8</sup> Strictly, it is the right of ownership and not the disposition which is registered in the Land Register (see para 7.10 below), but the usage is convenient.

<sup>9</sup> Conveyancing (Scotland) Act 1874 s 4(2).

<sup>10</sup> Para 7.7 below.

<sup>11</sup> *Young v Leith* (1847) 9 D 932.

<sup>12</sup> 1997 SC(HL) 66.

<sup>13</sup> Companies Act 1985 s 462(1) and Insolvency Act 1986 s 53(7).

<sup>14</sup> See Lord Jauncey at 72F and Lord Clyde at 80B-D.

<sup>15</sup> The exception may also extend to other insolvency processes, ie sequestration and liquidation. On this point Lord Jauncey and Lord Clyde seem not to have been in agreement. See eg K G C Reid, "Jam Today: *Sharp* in the House of Lords" 1997 SLT (News) 79, and R Rennie, "*Sharp v Thomson*: the final act" 1997 JLSS 130. *Sharp* was, however, a case about receivership alone.

<sup>16</sup> Indeed this is one of the criticisms of the approach taken by the House of Lords in *Sharp v Thomson*. Our provisional proposals for solving this problem created by *Sharp* are contained in paras 2.10 - 2.60 of our Discussion Paper No 107 on *Diligence against Land* (1998).

<sup>17</sup> But see para 7.11.

## The new system of land transfer

7.6 Voluntary transfer of land is effected under the present law by a formal deed, usually a disposition, which is signed by the transferor and then registered by the transferee in the Land Register or Register of Sasines.<sup>18</sup> There seems no reason why land should not continue to be transferred in the same way after the feudal system is abolished. The present system is well understood and works well in practice; and except in some minor respects, which are discussed later,<sup>19</sup> it could not sensibly be made more simple and less formal than is currently the case. We conclude, therefore, that the present system of land transfer ought to be retained. It could readily be adapted to electronic transfer in the event that a decision is taken to introduce automated registration of title.<sup>20</sup>

7.7 However, if it is to live on, the old system requires new language. The current provisions on land transfer are couched in the archaisms of feudalism. Thus by section 15 of the Titles to Land Consolidation (Scotland) Act 1868 registration of a conveyance

“shall have the same legal force and effect in all respects as if the conveyance or deed so recorded had been followed by an instrument of sasine ... expedite in favour of the person on whose behalf the conveyance or deed is presented for registration, and recorded in the appropriate register of sasines, at the date of recording the said conveyance or deed.”

And this virtual instrument of sasine itself has, by section 1 of the Infeftment Act of 1845, the further effect of a virtual giving of sasine, conducted on the land itself. Plainly these provisions require to be repealed<sup>21</sup> and replaced by some modern equivalent.

7.8 A post-feudal provision can be simpler and more direct. In respect of transactions registrable in the Register of Sasines,<sup>22</sup> the suggested rule is that ownership is transferred by the recording of a conveyance. The “conveyance” in regular use for voluntary transfers is the disposition,<sup>23</sup> but we also include within the term judicial conveyances, such as confirmation of executors<sup>24</sup> and the act and warrant of a trustee in sequestration,<sup>25</sup> as well as conveyances which arise directly by statute<sup>26</sup> or by common law.

7.9 Not all conveyances are capable of being recorded. Broadly, recording is only competent in respect of special conveyances, that is to say, conveyances which relate to

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<sup>18</sup> See para 7.4.

<sup>19</sup> Para 7.34.

<sup>20</sup> See Ian Burdon, *Automated Registration of Title to Land* (1998), and a Consultative Document issued by the Law Commission and H M Land Registry on *Land Registration for the Twenty-First Century* (Law Com No 254, 1998).

<sup>21</sup> This is done in sched 9 to the draft Bill.

<sup>22</sup> The Register of Sasines is the original land register, which was set up in 1617. It is gradually being phased out, county by county, in favour of the new Land Register of Scotland, which was established by the Land Registration (Scotland) Act 1979. The Land Register is expected to apply to the whole country by 2003, but some transactions will continue to be registrable in the Register of Sasines.

<sup>23</sup> There are other examples also, such as docketts granted by an executor under s 15(2) of the Succession (Scotland) Act 1964, or statutory conveyances granted under s 80 of the Lands Clauses Consolidation (Scotland) Act 1845.

<sup>24</sup> Succession (Scotland) Act 1964 s 14(1).

<sup>25</sup> Bankruptcy (Scotland) Act 1985 s 31(1).

<sup>26</sup> Eg Local Government etc (Scotland) Act 1994 s 15.

specific pieces of land and in which that land is properly identified.<sup>27</sup> Special conveyances are contrasted with general conveyances, which, in the usual case, convey all the property of a particular person without further specification. A disposition is a special conveyance. Commonly encountered examples of general conveyances are acts and warrants of trustees in sequestration, and deeds of assumption and conveyance in respect of new trustees.<sup>28</sup> A general conveyance cannot be recorded directly, but it is possible to record a notice of title in respect of one or more of the areas of land covered by such a conveyance.<sup>29</sup> The notice of title gives a full description of the property, and deduces title through the general conveyance. This difference in practice in relation to the two types of conveyance is soundly based, and we do not suggest that it should be altered. But the difference must be taken into account in formulating the new rules of transfer. Thus in relation to a transaction which is registrable in the Register of Sasines, the rule should be that ownership is transferred either by the recording of a conveyance or, in appropriate cases, by the recording of a notice of title which deduces title through a conveyance. It is not necessary to re-state here the familiar and settled rules about the cases in which direct recording is incompetent and a notice of title must be used.

7.10 A different rule is required for transfers registrable in the Land Register. The Land Register is a register of interests in land and not of deeds.<sup>30</sup> Hence what is registered in the Land Register is not the conveyance itself, but the real right of ownership which the conveyance vouches. No distinction is made between general and special conveyances, and both may be used as the basis of registration. In theory the Keeper could also accept other, less formal, evidence, for it is the act of registration which effects the transfer. In relation to a transaction which is registrable in the Land Register, the new rule should be simply that ownership is transferred by registration.

7.11 Occasionally land can be transferred without registration.<sup>31</sup> If title is held by A and B and the survivor, then, except where the destination is evacuated, B takes A's share on A's predecease. The change in ownership is not marked by a further<sup>32</sup> act of registration. A more esoteric example is alluvion, where changes in the boundaries of rivers and the sea lead to changes of ownership by the operation of accession.<sup>33</sup> Udal land can also be transferred without registration.<sup>34</sup> Our proposals are not intended to affect these examples. Hence it will be necessary to provide that the proposed new rules of transfer are without prejudice to any other method of transferring land under any enactment or rule of law.<sup>35</sup> In the standard case, however, the new rules should be mandatory and it should no longer be possible, as it is at present, to use a modified version of the pre-1845 method of transfer.<sup>36</sup>

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<sup>27</sup> *Macdonald v Keeper of the General Register of Sasines* 1914 SC 854.

<sup>28</sup> See *Trusts (Scotland) Act 1921* s 21 and sched B.

<sup>29</sup> *Conveyancing (Scotland) Act 1924* s 4.

<sup>30</sup> *Land Registration (Scotland) Act 1979* s 1(1).

<sup>31</sup> See in this context s 3(2) of the *Land Registration (Scotland) Act 1979*.

<sup>32</sup> There was of course an initial act of registration, which encompassed the special destination.

<sup>33</sup> Reid, *Property* paras 592-4.

<sup>34</sup> Para 7.23.

<sup>35</sup> This mirrors s 3(2) of the *Land Registration (Scotland) Act 1979*, which provides that the possibility of registration in the Land Register is without prejudice to any other means of creating or affecting real rights or obligations under any enactment or rule of law.

<sup>36</sup> Reid, *Property* (G L Gretton) para 107. The pre-1845 method is preserved by ss 135 and 163 of the *Titles to Land Consolidation (Scotland) Act 1868*, which should now be repealed.

7.12 We recommend that

**50. (a) Ownership of land should pass -**

**(i) in the case of a transfer which is registrable in the Land Register, on registration in that Register of the transfer; and**

**(ii) in any other case, on the recording of a conveyance, or of a notice of title deducing title through a conveyance, in the Register of Sasines.**

**(b) In this recommendation “conveyance” includes a conveyance by operation of a court decree, enactment or rule of law.**

**(c) This recommendation is without prejudice to any other means of transferring ownership of land under any enactment or rule of law.**

(Draft Bill, clause 4)

7.13 Recommendation 50 is couched in broad terms. It does not seek to lay down what is and what is not a valid conveyance. Nor does it concern itself with questions of form or execution, or with questions of legal capacity or title to grant. These matters are provided for already by the general law, and will not be affected by our reform. It follows that a transfer which appears to comply with the terms of our recommendation will not necessarily be effective in passing ownership. If a disposition turns out to be granted by a person who does not own the property, or who has no legal capacity, or if the deed is not properly executed, then ownership will not pass, at least in the case of Sasine transactions. The position of the Land Register is of course different. Registration there cures defects in the underlying deeds, and a defective conveyance does not result in a defective registration.<sup>37</sup> A person registered as proprietor in the Land Register is, as a matter of law, the owner of the property, and will remain owner unless or until the Register is altered, whether by a further act of registration or by rectification.<sup>38</sup>

### **Salmon fishings and other incorporeal separate tenements**

7.14 When land was originally feued by the Crown there was reserved, by implication, certain rights of which the most important was the right to fish for salmon.<sup>39</sup> Consequently a vassal receiving the grant of a river could not fish there for salmon unless the right to do so had been expressly granted by the Crown, or had subsequently been acquired in some other way, for example by prescription. Often the Crown did not keep the fishing rights for itself but granted them to someone else. That grant was also by feu, so that the right to fish was treated in the same way as land itself. Once granted, the right to fish could in turn be subfeued. Thus the same pyramid of rights which exists in respect of land may also exist in respect of salmon fishings, and it is only the person who holds the *dominium utile* of such

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<sup>37</sup> Land Registration (Scotland) Act 1979 s 3(1)(a).

<sup>38</sup> Rectification is possible only where there is an “inaccuracy” on the Register. See Land Registration (Scotland) Act 1979 s 9(1). An entry on the Register which followed on from a defective conveyance would be an example of an inaccuracy.

<sup>39</sup> See generally Gordon, *Scottish Land Law* chap 10, and Reid, *Property* paras 207 - 211 and 319 - 336.

fishings who is able to exercise the right. Sometimes this is the same person as the owner of the river, but just as often it is someone quite different.

7.15 The right to gather mussels and the right to gather oysters were treated in the same way as salmon fishings, and were impliedly reserved from all Crown grants. Other rights to be feudalised were the right of port, the right of ferry, and the right to hold fairs and markets. A non-Crown right which fell into the same category was the right to teinds, that is to say, to a tenth part of the land and industry of the laity. All these rights survive today but, with the possible exception of the right to mussels and oysters, are of little or no value and have become obsolete.<sup>40</sup> Elsewhere in this report we recommend the abolition of teinds.<sup>41</sup>

7.16 Today the classification of fishing rights as “land” seems a little odd. A more logical analysis would classify such rights, not as land, but rather as a burden on land; and it is certainly the case that a right to fish the river of another seems most like a personal servitude, that is to say, a servitude in which there is a servient tenement (the river) but no dominant tenement.<sup>42</sup> The question arises as to whether the opportunity presented by feudal abolition should be taken to make the change from “land” to servitude on land.

7.17 At one time we were attracted by the idea of making the change. It seemed unsatisfactory to perpetuate a feudal taxonomy in a post-feudal world; and it seemed anomalous that incorporeal separate tenements should continue to be transferred by disposition when other incorporeal property is transferred by assignation. But on further reflection we have concluded that no change should be made as part of the present exercise. The incorporeal separate tenements are very varied in character. Some are obsolete and should probably be abolished. Others may require to be modified. Some are privileges rather than burdens. Change would be complicated and, possibly, controversial. Moreover, the change in status from “land” to servitude would have important practical implications for the nature of the right. The right would become subject to long negative prescription,<sup>43</sup> so that after 20 years’ non-exercise the owner of the land would be free of the servitude and could exercise the right himself, as one of the normal rights of ownership. This is of particular importance for such rights as continue to be held by the Crown. Further, as the rights would no longer be separate tenements, they would pass by implication in a conveyance of the land itself.<sup>44</sup> In cases where they were held by a third party they would require to be expressly excluded both from the contract and from the conveyance if a claim in warrandice was to be avoided.<sup>45</sup> In ceasing to be separate tenements, the rights might also cease to have their own title sheet in the Land Register,<sup>46</sup> and there may be a question as to whether a lease of, say, salmon fishings would be binding on successors of the landlord, at least under the Act of 1449.<sup>47</sup> These are important and difficult issues on which we would not wish to reach a

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<sup>40</sup> See further paras 2.19 - 2.22.

<sup>41</sup> Para 3.55.

<sup>42</sup> For personal servitudes, see Scot Law Com DP No 106 paras 2.53 - 2.55.

<sup>43</sup> Prescription and Limitation (Scotland) Act 1973 s 8. At the moment separate tenements are, arguably, exempted from negative prescription as real rights of ownership in land, within sched 3(a).

<sup>44</sup> At present they require to be expressly mentioned: see eg *McKendrick v Wilson* 1970 SLT (Sh Ct) 39.

<sup>45</sup> *Campbell v McCutcheon* 1963 SC 505.

<sup>46</sup> For the current position, see Land Registration (Scotland) Act 1979 s 5(1)(a) (which requires to be read together with the definition of “incorporeal heritable right” in s 28(1)).

<sup>47</sup> Probably a lease of salmon fishings could continue to be registered under the Registration of Leases (Scotland) Act 1857 and so bind successors in that way. See *Palmer’s Trs v Brown* 1989 SLT 128. A standard

concluded view without further consultation. If the law of incorporeal separate tenements is to be reformed, this must be done as part of a different exercise.

7.18 We suggest, therefore, that in the immediate future the incorporeal separate tenements should retain their current status.<sup>48</sup> On the day on which the feudal system is abolished, the person holding the *dominium utile* of the separate tenement will become its outright owner,<sup>49</sup> and thereafter ownership will be transferred by disposition or other conveyance in accordance with recommendation 50.

### **Udal and other allodial land**

7.19 In Scotland a small amount of land is allodial, that is to say, is owned outright, without reference to a superior. Allodial land will not be directly affected by the abolition of feudalism. Indeed on one view feudal abolition will merely assimilate feudal land with the land which is currently owned outright. After abolition all land will be allodial.

7.20 The most important type of allodial land is udal land, which is found only in Orkney and Shetland, and is a historical relic of the time when these islands were part of Norway. With the abolition of the feudal system there will be very little difference between udal land and land in the rest of Scotland. The owners of udal land are, in principle, required to pay to the Crown a land tax, known as skat, but the earlier legislation phasing out feuduty was made to apply to skat also,<sup>50</sup> and elsewhere in this report we recommend the final abolition of skat on the same basis as feuduty.<sup>51</sup> With the disappearance of skat, udal land would retain only two distinctive features. The first is that the Crown has no residual claim to the foreshore, with the result that the foreshore is in private ownership, usually of the proprietor of the land immediately adjoining.<sup>52</sup> It has been suggested that public rights over udal foreshore may be in some way different and distinctive.<sup>53</sup> The second distinctive feature is that udal law does not recognise the incorporeal separate tenements described earlier.<sup>54</sup> Thus ownership of a udal river carries with it the right to fish for salmon.<sup>55</sup>

7.21 There is much to be said for abolishing the separate legal category of udal land. Abolition is attractive in theory without, probably, being troublesome in practice. It would have the advantage that all land in Scotland would come to be held on a uniform basis. But at the same time there would be no interference with rights already acquired - such as rights to the foreshore - and no conferral of new rights on the Crown. The foreshore and salmon fishings would remain in private ownership, as before. In the end, however, we have concluded that abolition ought not to be included as part of the present exercise. We did not consult on abolition in our original discussion paper. There may be difficulties which we are

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security could continue to be granted over the former separate tenements. See s 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970 as amended by the draft Bill sched 8 para 32(6).

<sup>48</sup> This confirms the provisional conclusion reached in Scot Law Com DP No 93 para 5.22.

<sup>49</sup> Para 2.5.

<sup>50</sup> Land Tenure Reform (Scotland) Act 1974 ss 4(7) and 5(12).

<sup>51</sup> Para 3.55.

<sup>52</sup> *Smith v Lerwick Harbour Trs* (1903) 5 F 680. The sea bed, however, is the property of the Crown, as in the rest of Scotland. See *Shetland Salmon Farmers Association v Crown Estate Commissioners* 1991 SLT 166.

<sup>53</sup> *Stair Memorial Encyclopaedia* vol 24, para 314.

<sup>54</sup> Paras 7.14 - 7.18.

<sup>55</sup> *Lord Advocate v Balfour* 1907 SC 1360.

unable to foresee. It can be argued that udal law affects more than just land.<sup>56</sup> And there would be incomplete assimilation of udal and feudal land for as long as formerly feudal land retains the idea of the incorporeal separate tenements. We think, however, that there is a case for reform and we may wish to return to this subject on a future occasion.

7.22 Udal land is not the only land which is allodial. But the other examples seem to be confined to parish churchyards, and land which has never been feued out by the Crown or which has since reverted to the Crown. Land acquired by compulsory purchase is sometimes classified as allodial, but it seems likely that such land continues to be held of the Crown, even if mid-superiorities are extinguished.<sup>57</sup>

7.23 After feudal abolition, all land will be allodial; and since the rules for transfer, described earlier, are designed for allodial land, there is no reason why they should not apply to all land, including land which is already allodial. Udal land, however, has its own distinctive rules and would fall within the exception provided for other means of transferring ownership.<sup>58</sup> At common law udal land could be transferred without writing and without registration,<sup>59</sup> although a requirement of writing was introduced by statute in 1995.<sup>60</sup> That rule will be unaffected by our proposed legislation, although the saving will be temporary in nature. Orkney and Shetland are due to become operational areas for the purposes of registration of title in 2003.<sup>61</sup> Thereafter the effect of section 3(3) of the Land Registration (Scotland) Act 1979 is that registration will be required to transfer ownership. In practice registration is already the norm.

### Miscellaneous issues

7.24 **Form of disposition.** After feudal abolition, as before, the standard deed for the transfer of ownership will be the disposition. Only one change in its wording seems necessary to take into account the reforms recommended in this report. At present the narrative clause of the disposition usually states whether the granter is a “heritable” (or, sometimes, “infest”) proprietor or merely an “uninfest” proprietor. In the latter case it is necessary for the granter to deduce title. The concept of infestment will disappear with feudalism itself, but in its place conveyancers will probably want to continue to use some term to indicate whether or not the granter has completed title. This is a matter of practice and not of law. One possibility would be to talk of “registered” and “unregistered” proprietors, or alternatively - and preserving one of the original terms - “heritable” and “unregistered” proprietors. A possible defect of preserving the term “heritable” proprietor is that the right of one holding on an unregistered conveyance is also, in strict law, a heritable one.<sup>62</sup>

7.25 The Halliday Report recommended a number of changes in the standard wording of a disposition, and favoured the introduction of a statutory form of deed.<sup>63</sup> Changes of this kind go well beyond the scope of the present exercise, but it is worth observing that the

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<sup>56</sup> *Stair Memorial Encyclopaedia* vol 24 paras 301 - 329.

<sup>57</sup> Gordon, *Scottish Land Law* chap 3.

<sup>58</sup> See recommendation 50(c), in para 7.12.

<sup>59</sup> *Stair* II.3.11; *Erskine* II.3.18.

<sup>60</sup> Requirements of Writing (Scotland) Act 1995 s 1(2)(b).

<sup>61</sup> The current timetable indicates that this will happen in 2003. See 1997 SLT (News) 218.

<sup>62</sup> Reid, *Property* para 14(2).

<sup>63</sup> *Conveyancing Legislation and Practice* (1966, Cmnd 3118) (the “Halliday Report”) paras 75 - 99.

recommendations have to some extent been superseded by the introduction of registration of title, and by the short model forms of disposition now contained in the *Registration of Title Practice Book*.<sup>64</sup>

**7.26 Deduction of title.** Where the granter of a disposition does not hold on a completed title, it will continue to be necessary, in Sasine transactions,<sup>65</sup> to deduce title. But title will be deduced from the “person having the last recorded title” and not from the “person last infeft”. Our draft Bill contains an appropriate amendment to the relevant provisions of the Conveyancing (Scotland) Act 1924.<sup>66</sup> Our Bill<sup>67</sup> also makes provision for the case where the person from whom title is being deduced owned without having a recorded title, a situation which is overlooked by the current legislation. Examples are rare but include corporations (such as the University of St Andrews)<sup>68</sup> which acquired before the Register of Sasines was set up in 1617, and, in theory at least, some owners of udal land.<sup>69</sup>

**7.27 Notarial instruments.** Until 1858 it was not competent to register conveyances.<sup>70</sup> The Register of Sasines, as its name suggests, was a register of instruments of sasine and not of conveyances. The instrument of sasine was a notarial deed which summarised the material terms of a prior conveyance and narrated the ceremony of sasine. There were thus two deeds in land transfer, the conveyance and the instrument of sasine, of which only the second could be registered. After 1858 direct registration became possible and instruments of sasine disappeared. But at the same time warrants of registration and notarial instruments were introduced in order to perform some of the tasks previously performed by the instrument of sasine.

**7.28 Warrants of registration are discussed below.** So far as notarial instruments are concerned, their justification was twofold. In the first place, like instruments of sasine, notarial instruments could be used to avoid the whole text of a conveyance from appearing on the register.<sup>71</sup> In some cases this was desirable. A deed containing a conveyance might also deal with other matters which were not appropriate for the register, or which were confidential to the parties. Hence instead of registering the deed there could be registered a notarial instrument which summarised those parts of the deed which conveyed the property. In the second place, even after 1858 there remained, and remain today, cases where the conveyance could not competently be registered.<sup>72</sup> For example, the grantee might have died, or the description of the property in a deed might not be sufficient for the purposes of registration. In such cases a notarial instrument could be registered instead.

**7.29** Today conveyancers adopt different solutions to these problems. The notice of title, introduced by statute in 1924,<sup>73</sup> performs the same role as the notarial instrument and is used

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<sup>64</sup> Para G.3.22.

<sup>65</sup> Once land is registered in the Land Register, deduction of title ceases to be required. See Land Registration (Scotland) Act 1979 s 15(3).

<sup>66</sup> Sched 8 para 17(3)-(6) and (19)-(21).

<sup>67</sup> By clause 6.

<sup>68</sup> See *Wallace v University Court of St Andrews* (1904) 6 F 1093.

<sup>69</sup> Para 7.23.

<sup>70</sup> See para 7.4.

<sup>71</sup> Titles to Land Consolidation (Scotland) Act 1868 s 17.

<sup>72</sup> Para 7.9.

<sup>73</sup> Conveyancing (Scotland) Act 1924 s 4 and Sched B. By s 24 notices of titles can also be used for registered long leases.

today where formerly the notarial instrument was used. For titles on the Land Register the notice of title has itself been replaced by a procedure whereby the underlying conveyance (midcouple) is presented directly for registration.<sup>74</sup> Furthermore, a clause of direction can be used as an alternative means of achieving the registration of part only of a deed,<sup>75</sup> although in modern practice conveyances are concise and rarely contain extraneous material which it is wished to keep out of the register. For all these reasons notarial instruments have disappeared from current practice. They could be abolished without loss.

7.30 Practical considerations also favour abolition. The statutory provisions on notarial instruments form a substantial body of law.<sup>76</sup> Some of these provisions would require to be amended to take into account the ending of the feudal system. It does not seem worth the trouble.

7.31 Abolition would be confined to notarial instruments used for completing title and contained in the conveyancing statutes. It would not affect the small number of cases in which notarial instruments are used for other purposes, for example for protesting of bills of exchange.<sup>77</sup> Nor would it affect notarial instruments used to complete title under the Lands Clauses Consolidation (Scotland) Act 1845.<sup>78</sup> Here the notarial instrument performs the function of setting out the circumstances in which land has been acquired compulsorily. It is not simply a method of completing title where there is an unbroken chain of writs from the person having the last recorded title. The ordinary forms of notice of title do not fit. We considered devising a special form of notice of title for the 1845 Act. That could be done quite easily but our conclusion was that change here was unnecessary. The new form would just be a notarial instrument under another name. There seems to be no need for a special statutory form after all these years.

7.32 Special mention may be made of the position of liquidators. By contrast with the position of trustees in sequestration, there is no automatic vesting of property in a liquidator, and the liquidator must normally make special application to the court.<sup>79</sup> Nonetheless, a liquidator is always able to complete title to land by means of a notarial instrument, and without a court application.<sup>80</sup> While in practice the power is almost never used, it would be wrong to remove it as an incidental effect of a quite different reform, and we suggest that it be retained by allowing the use of a notice of title in place of a notarial instrument. Our draft bill contains an appropriate amendment to the existing provision.<sup>81</sup>

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<sup>74</sup> Land Registration (Scotland) Act 1979 s 3(6).

<sup>75</sup> Titles to Land Consolidation (Scotland) Act 1868 s 12.

<sup>76</sup> The main provisions are: Registration of Leases (Scotland) Act 1857 ss 5, 8 and 9, and Scheds C and F; Titles to Land Consolidation (Scotland) Act 1868 ss 17, 19, 23, 25, 126, 127, and 130, and Scheds J, L, N, O, HH, JJ, KK, LL and MM; and Conveyancing (Scotland) Act 1874 s 53 and Sched N.

<sup>77</sup> Bills of Exchange Act 1882 s 51(7).

<sup>78</sup> Lands Clauses Consolidation (Scotland) Act 1845 ss 74, 76, 100, 102, 104 and 110. See further Halliday, *Conveyancing* vol I para 25-19. This usage of notarial instruments is also preserved under registration of title: see Land Registration (Scotland) Act 1979 s 3(6).

<sup>79</sup> Insolvency Act 1986 s 145.

<sup>80</sup> Titles to Land Consolidation (Scotland) Act 1868 s 25.

<sup>81</sup> Sched 8 para 8(9).

7.33 We recommend that

- 51. The provisions in the conveyancing statutes which allow the use of notarial instruments for the completion of title should be repealed.**

(Draft Bill, sched 8)

7.34 **Warrants of registration.** The warrant of registration marks the assent of the grantee to the registration of the deed, a function previously performed by the instrument of sasine. In terms it is a request to the Keeper, signed by the grantee or (almost always in practice) by the grantee's law agent, that the deed be duly registered.<sup>82</sup> However, it may be doubted whether the warrant continues to perform a useful role. In the Land Register warrants of registration have been replaced by a statutory application form, signed by or on behalf of the applicant. The application form is mandatory, rule 9(1) of the Land Registration (Scotland) Rules 1980 providing that "[a]ny application for registration shall be made by the person in whose favour a real right will be created or affected by registration and such application shall be on [one of the statutory forms]". Since April 1992 an application form has also been in use for the Register of Sasines, in connection with computerisation of the presentment book, although it has no statutory basis and, strictly, cannot be insisted upon.<sup>83</sup>

7.35 The present reforms seem an appropriate occasion to dispense with the warrant of registration, and to replace it with a statutory version of the current application form. This change would of course apply to all deeds registered in the Register of Sasines, and not merely to dispositions and notices of title. One modest gain would be an end to the small but persistent stream of cases in which deeds have to be returned from the register because of errors in the warrant of registration.

7.36 We recommend that

- 52. (a) Any application for recording a deed in the Register of Sasines should be made by or on behalf of the person in whose favour it is granted, and such application should be on such form or forms as may be prescribed by the Secretary of State.**

**(b) It should no longer be necessary for a deed being presented for recording in the Register of Sasines to contain a warrant of registration.**

(Draft Bill, clause 5)

7.37 **Grants by the Crown.** Grants from the Crown have always proceeded by feu and there may be doubt as to whether the Crown can competently grant a disposition. These doubts should be removed. Accordingly we recommend that

- 53. In cases where the alienation of land is otherwise competent, it should be competent for the Crown to grant a disposition of land.**

(Draft Bill, clause 53)

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<sup>82</sup> Titles to Land Consolidation (Scotland) Act 1868 ss 15 and 141. The statutory form of warrant of registration is now contained in s 10 and Sched F of the Conveyancing (Scotland) Act 1924.

<sup>83</sup> Form CPB2. See 1992 JLSS 107, 134 and 171.

## Proper liferents and other real rights

7.38 In feudal law ownership (*dominium*) was not the only real right on which infestment required to be taken. Infestment was also needed for heritable securities and for proper liferents. This meant that the right could not be acquired without sasine and entry with the superior, although after the reforms of the nineteenth century both could be achieved merely by registration of the appropriate deed in the Register of Sasines or Land Register. So far as heritable securities are concerned, the position has now been altered by statute. The Conveyancing and Feudal Reform (Scotland) Act 1970<sup>84</sup> abolished all existing methods of creating heritable securities and replaced them with a new standard security. Section 11(1) seems to dispense with the previous requirement of infestment by providing that

“Where a standard security is duly recorded, it shall operate to vest the interest over which it is granted in the grantee as a security for performance of the contract to which the security relates.”

In terms of this provision registration alone creates the real right, and there is no deemed infestment.<sup>85</sup> The position of proper liferents, however, remains unchanged.<sup>86</sup>

7.39 Other real rights in land have not been feudalised, so that infestment is not required. The purpose of registering a long lease is not to procure infestment but simply, in the words of the statute, so that it is “effectual against any singular successor in the lands and heritages thereby let”.<sup>87</sup> Similarly, registration of a servitude is no more than a method of making the right real.

7.40 A proper liferent may be created either by reservation or by grant. Thus the owner of land may either grant a right of liferent to a second party, or convey the land to a second party while reserving in the conveyance a right of liferent. A liferent created by grant is known as a simple liferent.<sup>88</sup> In both cases it is registration which creates the liferent,<sup>89</sup> but in feudal theory only simple liferents create a new infestment in the liferenter. In the case of a reserved liferent, the granter is considered to continue holding on the original infestment. As with ownership, so with liferent, the method of creation continues to be defined in feudal terms, as a deemed sasine and entry with the superior.<sup>90</sup> A statutory re-statement seems necessary here also. Hence we recommend that

### **54. The real right of proper liferent should be created -**

**(a) in a case where the right is registrable in the Land Register, on registration in that Register (or on such later date as may be provided for in the deed); and**

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<sup>84</sup> Section 9.

<sup>85</sup> Reid, *Property* (G L Gretton) para 112. The wording is altered by sched 8 para 32(8) of our draft Bill, but not in a way which affects the point just made.

<sup>86</sup> Reid, *Property* (G L Gretton) para 74.

<sup>87</sup> Registration of Leases (Scotland) Act 1857 s 2.

<sup>88</sup> W J Dobie, *Liferent and Fee* (1941) p 4.

<sup>89</sup> Whether of the conveyance, or of a notice of title deducing title through the conveyance.

<sup>90</sup> See especially Titles to Land Consolidation (Scotland) Act 1868 s 15.

**(b) in any other case, on the recording in the Register of Sasines of a deed granting or reserving the right (or on such later date as may be provided for in the deed).**

*(Draft Bill, clause 59)*

## Part 8 Non-Standard Tenures

### Burgage Tenure

8.1 Burgage tenure is the system of tenure by which land was held in royal burghs. According to Montgomery Bell<sup>1</sup>:

“Although it is clear and undoubted that the proper burgage lands are held of the Crown, authorities are not at one on the question, whether, during the subsistence of the burgh, the burgh itself, or each individual burgh proprietor is vassal of the Crown.”

The weight of opinion was that the land is held directly from the Crown, and this is the approach adopted in the modern textbooks.<sup>2</sup> It seems clear that the burgh proprietors hold their land on a feudal tenure. In so far as burgage tenure survives, therefore, it will be covered by the recommendation to convert feudal land to land in outright ownership.<sup>3</sup>

8.2 Traditionally burgage tenure had a number of specialities. In the first place, the burgh proprietors were prohibited from subinfeudation. The sole mode of transfer was to resign the land in the hands of the bailies of the burgh, who then disposed to the new proprietor.<sup>4</sup> Secondly, and by contrast to other feudal tenures, alienation was freely allowed.<sup>5</sup> Thirdly, burgage tenure had no *reddendo*, other than the obligation to “watch and ward” (which meant keeping peace within the burgh), and there were no feudal casualties.<sup>6</sup> In the absence of feuduty, the only perpetual payment which could be exacted was ground annual, which was non-feudal in nature. Indeed, the special nature of burgage tenure was one of the reasons for the development of contracts of ground annual.<sup>7</sup> The prohibition on subinfeudation was removed in 1874,<sup>8</sup> and today land held burgage is barely distinguishable from land held in feu farm.

### Booking tenure

8.3 Booking tenure, which is found only in Paisley, is a variant of burgage tenure in which land is held of the burgh rather than directly of the Crown.<sup>9</sup> The tenure is feudal, the burgh being a mid-superior. As with burgage tenure, subinfeudation became possible in

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<sup>1</sup> A M Bell, *Lectures on Conveyancing* (3rd edn 1892) Vol II p 793.

<sup>2</sup> See Reid, *Property* para 65 (G L Gretton); Gordon, *Scottish Land Law* para 2-11; McDonald, *Conveyancing Manual* para 6.15; Halliday, *Conveyancing* para 31-11. And see also *Urquhart v Clunes* (1758) Mor 15079.

<sup>3</sup> See para 2.5.

<sup>4</sup> Hope *Major Practicks* (Stair Society vol 3, 1937) III.3.12. For a description of transfers of burgage land see A M Bell, *op cit* at p 794.

<sup>5</sup> *Hay of Crimonmogat v Bailies of Aberdeen* (1634) Mor 15031.

<sup>6</sup> For feudal *reddendo*, see para 3.1.

<sup>7</sup> For ground annual, see para 3.54.

<sup>8</sup> Conveyancing (Scotland) Act 1874 s 25.

<sup>9</sup> Gordon, *Scottish Land Law* para 2-11. Its history is discussed in *Chalmers v Magistrates of Paisley* (1829) 7 S 718.

1874.<sup>10</sup> The tenure survives today, at least in theory, and will be converted to outright ownership under our proposed legislation.<sup>11</sup>

### Kindly tenants of Lochmaben

8.4 A kindly tenancy is a form of landholding found in a small part of Dumfriesshire.<sup>12</sup> It is sometimes characterised as allodial,<sup>13</sup> or as “non-feudal”.<sup>14</sup> Kindly tenancies are confined to four villages in the parish Lochmaben<sup>15</sup> (Greenhill, Heck, Hightae, and Smallholm), known as the Four Towns of Lochmaben. “Kindly” simply means hereditary.

8.5 **History.** The kindly tenants are believed to have had rights of occupation before the introduction of the system of sasine. These were “rental rights.”<sup>16</sup> When a statute of 1587<sup>17</sup> converted all rentals granted by the Crown into liferent rights, the four towns of Lochmaben were exempted.<sup>18</sup> In the early seventeenth century a number of grants of feu were made which, on their face, appeared to affect the rights of the kindly tenants.<sup>19</sup> In particular a barony was granted which included the four towns of Lochmaben. Over time, successive barons attempted to remove the kindly tenants, for example by making substantial increases in rent. However, in June 1664 a decree from the Scottish Parliament ordaining the kindly tenants to make payment was quashed by Sign Manual of Charles II. This reaffirmed the rights of the kindly tenants, declaring that:

“the tenants should have been protected, and these warrants above mentioned,<sup>20</sup> obeyed as constant leases, according to the true meaning thereof; and further, his majesty renews the said warrants and leases, and authorises the said tenants and their successors, to possess and enjoy their respective lands, they paying and performing yearly the rents and services paid and performed by their ancestors, anno 1602, and prohibits and discharges the keepers of the castle of Lochmaben, or any one who shall pretend right to the said crown lands in all time thereafter, under all highest pain, to exact more rent, or remove them from their ancient possessions, so long as they thankfully perform the same.”<sup>21</sup>

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<sup>10</sup> Conveyancing (Scotland) Act 1874 s 25.

<sup>11</sup> Draft Bill, clause 2(1).

<sup>12</sup> There is a useful discussion of the holding in John Carmont, “The King’s Kindlie tenants of Lochmaben” (1909-10) 21 JR 323 and by Robert Hunter, *Landlord and Tenant* (3rd edn) (1860) vol I at pp 411 - 412.

<sup>13</sup> *Marquis of Queensberry v Wright* (1838) 16 S 439 at 444 per Lord Ordinary (Cuninghame).

<sup>14</sup> Carmont *op cit* p 323 and p 331.

<sup>15</sup> There are, ironically, no kindly tenants of Lochmaben in the town of Lochmaben itself.

<sup>16</sup> For rental rights, see paras 8.10 -8.11.

<sup>17</sup> APS III, 456 (c 52(5)). The Act is discussed by Sir George Mackenzie, *Observations on the Acts of Parliament* (1686) at p 247.

<sup>18</sup> It is thought that the rationale for this is that the ancestors of the kindly tenants formed the retinue of Robert the Bruce. This theory is suggested by Carmont *op cit* pp 329 ff, referring to Sir Walter Scott’s *Minstrelsy of the Scottish Border*.

<sup>19</sup> Carmont *op cit* pp 331 ff.

<sup>20</sup> Of 1592 and 1602 by James VI ordering the keeper of the castle to desist from molestation or violence against the tenants, and to suffer and permit the tenants peaceably to occupy their possessions. These earlier warrants are discussed by Carmont *op cit* p 331.

<sup>21</sup> Quoted in *Viscount of Stormont v Henderson* (1732) 1 Paton’s Appeal Cases 77 at p 79.

8.6 **Nature.** A kindly tenancy is perpetual, and freely alienable.<sup>22</sup> Originally a rent was due<sup>23</sup>, to the Earl of Mansfield,<sup>24</sup> but rents fell to be redeemed under the provisions introduced in 1974 for feuduties,<sup>25</sup> and few are thought to survive. At one time kindly tenancies were transferred simply by registration in the Rent Roll kept by the factor (Chamberlain) of the Earl of Mansfield, although later the practice grew up of recording a disposition in the Register of Sasines.<sup>26</sup> Notice of the transfer continued to be sent to the Earl of Mansfield's factor, although it was unclear whether this was necessary. Since 1 April 1997 the county of Dumfries has been an operational area for the purposes of registration of title,<sup>27</sup> and transfer requires registration in the Land Register.<sup>28</sup> Notification to the Earl of Mansfield's factor is not required.

8.7 By custom each kindly tenant has a *pro indiviso* right to salmon fishings<sup>29</sup> in the River Annan for a stretch of some four miles.<sup>30</sup> This exists concurrently with any fishing rights which have been expressly granted.<sup>31</sup> It appears that the right of salmon fishings is not severable from the kindly tenancy.<sup>32</sup>

8.8 Solicitors practising in the Lochmaben area have confirmed that they rarely deal with the transfer of the rights of kindly tenants.<sup>33</sup> It appears that when such transfers are made ordinary dispositions are used, and the kindly tenancy is treated as if it were an ordinary *dominium utile*. The sole speciality of transfer is that in the narrative clause of the disposition reference is made to "all kindly tenants rights". Thus in conveyancing practice kindly tenancies have been assimilated to the position of vassals holding under normal feudal tenure.

8.9 **From kindly tenancy to ownership.** It is not necessary to enter the debate as to whether a kindly tenancy is truly feudal or allodial in character.<sup>34</sup> It is at any rate a right akin to ownership.<sup>35</sup> With the abolition of the feudal system, kindly tenancies could not easily, or usefully, survive as a distinctive tenure. Hence we recommend that

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<sup>22</sup> *Kindly Tenants of Lochmaben v Viscount of Stormont* (1726) Mor 15195 affd (1732) Paton's Appeal Cases 77.

<sup>23</sup> This seems clear from the Sign Manual of Charles II. See also J Rankine, *The Law of Leases in Scotland* (3rd ed) (1916) p 154.

<sup>24</sup> In what capacity is not clear.

<sup>25</sup> Land Tenure Reform (Scotland) Act 1974 ss 4-6.

<sup>26</sup> Research by Ian Burdon of the Registers of Scotland shows this to have started as early as 1790. See *Non-feudal Land Holdings* (unpublished, 1995) pp 6 ff.

<sup>27</sup> SI 1996/2490.

<sup>28</sup> Land Registration (Scotland) Act 1979 s 3(3)(c).

<sup>29</sup> The management of the right of salmon fishings in the stretch of the River Annan fished by the kindly tenants rests with the Commissioners of Fishing for the Royal Four Towns, a body incorporated by the Royal Four Towns Fishing Order Confirmation Act 1965 s 3.

<sup>30</sup> The stretch of the River Annan is that extending from Shillahill Bridge to Smallholmburn in the county of Dumfries. The stretch is defined for the purposes of the Royal Four Towns Fishing Order Confirmation Act 1965.

<sup>31</sup> See *Royal Four Towns Fishing Association v Assessor for Dumfriesshire* 1956 SC 379 esp at 386 and 388.

<sup>32</sup> *Ibid* at 389. Lord Sorn qualifies his remarks to this effect with the proviso "so far as our information goes" and cannot be said to have finally confirmed the position.

<sup>33</sup> The information in this paragraph was kindly provided by Messrs McJarrow and Stevenson, Solicitors, Lockerbie.

<sup>34</sup> The nature of the holding suggests that the right is probably feudal. The land is held directly of the Crown, and the kindly tenant cannot be removed from the land. If not actually feudal, the right is certainly very close to a feudal right.

<sup>35</sup> *Marquis of Queensberry v Wright* (1838) 16 S 439; *Royal Four Towns Fishing Association v Assessor for Dumfriesshire* 1956 SC 379 at 388.

55. (a) On the appointed day kindly tenancies should be abolished.
- (b) All existing kindly tenancies should be converted automatically, by operation of law, into ownership.
- (c) Rights of salmon fishings should be preserved, as inseverable pertinents.

(Draft Bill, clause 58)

Any rent still payable would be extinguished, against compensation, by application of the scheme already proposed for feuduty.<sup>36</sup> The position of salmon fishings would be unchanged. To allow severance might be to create a market which could lead in time to over-fishing.

### Rental rights

8.10 A rental right was a special form of lease, traditionally supposed to have been granted as a reward for services rendered.<sup>37</sup> For this reason the rent was usually low. Writing was required in which the words “rental right” or “kindly tenant” had to be used.<sup>38</sup> The right was entered in the rent book of the landlord, and perfected by possession. By contrast with kindly tenancies, rental rights were not perpetual.<sup>39</sup> If no ish was expressed, the right was treated as a liferent and terminated with the death of the rentaller.<sup>40</sup> Nor was it possible to assign or sublet. Indeed if a purported assignation extended to more than half of the land, an irritancy was incurred and the right itself came to an end.<sup>41</sup>

8.11 At least one rental right has been identified as surviving in Town and Kirk Yetholm in Roxburghshire, and there may possibly be others.<sup>42</sup> But it is at any rate clear that such rights are akin to leases rather than to ownership. As such, they would not be affected by abolition of the feudal system, and do not need to be specially provided for.

<sup>36</sup> See paras 3.51 - 3.55 and recommendation 18.

<sup>37</sup> R Hunter, *Landlord and Tenant* (3rd edn, 1860) vol I pp 470 ff. On rental rights generally see pp 110, 408 ff and 466 ff.

<sup>38</sup> Stair II.9.15 and 18. And see Hunter *op cit* p 409.

<sup>39</sup> *Kerr v Waugh* (1752) Mor 10308 and 15185.

<sup>40</sup> Act of 1587 (APS III, 456 (c 52(5))), discussed at p 247 of Mackenzie’s *Observations*. The Act applied only to the rental rights granted by the Crown, but it came to be accepted that other rental rights were subject to the same rule. See esp *Laird of Ayton v his Tenants* (1625) Mor 7191 and 15187. For the case law, see Hunter *op cit* pp 467 ff. Special rules applied where the rental was expressed as being for the rentaller and his heirs: see eg *Earl of Nithsdale v Brown* (1713) Mor 15194.

<sup>41</sup> Eg *Lord Craigie Wallace v his Tenants* (1625) Mor 7191, and *Lord Johnston v Captain Johnston* (1632) Mor 7198. A similar rule applies if the rental is transferred by a contract of excambion: *Earl of Galloway v Tailzifer* (1627) Mor 7193. The position where there is an express power to sublet is unclear. Only one case suggests that the rental right will survive: *Ley v Kirkwood* (1629) Mor 7195. See further Bankton II.9.42, and J Rankine, *the Law of Leases in Scotland* (3rd edn, 1916) p 153.

<sup>42</sup> Ian Burdon, *Non-feudal Land Holdings* (unpublished, 1995). Since the rental right identified had been assigned, it may in fact have been extinguished by the irritancy mentioned earlier.

## Tenancies at will

8.12 For completeness we mention tenancies at will,<sup>43</sup> which are defined in the Land Registration (Scotland) Act 1979 as perpetual occupancy rights of land with a building or buildings, and arising by custom and usage.<sup>44</sup> Ground rent is payable. Tenants at will are not owners, but can become owners by exercising a right to buy under the 1979 Act.<sup>45</sup> They will not be affected by the abolition of the feudal system.

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<sup>43</sup> See generally Gordon, *Scottish Land Law* para 19-16, and Halliday, *Conveyancing* para 40-55. The fullest treatment of tenancies at will is in the Report of the Guthrie Committee: *Report of the Scottish Leases Committee* (Cmnd. 8658, 1952). The Guthrie report (para 80) compares tenancies at will with rental rights, although acknowledging that the free assignability of the former contrasts with the standard view of the latter.

<sup>44</sup> Land Registration (Scotland) Act 1979 s 20(8). In *Macleane v Kershaw* 1993 SLCR 145 at p 154 it is suggested that the category of tenants at will is broader than those given the right to acquire the landlord's interest under the 1979 Act.

<sup>45</sup> Land Registration (Scotland) Act 1979 ss 20-22. There have only been a handful of cases on the provisions: *McCann v Anderson, More v Anderson* 1981 SLT (Lands Tr) 13; *Ferguson v Gibbs* 1987 SLT (Lands Tr) 32; *Macleane v Kershaw* 1993 SLCR 145; and *Conochie v Watt* (1993, unreported, but referred to in *Macleane* at p 158). See also D J Cusine (ed), *The Conveyancing Opinions of Professor J M Halliday* (1992) pp 375-7. In future sales will be by disposition and not by feu disposition. See sched 8 para 41(9)(c) of the draft Bill.

# Part 9 Amendments, Repeals and Conveyancing Reforms

## Introduction

9.1 The draft Bill appended to this report contains numerous repeals and amendments of statutory provisions. Many of these are obviously consequential on the main recommendations. They remove feudal terminology in a way which requires little or no explanation. Some repeals and amendments are consequential on the main recommendations, but less obviously so, and others go beyond what is purely consequential. We have taken the opportunity to recommend the removal of obsolete conveyancing legislation and some conveyancing anomalies. We explain the reasons for these changes in this part of the report. Further explanations on points of detail will be found in the explanatory notes which accompany the draft Bill. Some minor consequential amendments affect United Kingdom statutes dealing with reserved matters. For example schedule 8, paragraph 12 of the draft Bill provides that provisions in the Stamp Act 1891 relating to feu dispositions in Scotland and feu contracts in Scotland shall cease to have effect, except in relation to any such deeds executed before the appointed day. This is purely consequential because there will be no feu dispositions or feu contracts executed after the appointed day. Similarly, feudal terms like “feu duties” and “*dominium utile*” in the Income and Corporation Taxes Act 1988 are repealed or amended. Consequential amendments of this nature, made so as to form part of the law of Scotland only,<sup>1</sup> would seem to be clearly within the competence of the Scottish Parliament.<sup>2</sup>

## Eliminating feudal terminology

9.2 **Obviously feudal terms.** Many of the consequential repeals and amendments remove references to feus, feuduties, ground annuals, *dominium utile*, infeftment and other similar terms. These changes presented us with few problems, other than that of identifying the provisions where they were required. References to feuduties and ground annuals can usually be deleted without replacement. References to *dominium utile* generally become references to ownership. References to infeftment generally become references to completion of title.

9.3 **“Estate or interest in land”.** The expression “estate or interest in land” and similar expressions caused us more difficulty. They appear frequently in United Kingdom statutes which apply to Scotland as well as to England and Wales. They also appear in some Scottish statutes.

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<sup>1</sup> Scotland Act 1998 s 29(2)(a). Any tidying up of United Kingdom legislation which is desirable as a result of amendments made for the law of Scotland only can be done by subordinate legislation under s 104 of the Scotland Act 1998.

<sup>2</sup> Scotland Act 1998 sched 4 para 3.

9.4 The term “estate in land” is an expression which is derived from English law. There were at one time many different types of estate in land in England and, even after the simplifying reforms of the 1920’s,<sup>3</sup> the term remains appropriate in England. The term is appropriate enough in Scotland under the feudal system as a convenient generic term for the feudal estates of *dominium utile* or *dominium directum*. The expression will, however, cease to be appropriate once the feudal system is abolished. There will no longer be any *dominium utile* or *dominium directum*. Nor will the term be necessary for land held by trustees. Trustees in Scotland own the property and not an estate in the property. The beneficiaries have merely a personal right against the trustees. They do not own an estate in the property.<sup>4</sup> So the term “estate in land” is not necessary, or appropriate, to cover the situation of trust property in Scotland. Nor is the term necessary in relation to leased property. In Scotland the landlord and tenant do not hold separate estates in the land. The landlord owns the land and the tenant has, at most, a subordinate real right in the land. References to an “estate in land” have therefore been replaced or modified wherever they have been found. What is an appropriate replacement or modification depends on the context. Sometimes what is meant is the land itself and this can be said. Often in a United Kingdom statute it is sufficient to say that in Scotland “estate in land” includes the land.

9.5 The term “interest in land” appears in many statutes dealing with public law matters and has also appeared, more recently, in a few statutes dealing with Scottish private law. It appears sometimes along with “estate in land” or other terms and sometimes on its own. In some contexts its use may be explained by the feudal system because it is wide enough to cover the interest of the vassal and of the superior. We have looked carefully at those provisions where it is used to see if any amendment is needed. In some private law contexts we have concluded that the abolition of the feudal system provides the opportunity for more precision. Generally, however, we have not found it necessary to replace “interest in land” wherever it is found. It is a useful expression, particularly in United Kingdom statutes where a term of broad application is required. It will continue to be useful after abolition of the feudal system of land tenure. Ownership is an interest in land. So is the right of a lessee or a holder of a standard security. In some provisions the term “interest” could with advantage be replaced by “right” or “real right”. There may, however, be interests in land which are not rights in the land. A trust beneficiary may have an interest in land owned by the trustees. A householder may have an interest in the land overlooked by the windows of the house without having any right in that land. In many contexts the width and looseness of the term “interest” does not matter. For example, if public authorities are given powers to acquire interests in land on the payment of compensation it does not matter that the term interest has a wide meaning. An authority will not normally wish to acquire anything other than the land itself or a right in it. However, a bit of flexibility does no harm. In other contexts a tighter meaning is required. Our approach to the term “interest in land” has been to consider each provision on its merits. In many United Kingdom statutes of a public law nature it would be unnecessary, difficult and pointless to attempt to remove the term. Sometimes no amendment is required. Sometimes a slight adjustment is required to make it clear that, in the particular context, the most important “interest” in land in post-feudal Scotland will be the interest of the owner. In a few private law statutes greater precision has been thought necessary and “interest” has been replaced by references to the land or to a real right in the land.

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<sup>3</sup> The reforms culminated in the Law of Property Act 1925.

<sup>4</sup> *Inland Revenue v Clark's Trs* 1939 SC 11.

9.6 **A general translation provision.** We have conducted an extensive search of the statute book in order to identify provisions requiring amendment. However, even with the aid of the Statute Law Database, we cannot be confident that we have discovered all such provisions. There may also be provisions in Private Acts and subordinate legislation which use feudal terminology. There will also be feudal terms in private deeds executed before the appointed day. Some of these feudal references may have to be applied after the appointed day in a post-feudal world. The approach which we have used in amending existing statutes should be used to construe such references, unless the context otherwise requires. Accordingly we recommend that

**56. The construction, in relation to any period after the appointed day, of feudal terminology in any enactment passed or made, or in any deed executed, before the appointed day should be in accordance with, or on the analogy of, the following rules unless the context otherwise requires.**

(a) **A reference to the *dominium utile* of land is to be construed as a reference to the land or to the ownership of the land as may be appropriate in the context.**

(b) **A reference to an estate in land is to be construed as a reference to a right in land and as including a reference to ownership of land.**

(c) **A reference to a vassal in relation to land is to be construed as a reference to the owner of the land.**

(d) **A reference to feuing is to be construed as a reference to disposing; a reference to a feu disposition is to be construed as a reference to a disposition; and similarly for other like terms.**

(e) **A reference to taking infeftment is to be construed as a reference to completing title and similarly for like terms.**

(Draft Bill, clause 67)

9.7 **Power to make further amendments.** Our recommendations for specific amendments and for a general translation provision should cater for almost all cases where feudal terminology is used in legislation. However, it is possible that there might be a rare case left uncovered or inadequately covered. To cater for such cases we recommend that

**57. The Secretary of State should be given power to make orders making such consequential amendments or repeals to enactments as may be required to take account of the abolition of the feudal system of land tenure.**

(Draft Bill, clause 70(3))

## Entails

9.8 Entails, or tailzies, were at one time commonly used to keep lands in the same family for generations. A feudal grant of land would be made in such a way that the succession to it was strictly regulated and protected. For example, the deed might provide that on the death of the owner the land was to pass to his eldest son or other male heir and so on for subsequent owners. At any one time there would often be an heir in possession and an heir apparent who could expect to succeed to the lands on surviving the heir in possession. The stipulated line of succession would be secured by provisions, called the fetters of the entail, whereby any attempt by the heir in possession to interfere with the succession or to reduce the extent or value of the estate, for example by selling or feuing or burdening the property or even, in some cases, granting leases, resulted in the lands passing immediately to the next heir.

9.9 The lawfulness of entails of feudal land was established by the Entail Act or “Act concerning Tailzies” of 1685. This Act also established a register of tailzies - later known as the register of entails.

9.10 The disadvantages of tying up land by strict entails quickly became apparent and a long succession of statutes, beginning with the Entail Improvement Act 1770, gradually increased the powers of the heir in possession to deal with the land in ways inconsistent with the fetters of the entail. In the 18th and early 19th centuries there were also numerous private Acts of Parliament to enable heirs of entail to sell or burden the entailed estates for the payment of debts.<sup>5</sup> The judges were hostile to entails. The Court of Session developed a rule that the provisions of entails were to be interpreted strictly, and many lands were effectively disentailed by judicial construction.

9.11 A significant reform was introduced by the Entail Amendment Act 1848 which, with the preamble that

“the law of entail in Scotland has been found to be attended with serious evils, both to heirs of entail and to the community at large”

introduced provisions enabling heirs in possession to disentail the lands. An heir born after the date of the entail (if the entail was dated after 1 August 1848) or after 1 August 1848 (if the entail was dated before that date) could disentail without any consent. In other cases the consent of the heir next in succession was required. The procedure was by application to the Court of Session for authority to execute, and register in the register of tailzies, an instrument of disentail. The effect was to remove the fetters of the entail. The heir in possession was placed in the same position as a full owner. The special destination in the titles remained in force but the owner could defeat it by disposing of the property or altering the succession to it.

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<sup>5</sup> See the Chronological Table of Private and Personal Acts 1539-1994.

9.12 Acts of 1875<sup>6</sup> and 1882<sup>7</sup> enabled even those heirs in possession who required consent to obtain the authority of the court to disentail without the consent of any succeeding heir provided that the value of the interest of any such heir was ascertained and paid or secured on the land. Finally, the Entail (Scotland) Act 1914 prohibited the creation of new entails after 10 August 1914.

9.13 Entails have for a long time had serious disadvantages from the point of view of tax planning. Heirs of entail will normally have been advised decades ago to take advantage of the facilities for disentail. There must be few, if any, entails still in existence. Any heir of entail in possession born after the date of the entail can now disentail without any consent or payment of compensation.<sup>8</sup> Given that all existing entails must have been dated before 10 August 1914 there must be few, if any, cases where there is an heir of entail in possession who was born before the date of the entail. Even if there are any, they can disentail without the consent of the heir next entitled to succeed if the value of that heir's interest or expectancy is ascertained and secured on the land.<sup>9</sup>

9.14 The result of the long history of statutory intervention in relation to entails is that there are some twenty statutes still in force to deal with an area of the law which has become obsolete. Many of these statutes contain feudal language which would have to be amended to deal with the consequences of the abolition of the feudal system of land tenure. We concluded that this would be a pointless exercise and that, rather than amend the entail statutes to remove feudal terminology, we should recommend the ending of entails and the repeal of all this obsolete legislation.<sup>10</sup> We were confirmed in this view by consultation with the Keeper of the Registers, the Law Society of Scotland and some firms of solicitors known to represent large landed estates or to have acted in relation to entails in the past.

9.15 We have considered the question of compensation. For the reasons given above it seems likely that any remaining entailed estates could be disentailed under the existing law without any consents and without the need to pay compensation. Only if the heir in possession was born before the date of the entail (which must have been before 10 August 1914) could there be any question of compensation. We doubt whether any provision for compensation would be used. However, it can do no harm to err on the side of caution and to include a provision. An appropriate mechanism would be a claim to the Lands Tribunal for Scotland within two years after the appointed day. The Tribunal would have power to value the claim and to order the amount to be secured on the land for the benefit of the claimant in such manner as they might think fit. Normally the date of payment out of the lands would be the death of the current owner. If the owner chose not to alter the succession - so that the

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<sup>6</sup> Entail Amendment (Scotland) Act 1875.

<sup>7</sup> Entail (Scotland) Act 1882.

<sup>8</sup> Entail Amendment Act 1848 ss 1 and 2. There can now be no heirs born before 1 August 1848. So whether the entail was dated before or after that date now makes no difference in this respect.

<sup>9</sup> Entail Amendment (Scotland) Act 1875 s 5; Entail (Scotland) Act 1882 s 13; Entail (Scotland) Act 1914 s 3.

<sup>10</sup> A few provisions in the legislation on entails deal with non-entail matters and have to be preserved. We are recommending in this report the repeal of the Entail Sites Act 1840. The draft Bill makes the appropriate repeal in sched 9. For a discussion of the reasons for recommending repeal, see Scot Law Com DP No 106 para 8.69.

next heir succeeded in any event - the secured amount would cease to matter because it would be due to and by the same person.

9.16 The Keeper of the Registers suggested that provision should be made for the formal closure of the Register of Entails and for its transmission to the Keeper of the Records of Scotland for preservation.<sup>11</sup> Otherwise there might be continuing applications for the registration of old deeds relating to entails. It appears that applications for the registration of pre-1914 deeds of entail continued to be received for decades after new entails were prohibited by the Entail (Scotland) Act 1914. We agree with this suggestion.

9.17 We therefore recommend that

**58. (a) Any land held under an entail should be automatically disentailed on the appointed day.**

**(b) The effect of the automatic disentailing should be the same as the effect of a duly registered instrument of disentail under section 32 of the Entail Amendment Act 1848. Accordingly the heir of entail in possession should own the land free from the restrictions of the entail and should be free to alter the succession to it.**

**(c) Provision should be made to enable the heir next entitled to succeed to claim compensation, within two years after the appointed day, for the loss of the expectancy in any case where the consent of such an heir would have been required in the case of a voluntary disentail immediately before the appointed day. Any claim should be dealt with by the Lands Tribunal for Scotland who should be given power to value the claim and order it to be secured on the land for the benefit of the claimant in such manner as they think fit.**

**(d) Provision should be made for the closure of the Register of Entails and for its transmission to the Keeper of the Records for preservation.**

(Draft Bill, clauses 44 - 46)

### **Consequences of abolition of teinds, stipends and standard charges**

9.18 We have in an earlier part of this report recommended the abolition of teinds, stipends and standard charges.<sup>12</sup> All of these payments were part of the older system for financing parish churches and parish ministers of the Church of Scotland. The system was based on the heritors - neighbouring landowners who were ultimately responsible for meeting the financial needs of the parish church and minister through the financial mechanism of teinds. Heritors have long ceased to have any role in these matters but because teinds have not been abolished

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<sup>11</sup> Under s 1 of the Public Registers and Records (Scotland) Act 1948 the responsibility for framing and maintaining various registers, including the Register of Entails, is vested in the Keeper of the Registers and the responsibility for preserving the public registers, records and rolls of Scotland is vested in the Keeper of the Records.

<sup>12</sup> Paras 3.51 - 3.55.

many Acts of Parliament relating to the Church of Scotland continue to refer to them. The abolition of teinds, stipends and standard charges means that many old provisions based on the former system of finance fall to be repealed. The consequential provisions of this nature are surprisingly extensive. The net effect is a considerable simplification and modernisation of the relevant statutory material. We have consulted the Church of Scotland about these repeals and are very grateful for their assistance in what is a rather esoteric and specialised branch of the law.

### **Crown writs**

9.19 Sections 63 to 93 of the Titles to Land Consolidation (Scotland) Act 1868 deal, at great length, with Crown writs. They consolidate earlier provisions which were designed to simplify the procedure for obtaining Crown charters and other writs of a feudal nature. The procedure is still, however, remarkably complicated and archaic. It is rarely used in modern practice. It seems clear from the context in which these provisions are found that they are intended to deal with feudal writs, such as charters of novodamus, relating to the titles to land in Scotland. The long title of the 1868 Act is an Act

“to consolidate the statutes relating to the constitution and completion of titles to heritable property in Scotland, and to make certain changes in the law of Scotland relating to heritable rights”.

Section 3 of the Act draws a distinction between Crown writs and “charters, precepts, and writs from subject superiors”. Section 64 says that any person seeking to obtain a Crown writ shall lodge various documents, including “all the title deeds of the lands”. Section 79 says that the Crown writ, once obtained, is to be “a warrant for infeftment in the lands described”. The forms of Crown writs given in Schedule T to the Act all concern feudal writs relating to land in Scotland. We mention all this because it was drawn to our attention that there had been an attempt in recent years to use the procedure for purposes other than the completion of a feudal title to land. In our view it is clear that sections 63 to 93 of the 1868 Act are concerned exclusively with feudal charters and other writs relating to feudal land in Scotland. It follows that they now fall to be repealed.

9.20 The Sheriff Principal of Lothian and Borders (who is now the “presenter of signatures” for the purposes of these provisions on Crown writs), the Keeper of the Registers of Scotland, the Queen’s and Lord Treasurer’s Remembrancer and the Crown Estate Commissioners were consulted as to whether these provisions could safely be repealed. The results of consultation confirmed that sections 63 to 93 can now be repealed in their entirety and we so recommend.<sup>13</sup>

### **Service of heirs**

9.21 Sections 27 to 50 of the Titles to Land Consolidation (Scotland) Act 1868 deal with the service of heirs - an essentially feudal procedure whereby an heir could obtain infeftment. They were repealed by the Succession (Scotland) Act 1964.<sup>14</sup> However, the repeal was not to affect the “making up of title to any part of the estate of any person who died before” 10

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<sup>13</sup> The appropriate repeals are effected in sched 9 to the draft Bill.

<sup>14</sup> s 34(2) and sched 3.

September 1964 “or the right to take legal proceedings with respect to any such matters”.<sup>15</sup> This partial repeal meant (a) that archaic rules were preserved for cases involving deaths before 10 September 1964 and (b) that there was no provision whereby, when property was conveyed to named trustees and the heir of the last surviving named or assumed trustee, the heir of that trustee could establish his title to act as trustee. Such an heir had to apply to the Court of Session under the *nobile officium* for a declarator that he was entitled to act as trustee.<sup>16</sup> The problem in this type of case was that there was a trustee under the trust who was willing to act. So it was not possible to resort to the provisions in the Trusts (Scotland) Act enabling the court to appoint a new trustee where no new trustees could be assumed.<sup>17</sup> There was a need for a simple procedure before the Sheriff of Chancery to deal with the two types of case mentioned, but instead of simply providing for this in one short section the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980<sup>18</sup> revived sections 27 to 50 of the 1868 Act

“(a) in so far as they provide; and (b) for the purpose only of providing, a procedure whereby the heir of a last surviving trustee in a trust, called as heir of provision in the trust, may establish his entitlement to act as trustee by having himself served as heir in general to the last surviving trustee.”

9.22 The result of this rather lazy method of law reform is that pages of outdated provisions have been preserved to deal with a very small and easily solved problem. Our consultation confirms that all these sections can now be repealed, in so far as not already repealed,<sup>19</sup> and replaced by a simple modern alternative for those cases where a mechanism is still required (namely, pre-1964 deaths and establishing the title of the heir of provision of the last surviving trustee). We therefore recommend as follows.

**59. (a) Sections 27 to 50 of the Titles to Land Consolidation (Scotland) Act 1868 (dealing with the service of heirs) should be repealed, in so far as not already repealed, and replaced by provisions enabling the Sheriff of Chancery, on application, to grant a declarator that**

**(i) a named person has succeeded (either in general or to specified lands) as heir to a person who died before 10 September 1964, or**

**(ii) the applicant is entitled to act as trustee under a trust as heir of provision of the last surviving named or assumed trustee.**

**(b) The Sheriff of Chancery should have jurisdiction for the purposes of sub-paragraph (i) above, if the deceased died domiciled in Scotland or if lands which are the subject of the application are situated in Scotland**

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<sup>15</sup> s 37(1)(d) of the 1964 Act.

<sup>16</sup> See *Skinner Petr* 1976 SLT 60.

<sup>17</sup> s 22 of the Trusts (Scotland) Act 1921.

<sup>18</sup> s 6.

<sup>19</sup> Ss 29, 30 and 34 were repealed by SI 1996 /2184; s 39 was repealed by SLR 1950; and s 49 was repealed by SLR 1893. The draft Bill, in sched 9, simply repeals all the sections from 27 to 50. The effect of this is to repeal everything surviving. This technique leaves less room for confusion than repealing only the specified surviving sections.

**and for the purposes of paragraph (ii) above, if the trust is governed by the law of Scotland or if lands which are the subject of the application are situated in Scotland.**

**(c) Any reference in any enactment or deed to a decree of service as heir should be taken, after the date of commencement of the new provision, as including a reference to a decree of declarator granted under the new provision.**

(Draft Bill, clause 62)

## **Thirlage**

9.23 Thirlage was an obligation to take corn from particular land to a particular mill to be ground. Payment to the miller was known as multures.<sup>20</sup> The obligation of thirlage was over time commuted, either by agreement or under the Thirlage Act 1799, into an obligation to make an annual payment, known as dry multures. Any surviving obligation to pay dry multures would be abolished under the provision in the draft Bill dealing with payments analogous to feuduties.<sup>21</sup> Thereafter thirlage would cease to have any content even as an underlying theoretical explanation for a type of perpetual payment due in respect of particular land. In practice thirlage has long ceased to exist and it is time that it was formally abolished. We recommend that

**60. (a) All rights of thirlage not already extinguished should be extinguished on the appointed day.**

**(b) The Thirlage Act 1799 should be repealed.**

(Draft Bill, clause 49 and sched 9)

## **Partnerships and feudal property**

9.24 It is generally accepted that a Scottish firm, even although it is a legal person,<sup>22</sup> cannot own feudal property.<sup>23</sup> The property must be owned by trustees for the firm. The origins of this rule are obscure and the supposed justification for it - namely, that the firm as a legal entity cannot sustain the feudal relation - unconvincing, given that the feudal relation nowadays involves, at most, paying feuduty and not breaching real burdens enforceable by the superior. Nonetheless, the view that a firm cannot own feudal property is generally held and is acted on in practice. It can be supported by the authority of Bell who said, in his *Principles*,<sup>24</sup> that the firm was a separate person, capable of contracting in its own name with third parties and

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<sup>20</sup> For a full discussion, see Gordon, *Scottish Land Law* paras 10-79 - 10-90. See also D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) paras 1.29 and 3.75.

<sup>21</sup> Clause 50.

<sup>22</sup> Technically the firm is the legal person. The partnership is the relation between the partners. See the Partnership Act 1890 ss 1 and 4.

<sup>23</sup> See Styles, "Why can't partnerships hold heritage?" 1989 JLSS 414; Gretton, "Who owns partnership property?" 1987 JR 163.

<sup>24</sup> *Principles* s.357.

“capable also of holding a lease, but not of holding feudally as a vassal.”

Bell made the same point in his *Commentaries*<sup>25</sup> where he said that the firm, as a separate person,

“is known and recognised in its obligations and contracts by its separate name or firm, as its personal appellation. But it cannot hold feudal property in the social name.”

The Partnership Act 1890 regulates partnership property in some badly drafted provisions which are difficult to understand and apply in relation to Scotland.<sup>26</sup> It seems clear, however, that there is no prohibition in the Act on the ownership of land by Scottish partnerships. Indeed the Act seems to assume that heritable estate can belong to the partnership.<sup>27</sup> It provides, however, that the “title to and interest in” such heritable estate is to

“devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section”.<sup>28</sup>

The meaning is obscure but the general idea seems to be to leave questions of title and land tenure to the general law of property. The words “so far as necessary” are important. They leave open the possibility that in the case of some types of tenure no trust will be necessary. The explanation for the wording may be the complicated state of English land law at the time. There were many different tenures and estates in land and it was understandable that the Partnership Act should be framed on the basis that technical rules of property law were not its concern.

9.25 The rule that firms cannot own feudal property is anomalous. It is generally accepted that a firm can own moveable property.<sup>29</sup> Moveable property, such as vans, plant and machinery, computers, office furniture or stock in trade, is never, so far as we are aware, held by trustees for the firm. A firm can hold the right of a tenant under a lease of land, even a ground lease of 999 years or more.<sup>30</sup> We have been unable to find any reported case on the question whether a firm can own udal land or other allodial land,<sup>31</sup> but there appears to be no rule to the contrary, and persons are generally free to do what is not prohibited.

9.26 We will shortly be consulting, in a paper to be issued jointly with the English Law Commission, on possible reforms and clarifications of the rules on the ownership of property by firms. In that paper we will consider options for alleviating the potential problems caused by the fact that firms often come to an end as legal entities even although they may continue as

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<sup>25</sup> Vol 2 p 619 (5th ed 1826).

<sup>26</sup> s 20(1)(2) and (3).

<sup>27</sup> The Act is not consistent in its usage of “firm” and “partnership”. In s 20(2) it talks of “the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership”.

<sup>28</sup> s 20(2).

<sup>29</sup> *Forsyth v Hare and Co* (1834) 13 S 42. See also Gretton, “Who owns partnership property?” 1987 JR 163.

<sup>30</sup> The rule that a firm can be a tenant under a lease is taken for granted in numerous cases. There would be chaos in Scottish agriculture if it were otherwise.

<sup>31</sup> Such as land in a foreign country the law of which allows any legal person to own land.

business entities. In the meantime we have to take a decision on how to deal with the consequential effects in this area of the abolition of the feudal system of land tenure. If we say nothing in the draft Bill about the ownership of land by firms after the abolition of the feudal system there will be uncertainty. People will not know for certain whether the abolition of feudal tenure means that partnerships with legal personality can now own any Scottish land. We have to resolve the question one way or the other. It would be retrograde to prohibit firms from owning land in Scotland, given that the Partnership Act assumes that land can belong to a partnership. It would be anomalous and undesirable to provide that property which was formerly feudal property could not be owned by a firm, notwithstanding abolition of the feudal system. The only principled solution is to make it clear that, after abolition of the feudal system, any land in Scotland can be owned by a firm. This would not, of course, mean that firms would have to hold land in their own names. They could do so, but the short lives of many firms would often make it prudent to continue to take title in the names of trustees.

9.27 We have referred to firms for the sake of convenience. In fact the firms which would be able to own land in Scotland would be firms which have a separate legal personality. This might, depending on the applicable law, cover some foreign firms. If English law were to be changed so that certain English partnerships had legal personality then those firms too could own Scottish land. The rule is no different from that applying to companies. The general principle is that land in Scotland can be owned by any legal person unless there is something in the enactment by which, or by virtue of which, legal personality is conferred which limits the legal person's powers in such a way as to prevent land being owned.

9.28 We recommend that

**61. It should be made clear that firms or partnerships having legal personality will be capable, after the abolition of the feudal system of land tenure, of owning land in their own names.**

(Draft Bill, clause 64)

There may be a question as to whether the implementation of this recommendation would be within the competence of the Scottish Parliament. The first question is whether the proposed provision would relate to a reserved matter.<sup>32</sup> A doubt might be caused by Section C1 of Schedule 5 to the Scotland Act 1998 which provides that the following is a reserved matter.

“The creation, operation, regulation and dissolution of types of business association.”

“Business association” means any person (other than an individual) established for the purpose of carrying on any kind of business ...”. That would include a partnership which has legal personality. Our recommendation is clearly not concerned with the creation or dissolution of partnerships. It might, however, be argued that it was concerned with the operation or regulation of partnerships. It remains to be seen how those words will be interpreted. It is possible that they should be regarded as relating to the business activities of partnerships, or at least their relations with those outside the partnership, rather than merely incidental matters such as the forms of title deeds. In any event, whether a provision relates to a reserved matter

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<sup>32</sup> Scotland Act 1998 s 29 (2)(b).

is to be decided by reference to its purpose.<sup>33</sup> The purpose of the rule which we recommend is not to regulate, or control the operation of, partnerships but is merely to remove a consequential doubt which might arise from the abolition of feudal tenure. That, however, is not the end of the matter because a provision which would not otherwise relate to reserved matters but which makes modifications of Scottish private law as it applies to reserved matters may be outwith competence.<sup>34</sup> That rule, if unqualified, could endanger the whole project to reform the feudal system of land tenure in Scotland because clearly property law is going to “apply” to some reserved matters, including those relating to business associations. Fortunately, there is a qualification. The competence of the Scottish Parliament is preserved if the purpose of the provision is to make the law “apply consistently to reserved matters and otherwise”.<sup>35</sup> The purpose of all our recommendations, and of the one on partnerships in particular, is to make the law on the new way of owning land apply consistently across the board to all kinds of natural and legal persons. That, however, is still not the end of the matter because a provision will also be outwith the competence of the Scottish Parliament if it is in breach of the restrictions in schedule 4 to the Scotland Act 1998.<sup>36</sup> One of those restrictions is that the Parliament cannot modify a common law rule “the subject matter of which is a reserved matter”.<sup>37</sup> This takes us to the subject matter of the rule which says that feudal property cannot be owned by partnerships. It might perhaps be thought unrealistic to regard the subject matter of this rule as being the operation or regulation of partnerships. The subject matter is an incident of a certain form of land tenure. It is conveyancing more than anything else. Even if, however, the subject matter of the common law rule were to be regarded as a reserved matter, there is an exception which preserves the competence of the Scottish Parliament if the modifications in question

“(a) are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to reserved matters, and

(b) do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision”.<sup>38</sup>

In this case the recommended modification of the law on the ownership of property by partnerships is consequential on the abolition of the feudal system of land tenure. It is consequential on that because one of the results of abolition is to give rise to a doubt as to the position of partnerships in relation to formerly feudal property. The modification, in so far as it makes it clear that firms can own such property, does not go further than is necessary to remove the doubt. In so far as the law on the ownership of non-feudal land is restated that is also within the competence of the Scottish Parliament because the restrictions in schedule 4 do not prevent an Act of the Scottish Parliament from restating the law or restating it with such modifications as are permissible.<sup>39</sup> The draft clause<sup>40</sup> is expressed positively because that is the best and most direct way of resolving the doubts which have to be resolved but its effect, in our view, is the same as if it provided that nothing in the Act prevented land from being owned by a firm which has a legal personality distinct from the persons who compose it. That

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<sup>33</sup> Scotland Act 1998 s 29 (3).

<sup>34</sup> Scotland Act 1998, s 29(4).

<sup>35</sup> Scotland Act 1998 s 29(4).

<sup>36</sup> Scotland Act 1998 s 29(2)(c).

<sup>37</sup> Scotland Act 1998 sched 4 para 2(2)(a).

<sup>38</sup> Scotland Act 1998 sched 4 para 3(1).

<sup>39</sup> Scotland Act 1998 sched 4 para 7(1).

<sup>40</sup> See draft Bill clause 64.

would make it reasonably clear, but not quite so clear, that the old feudal restriction was not carried over into the new form of ownership of land. Indeed the same result would follow if nothing was said in the Act but there would be doubts and, given the caution of conveyancers, there is a need to resolve the doubts.

### **Other conveyancing amendments and repeals**

**9.29 Notarial instruments and warrants of registration.** Both notarial instruments and warrants of registration are successors to the feudal instrument of sasine. They carry feudal baggage with them. As mentioned earlier,<sup>41</sup> we have concluded that they should be removed from conveyancing practice. Amendments and repeals in the draft Bill bring this about.

**9.30 Time limit for registering conveyance on compulsory purchase.** Section 80 of the Lands Clauses Consolidation (Scotland) Act 1845 provides that feus and conveyances of lands to be purchased compulsorily, if registered within 60 days of execution, confer a good feudal title on the promoters of the undertaking in question. We have to amend this section anyway to remove feudal terminology and we have taken the opportunity to remove the 60 day limit which is a survival from an earlier era when all instruments of sasine had to be registered within this time limit. It is in the interest of the promoters to register their conveyance as soon as possible in order to obtain a good title and the 60 day limit serves no useful purpose. The relevant repeal in schedule 9 to the draft Bill achieves the desired result but, as the change affects conveyancing practice in this area, we draw attention to it here.

**9.31 Heritable securities.** The conveyancing statutes contain many provisions, often extremely detailed, relating to old forms of heritable security which are now rarely encountered in practice. The main example is the bond and disposition in security. New heritable securities in this form have been disallowed since 1970.<sup>42</sup> However, for decades before that bonds and dispositions in security had in practice been replaced by the *ex facie* absolute disposition which gave the heritable creditor much better rights of enforcement. We think that the time has come to cleanse the statute book of all these obsolescent provisions. Any difficulties which might be encountered if an old bond and disposition in security had to be assigned or discharged could be covered by a provision enabling the forms appropriate for standard securities to be used with any necessary modifications. The main modification required would be the replacement of the term standard security by the term heritable security. We therefore recommend that

- 62. To enable obsolete legislation relating to old forms of heritable security to be repealed it should be provided that the provisions of sections 14 to 30 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (on assignation, variation, discharge and calling up etc of standard securities) should apply, with any necessary modifications, to bonds and dispositions in security and similar old forms of heritable security.**

(Draft Bill, clause 63)

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<sup>41</sup> See paras 7.27 - 7.33.

<sup>42</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3).

9.32 **Other obsolete material.** The explanatory notes on the schedules to the draft Bill explain the reasons for recommending the repeal of various other obsolete provisions in the conveyancing statutes.

### **Descriptions in standard securities**

9.33 A standard security must comply with the forms (A and B) prescribed in schedule 2 to the Conveyancing and Feudal Reform (Scotland) Act 1970.<sup>43</sup> Note 1 to schedule 2 provides that:

“The security subjects shall be described by means of a particular description or by reference to a description thereof as in Schedule D to the Conveyancing (Scotland) Act 1924 or as in Schedule (G) to the Titles to Land Consolidation (Scotland) Act 1868.”

There is no mention of a general description. Accordingly, in *Beneficial Bank plc v McConnachie*<sup>44</sup> it was held by the First Division that a standard security which described a terraced house only by its postal address (“The Heritable Subjects known as 57 Longdykes Road, Prestonpans in the County of East Lothian”) failed to satisfy the requirements of note 1. There was only a general description of the property, and not a particular description. This followed an Outer House decision from the previous year.<sup>45</sup>

9.34 The decision in *Beneficial Bank* caused “considerable dismay in the [legal] profession”.<sup>46</sup> In other conveyancing deeds, including dispositions, land can be described in any manner which is sufficient to distinguish it from any other land. It had not occurred to most practitioners that the rule for standard securities might be different.<sup>47</sup> Nor was (or is) there a strong policy reason why this should be so. No special rule had applied to descriptions in bonds and dispositions in security, the precursor of the standard security.<sup>48</sup> The Halliday Committee, in recommending the introduction of the standard security, did not say that the rules for descriptions ought to be changed.<sup>49</sup> Later, once the legislation was passed, there was nothing in Professor Halliday’s authoritative commentaries on the Act to suggest that the rule for descriptions had been altered. On the contrary, Professor Halliday wrote that:<sup>50</sup>

“As to the description of security subjects see Volume II, Chapter 18.<sup>51</sup> A short conveyancing description including a postal address is sufficient.”

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<sup>43</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2).

<sup>44</sup> 1996 SC 119.

<sup>45</sup> *Bennett v Beneficial Bank plc* 1995 SLT 1105.

<sup>46</sup> McDonald, *Conveyancing Manual* para 8.11.

<sup>47</sup> However, the difficulty with note 1 had been pointed out by Professor Douglas Cusine in an article published at (1990) 35 JLSS 98, and thereafter at para 4.19 of his book on *Standard Securities* (1991).

<sup>48</sup> Titles to Land Consolidation (Scotland) Act 1868 Sched FF; *Murray's Tr v Wood* (1887) 14 R 856; *Cattanach's Tr v Jamieson* (1884) 11 R 972.

<sup>49</sup> The Report on *Conveyancing Legislation and Practice* (Cmnd 3118, 1966) p 106 gives a style for form A and form B securities. In both cases the direction as to description is simply “description of security subjects”.

<sup>50</sup> J M Halliday, *Conveyancing Law and Practice* vol III (1st edn, 1987) para 37-42.

<sup>51</sup> This is the chapter on descriptions in all conveyancing deeds. Standard securities are not singled out for special treatment.

In *Beneficial Bank* the court struggled to find a justification for change, arguing that in a security (unlike a disposition) the parties cannot rely on the possession of the grantee to eke out an inadequate description.<sup>52</sup> In fact, it is difficult to avoid the conclusion that the terms of note 1 were due to oversight and that there was no intention to change well-settled law.

9.35 Note 1 does not apply to securities granted over property already registered in the Land Register.<sup>53</sup> Hence the problem is one for first registrations in that Register and for Sasine transactions. Naturally, most standard securities already on the Registers have particular descriptions, usually incorporated by reference from a previous deed. A significant number, however, do not. On the authority of *Beneficial Bank* such securities are now shown to be void.<sup>54</sup> Many of the invalidated securities relate to tenement flats. A standard description of a flat gives the postal address of the tenement and then locates the flat within the building (eg “ALL and WHOLE the southmost flat on the first floor above the ground floor entering by the common passage and stair number three High Street, Kirkcaldy”). It is difficult to see how more could be done, except by use of a sectional plan. Descriptions of this kind are plainly valid for the purposes of ordinary deeds, although there has been some controversy as to whether they are properly characterised as general or as particular descriptions.<sup>55</sup> In *Beneficial Bank* it was said that such descriptions could be treated as particular descriptions, except in the case of ground floor flats.<sup>56</sup> The reason for singling out ground floor flats is not clear. If it is on the basis that there may also be garden ground, this overlooks the fact that upper flats (particularly in converted villas) may often include ownership of a garden.<sup>57</sup>

9.36 *Beneficial Bank* gives rise to two different kinds of problem. In the first place there is the problem of existing securities. A substantial number of securities on the Register are void. This places lenders in a difficult position. A lender could of course insist on the grant of a new security. Alternatively, the lender could apply for judicial rectification of the description under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 on the basis that it was the common intention of the parties that the description should be valid. Section 8 has already been used successfully for this purpose.<sup>58</sup> In fact the policy of institutional lenders seems to be to do neither, at least in the short term. Most securities do not have to be enforced. It would be administratively costly to check through a whole mortgage portfolio to determine which securities are in need of remedial action. If a debtor defaults on a security which is void under *Beneficial Bank*, judicial rectification can be sought at that time. It is true that, under section 9 of the 1985 Act, rectification will not be granted if a third party acted or

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<sup>52</sup> Similar arguments were employed in *Bennett v Beneficial Bank plc* 1995 SLT 1105.

<sup>53</sup> Land Registration (Scotland) Act 1979 s 15(1).

<sup>54</sup> Securities on the Land Register as a result of first registration would not be void, because of the curative effect of s 3(1)(a) of the Land Registration (Scotland) Act 1979. But the Register would be inaccurate and, in principle at least, rectification would be available under s 9(1).

<sup>55</sup> *Cooper's Trs v Stark's Trs* (1898) 25 R 1160.

<sup>56</sup> 1996 SC 119 at 126 - 127. For purposes of first registration, the Keeper will now accept, without exclusion of indemnity, descriptions of ground floor flats which do no more than locate the flat within the building. See (1997) 42 JLSS 290-1.

<sup>57</sup> The ready acceptance of a postal address for upper flats is not easily reconciled with its rejection in other types of property. As is observed in McDonald, *Conveyancing Manual* para 8.11: “If the postal address is sufficient to identify a block of flats comprising a tenement building, without any further particulars included, why should the postal address of a mid-terraced villa not suffice as a particular description?”

<sup>58</sup> *Beneficial Bank v Wardle* 1996 GWD 30-1825.

refrained from acting in reliance on the unrectified term. But this exception would not cover unsecured creditors or a trustee in sequestration or liquidator,<sup>59</sup> and posterior secured creditors would be excluded by the further requirement of section 9<sup>60</sup> that the person had no knowledge, actual or constructive, of the inaccuracy of the document. No creditor could reasonably suppose that parties intended to grant an invalid security, and no creditor could reasonably rely on such a supposition. It follows that defective securities can always be rectified where that is necessary, although at some inconvenience and expense.

9.37 The second problem relates to future securities. There is much valuable discussion in *Beneficial Bank* about the nature of a particular description. But, inevitably, doubts remain, so that it will not be clear in all cases which descriptions will and which will not qualify. In cases of doubt the path of prudence is to have a new plan drawn up, with the debtor bearing the cost.

9.38 The solution to these difficulties seems straightforward. The law should be restored to what it used to be for pre-1970 securities, and to what most practitioners, before *Beneficial Bank*, believed the position to be under standard securities. The restoration, moreover, should be retrospective. As has been seen, the effect of *Beneficial Bank* can be avoided, at a price, by an application for judicial rectification. A retrospective provision will do no more than save the creditor the trouble and expense. We suggest that a description in a standard security should be valid provided it is sufficient to identify the property. This is the rule which applies to other deeds.<sup>61</sup> As with other deeds, this would be without prejudice to any special rule which applies in relation to any register. In the case of the Register of Sasines it was held in *Macdonald v Keeper of the Registers*<sup>62</sup> that the Keeper can reject deeds which do not sufficiently disclose the identity of the property.<sup>63</sup> The corresponding rule for the Land Register is statutory. The Keeper is bound to reject a deed which does not give the relevant title number<sup>64</sup>; and it is further provided that<sup>65</sup>

“Land in respect of which an interest has been registered shall be sufficiently described in any deed relating to that interest if it is described by reference to the number of the title sheet of that interest, in or as nearly as may be in, the manner prescribed by Schedule B to these rules.”

Schedule B reads simply: “the subjects registered under Title Number(s) ...”.

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<sup>59</sup> *Bank of Scotland v Graham's Tr* 1993 SLT 252.

<sup>60</sup> Section 9(3).

<sup>61</sup> The rule is from the common law, although it is sometimes found in statutes or statutory instruments. A well-known example is the rule for confirmations of executors: “such a description as will be sufficient to identify the property or interest therein”. See Act of Sederunt SI 1966/593, s 1.

<sup>62</sup> 1914 SC 854.

<sup>63</sup> The case concerned a description of a tenement flat which did no more than give the postal address of the tenement and made no attempt to locate the individual flat.

<sup>64</sup> Land Registration (Scotland) Act 1979 s 4(2)(d).

<sup>65</sup> Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 25.

9.39 We recommend that

**63. (a) A description in a standard security should be sufficient (and be deemed always to have been sufficient) if it identifies the property to which it relates.**

**(b) Paragraph (a) is without prejudice to any requirement imposed as a condition of registration in any register.**

(Draft Bill, clause 71(3) and sched 8 para 32(23)(a))

### **Limitation on length of new leases**

9.40 We noted in Part 2 that it would not be satisfactory to allow the feudal system of land tenure to be replaced by a leasehold system which might in the course of time turn out to have many of the same defects. Fortunately, there is no risk of this happening in relation to residential property because there are already restrictions which, in effect, limit leases of residential property to a period of twenty years at most.<sup>66</sup> There is, however, a risk in relation to non-residential property. An essential corollary of the prohibition on the creation of new feus is some limitation on the length of new leases. There is no limitation at common law. Old ground leases of 999 years are not uncommon in certain parts of Scotland and old leases for much longer periods are sometimes encountered. Any limitation would have to be introduced by statute. We are of the view that such a limitation is necessary.

9.41 The principle of a limitation on the length of new leases is clear. The main difficulty is in determining what the limit should be. We did not consult on this question in our discussion paper on the feudal system<sup>67</sup> and are not at this stage able to make a recommendation. The same issue arises in relation to real burdens<sup>68</sup> and we are consulting on the limit in our discussion paper on that subject.<sup>69</sup> There are difficult issues involved, particularly in relation to commercial leases and the funding arrangements for commercial developments, and we intend to take the views of consultees into account and make a recommendation in our report on real burdens. The results of our consultation and of our own assessment will be available to government before the feudal system Bill is introduced. In the meantime we have deliberately left the period blank in the draft Bill.<sup>70</sup>

9.42 Some care has to be taken in the drafting of a limitation on the length of leases. Clearly it should apply only to future leases and not to existing leases. It should, we think, simply bring the lease to an end on the expiry of the period. In order to prevent avoidance the limitation would have to cover cases where a lease for a shorter period contained obligations to renew. There would, however, be no objection to the parties to a lease, which did not contain any obligation to renew, voluntarily entering into a new lease. The distinction here

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<sup>66</sup> Land Tenure Reform (Scotland) Act 1974 ss 8 - 10.

<sup>67</sup> Scot Law Com DP No 93.

<sup>68</sup> A person who wishes to alienate land but to impose real burdens after abolition of the feudal system and the reform of real burdens could achieve much the same effect by use of an ultra long lease.

<sup>69</sup> Scot Law Com DP No 106 paras 9.1 - 9.5.

<sup>70</sup> Clause 61.

would be between forced renewals, which would be treated as extending the original lease, and voluntary renewals which would be treated as a fresh start. There would also be no reason to restrict the operation of tacit relocation, the doctrine by which an expiring lease can be continued in effect for one year at a time if neither party intimates that the tenancy is at an end.<sup>71</sup> Taking all these points into account, we recommend that

- 64. (a) There should be a statutory limitation on the length of leases executed after the new legislation comes into force.**
- (b) The maximum permitted duration should be such period as may be determined by the government in the light of the consultation on this question following on our discussion paper on real burdens.**
- (c) Leases should terminate automatically on the expiry of the permitted period, if they have not come to an end earlier.**
- (d) In calculating the duration of a lease any period for which it is renewed in consequence of an obligation to renew should be taken into account, but the statutory provision should not prevent voluntary renewals or the operation of tacit relocation or extensions by or under any enactment.**

(Draft Bill, clause 61)

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<sup>71</sup> *Signet Group plc and C & J Clark Retail Properties* 1996 SC 444.

## Part 10 List of Recommendations

### Part 2 - Abolition

1. (a) The feudal system of land tenure should be abolished as from the appointed day.  
  
(b) The *dominium utile* in any land held on feudal tenure immediately prior to abolition should be converted automatically, by operation of law, into ownership and all feudal superiorities in the land should cease to exist.  
(Para 2.5; Draft Bill, clauses 1 and 2(1), (2))
2. It should not be possible to create any new feudal estate in land after the appointed day.  
(Para 2.8; Draft Bill, clause 2(3))
3. It should be provided that the Keeper must refuse any application for registration in the Land Register if it relates, in whole or in part, to any interest in land abolished by the new legislation.  
(Para 2.12; Draft Bill, clause 3(a))
4. It should be provided that the abolition of the feudal system of land tenure does not affect any prerogative power exercisable by the Crown as sovereign or head of state (including any prerogative powers relating to peerages, dignities or other honours or relating to ownerless or unclaimed property).  
(Para 2.27; Draft Bill, clause 52)
5. (a) Any surviving criminal or civil jurisdiction of barony courts should be abolished.  
  
(b) Any conveyancing privileges incidental to barony titles to land should be abolished.  
  
(c) The new legislation should not abolish the dignity of baron or any other dignity (whether or not of feudal origin). Accordingly barons should retain the right to call themselves baron and should retain any precedence and ceremonial or heraldic privileges deriving from their barony.  
  
(d) The dignity of baron should no longer be attached to land. It should be, and should be transferable only as, incorporeal heritable property.  
  
(e) It should be provided that after the appointed day a barony will not be an interest in land for the purposes of the Land Register and no deed relating to a barony can be recorded in the Register of Sasines.  
(Para 2.45; Draft Bill, clause 57)

6. It should be made clear
- (a) that any rectification of the Land Register which is required to take account of the abolition of the feudal system of land tenure, or of anything done under or by virtue of the legislation on abolition, is not to be regarded as prejudicing any proprietor in possession and
  - (b) that there is no entitlement to indemnity under section 12 of the Land Registration (Scotland) Act 1979 as a result of any such rectification or as a result of any inaccuracy in the register resulting from the abolition of the feudal system of land tenure, or of anything done under or by virtue of the legislation on abolition.  
(Para 2.50; Draft Bill, clause 3 (b) and (c))
7. It should be made clear that the statutory provisions abolishing the feudal system of land tenure do not supersede or impair the jurisdiction or prerogative of the Lord Lyon King of Arms.  
(Para 2.51; Draft Bill, clause 56)

### **Part 3 - Feuduty**

8. All remaining feuduties should be extinguished on the appointed day.  
(Para 3.8; Draft Bill, clause 7)
9. (a) Compensation should be payable by a former vassal to a former superior for the extinction of feuduty, provided that a notice is served on the former vassal within two years of the appointed day.
- (b) The notice for a *cumulo* feuduty should
    - (i) specify the amount of the *cumulo* feuduty
    - (ii) identify the property in respect of which it was paid
    - (iii) state the total compensation due for the extinction of that feuduty
    - (iv) show how the total compensation has been allocated among the former vassals and the compensation due by each former vassal,
    - (v) require payment of the compensation by the former vassal on whom the notice is served
    - (vi) state to whom payment should be made, and
    - (vii) have explanatory notes attached.
  - (c) In other cases the notice should
    - (i) specify the amount of the feuduty
    - (ii) identify the property in respect of which it was paid
    - (iii) state the compensation due for the extinction of that feuduty
    - (iv) require payment of the compensation
    - (v) state to whom payment should be made, and
    - (vi) have explanatory notes attached.

- (d) Subject to Recommendation 12 a former vassal on whom a notice has been served should pay the compensation within 8 weeks of service of the notice.
- (e) Compensation should be an ordinary, unsecured debt.  
(Para 3.22; Draft Bill, clause 8)
10. (a) Compensation for the extinction of a feuduty should be that sum of money which, if invested in two and one half per cent Consolidated Stock at the middle market price at the close of business last preceding the appointed day, would produce an annual sum equal to the feuduty.
- (b) In the case of a *cumulo* feuduty a former superior should allocate the sum determined under (a) among the former vassals in such proportions as are reasonable in the circumstances. An allocation should be presumed reasonable if it accords with an existing apportionment. The amount so allocated should be the compensation due by the former vassal to the former superior.  
(Para 3.22; Draft Bill, clause 9)
11. A collector of a feuduty or part of a feuduty should be under a duty to disclose to the superior or the former superior on request at any time after commencement of the legislation the identity and address of each vassal from whom the collector has collected the feuduty or part and in the case of a *cumulo* feuduty the amount collected from that vassal.  
(Para 3.22; Draft Bill, clause 14)
12. (a) Where the compensation due is £100 or over, the former superior should serve with the notice an instalment document. If this is not done, the notice should have no effect.
- (b) The document should specify -
- (i) the compensation due
  - (ii) the number of instalments
  - (iii) the amount of each instalment
  - (iv) the date of the first and subsequent payments
  - (v) the amount of the surcharge, and
  - (vi) have explanatory notes attached.
- (c) A former vassal who wishes to pay by instalments should sign, date and return the instalment document along with payment of the surcharge within 8 weeks of the date of service.

(d) The instalments should be determined in accordance with the following table -

<b>Compensatory Payment</b>		<b>Number of instalments</b>
between	£ 100 and £ 500	5
between	£ 501 and £1000	10
between	£1001 and £1500	15
more than	£1500	20

(e) The instalments should be equal instalments payable half yearly at Whitsunday and Martinmas beginning at the next term day.

(f) If an instalment is unpaid for 14 days the balance of unpaid compensation should immediately become due and payable.

(g) A former vassal should be able to pay the outstanding balance at any time.  
(Para 3.27; Draft Bill, clause 10)

13. (a) The rules on serving notices should make it possible for them to be served by delivery or by post to the former vassal's place of residence, place of business or ordinary postal address (or at the most recently known such address).

(b) Where former *pro indiviso* vassals have a common place of residence or business a notice should be regarded as duly served if it is delivered to one vassal or posted or delivered to that place addressed to all the vassals.

(c) The date of service should be the date of delivering or posting the notice in accordance with paragraphs (a) or (b).

(Para 3.32; Draft Bill, clause 11)

14. (a) For the purposes of payment of compensation, "vassal" and "superior" should mean the person who, on the day before the appointed day, has right to the feu (or, as the case may be, to the immediate superiority) whether or not on a completed title (and where more than one person comes within this description, the person who has most recently acquired such right).

(b) Where a feu is held by two or more vassals as common property

(i) any liability to pay compensation should be their joint and several liability; but

(ii) as among themselves they should be liable in the proportions in which they hold the feu.

(Para 3.37; Draft Bill, clause 15(1), (4))

15. There should prescribe after five years -

(i) the obligation to pay compensation for extinction of feuduty, and

(ii) the obligation to pay feuduty redemption money under ss 5 and 6 of the Land Tenure Reform (Scotland) Act 1974.

(Para 3.40; Draft Bill, clauses 12 and 51)

16. Blench duty should be extinguished at the same time and on the same terms as feuduty.  
(Para 3.42; Draft Bill, clause 15(1))
17. (a) Feuduty should continue to be payable for any period prior to the appointed day and, if any feuduty so payable has not fallen due before that day, it should fall due on that day.
- (b) Unpaid feuduty should cease to be a *debitum fundi* on the appointed day, as should any amount secured in favour of the former superior by s 5 of the Land Tenure Reform (Scotland) Act 1974.
- (c) The superior's hypothec should be extinguished on the appointed day.  
(Para 3.50; Draft Bill, clause 13)
18. (a) Ground annual, skat, teind, stipend, standard charge, dry multures and any other perpetual periodical payment in respect of the tenure, occupancy or use of land or under a land obligation should be extinguished on the appointed day in the same way as feuduties.
- (b) This rule should not, however, apply to any payments in defrayal of, or as a contribution towards, some continuing cost related to land or to payments made under a heritable security.
- (c) Extinction of a payment should not affect the underlying right to hold, use or occupy the land.  
(Para 3.55; Draft Bill, clause 50)
19. The periodical payment due to the Crown in respect of the produce of a gold and silver mine, of an amount which is calculated as a proportion of that produce, should not be a feuduty for the purposes of recommendations 8 to 17 or a perpetual periodical payment for the purposes of recommendation 18.  
(Para 3.56; Draft Bill, clause 55)

#### **Part 4 - Real burdens**

20. (a) A former superior should have no right to enforce real burdens; and accordingly all burdens which were enforceable only by a superior should be extinguished.
- (b) This rule should be subject to the exceptions contained in recommendations 22, 24, 25 and 31.  
(Para 4.20; Draft Bill, clause 16)

21. (a) The Keeper should not be required to remove from the Land Register a real burden extinguished on the appointed day unless requested to do so in an application for registration or rectification or ordered to do so by the court.
- (b) For a period of 5 years after the appointed day -
- (i) it should not be possible for an application or order to be made under paragraph (a);
- (ii) for the purposes of s 6(1)(e) of the Land Registration (Scotland) Act 1979 a real burden extinguished on the appointed day should continue to be treated as “subsisting”.
- (Para 4.25; Draft Bill, clause 40)

22. (a) Where -
- (i) a feudal estate of *dominium utile* of land (“the servient tenement”) is subject to a real burden enforceable by a superior of that estate; and
- (ii) at least one of the conditions set out in paragraph (b) is satisfied

the superior should be entitled, prior to the appointed day, to execute and register a notice nominating other land of which the superior has sole *dominium utile* (or, as the case may be, allodial ownership) as the new dominant tenement in the real burden.

- (b) The conditions are -
- (i) that the proposed dominant tenement has on it a permanent building which is in use wholly or mainly as a place of human habitation or resort, and that building is within 100 metres of the servient tenement;
- (ii) that the real burden comprises a right to enter, or otherwise make use of, the servient tenement, or is a right of pre-emption or redemption;
- (iii) that the proposed dominant tenement comprises minerals or salmon fishings or other incorporeal property, and that it is apparent from the terms of the real burden that it was created for the benefit of that tenement.
- (c) The notice would have to -
- (i) set out the entitlement to the superiority
- (ii) sufficiently describe the proposed dominant tenement and the servient tenement
- (iii) identify the burden, and

- (iv) identify any obligations on the superior which (as mentioned in recommendation 36) are a direct counterpart of the burden.
  - (d) The notice should be registered in the Register of Sasines or Land Register against both tenements.
  - (e) On the appointed day land nominated in the notice in accordance with this recommendation would become a dominant tenement in the burden.
  - (f) In this recommendation “superior” and “superiority” include “over-superior” and “over-superiority”.  
(Para 4.47; Draft Bill, clause 17)
23. (a) If land which became a dominant tenement under recommendation 22 is divided, the right to enforce the burdens should be capable of attaching to one only of the divided parts, and the other part should cease to be a dominant tenement.
- (b) The same rule should apply in respect of any further divisions.
- (c) The right should attach to the part which is nominated for that purpose in the conveyance by which the division is effected; and if no part is nominated, the burden should be extinguished.  
(Para 4.50; Draft Bill, clause 20(2), (3))
24. (a) Any real burden affecting the sea bed or foreshore and enforceable by the Crown as superior should, after the appointed day, continue to be enforceable by the Crown.
- (b) Such burdens should be known as “maritime burdens”.
- (c) Maritime burdens should not be capable of assignation.
- (d) Maritime burdens should be capable of variation and discharge by the Lands Tribunal under sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970.  
(Para 4.51; Draft Bill, clause 54 and sched 8 para 32(2), (3))
25. (a) Where
- (i) a feudal estate of *dominium utile* of land (“the servient tenement”) is subject to a real burden enforceable, as superior, by a conservation body, and
  - (ii) the real burden has the purpose of preserving or protecting, for the public benefit, the architectural, historical or other special interest of the servient tenement or any buildings thereon

the conservation body should be entitled, prior to the appointed day, to execute and register in the Register of Sasines or Land Register a notice converting such burden into a conservation burden.

- (b) The notice would have to -
  - (i) state that the superior is a conservation body
  - (ii) set out the entitlement to the superiority
  - (iii) sufficiently describe the servient tenement,
  - (iv) identify the burden, and
  - (v) identify any obligations on the superior which (as mentioned in recommendation 36) are a direct counterpart of the burden.
- (c) The notice would take effect on the appointed day.
- (d) A conservation burden would be enforceable by the conservation body in whose favour the notice was registered.
- (e) In this recommendation “conservation body” means a body nominated as such by the Secretary of State by regulations; and the Secretary of State may nominate only bodies which include among their objects the preservation or protection, for the benefit of the public, of the architectural, historical or other special interest of land or buildings.

(Para 4.56; Draft Bill, clauses 21 - 23)

26. (a) It should be possible to assign or otherwise transfer a conservation burden to another conservation body.
- (b) In appropriate cases an assignation should contain a clause of deduction of title.
- (c) An assignation or other transfer should not take effect until registered in the Register of Sasines or Land Register.
- (d) It should not be possible to create a standard security over a conservation burden.
- (e) A conservation burden should be extinguished if its holder ceases to be a conservation body.
- (f) Conservation burdens should be capable of variation and discharge by the Lands Tribunal under sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

(Para 4.61; Draft Bill, clauses 24 - 27 and sched 8 para 32(2), (3))

27. Where a notice has been registered under recommendations 22, 25 or 41, it should not be possible to register another notice in relation to the same burden unless the earlier notice has been discharged and the discharge registered.  
(Para 4.63; Draft Bill, clause 36(1))
28. (a) Notices (other than notices relating to conservation burdens) should be sworn or affirmed before a notary public. This should be done by the superior personally or, where the superior is a juristic person, by someone authorised to sign documents on its behalf.
- (b) Except where it is not reasonably practicable to do so, the superior should, before registration, send a copy of the notice (and explanatory note) to the owner of the servient tenement by post.
- (c) A separate notice should be required for each servient tenement.  
(Para 4.68; Draft Bill, clauses 17(4), (5), 28(4), (5), 35 and 36)
29. (a) The Keeper should not be required to verify -
- (i) that a copy of the notice has been sent to the owner of the servient tenement;
- (ii) that, in the case of a notice under recommendation 22, the dominant tenement has on it a permanent building which is in use wholly or mainly as a place of human habitation or resort, and that building is within 100 metres of the servient tenement; or
- (iii) that, in the case of a notice under recommendation 41, the statements made about development value, reduction in consideration, and the absence of a heritable security are accurate.
- (b) Where a notice submitted for registration is rejected by the Keeper but is subsequently determined by the court or the Lands Tribunal for Scotland to be registrable, it should be possible to register the notice at any time during a period of five years after the appointed day, and the effect of such registration should be backdated to the appointed day.  
(Para 4.72; Draft Bill, clauses 37 and 39)
30. (a) The Lands Tribunal should be empowered to make an order discharging or restricting a notice on cause shown.
- (b) An extract of the order should be capable of registration, and on registration should take effect as respects third parties.  
(Para 4.74; Draft Bill, clause 38)

31. (a) Where, immediately prior to the appointed day, a real burden regulating the maintenance or use of a common facility was enforceable by a superior, that burden should, following abolition, be enforceable by -
- (i) the owner or owners of that facility, and
  - (ii) the owner or owners of any other property served by that facility.
- (b) For the purposes of this recommendation -
- (i) a “common facility” is property which serves (and is intended to serve) other property;
  - (ii) “property” means land or a building or other heritable structure (or a part of such building or structure); and
  - (iii) “maintenance” includes reinstatement but does not include a liability which has been assumed by a local or other public authority.  
(Para 4.85; Draft Bill, clause 18)
32. (a) A dominant proprietor must demonstrate interest to enforce a real burden.
- (b) In the case of conservation burdens and maritime burdens (only), interest to enforce should be presumed.  
(Para 4.86; Draft Bill, clauses 19, 23(b) and 54(1)(b))
33. Where a real burden is created in a grant in feu, there should be no implication that adjacent land the *dominium utile* (or allodial ownership) of which is held by the superior is a dominant tenement in that burden.  
(Para 4.87; Draft Bill, clause 42)
34. From the date of the coming into force of the legislation, any irritancy clause enforceable by a superior should cease to have effect.  
(Para 4.89; Draft Bill, clause 47)
35. Where, under recommendation 20, the right of a former superior to enforce a burden has been extinguished -
- (i) it should not be possible to bring new proceedings for enforcement;
  - (ii) any current proceedings should be deemed abandoned; and
  - (iii) any decree or interlocutor already pronounced (except insofar as relating to the payment of money) should be deemed reduced.  
(Para 4.91; Draft Bill, clause 16(2), (3))

36. (a) Obligations due only because they have run with a superiority should cease to have effect.
- (b) However, the enforcement of -
- (i) a real burden reallocated under recommendations 22 and 31
  - (ii) a conservation burden, and
  - (iii) a maritime burden
- should be subject to compliance with any obligation which was binding on the superior immediately before the appointed day and which was the direct counterpart of the real burden.
- (c) An obligation mentioned in (b) should be extinguished on the extinction of the real burden to which it is the counterpart.  
(Para 4.96; Draft Bill, clauses 20(1), 23, 41, 48 and 54(1))
37. A possessor of title deeds or searches which relate to land should be under a duty to make them available to a person who has, or is entitled to acquire, a real right in the land, at that person's expense.  
(Para 4.97; Draft Bill, clause 60)

## **Part 5 - Compensation**

38. Compensation should be payable for the loss of development value real burdens.  
(Para 5.20; Draft Bill, clauses 28 - 34)
39. Compensation should be payable only where
- (a) the imposition of the real burden resulted in a substantial reduction in the consideration (if any) paid by the vassal
  - (b) the burden was designed to ensure that any significant increase in the value of the land due to its being freed for development for a purpose other than those permitted under the feudal grant would accrue to the superior, and
  - (c) the superior's rights in relation to the reserved development value are not protected by a heritable security.  
(Para 5.21; Draft Bill, clause 28)
40. Compensation should be payable only when an act or event takes place which would have been a breach of the real burden if it had not been extinguished.  
(Para 5.25; Draft Bill, clause 30(2)(c))

41. Compensation should be payable only if the superior has, before the appointed day, registered a notice reserving the right to claim compensation.  
(Para 5.29; Draft Bill, clauses 28 and 30(1))
42. The formal and procedural requirements relating to notices reserving the right to claim compensation should be the same as those for notices converting feudal burdens to neighbour burdens.  
(Para 5.33; Draft Bill, clauses 35 - 39)
43. The right to claim compensation should not be transmissible by voluntary assignation but it should be transmissible by testamentary disposition, by court decree, or by operation of law.  
(Para 5.35; Draft Bill, clause 29)
44. (a) Compensation should be payable only if
- (i) the event giving rise to the claim occurred within the period beginning five years before and ending twenty years after the appointed day, and
  - (ii) a claim for compensation is made to the owner of the land within three years after the occurrence of the event or (in the case of an occurrence before the appointed day) within three years after the appointed day.
- (b) In the case of a continuing course of action which would have constituted a breach if the burden had still subsisted, the period referred to in paragraph (a) should run from the commencement of the course of action.  
(Para 5.40; Draft Bill, clause 30(2), (4), (5))
45. (a) The amount of compensation payable on any one claim under the Act in relation to a development value real burden should be the amount of the development value which, at the time of the breach or occurrence, would have accrued to the owner if a valid burden, in the same terms as the extinguished burden, had been modified so as to permit the breach or occurrence founded on in that claim.
- (b) The maximum total amount of any compensation payable in relation to a development value real burden on a claim or claims under the Act should be such a sum as is sufficient to make up for any effect which the burden produced, at the time when it was imposed, in reducing the consideration then paid or made payable for the feu grant.  
(Para 5.46; Draft Bill, clause 32(1), (2))
46. In assessing the amount of any compensation payable, any entitlement of the former superior to recover the whole or part of the development value by virtue of a contractual claim or other means should be taken into account.  
(Para 5.47; Draft Bill, clause 32(3))

47. Any dispute as to liability for, or the amount of, compensation should be dealt with by the Lands Tribunal for Scotland.  
(Para 5.48; Draft Bill, clause 38(2))
48. (a) The person having the right to claim compensation should be able at any time to grant a discharge or restriction of the right to claim, and such discharge or restriction should be registrable.  
  
(b) The proprietor of the property should have the right at any time to apply to the Lands Tribunal for Scotland for an order discharging or restricting the notice on cause shown.  
(Para 5.56; Draft Bill, clauses 34 and 38(1))
49. In any application to the Lands Tribunal on any of the above matters relating to compensation the burden of proving any disputed question of fact should be on the superior, former superior or person having for the time being the right to claim compensation.  
(Para 5.57; Draft Bill, clause 38(3))

#### **Part 7 - Transfer of ownership**

50. (a) Ownership of land should pass -  
  
(i) in the case of a transfer which is registrable in the Land Register, on registration in that Register of the transfer; and  
  
(ii) in any other case, on the recording of a conveyance, or of a notice of title deducing title through a conveyance, in the Register of Sasines.  
  
(b) In this recommendation “conveyance” includes a conveyance by operation of a court decree, enactment or rule of law.  
  
(c) This recommendation is without prejudice to any other means of transferring ownership of land under any enactment or rule of law.  
(Para 7.12; Draft Bill, clause 4)
51. The provisions in the conveyancing statutes which allow the use of notarial instruments for the completion of title should be repealed.  
(Para 7.33; Draft Bill, sched 8)
52. (a) Any application for recording a deed in the Register of Sasines should be made by or on behalf of the person in whose favour it is granted, and such application should be on such form or forms as may be prescribed by the Secretary of State.

(b) It should no longer be necessary for a deed being presented for recording in the Register of Sasines to contain a warrant of registration.

(Para 7.36; Draft Bill, clause 5)

53. In cases where the alienation of land is otherwise competent, it should be competent for the Crown to grant a disposition of land.

(Para 7.37; Draft Bill, clause 53)

54. The real right of proper liferent should be created -

(a) in a case where the right is registrable in the Land Register, on registration in that Register (or on such later date as may be provided for in the deed); and

(b) in any other case, on the recording in the Register of Sasines of a deed granting or reserving the right (or on such later date as may be provided for in the deed).

(Para 7.40; Draft Bill, clause 59)

## **Part 8 - Non-standard tenures**

55. (a) On the appointed day kindly tenancies should be abolished.

(b) All existing kindly tenancies should be converted automatically, by operation of law, into ownership.

(c) Rights of salmon fishings should be preserved, as inseverable pertinents.

(Para 8.9; Draft Bill, clause 58)

## **Part 9 - Amendments, repeals and conveyancing reforms**

56. The construction, in relation to any period after the appointed day, of feudal terminology in any enactment passed or made, or in any deed executed, before the appointed day should be in accordance with, or on the analogy of, the following rules unless the context otherwise requires.

(a) A reference to the *dominium utile* of land is to be construed as a reference to the land or to the ownership of the land as may be appropriate in the context.

(b) A reference to an estate in land is to be construed as a reference to a right in land and as including a reference to ownership of land.

(c) A reference to a vassal in relation to land is to be construed as a reference to the owner of the land.

(d) A reference to feuing is to be construed as a reference to disposing; a reference to a feu disposition is to be construed as a reference to a disposition; and similarly for other like terms.

(e) A reference to taking infeftment is to be construed as a reference to completing title and similarly for like terms.

(Para 9.6; Draft Bill, clause 67)

57. The Secretary of State should be given power to make orders making such consequential amendments or repeals to enactments as may be required to take account of the abolition of the feudal system of land tenure.

(Para 9.7; Draft Bill, clause 70(3))

58. (a) Any land held under an entail should be automatically disentailed on the appointed day.

(b) The effect of the automatic disentailing should be the same as the effect of a duly registered instrument of disentail under section 32 of the Entail Amendment Act 1848. Accordingly the heir of entail in possession should own the land free from the restrictions of the entail and should be free to alter the succession to it.

(c) Provision should be made to enable the heir next entitled to succeed to claim compensation, within two years after the appointed day, for the loss of the expectancy in any case where the consent of such an heir would have been required in the case of a voluntary disentail immediately before the appointed day. Any claim should be dealt with by the Lands Tribunal for Scotland who should be given power to value the claim and order it to be secured on the land for the benefit of the claimant in such manner as they think fit.

(d) Provision should be made for the closure of the Register of Entails and for its transmission to the Keeper of the Records for preservation.

(Para 9.17; Draft Bill, clauses 44 - 46)

59. (a) Sections 27 to 50 of the Titles to Land Consolidation (Scotland) Act 1868 (dealing with the service of heirs) should be repealed, in so far as not already repealed, and replaced by provisions enabling the Sheriff of Chancery, on application, to grant a declarator that

(i) a named person has succeeded (either in general or to specified lands) as heir to a person who died before 10 September 1964, or

(ii) the applicant is entitled to act as trustee under a trust as heir of provision of the last surviving named or assumed trustee.

(b) The Sheriff of Chancery should have jurisdiction for the purposes of subparagraph (i) above, if the deceased died domiciled in Scotland or if lands which are the subject of the application are situated in Scotland and for the purposes of

paragraph (ii) above, if the trust is governed by the law of Scotland or if lands which are the subject of the application are situated in Scotland.

(c) Any reference in any enactment or deed to a decree of service as heir should be taken, after the date of commencement of the new provision, as including a reference to a decree of declarator granted under the new provision.

(Para 9.22; Draft Bill, clause 62)

60. (a) All rights of thirlage not already extinguished should be extinguished on the appointed day.

(b) The Thirlage Act 1799 should be repealed.

(Para 9.23; Draft Bill, clause 49 and sched 9)

61. It should be made clear that firms or partnerships having legal personality will be capable, after the abolition of the feudal system of land tenure, of owning land in their own names.

(Para 9.28; Draft Bill, clause 64)

62. To enable obsolete legislation relating to old forms of heritable security to be repealed it should be provided that the provisions of sections 14 to 30 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (on assignation, variation, discharge and calling up etc of standard securities) should apply, with any necessary modifications, to bonds and dispositions in security and similar old forms of heritable security.

(Para 9.31; Draft Bill, clause 63)

63. (a) A description in a standard security should be sufficient (and be deemed always to have been sufficient) if it identifies the property to which it relates.

(b) Paragraph (a) is without prejudice to any requirement imposed as a condition of registration in any register.

(Para 9.39; Draft Bill, clause 71(3) and sched 8 para 32(23)(a))

64. (a) There should be a statutory limitation on the length of leases executed after the new legislation comes into force.

(b) The maximum permitted duration should be such period as may be determined by the government in the light of the consultation on this question following on our discussion paper on real burdens.

(c) Leases should terminate automatically on the expiry of the permitted period, if they have not come to an end earlier.

(d) In calculating the duration of a lease any period for which it is renewed in consequence of an obligation to renew should be taken into account, but the statutory provision should not prevent voluntary renewals or the operation of tacit relocation or extensions by or under any enactment.

(Para 9.42; Draft Bill, clause 61)



# Appendix A

## Abolition of Feudal Tenure etc. (Scotland) Bill

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### ARRANGEMENT OF CLAUSES

#### PART I

##### ABOLITION OF FEUDAL TENURE

Clause

1. Abolition on appointed day.
2. Consequences of abolition.
3. Amendment of Land Registration (Scotland) Act 1979.

#### PART II

##### LAND TRANSFERS ETC. ON AND AFTER APPOINTED DAY

4. Ownership of land.
5. Form of application for recording deed in Register of Sasines.
6. Deduction of title for unregistered land etc.

#### PART III

##### FEUDUTIES

###### *Extinction of feuduties*

7. Extinction on appointed day.
8. Requiring compensatory payment.
9. Calculation of amount of compensatory payment.
10. Making compensatory payment by instalments.
11. Service under section 8(1).
12. Extinction by prescription of requirement to make compensatory payment.

###### *Arrears*

13. Arrears of feuduty etc.

###### *Disclosure*

14. Duty of collecting third party to disclose information.

*Interpretation*

Clause

15. Interpretation of Part III.

## PART IV

## REAL BURDENS

*Extinction of superior's rights*

16. Extinction of superior's rights.

*Reallotment etc.*

17. Reallotment of real burden by nomination of new dominant tenement.
18. Reallotment of real burden affecting facility of benefit to other land.
19. Interest to enforce real burden.
20. Further provision as respects reallotment.

*Conservation burdens*

21. Conservation bodies.
22. Notice preserving right to enforce conservation burden.
23. Enforcement of conservation burden.
24. Assignment of right to conservation burden.
25. Deduction of title for conservation burden.
26. Extinction of burden on body ceasing to be conservation body.
27. No standard security over conservation burden.

*Compensation*

28. Notice reserving right to claim compensation where land subject to development value burden.
29. Limited transmissibility of right to claim compensation.
30. Claiming compensation.
31. Service under section 30(3).
32. Amount of compensation.
33. The expression "owner" for purposes of sections 30 to 32.
34. Discharge, or restriction, of reserved right to claim compensation.

*Miscellaneous*

35. Notices under sections 17, 22 and 28: pre-registration requirements etc.
36. Further provision as respects sections 17, 22 and 28.
37. Notices under sections 17, 22 and 28: extent of Keeper's duty.
38. Referral to Lands Tribunal of dispute arising in relation to section 17, 22, 28 or 30.
39. Circumstances where certain notices may be registered after appointed day.

Clause

40. Duties of Keeper: amendments relating to the extinction of certain real burdens.
41. Extinction of counter-obligation.
42. No implication as to dominant tenement where real burden created in grant in feu.

*Interpretation*

43. Interpretation of Part IV.

PART V

ENTAILS

44. Disentailment on appointed day.
45. Compensation for expectancy or interest of apparent or other nearest heir in an entailed estate.
46. Closure of Register of Entails.

PART VI

MISCELLANEOUS

*Discharge of certain rights and extinction of certain obligations and payments*

47. Discharge of rights of irritancy.
48. Extinction of superior's rights and obligations *qua* superior.
49. Abolition of thirlage.
50. Extinction etc. of certain payments analogous to feuduty.
51. Extinction by prescription of obligation to pay redemption money for feuduty, ground annual etc.

*The Crown, the Lord Lyon and Barony*

52. Crown application.
53. Crown may sell or otherwise dispose of land by disposition.
54. Preserved right of Crown to maritime burdens.
55. Mines of gold and silver.
56. Jurisdiction and prerogative of Lord Lyon.
57. Baronies and other dignities and offices.

*Kindly Tenants of Lochmaben*

58. Abolition of Kindly Tenancies.

*Miscellaneous*

59. Creation of proper liferent.
60. Obligation to make title deeds and searches available.
61. Prohibition on leases for periods of more than [X] years.

## Clause

- 62. Certain applications to Sheriff of Chancery.
- 63. Application of 1970 Act to earlier forms of heritable security.
- 64. Ownership of land by a firm.

## PART VII

## GENERAL

- 65. The appointed day.
- 66. The expression "land".
- 67. Feudal terms in enactments and documents: construction after abolition of feudal system.
- 68. Orders, regulations and rules.
- 69. Saving for contractual rights.
- 70. Minor and consequential amendments and repeals.
- 71. Short title, commencement and extent.

## SCHEDULES:

- Schedule 1 —Form of notice requiring compensatory payment etc.: *cumulo* feuduty.
- Schedule 2 —Form of notice requiring compensatory payment etc.: ordinary case.
- Schedule 3 —Form of instalment document.
- Schedule 4 —Form of notice prospectively nominating dominant tenement.
- Schedule 5 —Form of notice preserving conservation body's right to real burden.
- Schedule 6 —Form of notice reserving right to compensation in respect of extinction of development value burden.
- Schedule 7 —Form of discharge [*or* restriction] of reserved right to claim compensation.
- Schedule 8 —Minor and consequential amendments.
  - Part I—Minor and consequential amendments: general.
  - Part II—Minor and consequential amendments relating to the National Trust for Scotland.
- Schedule 9 —Repeals.
  - Part I—Repeals: general.
  - Part II—Repeals relating to the National Trust for Scotland.



DRAFT  
OF A  
**B I L L**  
TO

Abolish the feudal system of land tenure in Scotland; to abolish a related system of land tenure in Scotland; to make new provision as respects the ownership of land in Scotland; to make consequential provision for the extinction and recovery of feuduties and of certain other perpetual periodical payments and for the extinction by prescription of any obligation to pay redemption money under the Land Tenure Reform (Scotland) Act 1974; to make further provision as respects real burdens affecting land in Scotland; to provide for the disentailment of land in Scotland; to discharge all rights of irritancy held by superiors in Scotland; to abolish for Scotland the obligation of thirlage; to prohibit the granting of leases over land in Scotland for periods exceeding a certain number of years; to make new provision for Scotland as respects conveyancing; to enable firms with separate personality to own land in Scotland; and for connected purposes. A.D. 1998.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5

PART I

ABOLITION OF FEUDAL TENURE

1. The feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior is, on the appointed day, abolished. Abolition on appointed day.
- 10 2.—(1) An estate of *dominium utile* of land shall, on the appointed day, cease to exist as a feudal estate but shall forthwith become the ownership of the land and, in so far as is consistent with the provisions of this Act, the land shall be subject to the same subordinate real rights and other encumbrances as was the estate of *dominium utile*. Consequences of abolition.

## EXPLANATORY NOTES

**These notes refer to the provisions of the Bill as if they had been enacted.**

### *Clause 1*

This clause abolishes the feudal system of land tenure. It implements recommendation 1 (a). (See paragraph 2.5 of the report). The “appointed day” will be fixed by statutory instrument. See clause 65.

### *Clause 2*

This clause implements recommendations 1(b) and 2. (See paragraphs 2.5 and 2.8 of the report).

Subsection (1) makes it clear that those who hold land as vassals under the feudal system, and who are technically said to own the *dominium utile*, will automatically become owners of the land on the appointed day. The abolition of the feudal system will not affect non-feudal burdens and encumbrances on the land.

Subsection (2) abolishes all superiorities and mid-superiorities. This includes the paramount superiority of the Crown. See clause 52.

Subsection (3) prohibits new feus after the appointed day.

## PART I

(2) Every other feudal estate in land shall, on that day, cease to exist.

(3) It shall, on that day, cease to be possible to create a feudal estate in land.

Amendment of  
Land Registration  
(Scotland) Act  
1979.

1979 c. 33.

3. The Land Registration (Scotland) Act 1979 shall be amended as follows— 5

(a) in section 4(2) (applications for registration which are not to be accepted by the Keeper of the Registers of Scotland), after paragraph (a) there shall be inserted—

“(aa) it relates in whole or in part to an interest in land which by, under or by virtue of any provision of the Abolition of Feudal Tenure etc. (Scotland) Act 1998 is an interest which has ceased to exist;” 10

(b) in section 9 (rectification of Land Register of Scotland)—

(i) in subsection (3), at the beginning insert “Subject to subsection (3B) below,”; and 15

(ii) after subsection (3A) insert—

“(3B) Rectification requisite to take account of, or of anything done under or by virtue of, any provision of the Abolition of Feudal Tenure etc. (Scotland) Act 1998, other than section 4 or 59, shall, for the purposes of subsection (3) above, be deemed not to prejudice a proprietor in possession.”; and 20

(c) in section 12(3) (circumstances in which there is no entitlement to be indemnified by the Keeper), after paragraph (c) insert—

“(cc) the loss arises in consequence of— 25

(i) a rectification which; or

(ii) there being, in the register, an inaccuracy the rectification of which,

would be deemed, by subsection (3B) of section 9 of this Act, not to prejudice a proprietor in possession;” 30

## PART II

## LAND TRANSFERS ETC. ON AND AFTER APPOINTED DAY

Ownership of land.

4.—(1) Ownership of land shall pass—

(a) in a case where a transfer is registrable under section 2 of the Land Registration (Scotland) Act 1979, on registration in the Land Register of Scotland; 35

(b) in any other case, on recording of a conveyance of the land in the Register of Sasines.

(2) This section is without prejudice to any other enactment, or rule of law, by or under which ownership of land may pass. 40

(3) In subsection (1) above—

## *Explanatory Notes*

### *Clause 3*

The abolition of the feudal system will mean that the Land Register will contain obsolete material. This clause contains technical amendments designed to ensure that such material will be eliminated over time and can be safely eliminated.

The amendment in paragraph (a) ensures that the Keeper will refuse to accept applications for registration which relate in whole or in part to superiorities. This will eventually lead to a cleansing of the register. Without this provision there might be a temptation for people to register “mixed estates” consisting partly of abolished rights in land, without making any attempt to distinguish between what has been abolished and what remains. This amendment implements recommendation 3. (See paragraph 2.12 of the report).

The amendments in paragraphs (b) and (c) are designed to enable the Keeper to rectify the register to take account of the abolition of the feudal system, and things done in consequence of that abolition, and to do so without fear of claims for indemnity. These paragraphs implement recommendation 6. (See paragraph 2.50 of the report). They allow the Keeper to delete superiority titles, and real burdens enforceable only by superiors. They also allow him to reinstate deletions or other changes made in error. The exclusion of clauses 4 and 59 is to prevent rectification taking place following a standard transfer of ownership or creation of a liferent.

### *Clause 4*

This re-states, in non-feudal language, the established rules for the transfer of ownership of land. It implements recommendation 50. See paragraphs 7.6 - 7.12 of the report.

Subsection (1) provides that ownership passes on registration in the appropriate property register.

Subsection (2) follows s 3(2) of the Land Registration (Scotland) Act 1979 in saving any special rule of the common law or statute. These are rare. The most important in practice is the rule that when land is conveyed to A and B and the survivor, ownership of A's *pro indiviso* share passes automatically to B, without further registration, in the event that A predeceases B without evacuating the destination.

(a) “conveyance” includes—

PART II

(i) conveyance by, or under, any enactment, rule of law or decree; and

(ii) a notice of title deducing title through a conveyance; and

5 (b) “registrable” and “registration” have the meanings respectively assigned to those expressions by section 1(3) of the Land Registration (Scotland) Act 1979.

1979 c. 33.

10 5.—(1) Any application for the recording of a deed in the Register of Sasines shall be made by, or on behalf of, the person in whose favour the deed is granted; and it shall not be necessary to endorse on any deed a warrant of registration.

Form of application for recording deed in Register of Sasines.

(2) The Secretary of State may, after consultation with the Lord President of the Court of Session, make rules—

15 (a) prescribing the form to be used for the purposes of subsection (1) above; and

(b) regulating the procedure relating to applications for recording.

6. For any land—

Deduction of title for unregistered land etc.

(a) a real right in which has never been registered in the Land Register of Scotland; and

20 (b) title to which has never been constituted by the recording of a deed in the Register of Sasines,

title may be deduced from any person having ownership of the land.

## PART III

## FEUDUTIES

25 *Extinction of feuduties*

7. Without prejudice to section 13 of this Act, any feuduty which has not been extinguished before the appointed day is extinguished on that day; and accordingly no payment shall be exigible, in respect of feuduty, for that day or for any period after that day.

Extinction on appointed day.

30 8.—(1) Where a feuduty is extinguished by section 7 of this Act, the person who was the superior in relation to the feu (that person being in the following provisions of this Part of this Act referred to as the “former superior”) may, within two years after the appointed day, duly serve on the person who was the vassal in relation to the feu (that person being in those provisions referred to as the “former vassal”) notice requiring that a payment specified in the notice (being a payment calculated in accordance with section 9 of this Act) be made to him by the former vassal; and any such payment is referred to in this Act as a “compensatory payment”.

Requiring compensatory payment.

40 (2) In its application to a feuduty which was, at extinction, a *cumulo* feuduty, subsection (1) above shall be construed as relating to separate notice being duly served on each former vassal from whom payment is sought; and in that application, notice under that subsection shall be in (or as nearly as may be in) the form, with its Appendix, contained in Schedule 1 to this Act.

## *Explanatory Notes*

### *Clause 5*

This clause implements recommendation 52. See paragraphs 7.34 - 7.36 of the report. It brings the Register of Sasines into line with the Land Register by removing the need for a warrant of registration. The warrant will be replaced with a new statutory application form.

### *Clause 6*

This clause deals with a lacuna in the existing law. See paragraph 7.26 of the report. The legislation on deduction of title takes for granted that there will always be a last recorded title. Very occasionally there will not. Examples of ownership without a recorded (or registered) title include udal land, and corporations holding on a pre-1617 title. The purpose of clause 6 is not to require deduction of title in every case where a deed is taken from a person who owns without a recorded title. Rather it allows deduction of title from such a person in a case where deduction of title would otherwise be necessary.

### *Clause 7*

This clause is the first of a group of clauses which implement recommendations 8 to 17 on extinction of feuduties and payment of compensation to former superiors. See paragraphs 3.8 - 3.50 of the report.

This clause extinguishes all remaining feuduties on the appointed day (that is the day on which the feudal system of land tenure is abolished: see clause 65). Extinction is prospective only and does not affect recovery of arrears. See clause 13. This clause implements recommendation 8. See paragraph 3.8 of the report.

### *Clause 8*

This clause enables a former superior, who so wishes, to claim compensation from a former vassal by serving a notice on the vassal in prescribed form. It implements recommendation 9. See paragraphs 3.14 - 3.22 of the report. The sum due by the vassal is calculated in accordance with clause 9. It is an ordinary unsecured debt.

Subsection (1) requires the notice to stipulate the sum due by the former vassal. The notice has to be served within two years of the appointed day. "Superior" and "vassal" are defined in clause 15(1). "Feu" is defined in clause 15(2) and (3).

Subsection (2) provides that for a *cumulo* feuduty separate notice has to be served on each former vassal in respect of the sum due by that vassal. It also prescribes a statutory form of notice (with appendix) for such a feuduty. See schedule 1. "*Cumulo* feuduty" is defined in clause 15(2).

Subsection (3) prescribes a statutory form of notice for other feuduties. See schedule 2.

Subsection (4) requires the prescribed explanatory note to be served with each notice.

Subsection (5) gives a vassal 8 weeks from service of the notice to pay the sum due. This is subject to the provisions for payment by instalments in clause 10.

Subsection (6) explains by reference to clause 11 what is meant by due service.

## PART III

(3) Except in the application mentioned in subsection (2) above, notice under subsection (1) above shall be in (or as nearly as may be in) the form contained in Schedule 2 to this Act.

(4) To any notice served under subsection (1) above shall be attached a copy of the explanatory note which immediately follows, as the case may be— 5

- (a) the Appendix to the form in Schedule 1; or
- (b) the form in Schedule 2,

to this Act.

(5) Subject to section 10 of this Act, if subsections (1) to (4) above are 10 complied with, then within fifty-six days after due service on him a former vassal shall make the compensatory payment.

(6) The reference in subsection (1) above to a notice being duly served shall be construed in accordance with section 11 of this Act.

Calculation of amount of compensatory payment.

9.—(1) In calculating the compensatory payment in respect of which 15 notice may be served under section 8(1) of this Act, there shall first be determined the sum of money which would, if invested in two and a half per cent. Consolidated Stock at the middle market price at the close of business last preceding the appointed day, produce an annual sum equal to the feuduty. 20

(2) Unless the feuduty was, at extinction, a *cumulo* feuduty the sum so determined shall be the compensatory payment.

(3) If the feuduty was, at extinction, a *cumulo* feuduty the former superior shall, after determining that sum, allocate it among the former vassals in such proportions as are reasonable in all the circumstances; and an amount 25 which is so allocated to a former vassal shall be the compensatory payment for that former vassal.

(4) If the feuduty was, at extinction, a *cumulo* feuduty wholly or partly apportioned among the former vassals, then for the purposes of subsection (3) above the proportions of an allocation shall be presumed reasonable in so 30 far as they accord with that apportionment.

Making compensatory payment by instalments.

10.—(1) Where notice under section 8(1) of this Act requires from a former vassal a compensatory payment of not less than £100, the former superior shall serve with it a filled out document (in this section referred to as an “instalment document”), in (or as nearly as may be in) the form contained in 35 Schedule 3 to this Act, for signature and dating by the former vassal (there being appended to the document so sent a copy of the explanatory note which immediately follows that form in the Schedule); and if the former superior does not do so then no requirement to make the compensatory payment shall arise under section 8(5) by virtue of that notice. 40

(2) A former vassal on whom an instalment document is served shall obtain the option of making the compensatory payment by instalments if (and only if)—

- (a) he signs, dates and returns the document within the period which (but for this section) is allowed for making that payment by section 45 8(5) of this Act; and

## *Explanatory Notes*

### *Clause 9*

This clause sets out the rules for calculating the sum due by each former vassal for the extinction of a feuduty. It implements recommendation 10. See paragraphs 3.12 - 3.13, and 3.16 - 3.19 of the report.

Subsection (1) adopts the compensation formula in the Land Tenure Reform (Scotland) Act 1974.

Subsection (2) provides that, except in the case of a *cumulo* feuduty, the sum brought out using the statutory formula is the sum due by the former vassal.

Subsection (3) requires the former superior to allocate the compensation due for the extinction of a *cumulo* feuduty among the former vassals in order to find the share due by each.

Subsection (4) creates a presumption that an allocation is reasonable if it accords with an existing apportionment.

### *Clause 10*

This clause provides a scheme for payment by instalments where the sum due is £100 or more. It implements recommendation 12. See paragraphs 3.23 - 3.27 of the report.

Subsection (1) requires a former superior to serve a completed instalment document (and explanatory note) in prescribed form on the former vassal at the same time as the notice calling for payment of the sum due. Otherwise the notice has no effect.

Subsection (2) requires a vassal to sign, date and return the instalment document along with payment of the 10% surcharge within 8 weeks of the date of service of the notice.

Subsection (3) sets out the details of the scheme. It also provides for immediate payment of the balance if an instalment is unpaid for 14 days and makes it clear that in other cases the balance can be repaid at any time.

(b) when so returning the document, he pays to the former superior an amount equivalent to one tenth of the compensatory payment (being an amount thus payable in addition to the compensatory payment and irrespective of how or when the compensatory payment is subsequently made).

(3) Where the option of making the compensatory payment by instalments is obtained, those instalments shall be equal instalments payable where—

- (a) the compensatory payment is £500 or less, on each of the five;
- (b) it is more than £500 but not more than £1,000, on each of the ten;
- 10 (c) it is more than £1,000 but not more than £1,500, on each of the fifteen; and
- (d) it is more than £1,500, on each of the twenty,

term days of Whitsunday or Martinmas which then next follow; except that—

- 15 (i) in a case where any such instalment remains unpaid for fourteen days after falling due, the outstanding balance of the entire compensatory payment shall immediately fall due; and
- (ii) in any other case, the former vassal may pay that outstanding balance at any time.

20 **11.—**(1) Subject to subsection (2) below, due service under section 8(1) of this Act is effected by delivering the documents in question to the former vassal or by sending them by post, or delivering them, addressed to him at an appropriate place.

Service under section 8(1).

(2) Due service under section 8(1) of this Act is effected, in relation to any such feu (or part of a feu) as is mentioned in section 15(4) of this Act—

- (a) in a case where the former vassals are known to have a common place of residence or common place of business—
  - (i) by delivering those documents to one of the former vassals; or
  - 30 (ii) by sending them by post, or by delivering them, to that place addressed to both (or all) of the former vassals; and
- (b) in any other case by, as respects each former vassal, either delivering those documents to him or by sending them by post, or delivering them, addressed to him at a place which is an appropriate place.

35 (3) The date on which notice under section 8(1) of this Act is served on a former vassal is the date of delivery, or as the case may be of posting, in compliance with subsections (1) and (2) above.

(4) A reference in this section to an “appropriate place” is, for any former vassal, to be construed as a reference to—

- 40 (a) his place of residence;
- (b) his place of business; or
- (c) a postal address which he ordinarily uses,

or, if none of those is known at the time of delivery or posting, as a reference to whatever place is at that time his most recently known place of residence or  
45 place of business or postal address which he ordinarily used.

## *Explanatory Notes*

### *Clause 11*

This clause sets out the rules for service of a notice (and instalment document). Service of a notice constitutes the debt and triggers liability for payment. It is also the starting point for negative prescription. The clause implements recommendation 13. See paragraphs 3.28 - 3.32 of the report.

Subsection (1) read with subsection (4) sets out the normal rule for service. Service on each former vassal is required either personally or by post or delivery to that person's place of residence, place of business, or a postal address which that person ordinarily uses or that person's most recently known such address.

Subsection (2) relaxes the normal rule where a feu or part of a feu is held by two or more former vassals as common property and they have a common place of residence or place of business. In other cases they are subject to the normal rule.

Subsection (3) defines the date of service.

PART III  
Extinction by  
prescription of  
requirement to  
make  
compensatory  
payment.

1973 c. 52.

**12.** In Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (which specifies obligations affected by prescriptive periods of five years under section 6 of that Act)—

(a) in paragraph 1, after sub-paragraph (a) there shall be inserted—

“(aa) to any obligation to make a compensatory payment 5  
 (“compensatory payment” being construed in  
 accordance with section 8(1) of the Abolition of  
 Feudal Tenure etc. (Scotland) Act 1998, including  
 that section as read with section 50 of that Act);”;  
 and 10

(b) in paragraph 2(e), after the words “paragraph 1(a)” there shall be inserted “or (aa)”.

#### *Arrears*

Arrears of feuduty  
etc.

1974 c. 38.

**13.—**(1) Feuduty shall continue to be exigible for any period before the appointed day; and if (in so far as so exigible) it has not fallen due before 15  
 that day, it shall fall due on that day.

(2) On the appointed day feuduty shall cease to constitute a *debitum fundi* as shall any amount secured, in favour of a superior, by virtue of section 5 of the Land Tenure Reform (Scotland) Act 1974 (redemption on transfer of land). 20

(3) The superior’s hypothec is, on the appointed day, abolished.

(4) Subsections (2) and (3) above are without prejudice to any—

(a) action—

- (i) founded on a *debitum fundi* or superior’s hypothec; and
- (ii) commenced before the appointed day; or 25

(b) right or preference—

- (i) so founded; and
- (ii) claimed in a sequestration, or in some other process in which there is ranking, commenced before that day.

#### *Disclosure*

30

Duty of collecting  
third party to  
disclose  
information.

**14.** For the purposes of section 8(1) of this Act, a superior (or, on or after the appointed day, a former superior) who receives, or has at any time received, from a third party an amount collected in respect of feuduty from and remitted to the superior (or former superior) on behalf of a vassal (or, on or after the appointed day, a former vassal) may require the third party to 35  
 disclose the identity and address of the vassal (or former vassal) and, in the case of remission as a part of a feuduty, the amount so collected from the vassal (or former vassal); and the third party shall forthwith comply with that requirement.

#### *Interpretation*

40

Interpretation of  
Part III.

**15.—**(1) In this Part of this Act, unless the context otherwise requires—

“compensatory payment” shall be construed in accordance with section 8(1) of this Act;

## *Explanatory Notes*

### *Clause 12*

This clause provides that the obligation to pay compensation prescribes after 5 years. Prescription starts to run from the date when the obligation becomes enforceable, that is to say, the date of service of the notice. This clause implements recommendation 15(i). See paragraph 3.38 of the report.

### *Clause 13*

This clause deals with transitional arrangements for feuduty. It implements recommendation 17. See paragraphs 3.45 - 3.50 of the report.

Subsection (1) makes it clear that arrears for any period before the appointed day are still recoverable and provides that feuduties which relate to that period but which have not yet fallen due fall due on the appointed day. The persons liable for payment remain unchanged. See paragraph 3.45 of the report.

Subsection (2) abolishes the security that a superior previously had over the feu for feuduty and unpaid redemption money while subsection (3) abolishes the security which the superior had over moveable property. See paragraph 3.48 of the report. The former superior will still be able to recover arrears as a personal debt in the usual way.

Subsection (4) saves any actions founded on the abolished securities which have commenced before the appointed day and also any rights or preferences so founded which are claimed in a sequestration or other ranking process (such as a multiplepointing or liquidation) which have commenced before that day.

### *Clause 14*

This clause places a statutory duty on the collector of a feuduty or part of a feuduty to disclose information about the vassals from whom feuduty has been collected and the amount so collected. The collector could be a vassal or a property factor. It comes into force on Royal Assent (see clause 71(1)) in order to allow a superior time to investigate *cumulo* feuduties. It implements recommendation 11. See paragraph 3.16 of the report.

### *Clause 15*

This clause gives the meaning of certain terms used in Part III.

Subsection (1) makes it clear that blench duty is also extinguished. This implements recommendation 16. See paragraph 3.42 of the report.

Subsection (1) defines "vassal" for the purposes of liability for compensation. The feudal meaning of the term is extended to include a person who has right to the feu even if that person's title is not completed. This is to take account of the situation where property is in the process of changing hands before the appointed day. This clause implements recommendation 14(a). See paragraph 3.33 of the report.

## PART III

“feuduty” includes blench duty;

“superior”, in relation to a feu, means the person who, immediately before the appointed day, has right to the immediate superiority, whether or not he has completed title (and if more than one person comes within that description, then the person who has most recently acquired such right); and “former superior” shall be construed in accordance with section 8(1) of this Act; and

“vassal”, in relation to a feu, means the person who, immediately before the appointed day, has right to the feu, whether or not he has completed title (and if more than one person comes within that description, then the person who has most recently acquired such right); and “former vassal” shall be construed in accordance with section 8(1) of this Act.

(2) Where a feu comprises parts each held by a separate vassal, being parts upon which feuduty has not been allocated, the whole of any feuduty exigible in respect of the parts so held is in this Part of this Act referred to as a “*cumulo* feuduty”; and any reference in this Part of this Act to a feu is to be construed, in relation to the parts so held, as a reference to those parts collectively.

(3) Any reference in this Part of this Act to a feu is to be construed as including a reference to any part of a feu if it is a part upon which feuduty has been allocated.

(4) Where, immediately before the appointed day a feu, or any part of a feu, is held by two or more vassals as common property—

(a) any liability to make a compensatory payment shall be their joint and several liability (though as between, or as the case may be among, themselves they shall be liable in the proportions in which they hold the feu); and

(b) subject to section 11 of this Act they shall together be treated for the purposes of this Act as being a single vassal.

## PART IV

## REAL BURDENS

*Extinction of superior's rights*

16.—(1) Subject to sections 17, 18, 22, 23 and 54 of this Act—

(a) a real burden which, immediately before the appointed day, is enforceable by, and only by, a superior shall on that day be extinguished; and

(b) any other real burden shall, on and after that day, not be enforceable by a former superior.

(2) Subject to subsection (3) below,—

(a) on or after the appointed day, no proceedings for such enforcement shall be commenced;

(b) any proceedings already commenced for such enforcement shall be deemed to have been abandoned on that day and may, without further process and without any requirement that full judicial expenses shall have been paid by the pursuer, be dismissed accordingly; and

Extinction of superior's rights.

## Explanatory Notes

### Clause 15 (cont'd)

Subsections (2) and (3) define “*cumulo* feuduty” and “feud” for the purposes of Part III. The definitions cover the case where part of the *cumulo* has been allocated. See paragraphs 3.3 - 3.4 of the report. The definition of “*cumulo* feuduty” embraces (i) the whole *cumulo* feuduty where no part has been allocated and (ii) the unallocated balance of a *cumulo* remaining exigible from more than one part of a feud where part has already been allocated. The definition of “feud” embraces (i) the original feud where there has been no allocation of the *cumulo* (ii) those parts of a feud which are subject to the unallocated balance of a *cumulo* and (iii) each part of a feud on which part of a *cumulo* has been allocated.

Subsection (4) makes it clear that where a feud or any part of a feud is held as common property the liability of the former vassals to pay compensation is joint and several, subject to a right of relief based on the size of their *pro indiviso* shares. This implements recommendation 14(b). See paragraph 3.36 of the report.

### Clause 16

This is the first of a sequence of provisions dealing with real burdens. It sets out the general rule that superiors' rights in relation to real burdens are extinguished. The clause implements recommendations 20 and 35. See paragraphs 4.16 - 4.18 and 4.91 of the report.

By subsection (1) any real burden enforceable only by a superior is extinguished on the appointed day. A burden which a third party (such as a neighbour) can also enforce survives but the (former) superior loses his rights. The “appointed day” is the day on which the feudal system is abolished: see clause 65. Clauses 17, 18, 22, 23 and 54 set out exceptions to this rule. By clause 69 a former superior will retain any purely contractual rights. In a question between the original parties, a condition in a feud which is valid as a real burden will also be valid as a contractual term. Clause 16 extinguishes only the real burden.

Subsections (2) and (3) prevent the enforcement, after the appointed day, of superiors' rights extinguished under subsection (1). It makes no difference that the breach occurred before the appointed day. Subsection (2) makes clear that an interdict, or order for specific implement, will not survive the appointed day. However, by subsection (3) decrees for payment of money (eg in relation to the cost of common repairs) obtained before the appointed day continue to be enforceable thereafter.

## PART IV

(c) any decree or interlocutor already pronounced in proceedings for such enforcement shall be deemed to have been reduced, or as the case may be recalled, on that day.

(3) Subsection (2) above shall not affect any decree, or interlocutor, pronounced before the appointed day in so far as that decree or interlocutor relates to the payment of money. 5

*Reallotment etc.*

Reallotment of real  
burden by  
nomination of new  
dominant  
tenement.

17.—(1) Where—

(a) a feudal estate of *dominium utile* of land is subject to a real burden enforceable by a superior of the feu; and 10

(b) at least one of the conditions set out in subsection (7) below is met, the superior may, before the appointed day, prospectively nominate other land (being land of which he has the sole *dominium utile* or sole allodial ownership), or any part of that other land, as a dominant tenement by duly executing and registering a notice in, or as nearly as may be in, the form 15 contained in Schedule 4 to this Act.

(2) The notice shall—

(a) set out the title of the superior;

(b) describe, sufficiently to enable identification by reference to the Ordnance Map, both the land the *dominium utile* of which is 20 subject to the real burden (or any part of that land) and the land (or part) nominated;

(c) specify which of the conditions set out in subsection (7) below is (or are) met;

(d) set out the terms of the real burden; and 25

(e) set out the terms of any counter-obligation to the real burden if it is a counter-obligation enforceable against the superior.

(3) For the purposes of subsection (1) above a notice is duly registered only when registered against both tenements described in pursuance of subsection (2)(b) above. 30

(4) Before submitting any notice for registration under this section, the superior shall swear or affirm before a notary public that to the best of the knowledge and belief of the superior all the information contained in the notice is true.

(5) For the purposes of subsection (4) above, if the superior is— 35

(a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the superior may swear or affirm;

(b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm; 40

and any reference in that subsection to a superior shall be construed accordingly.

(6) If subsections (1) to (5) above are complied with and immediately before the appointed day the real burden is still enforceable by the superior (or by his successor) then, subject to section 20(2) of this Act, on that day— 45

(a) the land (or part) nominated shall become a dominant tenement; and

*Clause 17*

The right to enforce a feudal real burden attaches to the feudal superiority. This clause allows superiors, in certain circumstances, to reallocate that right to land which they own in the neighbourhood. Where this is done, the land becomes the new dominant tenement, and the burden is enforceable by the owner for the time being of that land. The clause implements recommendation 22. See paragraphs 4.26 - 4.47 of the report.

Subsection (1) provides for the registration of a notice nominating land as a replacement dominant tenement. The superior must be sole owner. Unless the land is in the vicinity of the servient tenement (ie the feu subject to the real burden) there will be no interest to enforce and the registration will be pointless. (A requirement of interest to enforce is preserved by clause 19.) Clause 17 comes into force on Royal Assent (see clause 71(1)), and the superior has until the appointed day to complete registration.

Subsection (2) sets out the content of the notice. The notice must follow the statutory form given in schedule 4. Further provision in relation to counter-obligations (paragraph (e)) is made in clause 20(1).

Subsection (3) provides for dual registration, against both tenements. Registration is to be in the Land Register or Register of Sasines (clause 43). If the title to one tenement is in the Land Register and to the other is in the Register of Sasines, it will be necessary to apply to both registers.

Subsections (4) and (5) provide that the notice must be sworn or affirmed before a notary public. This implements recommendation 28(a). See paragraph 4.65 of the report. In the normal case this must be done by the superior personally, but subsection (5) sets out some exceptions. Subsection (5)(b) must be read with schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons.

On the appointed day subsection (6) converts the feudal burden into a neighbour burden in which the dominant tenement is the land nominated by the superior. It makes no difference if the superior no longer owns the land. Subsection (6) imposes two conditions. First, there must have been full compliance with subsections (1) to (5). Secondly, the burden must have been enforceable, not only at the time of registration of the notice, but immediately before the appointed day. If the person registering the notice subsequently conveyed the superiority, it is sufficient if the burden was enforceable by the new superior.

By subsection (1) a notice is not validly registered unless one (at least) of the three paragraphs of subsection (7) is satisfied. A building would not qualify under paragraph (a) if it was used for animals or for storage. Paragraph (b) should be read together with the definition of "real burden" in clause 43. Some rights of pre-emption and redemption are merely contractual in character, and would not qualify. Paragraph (c) allows minerals and salmon fishings to be dominant tenements, in the unusual circumstances which are set out.

(b) the land the *dominium utile* of which was subject to the real burden (or if part only of that land is described in pursuance of subsection (2)(b) above, that part) shall be the servient tenement.

(7) The conditions are—

5 (a) that the land which by virtue of this section would become the dominant tenement has on it a permanent building which is in use wholly or mainly as a place of human—

(i) habitation; or

(ii) resort,

10 and that building is, at some point, within one hundred metres (measuring along a horizontal plane) of the land which would be the servient tenement;

(b) that the real burden comprises—

15 (i) a right to enter, or otherwise make use of, the servient tenement; or

(ii) a right of pre-emption or of redemption;

(c) that the land which by virtue of this section would become the dominant tenement comprises—

(i) minerals; or

20 (ii) salmon fishings or some other incorporeal property,

and it is apparent from the terms of the real burden that it was created for the benefit of such land.

(8) This section is subject to sections 35 and 36 of this Act.

25 **18.**—(1) Subject to subsection (2) below, where, immediately before the appointed day, a real burden enforceable by a superior regulates the maintenance, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to other land (examples of property which might constitute such a facility being, without prejudice to the generality of this subsection, set out in subsection (3) below) then—

Reallotment of real burden affecting facility of benefit to other land.

30 (a) the land benefited;

(b) the heritable property which constitutes the facility,

shall, if on the appointed day it is not a dominant tenement, become a dominant tenement on that day (the servient tenement being the land the *dominium utile* of which was subject to the real burden immediately before that day).

(2) Subsection (1) above does not apply to a real burden in so far as that burden constitutes an obligation to maintain or reinstate which has been assumed—

(a) by a local or other public authority; or

40 (b) by, under or by virtue of any enactment, by a successor body to any such authority.

(3) The examples referred to in subsection (1) above are—

(a) a common part of a tenement building;

(b) a common area for recreation;

## *Explanatory Notes*

### *Clause 18*

This clause saves real burdens which are currently enforceable by a superior and which concern common facilities. After the appointed day the enforcement rights of the superior will transfer automatically to the owners of those properties which benefit from the common facility. The clause implements recommendation 31. See paragraphs 4.78 - 4.85 of the report.

Subsection (1) transfers superiors' enforcement rights to the owners of the properties benefited by the common facility. The benefit must be intentional and not merely adventitious. By paragraph (a) such properties become dominant tenements in the burden. The servient tenement, as before, is the property (or properties) which were already subject to the burden. Often the person who owns the facility will come within paragraph (a) but, if not, is given enforcement rights by paragraph (b). Subsection (1) only creates enforcement rights where none exist already. If, as often happens in practice, the properties benefiting from the facility are already both dominant and servient tenements in the burden (ie are subject to the burden, with mutual enforcement rights), clause 18 will not be necessary and will not apply.

Subsection (2) excludes maintenance obligations (for example in relation to roads and sewers) which have been taken over by a local or other public authority.

Subsection (3) gives some non-exhaustive examples of common facilities.

## PART IV

- (c) a private road;
- (d) private sewerage.

Interest to enforce  
real burden.

**19.** Sections 17 and 18 of this Act are without prejudice to any requirement that a dominant proprietor have an interest to enforce a real burden (and such interest shall not be presumed).

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Further provision  
as respects  
reallotment.

**20.—(1)** Where a real burden is reallotted under section 17 or 18 of this Act, the right to enforce the burden shall be subject to any counter-obligation enforceable, immediately before the appointed day, against the superior.

(2) If by a conveyance registered before the appointed day land which under section 17(1) of this Act, or under this subsection, is prospectively nominated as a dominant tenement is divided into parts, then in the conveyance one only of the parts may be prospectively nominated under this subsection as the dominant tenement; and section 16 and paragraph (a) of section 17(6) of this Act shall apply accordingly except that the reference in that paragraph to the land (or part) nominated shall be construed as a reference to the part nominated (or as the case may be last nominated) under this subsection.

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(3) If by a conveyance registered on or after the appointed day land which by virtue of section 17(1) of this Act is a dominant tenement is divided into parts, then in the conveyance one only of the parts may be specified as the dominant tenement; and only if so specified shall any of those parts continue to be the dominant tenement as respects the real burden.

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#### *Conservation burdens*

Conservation  
bodies.

**21.—(1)** For the purposes of this Part of this Act, the Secretary of State may, subject to subsection (2) below, by regulations, prescribe such body (if any) as he thinks fit to be a conservation body.

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(2) The power conferred by subsection (1) above may be exercised in relation to a body only if the object of the body (or, as the case may be, one of its objects) is 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).

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(3) Where the power conferred by subsection (1) above is exercised in relation to a trust, the conservation body shall be the trustees of the trust.

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(4) The Secretary of State may, by regulations, prescribe that such conservation body as may be specified in the regulations shall cease to be a conservation body.

Notice preserving  
right to enforce  
conservation  
burden.

**22.—(1)** Where a conservation body has the right as superior to enforce a real burden of the class described in subsection (2) below, it may, before the appointed day, preserve the right to enforce the burden in question after that day by executing and registering against the *dominium utile* of the land subject to the burden a notice in, or as nearly as may be in, the form contained in Schedule 5 to this Act; and any burden as respects which such a

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## *Explanatory Notes*

### *Clause 19*

At present a superior requires an interest to enforce real burdens, but interest to enforce is presumed. This clause reaffirms the need for interest to enforce for those succeeding to superiors' rights, but removes the presumption. The clause implements recommendation 32(a). See paragraph 4.86 of the report.

### *Clause 20*

Subsection (1) makes clear that the acquisition of superiors' enforcement rights under clauses 17 or 18 is subject to compliance with any counter-obligations which were binding on the superior. In the case of clause 17, the counter-obligations require to be listed in the initial notice (see clause 17(2)(e)). This implements recommendation 36(b). See paragraph 4.95 of the report. Subsection (1) does not make the counter-obligations independently enforceable; but a person in breach will be unable to enforce the real burden. By clause 41, a counter-obligation is extinguished with the extinction of the burden to which it relates.

Subsections (2) and (3) provide that, when a new dominant tenement created by virtue of clause 17 comes to be divided, only one of the resulting parts can retain the status of dominant tenement. This implements recommendation 23. See paragraphs 4.48 - 4.50 of the report.

The standard rule is set out in subsection (3). The successor dominant tenement is to be nominated in the split-off conveyance. If no nomination is made, the entire property loses the right to the burden. The same rule applies if the successor dominant tenement itself comes to be divided. This is because such a successor tenement is also a dominant tenement "by virtue of" clause 17.

Subsection (2) deals with the transitional case of a division occurring between the registration of a notice under clause 17 and the appointed day. Again there must be nomination in the split-off conveyance. The part so nominated then becomes the new dominant tenement on the appointed day.

### *Clause 21*

This is the first of a number of clauses dealing with conservation burdens. It provides for the establishment by the Secretary of State of a list of conservation bodies. The clause implements recommendation 25(e). See paragraphs 4.55 and 4.56 of the report.

Subsection (2) sets out the criteria for a body to be included on the list.

Trusts are not separate legal persons. The effect of subsection (3) is that, in relation to a trust, the conservation body is to be the trustees.

Subsection (4) allows bodies to be removed from the list.

### *Clause 22*

This clause allows a superior which is also a conservation body to preserve burdens concerned with conservation. It implements recommendation 25(a) and (b). See paragraphs 4.55 and 4.56 of the report.

right is so preserved shall, on and after the appointed day, be known as a “conservation burden”.

PART IV

(2) The class is those real burdens which are enforceable against a feudal estate of *dominium utile* of land for the purpose of preserving, or protecting,  
5 for the benefit of the public—

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

10 (3) The notice shall—

- (a) state that the superior is a conservation body by virtue of section 21 of this Act;
- (b) set out the title of the superior;
- (c) describe, sufficiently to enable identification by reference to the  
15 Ordnance Map, the land subject to the real burden (or any part of that land);
- (d) set out the terms of the real burden; and
- (e) set out the terms of any counter-obligation to the real burden if it is a counter-obligation enforceable against the superior.

20 (4) This section is subject to sections 35 and 36 of this Act.

23. Subject to section 26 of this Act, if a notice has been executed and registered in accordance with section 22 of this Act and, immediately before the appointed day, the burden to which the notice relates is still enforceable by the conservation body as superior (or by a conservation body which is its  
25 successor as superior), then, on and after the appointed day, the conservation body (or such successor) shall—

Enforcement of conservation burden.

- (a) subject to any counter-obligation, have title to enforce the burden against the land to which the notice in question relates; and
- (b) be presumed to have an interest to enforce that burden.

30 24. The right to a conservation burden may be assigned or otherwise transferred to any conservation body; and any such assignation or transfer shall take effect on registration.

Assignation of right to conservation burden.

25. Where a conservation body does not have a completed title to a conservation burden, the body may—

Deduction of title for conservation burden.

- 35 (a) in any assignation, or transfer, under section 24 of this Act, deduce title to the conservation burden through the midcouples linking the conservation body to the conservation body having the last completed title; or
- (b) complete title to the burden by registering a notice of title.

40 26. If, immediately before ceasing to be a conservation body (whether because regulations under section 21(4) of this Act so provide or because the body has ceased to exist), a body was entitled to enforce a conservation burden, then, on the body so ceasing, that burden shall forthwith be extinguished.

Extinction of burden on body ceasing to be conservation body.

## *Explanatory Notes*

### *Clause 22 (cont'd)*

Subsection (1) sets out how the burdens are to be preserved. The conservation body must register a notice before the appointed day (that is, the day on which the feudal system is abolished: see clause 65). Registration is to be in the Land Register or Register of Sasines (clause 43). If no notice is registered, the burdens will be extinguished under clause 16.

Subsection (2) sets out the type of burden which may be preserved.

Subsection (3) sets out the content of the notice. The notice must follow the statutory form given in schedule 5.

### *Clause 23*

This clause implements recommendation 25(c) and (d). See paragraphs 4.55 and 4.56 of the report. Its effect is that on the appointed day a feudal burden in respect of which a notice has been registered under clause 22 is converted into a conservation burden. The burden is enforceable by the person who is superior immediately before the appointed day, provided that such person is a conservation body. If the then superior is not a conservation body, the conversion will not take place and the burden will be dealt with under clause 16.

### *Clause 24*

This clause makes clear that the benefit of a conservation burden can be assigned to another conservation body. It implements recommendation 26(a) and (c). See paragraphs 4.57 and 4.61 of the report. The registration must take place in the Land Register or Register of Sasines (see clause 43). There is no requirement of intimation.

### *Clause 25*

This clause provides for deduction of title in cases where, under the general law, deduction of title would be required. It implements recommendation 26(b). See paragraph 4.57 of the report.

### *Clause 26*

This clause makes clear that a conservation burden is extinguished if its holder ceases to be a conservation body. It implements recommendation 26(e). See paragraphs 4.58 and 4.61 of the report.

PART IV  
No standard  
security over  
conservation  
burden.  
1970 c. 35.

27. In section 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (the standard security), after subsection (2) insert—

“(2A) It shall not be competent to grant a standard security over a conservation burden (within the meaning of Part IV of the Abolition of Feudal Tenure etc. (Scotland) Act 1998).”.

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#### Compensation

Notice reserving  
right to claim  
compensation  
where land subject  
to development  
value burden.

28.—(1) Subject to subsection (2) below, where—

- (a) before the appointed day, land was feued subject to a real burden enforceable by a superior which reserved for the superior the benefit (whether wholly or in part) of any development value of the land (such a real burden being referred to in this Part of this Act as a “development value burden”); and
- (b) either—
  - (i) the consideration paid, or payable, under the grant in feu was significantly lower than it would have been had the feu not been subject to the real burden; or
  - (ii) because the feu was subject to the burden, there was no such consideration,

the superior may, before that day, reserve the right to claim (in accordance with section 30 of this Act) compensation by executing and registering against the *dominium utile* of the land subject to the burden a notice in, or as nearly as may be in, the form contained in Schedule 6 to this Act.

(2) A superior may not register a notice under this section if the development value is wholly secured for his benefit by a heritable security.

(3) A notice under this section shall—

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- (a) set out the title of the superior;
- (b) describe, sufficiently to enable identification by reference to the Ordnance Map, the land the *dominium utile* of which is subject to the development value burden;
- (c) set out the terms of the burden;
- (d) state that the burden reserves development value and set out any information relevant to that statement;
- (e) set out, to the best of the superior’s knowledge and belief, the amount by which the consideration was reduced because of the imposition of the burden;
- (f) state that the development value is not wholly secured for the benefit of the superior by a heritable security; and
- (g) state that the superior reserves the right to claim compensation in accordance with section 30 of this Act.

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(4) Before submitting any notice for registration under this section, the superior shall swear or affirm before a notary public that to the best of the knowledge and belief of the superior all the information contained in the notice is true.

(5) For the purposes of subsection (4) above, if the superior is—

- (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the superior may swear or affirm;

## *Explanatory Notes*

### *Clause 27*

This clause prevents a standard security being granted over a conservation burden. It implements recommendation 26(d). See paragraphs 4.59 and 4.61 of the report.

### *Clause 28*

This clause is the first of a group of clauses which implement recommendations 38 to 49 on compensation for the loss of certain real burdens reserving development value to the superior. This is discussed generally in Part 5 of the report. It applies where land was given away or feued at an undervalue for a particular purpose but the superior by means of a feudal real burden reserved the right to recover something if it were used or developed for some other purpose. For example, land feued for use as a sports field might be suitable for a commercial development. The superior may have been happy to grant a feu for a token sum so long as the ground was used as a sports field but may have been unwilling to allow the vassal to make a large profit by selling the land for development. In the absence of some provision for compensation the abolition of the feudal system would mean that the real burden would fly off and, if the arrangement could not be enforced as an ordinary contract between the original parties, the vassal could make an immediate windfall gain at the expense of the superior.

Subsection (1) enables the superior, before the appointed day, to reserve the right to claim compensation by executing and registering a notice in prescribed form. It implements recommendation 41. (See paragraph 5.29 of the report).

Subsection (2), which implements recommendation 39(c) (on which see paragraph 5.21 of the report), provides that a superior who holds a heritable security for the full amount of the development value cannot register a notice. In most cases where superiors have deliberately reserved development value in recent decades they will be protected by a heritable security and will therefore suffer no loss as a result of the abolition of the feudal system.

Subsection (3) says what must be set out in the notice. (See paragraphs 5.27 and 5.28 of the report).

Subsections (4) and (5) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done by the superior personally, but subsection (5) sets out some exceptions. Subsection (5)(b) must be read with schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. These subsections implement recommendations 28 (a) and 42. (See paragraphs 4.65 and 5.30 of the report).

Subsection (6) defines “development value”.

- (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm; and any reference in that subsection to a superior shall be construed accordingly.
- 5 (6) In this Part of this Act, “development value” (except in the expression “development value burden”) means any significant increase in the value of the land arising as a result of the land becoming free to be used, or dealt with, in some way not permitted under the grant in feu.
- (7) This section is subject to sections 35 and 36 of this Act.
- 10 **29.** A right to claim compensation reserved in accordance with section 28 of this Act is transmissible—
- (a) by testamentary disposition;
- (b) by decree of any court; or
- (c) by operation of law;
- 15 but such a right may not be assigned.
- 30.—**(1) Where the conditions mentioned in subsection (2) below are satisfied, any person who has, by a notice executed and registered in accordance with section 28 of this Act, a reserved right to claim compensation shall be entitled, subject to any order under section 38(2) of this Act, to compensation from the person who is the owner.
- 20 (2) The conditions are—
- (a) the real burden set out in the notice was, immediately before the appointed day, enforceable by the superior;
- (b) on that day the burden, or as the case may be any right of the superior to enforce the burden, was extinguished, or rendered unenforceable, by section 16(1) of this Act; and
- 25 (c) at any time—
- (i) during the period of five years ending immediately before the appointed day, there was a breach of the burden; or
- 30 (ii) during the period of twenty years beginning with the appointed day, there was an occurrence, which, but for the burden becoming extinct, or unenforceable, as mentioned in paragraph (b) above, would have been a breach of the burden.
- (3) Where a person is entitled, by virtue of subsection (1) above, to compensation, he shall make any claim for such compensation by notice in writing duly served on the owner; and any such notice shall specify, in accordance with section 32 of this Act, the amount of compensation claimed.
- 35 (4) Where, in relation to a claim made under subsection (3) above, the condition mentioned in—
- 40 (a) sub-paragraph (i) of subsection (2)(c) above applies, any such claim may not be made more than three years after the appointed day;
- (b) sub-paragraph (ii) of subsection (2)(c) above so applies, any such claim may not be made more than three years after the date of the occurrence.

PART IV

Limited transmissibility of right to claim compensation.

Claiming compensation.

## *Explanatory Notes*

### *Clause 29*

In order to prevent the emergence of a market in reserved rights to compensation, which might encourage speculative claims, this clause provides that such rights cannot be assigned. They can, however, be transmitted by will or by court decree or by operation of law. The clause implements recommendation 43. (See paragraph 5.35).

### *Clause 30*

This clause deals with the circumstances in which a right to compensation arises if a notice has been duly registered. It implements recommendations 40 and 44. The general rule is that the right does not emerge immediately on the appointed day. It emerges only if something happens within twenty years after the appointed day which would have been a breach of the burden if it had still subsisted. (See paragraph 5.25 of the report). The reasons for the twenty year limit are explained in paragraph 5.37 of the report. To deal with cases where there may have been a breach so shortly before the appointed day that the superior has not had time to enforce the burden, the clause also allows the superior to claim compensation for breaches within five years before the appointed day.

Subsection (1) confers the right to compensation if the conditions mentioned later are satisfied.

Subsection (2) sets out the conditions which have to be satisfied before the right to compensation is acquired. It makes it clear, in particular, that the real burden must have been enforceable by the superior before it was extinguished or rendered unenforceable by the Act. This is not an empty requirement. The requirements for the constitution of a real burden are strict and many apparently valid real burdens are unenforceable. (See paragraphs 5.22 ff of the report).

Subsection (3) regulates the way in which a claim is to be made. There is a need for precision because of the time limits in subsection (4).

Subsection (4) lays down time limits within which a claim for compensation must be made. In the normal case the time limit is three years from the date of the occurrence which would have been a breach had the burden still subsisted. In the special transitional case of breaches in the five years before the appointed day the time limit is three years from the appointed day. This implements recommendation 44(a)(ii). See paragraph 5.40 of the report.

Subsection (5) makes it clear that in the case of a continuing breach or occurrence the time runs from the date when the breach or occurrence first happens. This implements recommendation 44(b). See paragraph 5.40 of the report.

Subsection (6) defines "owner" for the purposes of the clause. It is the person who is the owner at the time of the breach or occurrence who is liable for the compensation.

## PART IV

(5) For the purposes of this section, if a breach, or occurrence, such as is mentioned in subsection (2)(c) above is continuing, the breach or, as the case may be, occurrence shall be taken to occur when it first happens.

(6) The reference in subsection (3) above to a notice being duly served shall be construed in accordance with section 31 of this Act. 5

## Service under section 30(3).

**31.**—(1) Due service under section 30(3) of this Act is effected by delivering the notice in question to the owner or by sending it by post, or delivering it, addressed to him at an appropriate place.

(2) The date on which notice under section 30(3) of this Act is served on an owner is the date of delivery, or as the case may be of posting, in compliance 10 with subsection (1) above.

(3) A reference in this section to an “appropriate place” is, for any owner, to be construed as a reference to—

(a) his place of residence;

(b) his place of business; or 15

(c) a postal address which he ordinarily uses,

or, if none of those is known at the time of delivery or posting, as a reference to whatever place is at that time his most recently known place of residence or place of business or postal address which he ordinarily used.

## Amount of compensation.

**32.**—(1) The amount of any compensation payable on a claim made under 20 section 30(3) of this Act shall, subject to subsection (2) below, be such sum as represents, at the time of the breach or occurrence in question, any development value which would have accrued to the owner had the burden been modified to the extent necessary to permit the land to be used, or dealt with, in the way that constituted the breach or, as the case may be, 25 occurrence on which the claim is based.

(2) The amount payable as compensation (or, where more than one claim is made in relation to the same development value burden, the total compensation payable) under subsection (1) above shall not exceed such sum as will make up for any effect which the burden produced, at the time when it 30 was imposed, in reducing the consideration then paid or made payable for the feu.

(3) In assessing for the purposes of subsection (1) above an amount of compensation payable, any entitlement of the claimant to recover any part of the development value of the land subject to the development value burden 35 shall be taken into account.

(4) The reference in subsection (1) above to a burden shall, in relation to an occurrence, be construed as a reference to the burden which would have been breached but for its becoming, by section 16(1) of this Act, extinct or unenforceable. 40

## The expression “owner” for purposes of sections 30 to 32.

**33.**—(1) In sections 30 to 32 of this Act, “owner” means the person who, at the time of the breach or, as the case may be, occurrence, mentioned in section 30(2)(c) of this Act, has right to—

(a) the *dominium utile*; or

## *Explanatory Notes*

### *Clause 31*

This clause makes provision for service of a claim for compensation. See paragraph 5.36 of the report. It follows the model of clause 11 (compensation for extinction of feuduty), except that in a case where the land is owned in common, separate service is required on each *pro indiviso* owner. This is because of the potentially large sums which might be claimed.

### *Clause 32*

This clause deals with the amount of compensation. It implements recommendations 45 and 46. See paras 5.41 to 5.47 of the report.

Subsection (1) provides that the amount payable on any one claim is the amount of development value which would have accrued to the owner of the land if the burden (or a “shadow” burden in the same terms: see subsection (4)) had been modified so as to free the land for the development which has actually occurred. So if, for example, the burden prohibited all building and the owner, seven years after the appointed day, has built a small shed, the compensation would only be the difference between the value of the land on the assumption that a shed could not be built and the value of the land on the assumption that a shed could be built. Building the shed would not trigger a claim for compensation based on the fact that a supermarket could be built.

Subsection (2) limits the total amount of compensation payable, on one or several claims, to such an amount as will make up for any effect which the burden produced at the time when it was imposed in reducing or eliminating the consideration for the grant. This formula is derived from section 1(4)(ii) of the Conveyancing and Feudal Reform (Scotland) Act 1970.

Subsection (3) is designed to prevent double compensation. The former superior may, for example, have a valid contractual claim against the former vassal if they are both the original parties to the contract. There would be no need for statutory compensation in such a case.

Subsection (4) is designed to deal with the point that, in the case of an occurrence after the appointed day, the burden will already have been extinguished. The comparison is between what the land would have been worth if the burden had subsisted unmodified and what it would have been worth if the burden had been modified to permit the development which has taken place.

### *Clause 33*

Subsection (1) defines “owner” for the purposes of liability for compensation. Before the appointed day such a person will have *dominium utile* and thereafter, by clause 2(1), ownership.

Subsection (2) makes clear that where the land is held as common property, the liability of the owners is joint and several, subject to a right of relief based on the size of the *pro indiviso* shares.

(b) the ownership,  
of the land which, immediately before the appointed day, was subject to the  
development value burden, whether or not he has completed title; and if  
more than one person comes within that description, then the owner is the  
5 person who has most recently acquired such right.

PART IV

(2) Where the land in question is held by two or more such owners as  
common property, any liability for payment of compensation shall be their  
joint and several liability (though as between, or as the case may be among,  
themselves they shall be liable in the proportions in which they hold the  
10 land).

34. A reserved right to claim, in accordance with section 30 of this Act,  
compensation may be discharged, or restricted, by execution and registration  
of a discharge, or restriction, in the form, or as nearly as may be in the form,  
contained in Schedule 7 to this Act.

Discharge, or  
restriction, of  
reserved right to  
claim  
compensation.

15

*Miscellaneous*

35.—(1) This section applies in relation to any notice which is to be  
submitted for registration under section 17, 22 or 28 of this Act.

Notices under  
sections 17, 22 and  
28: pre-regis-  
tration  
requirements etc.

(2) It shall not be necessary to endorse on the notice a warrant of  
registration.

20 (3) Except where it is not reasonably practicable to do so, a superior shall,  
before he executes the notice, send by post to the person who has the estate of  
*dominium utile* of the land to which the burden relates (addressed to “The  
Proprietor” where the name of that person is not known) a copy of—

(a) the notice; and  
25 (b) the explanatory note set out in whichever Schedule to this Act relates to  
the notice.

(4) A superior shall, in the notice, state either—  
(a) that a copy of the notice has been sent in accordance with subsection  
(3) above; or  
30 (b) that it was not reasonably practicable for such a copy to be sent.

36.—(1) Where a notice relating to a real burden has been registered under  
section 17, 22 or 28 of this Act against the *dominium utile* of any land which is  
subject to the burden, it shall not be competent to register under any of those  
sections against that *dominium utile* another notice relating to the same real  
35 burden; but nothing in this subsection shall prevent registration where a  
discharge of an earlier such notice has been registered.

Further provision  
as respects  
sections 17, 22 and  
28.

(2) Where the *dominium utile* of any land comprises parts each held by a  
separate vassal, each part shall be taken to be a separate feudal estate of  
*dominium utile*.

40 (3) Where more than one feudal estate of *dominium utile* is subject to the  
same real burden enforceable by a superior of the feu, he shall, if he wishes to  
execute and register a notice under section 17, 22 or 28 of this Act against  
those feudal estates in respect of that real burden, require to do so against  
each separately.

## *Explanatory Notes*

### *Clause 34*

This clause makes it clear that a reserved right to claim compensation under the Act can be discharged or restricted by the person entitled to it. To keep the records clear provision is made for registration. Schedule 7 provides the appropriate form. This clause is concerned with voluntary discharge or restriction. Clause 38(1), noted below, enables the owner of land affected by a notice reserving the right to compensation to apply to the Lands Tribunal for Scotland to have the notice discharged or restricted without the consent of the person entitled to it. Together, these two provisions implement recommendation 48. See paragraph 5.56 of the report.

### *Clause 35*

This is the first of a group of clauses making common provision for notices drawn up under clauses 17 (neighbour burdens), 22 (conservation burdens) and 28 (claims for compensation in respect of development value burdens).

Clause 5 (which abolishes warrants of registration) does not come into force until the appointed day and so would not affect notices (which require to be registered before that day). Subsection (2) therefore exempts notices from having to contain warrants of registration.

Subsections (3) and (4) implement recommendation 28(b) and provide for the sending of a copy of the notice to the vassal. See paragraphs 4.66 and 4.68 of the report. Normally service is by post, and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable.

### *Clause 36*

Subsection (1) makes it clear that the various notices are mutually exclusive. It implements recommendation 27. See paragraphs 4.62 and 4.63 of the report.

Subsection (2) deals with division of a feu. The rule is that if land originally subject to a single grant in feu comes to be divided into separate parts, each owned separately, each part is treated as a separate feu for the purposes of part IV of the Bill.

Subsections (3) and (4) regulate the number of notices which need to be sent. Each feu requires its own notice, but the same notice can be used for more than one burden. These provisions implement recommendation 28(c). See paragraphs 4.67 and 4.68 of the report.

## PART IV

(4) Where a feudal estate of *dominium utile* is subject to more than one real burden enforceable by a superior of the feu, he may if he wishes to execute and register a notice under section 17, 22 or 28 of this Act against that feudal estate in respect of those real burdens, do so by a single notice.

Notices under sections 17, 22 and 28: extent of Keeper's duty.

**37.—**(1) In relation to any notice submitted for registration under section 17, 22 or 28 of this Act, the Keeper of the Registers of Scotland shall not be required to determine whether the superior has complied with the terms of section 35(3) of this Act. 5

(2) In relation to any notice submitted for registration under—

(a) section 17 of this Act, the Keeper shall not be required to determine, 10 where, in pursuance of subsection (2)(c) of that section, the condition specified is that mentioned in subsection (7)(a) of that section, whether the terms of that condition are satisfied;

(b) section 28 of this Act, the Keeper shall not be required to determine whether— 15

(i) the requirements of subsection (1)(a) and (b) are satisfied; or

(ii) the statements made or information provided, in pursuance of subsection (3)(d), (e) and (f), are correct.

Referral to Lands Tribunal of dispute arising in relation to section 17, 22, 28 or 30.

**38.—**(1) Any dispute arising in relation to a notice registered under section 17, 22 or 28 of this Act may be referred to the Lands Tribunal for Scotland; and, in determining the dispute, the Tribunal may make such order as it thinks fit discharging or, to such extent as may be specified in the order, restricting the notice in question. 20

(2) Any dispute arising in relation to a claim made under section 30(3) of this Act may be referred to the Lands Tribunal for Scotland; and, in determining the dispute, the Tribunal may make such order as it thinks fit (including an order fixing the amount of any compensation payable under the claim in question). 25

(3) In any referral under subsection (1) or (2) above, the burden of proving 30 any disputed question of fact shall be on the person relying on the notice or, as the case may be, making the claim.

(4) Any order made under subsection (1) or (2) above—

(a) may be registered; and

(b) shall take effect as respects third parties on such registration. 35

Circumstances where certain notices may be registered after appointed day.

**39.—**(1) Where—

(a) a notice submitted, before the appointed day, for registration under section 17, 22 or 28 of this Act is rejected by the Keeper of the Registers of Scotland; but

(b) a court or the Lands Tribunal for Scotland then determines that the 40 notice is registrable,

the notice may, at any time during the period of five years beginning with that day, be registered; and any notice so registered shall be treated as if it had been registered, under section 17, 22 or, as the case may be, 28, before that day. 45

## *Explanatory Notes*

### *Clause 37*

This clause relieves the Keeper of the need to verify certain facts which in practice would be difficult to check. It implements recommendation 29(a). See paragraphs 4.70 and 4.72 of the report. Although the clause applies to both registers, it is of importance mainly in relation to the Land Register.

### *Clause 38*

This clause gives the Lands Tribunal a broad jurisdiction to resolve disputes in relation to notices. It implements recommendations 30, 47, 48(b) and 49. See paragraphs 4.74 and 5.48 - 5.57 of the report.

Subsection (2) gives jurisdiction in relation to claims for compensation following the extinction of development value burdens.

Subsection (3) provides for burden of proof.

Subsection (4) allows the registration of Lands Tribunal orders and provides that, on registration, they will affect third parties.

### *Clause 39*

Clause 39 allows late registration, within limits, if the initial rejection of a notice by the Keeper is judicially overturned. It implements recommendation 29(b). See paragraph 4.71 of the report.

(2) In subsection (1)(b) above, “court” means any court having jurisdiction in questions of heritable right or title.

PART IV

40.—(1) The Keeper of the Registers of Scotland shall not be required to remove from the Land Register of Scotland a real burden extinguished by section 16(1)(a) of this Act unless he is requested to do so in an application for registration or rectification or is, under section 9(1) of the Land Registration (Scotland) Act 1979 (rectification of the register), ordered to do so by the court or the Lands Tribunal for Scotland; and no such request or order shall be competent during that period of five years which commences with the appointed day.

Duties of Keeper: amendments relating to the extinction of certain real burdens. 1979 c. 33.

(2) During the period of five years mentioned in subsection (a) above a real burden, notwithstanding that it has been so extinguished, shall, for the purposes of section 6(1)(e) of that Act of 1979 (entering enforceable real right in title sheet), be taken to subsist.

41. Without prejudice to any other way in which a counter-obligation to a real burden may be extinguished, any such counter-obligation is extinguished on the extinction of the real burden.

Extinction of counter-obligation.

42. Where a real burden is created (or has at any time been created) in a grant in feu, the superior having the *dominium utile*, or allodial ownership, of land (the “superior’s land”) in the vicinity of the land feued, no implication shall thereby arise that the superior’s land is a dominant tenement.

No implication as to dominant tenement where real burden created in grant in feu.

#### Interpretation

43. In this Part of this Act, unless the context otherwise requires—

“conservation body” means a body prescribed under section 21(1) of this Act;

“conservation burden” shall be construed in accordance with section 22(1) of this Act;

“development value burden” and “development value” shall be construed in accordance with section 28 of this Act;

“notary public” includes any person duly authorised by the law of the country (other than Scotland) in which the swearing or affirmation takes place to administer oaths or receive affirmations in that other country;

“real burden”—

(a) includes—

(i) a right of pre-emption;

(ii) a right of redemption; or

(iii) a right (other than an exclusive right) of fishing or game,

provided that it is constituted as a real burden; but

(b) does not include a pecuniary real burden;

Interpretation of Part IV.

*Explanatory Notes*

*Clause 40*

This clause implements recommendation 21. See paragraphs 4.21 - 4.25 of the report.

The clause has two purposes. First, it makes clear that the Keeper has no immediate duty to delete extinguished real burdens from the Land Register but can wait until deletion is requested by the owners of the affected land. Since there are 500,000 title sheets it is inevitable that the cleansing of the Register of real burdens will be a gradual process.

Secondly, the clause gives the Keeper temporary relief for a period of five years after the appointed day. There is no obligation to delete extinguished burdens during this period, even on request; and subsection (2) means that in relation to first registrations the Keeper can disregard the fact that burdens have been extinguished. The five-year period ties in with the period of registration of implied enforcement rights under the proposed legislation on real burdens. The Keeper would be unable to delete burdens safely unless sure that no implied rights existed.

*Clause 41*

Counter-obligations are tied to real burdens. This clause makes it clear that, on the extinction of a real burden, any counter-obligation is extinguished also. It implements recommendation 36(c). See paragraphs 4.95 and 4.96 of the report.

*Clause 42*

This clause makes clear, for the avoidance of doubt, that a real burden created in a grant in feu is implied to be for the benefit of the superiority only, and not for the benefit of land in the vicinity which the superior also happens to own. Such land could be made a dominant tenement only by express stipulation. This implements recommendation 33. See paragraph 4.87 of the report.

*Clause 43*

This clause gives the meaning of certain terms used in part IV.

“Superior” is defined to include over-superior. Over-superiors are able under the existing law to enforce real burdens directly against the person holding *dominium utile*. Consequently for the purposes of part IV over-superiors are treated in the same way as immediate superiors.

## PART IV

“registering” means registering an interest in land (or information relating to such an interest) in the Land Register of Scotland or, as the case may be, recording a document in the Register of Sasines; and cognate expressions shall be construed accordingly; and

“superior” means a person who has right to the immediate superiority or to any over-superiority, whether or not he has completed title (and if more than one person comes within either of those descriptions then, in relation to that description, the person who has most recently acquired such right) and “former superior” shall be construed accordingly.

## PART V

## ENTAILS

Disentailment on appointed day.

**44.**—(1) Land which, immediately before the appointed day, is held under an entail is disentailed on that day.

1848 c. 36.

(2) Section 32 of the Entail Amendment Act 1848 (which makes provision as respects an instrument of disentail executed and recorded under that Act) shall apply to the effect of disentailment by subsection (1) above as that section applies to the effect of such an instrument so executed and recorded.

Compensation for expectancy or interest of apparent or other nearest heir in an entailed estate.

**45.**—(1) Where, immediately before the appointed day—

(a) land is held under an entail; and

(b) the consent of a person who is an apparent or other nearest heir is required to any petition for authority of the court for the purpose of presenting an instrument of disentail,

the valuation of any expectancy or interest of the person, which on his refusal to give such consent would fall, before the appointed day, to be ascertained under section 13 of the Entail (Scotland) Act 1882 may, within two years after the appointed day, be referred by him to, and determined by, the Lands Tribunal for Scotland.

1882 c. 53.

(2) The Tribunal shall direct that any sum ascertained by them in a valuation by virtue of subsection (1) above shall be secured on the land, for the benefit of the person, in such manner as they think fit.

Closure of Register of Entails.

**46.** The Keeper of the Registers of Scotland shall, immediately before the appointed day, close the Register of Entails; and as soon as is practicable thereafter, he shall transmit that register to the Keeper of the Records of Scotland for preservation.

## PART VI

## MISCELLANEOUS

*Discharge of certain rights and extinction of certain obligations and payments*

Discharge of rights of irritancy.

**47.**—(1) All rights of irritancy held by a superior are, on the day on which this section comes into force, discharged; and on that day any proceedings already commenced to enforce any such right shall be deemed abandoned

*Clause 44*

This clause abolishes entails.

Subsection (1) provides for automatic disentailing on the appointed day. It implements recommendation 58(a). See paragraphs 9.14 and 9.17 of the report.

Subsection (2) provides that the effect of automatic disentailing is to be the same as the effect of a duly recorded instrument of disentail. This means that the destination in the titles will remain in force as a special destination, until altered, but the restrictions on the freedom of the owner of the property to deal with it as his own property will fall away. Accordingly the owner can sell the property or alter the succession to it. See recommendation 58(b). (Paragraph 9.17 of the report).

*Clause 45*

It is unlikely, for the reasons given in paragraphs 9.13 and 9.15, that there will be any heirs in a position to claim compensation for the effects of automatic disentailing on their prospects of succeeding to the entailed estates. However, out of caution, this clause provides a mechanism for assessing compensation and having it secured on the land. It implements recommendation 58(c). (Paragraph 9.17 of the report).

*Clause 46*

This clause provides for the Register of Entails (formerly known as the Register of Tailzies) to be closed and transmitted to the Keeper of the Records of Scotland for preservation. It implements recommendation 58(d). (See paragraphs 9.16 and 9.17 of the report).

*Clause 47*

“Irritancy” means confiscation of the feu. A superior can irritate for non-payment of feuduty or (in cases where the right has been stipulated for) for non-compliance with real burdens. This clause implements recommendation 34 by extinguishing the remedy. See paragraph 4.89 of the report. The clause comes into force on Royal Assent (see clause 71(1)).

and may, without further process and without any requirement that full judicial expenses shall have been paid by the pursuer, be dismissed accordingly.

PART VI

(2) Subsection (1) above shall not affect any cause in which final decree (that is to say, any decree or interlocutor which disposes of the cause and is not subject to appeal or review) is granted before the coming into force of this section.

48.—(1) Subject to section 13, to Part IV, and to section 54(1), of this Act, a right or obligation which, immediately before the appointed day, is enforceable by, or as the case may be against, a superior *qua* superior shall, on that day, be extinguished.

Extinction of superior's rights and obligations *qua* superior.

(2) Subject to subsection (3) below—

- (a) on or after the appointed day, no proceedings for such enforcement shall be commenced;
- 15 (b) any proceedings already commenced for such enforcement shall be deemed to have been abandoned on that day and may, without further process and without any requirement that full judicial expenses shall have been paid by the pursuer, be dismissed accordingly; and
- 20 (c) any decree, or interlocutor, already pronounced in proceedings for such enforcement shall be deemed to have been reduced, or as the case may be recalled, on that day.

(3) Subsection (2) above shall not affect any decree, or interlocutor, pronounced before the appointed day in so far as that decree or interlocutor relates to the payment of money.

49. Any obligation of thirlage which has not been extinguished before the appointed day is extinguished on that day.

Abolition of thirlage.

50.—(1) The provisions of Part III of this Act shall apply as regards ground annual, skat, teind, stipend, standard charge, dry multures (including compensation payable in respect of commutation pursuant to the Thirlage Act 1799) and, subject to the exceptions mentioned in subsection (2) below, as regards any other perpetual periodical payment in respect of the tenure, occupancy or use of land or under a land obligation, as those provisions apply as regards feuduty; but for the purposes of that application—

Extinction etc. of certain payments analogous to feuduty.

1799 c. 55.

- 35 (a) references in the provisions to “vassal” and “superior” shall be construed as references to, respectively, the payer and the recipient of the ground annual, skat, teind, stipend, standard charge, dry multures or other payment in question (“former vassal” and “former superior” being construed accordingly); and
- 40 (b) a form (and its explanatory note) contained in a Schedule to this Act shall be modified so as to accord with the kind of payment to which it relates.

(2) The exceptions are any payments—

- 45 (a) in defrayal of, or as a contribution towards, some continuing cost related to land; or

## *Explanatory Notes*

### *Clause 48*

This clause implements recommendation 36(a). See paragraphs 4.92 - 4.96 of the report.

A superior has certain rights and, sometimes, obligations by virtue of being superior. Such rights and obligations run with the superiority and transmit to successors. Parts III and IV of the bill provide for the extinction (with exceptions) of the two principal rights of a superior, namely the right to feuduty and the right to enforce real burdens. This clause extinguishes any other residual rights which a superior might be thought to have. It also extinguishes obligations on the superior, other than the counter-obligations which are expressly saved by clauses 20(1), 23(a) and 54(1)(a). As clause 69 makes plain, contractual rights and obligations are unaffected.

Subsections (2) and (3) are modelled on the equivalent provisions in clause 16, and prevent the enforcement of superiors' rights and obligations after the appointed day.

### *Clause 49*

Thirlage was the obligation on a landowner to take corn to a particular mill to be ground. It seems improbable that any obligations of thirlage still survive. The purpose of this clause (which implements recommendation 60(a)) is to put the matter beyond doubt. See paragraph 9.23 of the report.

### *Clause 50*

This clause applies the provisions of Part III on extinction of feuduties to other payments which, although non-feudal in nature, have similar characteristics. This follows the scheme in the Land Tenure Reform (Scotland) Act 1974 but adds teinds and stipend. It also specifically applies to dry multures (see paragraph 9.23 of the report and clause 49). Subsection (4) makes it clear that extinction of the payment does not affect the underlying right to hold, occupy or use the land. This clause implements recommendation 18. See paragraphs 3.51 - 3.55 of the report.

PART VI

(b) made under a heritable security.

1970 c. 35.

(3) The definition of “land obligation” in subsection (2) of section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970 shall apply for the purposes of this section as it applies for the purposes of that section.

(4) Nothing in subsections (1) to (3) above shall be taken to prejudice the tenure, occupancy or use of land. 5

Extinction by prescription of obligation to pay redemption money for feuduty, ground annual etc. 1973 c. 52. 1974 c. 38.

**51.** Notwithstanding the terms of Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (which define obligations affected by prescriptive periods of five years), any obligation under section 5 (redemption of feuduty, ground annual etc. on transfer for valuable 10 consideration) or 6 (redemption of feuduty, ground annual etc. on compulsory acquisition) of the Land Tenure Reform (Scotland) Act 1974 to pay redemption money is an obligation to which section 6 of that Act of 1973 (extinction of obligation by prescriptive period of five years) applies; and for the purposes of that application, the reference in subsection (1) of 15 section 6 of that Act of 1973 to the “appropriate date” is a reference to the date of redemption within the meaning of—

(a) except in the case mentioned in paragraph (b) below, section 5 (read, as the case may be, with section 6(2)(a)); or

(b) in the case of an obligation arising out of the acquisition of land by 20 means of a general vesting declaration, section 6(4), of that Act of 1974.

*The Crown, the Lord Lyon and Barony*

Crown application.

**52.** This Act binds the Crown and accordingly such provision as is made by section 2 of this Act as respects feudal estates of *dominium* shall apply to 25 the superiority of the Prince and Steward of Scotland and to the ultimate superiority of the Crown; but nothing in this Act shall be taken to supersede or impair any power exercisable by Her Majesty by virtue of Her prerogative (including, without prejudice to the generality of this section, the prerogative of honour and prerogative rights as respects ownerless or unclaimed 30 property).

Crown may sell or otherwise dispose of land by disposition.

**53.** It shall be competent for the Crown, in selling or otherwise disposing of any land, to do so by granting a disposition of that land.

Preserved right of Crown to maritime burdens.

**54.—(1)** Where, immediately before the appointed day, the Crown has the right as superior to enforce a real burden against part of the sea bed or part of the 35 foreshore, then, on and after that day, the Crown shall—

(a) subject to any counter-obligation, have title to enforce; and

(b) be presumed to have an interest to enforce,

the burden; and any burden as respects which the Crown has such title and interest shall, on and after the appointed day, be known as a “maritime 40 burden”.

## *Explanatory Notes*

### *Clause 51*

This clause reduces to 5 years the period of negative prescription for redemption money for feuduty, ground annual etc due under sections 5 and 6 of the 1974 Act. It is to apply to any obligation to pay redemption money that is still extant at the appointed day. It implements recommendation 15(ii). See paragraph 3.39 of the report.

### *Clause 52*

The Act is to apply to the Crown. So the Crown's paramount feudal superiority will disappear on the appointed day and the Crown will not be able to grant new feus. (See paragraph 2.5 of the report). The abolition of the feudal system of land tenure will not affect property held allodially by the Crown which has never entered a feudal chain. And nothing in the Act will supersede or impair any prerogative powers of the Crown. The distinction made here is between the Crown's rights and powers as feudal superior and the Crown's rights and powers as sovereign. The prerogative powers are preserved generally but two of them are mentioned specifically for the avoidance of any doubt. The prerogative of honour is mentioned to make it clear that matters such as peerages are not affected, even although many of these matters may go back to feudal times. The Crown's prerogative rights in relation to ownerless or unclaimed property are also specifically mentioned. These cover the Crown's rights as so-called last heir (*ultimus haeres*) to property which is unclaimed by any heir on the death of a deceased and the Crown's right to property, whether moveable or heritable, which ceases to have an owner (*bona vacantia*). Clause 52 implements recommendation 4. (See paragraph 2.27 of the report).

### *Clause 53*

There is at present some doubt as to whether the Crown can dispense, as opposed to feu, land. It is necessary to remove this doubt. This clause therefore provides that the Crown can grant a disposition of land. It implements recommendation 53. (See paragraph 7.37 of the report).

### *Clause 54*

The Crown has in the past feued parts of the seabed or foreshore for various purposes, including the construction of piers, harbours and bridges. Real burdens restricting the use of the seabed or foreshore feued out may have been imposed in the feudal grant. Such burdens are in a special position. There is a public interest in the use made of the seabed and foreshore. It would not be in the public interest if all such burdens were to fall with the abolition of the feudal system. This clause therefore preserves the right of the Crown to enforce such "maritime" burdens. (See paragraph 4.51 of the report).

- (2) The right of the Crown to a maritime burden may not be assigned. PART VI
- (3) For the purposes of this section—  
 “sea bed” means the bed of the territorial sea adjacent to Scotland; and  
 “territorial sea” includes any tidal waters.
- 5 (4) In this section, “real burden” has the same meaning as in Part IV of this Act.
- 10 **55.** The periodical payment to the Crown, in respect of the produce of a mine which by the Royal Mines Act 1424 belongs to the Crown, of an amount which is not fixed but is calculated as a proportion of that produce is not—
- (a) a payment to the Crown *qua* superior for the purposes of section 48 of this Act;
- (b) a perpetual periodical payment for the purposes of section 50 of this Act; or
- 15 (c) a feuduty for the purposes of Part III of this Act.
- 56.** Nothing in this Act shall be taken to supersede or impair the jurisdiction or prerogative of the Lord Lyon King of Arms. Jurisdiction and prerogative of Lord Lyon.
- 57.—**(1) Any jurisdiction of, and any conveyancing privilege incidental to, barony shall on the appointed day cease to exist; but nothing in this Act affects the dignity of baron or any other dignity or office (whether or not of feudal origin). Baronies and other dignities and offices.
- (2) When, by this Act, an estate held in barony ceases to exist as a feudal estate, the dignity of baron, though retained, shall not attach to the land; and on and after the appointed day any such dignity shall be, and shall be transferable only as, incorporeal heritable property (and shall not be an interest in land for the purposes of the Land Registration (Scotland) Act 1979 or a right as respects which a deed can be recorded in the Register of Sasines). 1979 c. 33.
- (3) Where there is registered, before the appointed day, a heritable security over an estate to which is attached the dignity of baron, the security shall on and after that day (until discharge) affect—
- (a) in the case of an estate of *dominium utile*, both the dignity of baron and the land; and
- (b) in any other case, the dignity of baron.
- 35 (4) In this section—  
 “conveyancing privilege” includes any privilege in relation to prescription;  
 “dignity” includes any quality or precedence associated with, and any heraldic privilege incidental to, a dignity; and
- 40 “registered” has the same meaning as in Part IV of this Act.

## Explanatory Notes

### Clause 55

This clause makes it clear that the payment in question is not extinguished by abolition of the feudal system. It is not subject to extinction under clause 48 or as a perpetual periodical payment under clause 50 or as a feuduty under Part III. This implements recommendation 19. See paragraph 3.56 of the report.

### Clause 56

This clause preserves the jurisdiction and prerogatives of the Lord Lyon King of Arms. It implements recommendation 7. (See paragraph 2.51 of the report).

### Clause 57

This clause deals with the effect of the abolition of the feudal system of land tenure on feudal baronies - that is to say on the type of barony which goes with a piece of land originally granted by the Crown in free barony (*in liberam baroniam*) on a feudal barony title. Land which carries a barony with it can be bought and sold in the normal way. Such baronies are not an aspect of the constitution and have nothing to do with the Crown, except in so far as the Crown is the feudal superior of the land in question. They are therefore within the competence of the Scottish Parliament. See paragraphs 2.43 - 2.44 of the report.

Subsection (1) implements recommendation 5(a) and (b). (Paragraph 2.45 of the report). It abolishes any surviving criminal or civil jurisdiction of barony courts. In fact such jurisdiction is obsolete for all practical purposes. It also abolishes any conveyancing privileges incidental to a barony, such as the ability to convey the barony lands by a general description or the ability to acquire a right to salmon fishings by prescription even although they are not expressly mentioned in the titles to the land. These privileges are not now important in practice and are becoming irrelevant with the spread of registration of title. See paragraphs 2.39 - 2.40 and 5.62 - 5.64 of the report. Subsection (1) expressly preserves the dignity of baron (derived from the former direct connection with the Crown as feudal superior of land held in barony) and any other dignity or office whether or not of feudal origin. The reference to offices is intended to make it clear that the abolition of the feudal system of land tenure will not affect ancient offices in the Royal Household which might be regarded as survivals from a feudal era.

Subsection (2) provides that the retained dignity of baron will no longer attach to the land. It will be a floating dignity which can be bought and sold as incorporeal property and left by will in the normal way. On the death of a baron intestate the barony would transmit to the eldest son or other heir in accordance with the pre-1964 rules on intestate succession. See paragraph 2.41. For the avoidance of doubt it is provided that baronies will not be registrable in the Land Register and that deeds relating to them will not be recordable in the Register of Sasines. This subsection implements recommendation 5(c)(d) and (e). (Paragraph 2.45 of the report).

Subsection (3) is a savings provision for existing heritable securities over barony titles. See *Bristol and West Building Society v Aitken Nairn WS* 1998 SCLR 465 and 1999 SLT 43. It makes it clear that from the appointed day a security over the former *dominium utile* will continue to attach to the land and the dignity of baron and a security over the former *dominium directum* will continue to attach to the dignity.

Subsection (4) makes it clear that “conveyancing privilege” covers, for example, the special rule relating to the prescription of salmon fishings and that the reference to “dignity” includes matters of heraldry and precedence incidental to a dignity, such as the addition of baronial additaments to a coat of arms.

## PART VI

*Kindly Tenants of Lochmaben*

Abolition of  
Kindly Tenancies.

**58.**—(1) The system of land tenure whereby the persons known as the Kindly Tenants of Lochmaben hold land on perpetual tenure without requiring to procure infeftment is, on the appointed day, abolished.

(2) On the appointed day the interest of a Kindly Tenant shall forthwith become the ownership of the land (which shall be taken to include any right of salmon fishing inseverable from the kindly tenancy); and, in so far as is consistent with the provisions of this Act, the land shall be subject to the same subordinate real rights and other encumbrances as was the kindly tenancy.

(3) A right of salmon fishing inseverable from a kindly tenancy shall on and after the appointed day be inseverable from the ownership of the land in question.

*Miscellaneous*

Creation of proper  
liferent.  
1979 c. 33.

**59.**—(1) A proper liferent over land is created—

(a) in a case where the right is registrable under section 2 of the Land Registration (Scotland) Act 1979—

(i) (unless the deed granting or reserving the right makes provision for some later date) on registration; or

(ii) (where provision is made for such a date and the right has been registered) on that date; or

(b) in any other case—

(i) (unless the deed granting or reserving the right makes provision for some later date) on recording of the deed in the Register of Sasines; or

(ii) (where provision is made for such a date and such deed has been so recorded) on that date.

(2) This section is without prejudice to any other enactment, or rule of law, by or under which a proper liferent over land may be created.

(3) In subsection (1)(a) above, “registrable” and “registration” have the meanings respectively assigned to those expressions by section 1(3) of the Land Registration (Scotland) Act 1979.

(4) The references, in subsection (1)(b) above, to a deed being recorded include references to a notice of title deducing title through a deed being recorded.

Obligation to  
make title deeds  
and searches  
available.

**60.** A possessor of title deeds or searches which relate to any land shall make them available to a person who has (or is entitled to acquire) a real right in the land, on all necessary occasions when the person so requests, at the person’s expense.

Prohibition on  
leases for periods  
of more than [X]  
years.

**61.**—(1) Notwithstanding any provision to the contrary in any lease, no lease of land executed on or after the coming into force of this section may continue for a period of more than [X] years; and any such lease which is still operative at the end of that period shall, by virtue of this subsection, be terminated forthwith.

## *Explanatory Notes*

### *Clause 58*

This clause provides for the abolition of kindly tenancies and the conversion of the interest of the kindly tenant to ownership. It implements recommendation 55. See paragraph 8.9 of the report.

Subsection (1) abolishes the tenure. It is in equivalent terms to clause 1.

Subsection (2) converts the interest of the kindly tenant into ownership, which it already is for all practical purposes. It is an equivalent provision to clause 2(1). This allodial ownership will remain subject to the same real rights and encumbrances as the kindly tenancy (for example servitudes or standard securities).

Subsection (3) is a specific provision for the right of salmon fishings of kindly tenants. The right to fish for salmon, in so far as it is an inseverable pertinent of the kindly tenancy, will remain so in the future. See paragraph 8.9 of the report.

### *Clause 59*

This re-states, in non-feudal language, the established rules for the creation of the real right of proper liferent. It does not affect trust liferents. The clause implements recommendation 54. See paragraphs 7.38 - 7.40 of the report.

Subsection (1) provides that a proper liferent is created on registration in the appropriate property register (or on such later date as the deed may provide).

Subsection (2) follows s 3(2) of the Land Registration (Scotland) Act 1979 in saving any special rule of the common law or statute. It is reproduced here largely out of caution. As with the equivalent provision in clause 4, it would accommodate cases involving destinations.

### *Clause 60*

Superiors often hold title deeds which relate in part to other properties and which they are obliged to make available under a clause of assignation of writs (whether expressed in the grant in feu, or implied by s 16(2) of the Land Registration (Scotland) Act 1979). This obligation will fall with feudal abolition. Clause 60 provides a replacement obligation, which is not confined to former superiors. The obligation is owed only to a person who has, or is entitled to acquire, a real right. The clause implements recommendation 37. See paragraph 4.97 of the report.

### *Clause 61*

This clause implements recommendation 64. (See paragraph 9.42 of the report). It is designed to prevent the feudal system from being replaced by a system of very long leases with many of the same defects. Leases of residential property are already restricted in effect to twenty years by section 8 of the Land Tenure Reform (Scotland) Act 1974. However, there is no restriction on the length of other leases. In some areas of Scotland ground leases of 999 years or longer have at times been common.

(2) If a lease of land so executed includes provision (however expressed) requiring the landlord or the tenant to renew the lease then the duration of any such renewed lease shall be added to the duration of the original lease for the purposes of reckoning the period mentioned in subsection (1) above.

5 (3) Nothing in subsection (1) above shall prevent—

(a) any lease being continued by tacit relocation; or

(b) the duration of any lease being extended by, under or by virtue of any enactment.

(4) For the purposes of this section “lease” includes sublease.

10 **62.** After section 26 of the Titles to Land Consolidation (Scotland) Act 1868 there shall be inserted—

“Application for declarator of succession as heir in general or to specified lands.

15

26A. On an application being made by any person having an interest, the Sheriff of Chancery may, if satisfied that—

(a) such deceased person as may be specified in the application died before 10th September 1964 and that person either—

(i) was domiciled in Scotland at the date of his death; or

20

(ii) was the owner of lands situated in Scotland to which the application relates; and

(b) the applicant, or as the case may be such person as may be specified in the application, has succeeded as heir to that deceased, and is either—

25

(i) heir in general; or

(ii) heir to such lands as may be specified in the application,

grant declarator that the applicant, or as the case may be such person as may be specified in the declarator, is the heir in general or heir to the lands so specified.

30 Application for declarator of succession as heir to last surviving trustee under a trust.

35

26B. On an application being made under this section, the Sheriff of Chancery may, if satisfied that—

(a) such deceased person as may be specified in the application was the last surviving trustee named in, or assumed under, a trust;

(b) the trust provides for the heir of such last surviving trustee to be a trustee;

(c) either—

40

(i) the trust is governed by the law of Scotland; or

(ii) lands subject to the trust and to which the application relates are situated in Scotland; and

(d) the applicant has succeeded as heir to the deceased, grant declarator that the applicant is the heir of the deceased and accordingly is a trustee under the trust.

Certain applications to Sheriff of Chancery. 1868 c. 101.

## *Explanatory Notes*

### *Clause 61 (cont'd)*

Subsection (1) provides that no lease of land executed after the clause comes into force (on Royal Assent) may continue for longer than a certain period. The Commission makes no recommendation as to the length of the period. This is left open for decision by the government, which will be able to take into account the responses to the Commission's discussion paper on *Real Burdens* (DP No 106, 1998). Leases, whatever their terms, will come to an end automatically when the end of the period is reached.

Subsection (2) prevents the law from being evaded by using leases which contain obligations to renew.

Subsection (3) deals with tacit relocation, which is the doctrine whereby a lease may be tacitly continued for a year at a time if the tenant continues in occupation and nothing is done to bring the lease to an end. Tacit relocation is not affected by the section. Subsection (3) also preserves the effect of any enactment under, or by virtue of which, the duration of a lease may be extended.

### *Clause 62*

This clause implements recommendation 59. (See paragraphs 9.21 - 9.22 of the report). It modernises a large part of the Titles to Land Consolidation (Scotland) Act 1868 by replacing many pages of provisions on the service of heirs by three sections which enable the same results to be achieved in a simpler way.

PART VI	Construction of reference to service of heir.	26C. A reference in any enactment or deed to a decree of service of heir (however expressed) shall include a reference to a declarator granted under section 26A or 26B of this Act.”.	
Application of 1970 Act to earlier forms of heritable security. 1970 c. 35.	63.—(1)	Sections 14 to 30 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which provisions relate to the assignation, variation, discharge and calling-up etc. of standard securities) shall apply (with the substitution of the word “heritable” for “standard” and subject to such other modifications as may be necessary) as respects any heritable security granted before 29th November 1970 as those provisions apply as respects a standard security.	5 10
	(2)	For the purposes of the said sections 14 to 30 (as modified by, or by virtue of, subsection (1) above), “heritable security” shall, with the modification mentioned in subsection (3) below, include a pecuniary real burden but shall not include a security constituted by <i>ex facie</i> absolute disposition.	15
	(3)	The modification is that the reference to the date in subsection (1) above shall be disregarded.	
Ownership of land by a firm.	64.	A firm may, if it has a legal personality distinct from the persons who compose it, itself own land.	20

## PART VII

## GENERAL

The appointed day.	65.	The Secretary of State may, for the purposes of this Act, by order appoint a day (in this Act referred to as the “appointed day”), being one or other of the terms of Whitsunday and Martinmas.	25
The expression “land”.	66.	In this Act, unless the context otherwise requires, “land” includes all subjects of heritable property which, before the appointed day, are, or of their nature might be, held of a superior according to feudal tenure.	
Feudal terms in enactments and documents: construction after abolition of feudal system.	67.—(1)	Where a term or expression, which before the appointed day would ordinarily, or in the context in which it is used, depend for its meaning on there being a feudal system of land tenure, requires to be construed, in relation to any period from that day onwards—	30
	(a)	in an enactment (other than this Act) passed;	
	(b)	in an enactment contained in subordinate legislation made; or	
	(c)	in a document executed,	35
		before the appointed day, then in so far as the context admits, where the term or expression is, or contains, a reference to—	
	(i)	the <i>dominium utile</i> of the land, that reference shall be construed either as a reference to the land or as a reference to the ownership of that land;	40
	(ii)	an estate in land, that reference shall be construed as a reference to a right in land and as including ownership of land;	

## *Explanatory Notes*

### *Clause 63*

This clause implements recommendation 62. (See paragraph 9.31 of the report). It enables many obsolete or obsolescent provisions in the old conveyancing Acts to be swept away. It does this by providing that the forms and procedures used in relation to standard securities, the modern form of security over land, can be used, with any appropriate modifications, in relation to older forms of heritable security such as the bond and disposition in security. This enables many provisions dealing with the older forms of heritable security, which are now hardly ever encountered in practice, to be repealed.

### *Clause 64*

The prevailing view is that feudal property cannot be owned by partnerships, even although they have a separate legal personality in Scottish law. The reason commonly given for this anomaly is that the obligations, such as military service, originally incumbent on a vassal could not be performed by partnerships. The abolition of the feudal system would give rise to doubt as to the position of partnerships. This clause, which implements recommendation 61, resolves the doubt by making it clear that partnerships having a separate legal personality (as all Scottish partnerships have) can themselves own land. See paragraphs 9.24 - 9.28 of the report. The question whether this clause is within the competence of the Scottish Parliament is discussed at paragraph 9.28.

### *Clause 65*

This clause provides that the appointed day, which is the day when the feudal system would be abolished and many of the provisions of the Act would come into effect, is to be fixed by the Secretary of State by order. This is discussed at paragraph 1.23 of the report. The clause will have to be altered when Part II of the Scotland Act 1998 (which provides for a Scottish Administration) is brought into force. The appointed day is to be either a Whitsunday (28 May) or a Martinmas (28 November) because those are the dates on which feuduty is normally payable.

### *Clause 66*

This clause defines "land". See paragraph 1.22 of the report. The definition is wide enough to include any type of heritable property which could have been held on feudal tenure, thus avoiding the risk that the feudal system would survive in relation to some anomalous type of property. The definition expressly includes land which was not actually held on feudal tenure but which of its nature might have been (eg ground owned under udal law).

### *Clause 67*

This clause implements recommendation 56. (Paragraph 9.6 of the report). It provides for the automatic translation of certain feudal terms which might be found in deeds or enactments dating from before the appointed day but having to be applied after the appointed day. The translations will apply only in so far as the context admits.

(iii) a vassal in relation to land, that reference shall be construed as a reference to the owner of the land;

(iv) feuing, that reference shall be construed as a reference to disposing;

5 (v) a feu disposition, that reference shall be construed as a reference to a disposition;

(vi) taking infeftment, that reference shall be construed as a reference to completing title,

analogous terms and expressions being construed accordingly.

10 (2) On and after the appointed day, any reference in any document executed before that day to a superior shall, where that reference requires to be construed in relation to a real burden which a person is entitled, by virtue of section 17, 18, 23 or, as the case may be, 54 of this Act to enforce on and after that day, be construed as a reference to that person.

15 (3) Subsection (1) above is without prejudice to section 70 of, and Schedules 8 and 9 to, this Act or to any order made under subsection (3) of the said section 70.

(4) In subsection (1) above—

(a) in paragraph (a), “enactment” includes a local and personal or private Act; and

20 (b) in paragraph (b), “subordinate legislation” has the same meaning as in the Interpretation Act 1978.

1978 c. 30.

25 **68.** Any power of the Secretary of State under this Act to make orders, regulations or rules shall be exercisable by statutory instrument; and a statutory instrument containing any such orders, regulations or rules, other than an order under section 65, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Orders, regulations and rules.

30 **69.** As respects any land granted in feu before the appointed day, nothing in this Act shall affect any right (other than a right to feuduty) included in the grant in so far as that right is contractual as between the parties to the grant (or, as the case may be, as between one of them and a person to whom any such right is assigned).

Saving for contractual rights.

**70.—**(1) Schedule 8 to this Act, which contains minor amendments and amendments consequential upon the provisions of this Act, shall have effect.

Minor and consequential amendments and repeals.

35 (2) The enactments mentioned in Schedule 9 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(3) The Secretary of State may by order make such further amendments or repeals, in such enactments as may be specified in the order, as appear to him to be necessary or expedient in consequence of any provision of this Act.

40 (4) In this section “enactment” has the same meaning as in section 67(1)(a) of this Act.

**71.—**(1) This Act—

(a) may be cited as the Abolition of Feudal Tenure etc. (Scotland) Act 1998; and

Short title, commencement and extent.

## *Explanatory Notes*

### *Clause 68*

This clause regulates the making of orders under the Act. It will have to be changed when the Scotland Act 1998 is brought fully into force.

### *Clause 69*

Like other conveyances, grants in feu contain contractual terms, such as warrandice or the conditions which, on registration, become real burdens. Such terms become enforceable immediately on acceptance of delivery of the deed, and thus before the superior-vassal relationship is constituted by registration. As clause 48 makes clear, feudal abolition will extinguish (subject to exceptions) all rights and obligations of a superior *qua* superior. But it is not intended to extinguish contractual rights and obligations, whether created in grants of feu or otherwise. Clause 69 makes the position clear in relation to the former. Even after abolition, a former superior will be able to enforce the terms of a grant in feu against the original vassal insofar as such terms are contractual; and, as with other contracts, the rights can be assigned. But the right to feuduty is expressly excluded, on the ground that part III of the Bill already provides full compensation for its loss.

### *Clause 70*

This section gives effect to the schedules of amendments and repeals. The effect is to cleanse the statute book of a great mass of obsolete legislation. Because enactments made against the background of the feudal system extend over hundreds of years and cover disparate subjects it is impossible to guarantee that all provisions containing feudal terminology or concepts have been discovered. The translation provision in clause 67 should help but, as an added safeguard, power is given by subsection (3) (implementing recommendation 57, paragraph 9.7 of the report) to make further consequential amendments by order. The reference to the Secretary of State will have to be changed once Part II of the Scotland Act 1998 (which provides for a Scottish Administration) is in force.

### *Clause 71*

This clause deals with the short title, the dates of commencement and the territorial extent of the legislation. It will have to be amended for the purposes of introduction in the Scottish Parliament. For example, the word "(Scotland)" might not then be appropriate in the short title and subsections (4), (5) and (6) will require reconsideration.

The amendment to the 1970 Act mentioned in subsection (3) is to the effect that the security subjects in a standard security need be described only in such a manner that they can be identified. This resolves the difficulty created by the decision in *Beneficial Bank plc v McConnachie* 1996 SC 119. The amendment is to be retrospective, for reasons given in paragraphs 9.33 - 9.39 of the report, and (by subsections (1) and (2)(c)) comes into force on Royal Assent. These provisions implement recommendation 63.

## PART VII

(b) subject to subsection (2) below, comes into force on Royal Assent .

(2) There shall come into force on the appointed day—

(a) sections 1 and 2, 4 to 13, 27, 30 to 33, 40, 44 and 45, 48 to 51, 53 to 55, 57 to 60, 62 to 64, 67, 69 and 70(1) (except in so far as relating to paragraph 32(23)(a) of Schedule 8) and (2);

5

(b) Schedules 1 to 3;

(c) subject to paragraph 48(3) of Schedule 8, that Schedule, except paragraph 32(23)(a); and

(d) Schedule 9.

1970 c. 35.

(3) Note 1 to Schedule 2 to the Conveyancing and Feudal Reform 10 (Scotland) Act 1970 shall be deemed to have been originally enacted as amended by the said paragraph 32(23)(a).

(4) Except as provided for in subsections (5) and (6) below, this Act extends to Scotland only.

(5) The amendments in Schedule 8 and the repeals in Schedule 9 have the 15 same extent as the enactments to which they refer; and section 70(1) and (2) shall apply accordingly.

(6) Section 70(3), and section 68 in its application to any order made under section 70(3), extend to every part of the United Kingdom.

## SCHEDULES

### SCHEDULE 1

Section 8(1) and  
(2).

FORM OF NOTICE REQUIRING COMPENSATORY PAYMENT ETC.: CUMULO FEUDUTY

5 "NOTICE UNDER SECTION 8(1) OF THE ABOLITION OF FEUDAL TENURE ETC.  
(SCOTLAND) ACT 1998 (CUMULO FEUDUTY)

To: *[name and address of former vassal]*.

10

This notice is sent by *[name and address of former superior]*. You are required to pay  
the sum of £ *[amount]* as a compensatory payment for the extinction of the *cumulo*  
15 feuduty of £ *[amount]* per annum due in respect of *[give sufficient identification of the*  
*land in respect of which the cumulo feuduty was due]*.

20

The attached appendix shows the total sum due as compensation for the extinction of the  
feuduty and the compensatory payment due by each owner.

25

*(If arrears of the feuduty are also sought, then add:*

You are also required to pay the sum of £ *[amount]* as arrears of the feuduty.)

30

Signed: *[signature either of the former superior or of his agent; and if an agent*  
35 *signs he should put the word "Agent" after his signature]*

40 Date:

*(If payment is to be made to an agent of the former superior then add:*

45 Payment should be made to: *[name and address of agent]*.)".

## **Schedule 1**

This is the statutory form of notice (with appendix) prescribed by clause 8(2) of the Bill for claiming compensation for the extinction of a *cumulo* feuduty. It contains instructions for completing the form, an explanatory note a copy of which must be served with the notice (see clause 8(4) of the Bill) and notes for completion of the appendix. The terms of the notice are discussed at paragraphs 3.14 ff of the report.

SCH. 1

**Appendix referred to in the Notice:****Total compensation payable is £ [amount], allocated as follows:**

Owner (see note for completion 1)	Property (see note for completion 2)	Compensatory payment (see note for completion 3)

*Explanatory Note*

*(This explanation, and the "Notes for completion of the Appendix" which immediately follows it, have no legal effect)*

The feudal system was abolished on [insert date of abolition]. By this notice your former feudal superior is claiming compensation from you for the extinction of the *cumulo* feuduty which affected your property. A *cumulo* feuduty is one which affects two or more properties in separate ownership. This notice must have been sent within two years after the date of abolition.

*Explanatory Notes*

The appendix sets out the total sum due as compensation for the extinction of the *cumulo* feuduty and divides that sum among the owners of the affected properties.

SCH. 1

5 The total compensation payable is that sum which would, if invested in 2½% Consolidated Stock at the middle market price at the close of business last preceding the date of abolition, produce an annual sum equal to the *cumulo* feuduty. In practice the sum is arrived at by multiplying the feuduty by a factor known as the "compensation factor". This factor is [*insert factor*].  
10

If the amount of the compensatory payment allocated to you is £100 or more you can choose to pay the sum due by instalments. You may do this by signing, dating and returning, within eight weeks, the enclosed instalment document.  
15

Unless you are paying by instalments you must pay the compensatory payment allocated to you within eight weeks.

20 Your former feudal superior may also be claiming arrears of feuduty for the period before the date of abolition.

25 If you think that the amount required from you is not due, you are advised to consult your solicitor or other adviser.

30

*Notes for completion of the Appendix*

35

1. Insert the name of each owner.

40 2. Give sufficient identification of each part of the land held in separate ownership (including, where appropriate, the postal address) which was subject to the *cumulo* feuduty.

45 3. Insert the amount of the compensation allocated to each owner.

50

*Explanatory Notes*

Section 8(1) and  
(3).

## SCHEDULE 2

### FORM OF NOTICE REQUIRING COMPENSATORY PAYMENT ETC.: ORDINARY CASE

“NOTICE UNDER SECTION 8(1) OF THE ABOLITION OF FEUDAL TENURE ETC.  
(SCOTLAND) ACT 1998 (ORDINARY CASE)

5

To: *[name and address of former vassal]*.

10

This notice is sent by *[name and address of former superior]*. You are required to pay the sum of £ *[amount]* as a compensatory payment for the extinction of the feuduty of £ *[amount]* per annum due in respect of *[give sufficient identification of the land in respect of which the feuduty was due]*.

15

*(If arrears of the feuduty are also sought, then add:*

20

You are also required to pay the sum of £ *[amount]* as arrears of the feuduty.)

Signed: *[signature either of the former superior or of his agent; and if an agent signs he should put the word “Agent” after his signature]*

25

Date:

30

*(If payment is to be made to an agent of the former superior then add:*

Payment should be made to: *[name and address of agent]*.)”.

35

### *Explanatory Note*

*(This explanation has no legal effect)*

40

The feudal system was abolished on *[insert date of abolition]*. By this notice your former feudal superior is claiming compensation from you for the extinction of the feuduty which affected your property. This notice must have been sent within two years after the date of abolition.

45

The compensatory payment is that sum which would, if invested in 2½% Consolidated Stock at the middle market price at the close of business last preceding the date of abolition, produce an annual sum equal to the feuduty. In practice the sum is arrived at by multiplying the feuduty by a factor known as the “compensation factor”. This factor is *[insert factor]*.

50

**Schedule 2**

This is the statutory form of notice prescribed by clause 8(3) of the Bill for claiming compensation for the extinction of a feuduty which is not a *cumulo* feuduty. It contains instructions for completing the form and an explanatory note a copy of which must be served with the notice (see clause 8(4) of the Bill). The terms of the notice are discussed at paragraphs 3.14 ff of the report.

SCH. 2

If the compensatory payment is £100 or more you can choose to pay the sum by instalments. You may do this by signing, dating and returning, within eight weeks, the enclosed instalment document.

5

Unless you are paying by instalments you must pay the compensatory payment within eight weeks.

10

Your former feudal superior may also be claiming arrears of feuduty for the period before the date of abolition.

15 If you think that the amount required from you is not due, you are advised to consult your solicitor or other adviser.

### SCHEDULE 3

Section 10(1).

#### FORM OF INSTALMENT DOCUMENT

##### "INSTALMENT DOCUMENT"

20

To: *[name and address of former superior or of his agent]*.

25

30 I *[name and address of former vassal]* opt to make the compensatory payment of £ *[amount]* due under the notice dated *[date]* by *[number of instalments: see note for completion]* equal half-yearly instalments of £ *[amount]* on 28 May and 28 November each year, commencing on *[28 May or 28 November]* *[year]*.

35

I enclose payment of £ *[amount]* as an amount payable in addition to the compensatory payment.

40

45 Signed:

50 Date: .".

### **Schedule 3**

This is the statutory form of instalment document prescribed by clause 10(1) of the Bill for use where the compensation due for the extinction of a feuduty is £100 or more and thus qualifies for payment by instalments. It contains instructions for completing the form, an explanatory note a copy of which must be served with the document (see clause 10(1) of the Bill) and a note for completion of the form. Payment by instalments is discussed at paragraphs 3.23 to 3.27 of the report.

## SCH. 3

*Explanatory Note**(This explanation has no legal effect)*

You can choose to pay by instalments by signing, dating and returning this form within eight weeks, but if you do so you must enclose the additional amount (10% over and above the compensatory payment) mentioned in this notice.

The compensatory payment will be payable in 5, 10, 15 or 20 equal instalments (depending on the total amount). The first payment will be made at the first term day of Whitsunday (28 May) and Martinmas (28 November) which follows the return of the instalment document. Payments will be due half-yearly thereafter on 28 May and 28 November until payment in full has been made.

If you fail to pay an instalment within 14 days after the day on which it is due, the whole balance of the compensatory payment will be due at once.

*Note for completion of the form by the former superior**(This note has no legal effect)*

Insert the number of instalments in accordance with the following table:

<b>Compensatory Payment</b>	<b>Number of instalments</b>
£100 but not exceeding £500	5
exceeding £500 but not exceeding £1,000	10
exceeding £1,000 but not exceeding £1,500	15
exceeding £1,500	20.

Section 17(1).

## SCHEDULE 4

FORM OF NOTICE PROSPECTIVELY NOMINATING DOMINANT TENEMENT

"NOTICE PROSPECTIVELY NOMINATING DOMINANT TENEMENT"

**Superior:***(see note for completion 1)*

**Schedule 4**

This is the statutory form of notice prescribed by clause 17(1) of the Bill for use by superiors who wish to convert feudal burdens to neighbour burdens. It contains an explanatory note and notes for completion of the notice. See clause 17 of the Bill and paragraphs 4.26 to 4.47 of the report. On procedural etc matters see clauses 35 and 36 of the Bill and paragraphs 4.64 to 4.68 of the report.

SCH. 4

**Description of land which is to be the servient tenement:**  
*(see note for completion 2)*

**Description of land nominated as dominant tenement:**  
*(see note for completion 2)*

**Specification of condition met:**  
*(see note for completion 3)*

*Explanatory Notes*

SCH. 4

**Terms of real burden:**  
*(see note for completion 4)*

**Any counter-obligation:**  
*(see note for completion 4)*

**Title to the superiority:**  
*(see note for completion 5)*

*Explanatory Notes*

**Title to land nominated as dominant tenement:**  
*(see note for completion 5)*

**Service:**  
*(see note for completion 6)*

**I swear [or affirm] that the information contained in the notice is, to the best of my knowledge and belief, true.**

**Signature of superior:**  
*(see note for completion 7)*

**Signature of notary public:**

**Date: ?.**

*Explanatory Notes*

*Explanatory Note**(This explanation has no legal effect)*

This notice is sent by your feudal superior, who is also a neighbour. In this notice your property (or some part of it) is referred to (prospectively) as the “servient tenement” and neighbouring property belonging to the superior is referred to (again prospectively) as the “dominant tenement”. 5

By this notice the feudal superior asserts that at present the use of your property is subject to certain burdens and conditions enforceable by him and claims the right to continue to enforce the burdens and conditions, not as superior but in his capacity of owner of neighbouring property. The notice, if it is registered in the Land Register or Register of Sasines under section 17 of the Abolition of Feudal Tenure etc. (Scotland) Act 1998, will allow him and his successors, as such owners, to enforce the burdens and conditions after the feudal system is abolished (which will be shortly). 10 15

Normally, for the notice to be valid, there must, on the dominant tenement, be a permanent building which is within 100 metres of the servient tenement. That building must be in use as a place of human habitation or of human resort. However, the presence of a building is not required if the burden gives a right to enter or otherwise make use of the servient tenement, or if it gives a right of pre-emption or redemption, or if the dominant tenement comprises, and the real burden was created for the benefit of, minerals, salmon fishings or some other incorporeal property. 20 25

If you think that there is a mistake in this notice or if you wish to challenge it, you are advised to contact your solicitor or other adviser. 30

*Notes for completion of the notice* 35  
*(These notes have no legal effect)*

1. Insert name and address of superior. 40

2. Describe the land in a way that is sufficient to enable the Keeper to identify it by reference to the Ordnance Map. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines. 45

3. Insert one or more of the following:  
“The dominant tenement has on it a [*specify type of building*] at [*specify address of building*] which is within 100 metres of the servient tenement.”; 50  
“The real burden comprises a right to enter, or otherwise make use of, the servient tenement.”;  
“The real burden comprises a right of [*specify pre-emption or redemption (or both)*].”.

*Explanatory Notes*

“The dominant tenement comprises, and (as is apparent from the terms of the real burden) that burden was created for the benefit of, [*specify minerals or salmon fishings or some other incorporeal property*].”.

- 5 4. Specify by reference to the appropriate Register the deed or deeds in which the real burden or counter-obligation was imposed. Set out the real burden or counter-obligation in full or refer to the deed in such a way as to identify the real burden or counter-obligation.
- 10 5. Where the title has been registered in the Land Register of Scotland and the superior is—
- (a) registered as proprietor, specify the title number;
  - (b) not registered as proprietor, specify the title number and set out the midcouples or links between the person last registered and the superior so as
- 15 sufficiently to identify them.
- Where the title has not been registered in the Land Register and the superior—
- (a) has a recorded title, specify by reference to the Register of Sasines the deed constituting the immediate title;
  - (b) does not have a recorded title, either—
- 20 (i) specify by reference to the Register of Sasines the deed constituting the immediate title of the person with the last recorded title and set out the midcouples or links between that person and the superior so as sufficiently to identify them; or
  - 25 (ii) if there is no such deed, specify the nature of the superior’s title.

6. Do not complete until a copy of the notice has been sent to the owner of the prospective servient tenement (except in a case where this is not reasonably practicable). Then insert whichever is applicable of the following:

- 30 “The superior has sent a copy of this notice by [*specify whether by recorded delivery or registered post or by ordinary post*] on [*date of posting*] to the owner of the prospective servient tenement at [*state address*].”; or

“It has not been reasonably practicable to send a copy of this notice to the owner of the prospective servient tenement for the following reason: [*specify the reason*].”.

- 35 7. The superior should not swear or affirm, or sign, until a copy of the notice has been sent (or otherwise) as mentioned in note 6. Before signing the superior should swear or affirm before a notary public (or, if the notice is being completed outwith Scotland, before a person duly authorised under the local law to administer oaths or receive
- 40 affirmations) that, to the best of the superior’s knowledge and belief, all the information contained in the notice is true. The notary public should also sign. Swearing or affirming a statement which is known to be false or which is believed not to be true is a criminal offence under the False Oaths (Scotland) Act 1933. Normally the superior should swear or affirm, and sign, personally. If, however, the superior is
- 45 legally disabled or incapable (for example, because of mental disorder) his legal representative should swear or affirm and sign. If the superior is not an individual (for example, if it is a company) a person entitled by law to sign formal documents on its behalf should swear or affirm and sign.

*Explanatory Notes*

Section 22(1).

## SCHEDULE 5

FORM OF NOTICE PRESERVING CONSERVATION BODY'S RIGHT TO REAL BURDEN

"NOTICE PRESERVING CONSERVATION BODY'S RIGHT TO REAL BURDEN

**Superior (being a conservation body prescribed under S.I.           ):**  
*(see note for completion 1)*

**Description of land subject to the real burden:**  
*(see note for completion 2)*

**Terms of real burden:**  
*(see note for completion 3)*

*Explanatory Notes*

**Schedule 5**

This is the statutory form of notice prescribed by clause 22(1) of the Bill for use by superiors which are conservation bodies (see clause 21 of the Bill) to convert feudal burdens to conservation burdens. It contains an explanatory note and notes for completion of the notice. See clauses 21 and 22 of the Bill and paragraphs 4.52 to 4.56 of the report. On procedural etc matters see clauses 35 and 36 of the Bill and paragraphs 4.64 to 4.68 of the report.

SCH. 5

**Any counter-obligation:**  
*(see note for completion 3)*

**Title to the superiority:**  
*(see note for completion 4)*

**Service:**  
*(see note for completion 5)*

*Explanatory Notes*

## SCH. 5

**Signature of superior (or agent):**  
*(see note for completion 6)* 5

**Signature of witness:** 10

15

**Name and address of witness:**  
 20

**Date:” .** 25

*Explanatory Note*

*(This explanation has no legal effect)*

This notice is sent by your feudal superior. 30

At present the use of your property is subject to certain burdens and conditions enforceable by the feudal superior. The feudal system is shortly to be abolished. By the regulations mentioned in the notice, the Secretary of State has prescribed that your superior should be a conservation body. Such a body is entitled to enforce certain real burdens (referred to prospectively as “conservation burdens”). These are burdens which have been imposed in the public interest for the preservation or protection either of architectural or historic characteristics of land or of some other special characteristic of land derived from the flora, fauna, or general appearance of the land. By this notice the conservation body is claiming the right to continue to enforce a conservation burden, not as superior but in its capacity as a conservation body. The notice, if it is registered in the Land Register of Scotland or recorded in the Register of Sasines under section 22 of the Abolition of Feudal Tenure etc. (Scotland) Act 1998, will allow the body and its successors to enforce the burden and conditions after the feudal system has been abolished. 35  
 40  
 45

If you think that there is a mistake in this notice or if you wish to challenge it, you are advised to consult your solicitor or other adviser. 50

*Explanatory Notes*

*Notes for completion of the notice*  
*(These notes have no legal effect)*

SCH. 5

- 5 1. Insert the year and number of the relevant statutory instrument and the name and address of the conservation body.
2. Describe the land in a way that is sufficient to enable the Keeper to identify it by  
 10 reference to the Ordnance Map. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
- 15 3. Specify by reference to the appropriate Register the deed or deeds in which the real burden or counter-obligation was imposed. Set out the real burden or counter-obligation in full or refer to the deed in such a way as to identify the real burden or counter-obligation.
- 20 4. Where the title has been registered in the Land Register of Scotland and the superior is—
- (a) infeft, specify the title number;
- 25 (b) uninfef, specify the title number and set out the midcouples or links between the person last infeft and the superior so as sufficiently to identify them.
- Where the title has not been registered in the Land Register and the superior—
- (a) has a recorded title, specify by reference to the Register of Sasines the  
 30 deed constituting the immediate title;
- (b) does not have a recorded title, either—
- (i) specify by reference to the Register of Sasines the deed  
 35 constituting the immediate title of the person last infeft and set out the midcouples or links between the person last infeft and the superior so as sufficiently to identify them; or
- (ii) if there is no such deed, specify the nature of the superior's title.
- 40 5. Do not complete until a copy of the notice has been sent to the owner of the land subject to the burden (except in a case where this is not reasonably practicable). Then insert whichever is applicable of the following:
- “The superior has sent a copy of this notice by [*specify whether by recorded  
 45 delivery or registered post or by ordinary post*] on [*date of posting*] to the owner of the land subject to the real burden at [*state address*].”; or
- “It has not been reasonably practicable to send a copy of this notice to the owner of the land subject to the real burden for the following reason: [*specify the reason*].”.
- 50 6. The notice should not be signed until a copy of it has been sent (or otherwise) as mentioned in note 5. The conservation body or its agent should sign; and if the agent signs he should add his name and address and the words “Agent of [*name of conservation body*].”.

*Explanatory Notes*

Section 28(1).

## SCHEDULE 6

FORM OF NOTICE RESERVING RIGHT TO COMPENSATION IN RESPECT OF EXTINCTION  
OF DEVELOPMENT VALUE BURDEN"NOTICE RESERVING RIGHT TO COMPENSATION IN RESPECT OF EXTINCTION OF  
DEVELOPMENT VALUE BURDEN

**Superior:**  
*(see note for completion 1)*

**Description of land (or part) subject to the real burden:**  
*(see note for completion 2)*

**Terms of real burden:**  
*(see note for completion 3)*

**Schedule 6**

This is the statutory form of notice prescribed by clause 28(1) of the Bill for use by superiors who wish to reserve the right to claim compensation for the loss of development value burdens. It contains an explanatory note and notes for completion of the notice. See clause 28 of the Bill and paragraphs 5.14 to 5.57 of the report. On procedural etc matters see clauses 35 and 36 of the Bill and paragraphs 4.64 to 4.68 of the report.

SCH. 6

**Statement that burden reserves development value:**  
*(see note for completion 4)*

**Title to the superiority:**  
*(see note for completion 5)*

**Details of feu grant:**  
*(see note for completion 6)*

*Explanatory Notes*

SCH. 6

**Amount by which consideration reduced due to burden:**  
*(see note for completion 7)*

**Statement that development value not wholly secured by heritable security:**

**Service:**  
*(see note for completion 8)*

*Explanatory Notes*

By this notice I [A.B.] (*superior*) reserve the right to claim compensation in respect of the extinction of the development value burden(s) set out in this form.

5

I swear [*or affirm*] that the information contained in the notice is, to the best of my knowledge and belief, true.

10 **Signature of superior:**

(*see note for completion 9*)

15

**Signature of notary public:**

20

**Date: .”.**

25

*Explanatory Note*

(*This explanation has no legal effect*)

This notice is sent by your feudal superior.

30 The feudal system is shortly to be abolished. By this notice the feudal superior is claiming that your property is subject to a development value burden. He is reserving the right to claim compensation for the loss of the burden. Compensation so claimed is payable if either during the five year period ending on [*insert date of appointed day*] or during the twenty year period starting on that date something  
35 happens which, had the feudal system not been abolished, would have been a breach of the burden.

40 A development value burden is a special type of real burden designed to reserve for the superior the benefit of any increase in the value of the land arising from the land being freed to be used or dealt with in a way prohibited by the burden. Burdens of this type were typically inserted in feudal grants where the superior gave away land, or sold it very cheaply, on condition that it was used only for some charitable or community purposes (for example, for use only as a community hall or sports field).

45

For the superior to be entitled to reserve the right to claim compensation, the burden must have led to the price paid for your property when it was first sold by the superior being significantly lower than it would otherwise have been.

50

This notice will be registered in the Land Register of Scotland, or recorded in the Register of Sasines, under section 28 of the Abolition of Feudal Tenure etc. (Scotland) Act 1998.

*Explanatory Notes*

## SCH. 6

If you think that there is a mistake in this notice or if you wish to challenge it, you are advised to consult your solicitor or other adviser.

5

*Notes for completion of notice  
(These notes have no legal effect)*

10

1. Insert name and address of superior.

2. Describe the land in a way that is sufficient to enable the Keeper to identify it by reference to the Ordnance Map. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

15

20

3. Specify by reference to the appropriate Register the deed or deeds in which the development value burden was imposed. Set out the burden in full or refer to the deed in such a way as to identify the burden. If the notice is used to reserve rights in relation to more than one development value burden details of each burden should be set out separately, in numbered paragraphs.

25

4. State that the burden reserves the development value. Section 28(6) of the Abolition of Feudal Tenure etc. (Scotland) Act 1998 defines “development value” as “any significant increase in the value of the land arising as a result of the land becoming free to be used, or dealt with, in some way not permitted under the grant in feu”. Set out any information (additional to that provided in the other boxes) which supports that statement.

30

35

5. Where the title has been registered in the Land Register of Scotland and the superior is—

- (a) infeft, specify the title number;
- (b) uninfef, specify the title number and set out the midcouples or links between the person last infeft and the superior so as sufficiently to identify them.

40

Where the title has not been registered in the Land Register and the superior—

- (a) has a recorded title, specify by reference to the Register of Sasines the deed constituting the immediate title;
- (b) does not have a recorded title, either—
  - (i) specify by reference to the Register of Sasines the deed constituting the immediate title of the person last infeft and set out the midcouples or links between the person last infeft and the superior so as sufficiently to identify them; or
  - (ii) if there is no such deed, specify the nature of the superior’s title.

45

50

6. Specify by reference to the appropriate Register the writ granting the relevant land in feu.

55

*Explanatory Notes*

7. State the amount by which the consideration was reduced because of the imposition of the burden. (If the notice relates to more than one burden, the amounts should be shown separately for each burden.) The statement should be made to the best of the superior's knowledge and belief.

8. Do not complete until a copy of the notice has been sent to the owner of the land subject to the burden (except in a case where this is not reasonably practicable). Then insert whichever is applicable of the following:

"The superior has sent a copy of this notice by [*specify whether by recorded delivery or registered post or by ordinary post*] on [*date of posting*] to the owner of the land subject to the burden at [*state address*]."; or

"It has not been reasonably practicable to send a copy of this notice to the owner of the land subject to the burden for the following reason: [*specify the reason*]."

9. The superior should not swear or affirm, or sign, until a copy of the notice has been sent (or otherwise) as mentioned in note 8. Before signing the superior should swear or affirm before a notary public (or, if the notice is being completed outwith Scotland, before a person duly authorised under the local law to administer oaths or receive affirmations) that, to the best of the superior's knowledge and belief, all the information contained in the notice is true. The notary public should also sign. Swearing or affirming a statement which is known to be false or which is believed not to be true is a criminal offence under the False Oaths (Scotland) Act 1933. Normally the superior should swear or affirm, and sign, personally. If, however, the superior is legally disabled or incapable (for example, because of mental disorder) his legal representative should swear or affirm and sign. If the superior is not an individual (for example, if it is a company) a person entitled by law to sign formal documents on its behalf should swear or affirm and sign.

#### SCHEDULE 7

Section 34.

##### FORM OF DISCHARGE [OR RESTRICTION] OF RESERVED RIGHT TO CLAIM COMPENSATION

"DISCHARGE [OR RESTRICTION] OF RESERVED RIGHT TO CLAIM COMPENSATION I, [A. B.] (*designation*), hereby discharge the right to claim compensation reserved by a notice dated (*specify date*) and [recorded in the Register of Sasines for (*specify county*) on (*specify date*) under (*specify fiche and frame*) or registered in the Land Register of Scotland on (*specify date*) against the subjects in title number (*specify number*)] [*add if applicable but only to the extent of (specify restriction) or but only in relation to (specify restriction)*]."

(Execute in accordance with section 3 of the Requirements of Writing (Scotland) Act 1995.)

*Explanatory Notes*

**Schedule 7**

This is the statutory form of discharge or restriction of a reserved right to claim compensation for the loss of development value burdens. See clause 34 of the Bill and paragraphs 5.54 to 5.56 of the report.

Section 70(1).

## SCHEDULE 8

## MINOR AND CONSEQUENTIAL AMENDMENTS

## PART I

## MINOR AND CONSEQUENTIAL AMENDMENTS: GENERAL

- Mines and Metals Act 1592 (c.31)* 5  
(Act of the Parliaments of Scotland)
1. In the Mines and Metals Act 1592—
- (a) for the words “sett in few ferme” substitute “dispone”;
  - (b) for the word “frehalder” substitute “owner”;
  - (c) the words “or few” shall cease to have effect; 10
  - (d) for the words “saidis fewis” substitute “disposition of the saidis mynis”;
  - (e) for the words “four witnesses” substitute “ane witness”; and
  - (f) for the words “set the same in few” substitute “dispone the same or set the same”.
- Redemptions Act 1661 (c.247)* 15  
(Act of the Parliaments of Scotland)
2. In the Redemptions Act 1661 (exercise of right of redemption against heirs and successors), for the words—
- (a) “infetment of fie” substitute “fie”; and
  - (b) “fie infetments” substitute “grants”. 20
- Real Rights Act 1693 (c.22)*  
(Act of the Parliaments of Scotland)
3. In the Real Rights Act 1693 (determination of preferences according to date and priority of registration), for the words from “All Infetments” to the end substitute “reall rights in land shall in all competitions be preferable and preferred according to the date and priority of registration in the General Register of Sasines”. 25
- Lands Clauses Consolidation (Scotland) Act 1845 (c.19)*
- 4.—(1) The Lands Clauses Consolidation (Scotland) Act 1845 shall be amended in accordance with this paragraph.
- (2) In section 7 (parties under disability enabled to sell and convey), the words “heirs of entail,” “estate or,” “married women seised in their own right or entitled to terce or dower, or any other right or interest, husbands,” “or feoffees,” “and as to such married women as if they were sole,” and, in the last two places where they occur, “married women,” shall cease to have effect. 30
  - (3) In section 8 (parties under disability may exercise other powers), the words from “power herein” to “therewith, and the” and, in both places where they occur, “feu duties, ground annuals,” shall cease to have effect. 35
  - (4) Sections 10 (where vendor absolutely entitled, lands may be sold on feu duties, &c.) and 11 (provisions incidental to section 10) shall cease to have effect.
  - (5) In section 12 (power to purchase lands required for additional accommodation), the word “, feu,” in both places where it occurs, shall cease to have effect. 40
  - (6) In section 67 (purchase money payable to parties under disability to be deposited in bank), the words “heir of entail,” “married woman seised in her own right or entitled to terce or dower or any other right or interest, husband,” “on the same heirs, or,” “, or affecting succeeding heirs of entail in any such lands, whether 45

*Explanatory Notes*

**Schedule 8 Part I**

This schedule contains numerous consequential and conveyancing amendments. Many remove feudal terminology or replace it with non-feudal language. See paragraphs 9.1 to 9.20 and 9.29 to 9.32 of the report. Part I of the schedule deals with amendments to public general statutes.

*Mines and Metals Act 1592*

Feudal terminology is replaced by non-feudal language. A requirement of four witnesses for a notarial procedure is replaced by a requirement of one witness. This accords with general policy on corroboration for civil matters.

*Redemptions Act 1661*

Feudal terminology is replaced.

*Real Rights Act 1693*

Feudal terminology is replaced. This Act is not applicable in land registration (see Land Registration (Scotland) Act 1979, sections 7, 29(2) and schedule 3) and accordingly the Register of Sasines is specified.

*Lands Clauses Consolidation (Scotland) Act 1845*

**Section 7**

Obsolete references are removed.

**Section 8**

Feudal terminology is removed.

**Sections 10 and 11**

These provisions relate to the disposal of land to the purchasing authority in consideration for feuduty or ground annual and fall to be repealed.

**Section 12**

Feudal terminology is removed.

**Sections 67, 69 and 70**

Obsolete references are removed.

**Section 73**

This section falls to be repealed with the abolition of entails. See Part V of the Bill, implementing recommendation 58, paragraph 9.17 of the report.

**Sections 74, 76 and 77**

References to “estate” are replaced by appropriate terminology. See paragraph 9.4 of the report.

**Section 79**

References to feudal terminology and entails are removed.

**Section 80 and Schedule (B)**

Feudal terminology is removed. This also involves the repeal of Schedule (B) which is the style of statutory conveyance if the consideration is feuduty or ground annual.

imposed and constituted by the entailer, or in virtue of powers given by the entail, or in virtue of powers conferred by any Act of Parliament” and “same heirs, and the” shall cease to have effect.

(7) In each of sections 69 (sums to be deposited, or paid to trustees) and 70 (sums to be paid to parties), the word “coverture,” and the word “husbands,” shall cease to have effect.

(8) Section 73 (special provision for lands to be held under entail etc.) shall cease to have effect.

(9) In each of sections 74 (completion of title on deposit of purchase money or compensation) and 76 (further provision in that regard), for the word “estate” substitute “right”.

(10) In section 77 (application of money deposited), for the word “estates” substitute “rights”.

(11) In section 79 (expenses in cases of money deposited), the words “feu or” and “, and of re-entailing any of such lands,” shall cease to have effect.

(12) In section 80 (form of conveyances)—

(a) the words “feus and”, in both places where they occur, shall cease to have effect;

(b) for the words “the schedules (A.) and (B.) respectively” substitute “schedule (A.)”; and

(c) the words “the particular register of sasines kept for the county, burgh, or district in which the lands are locally situated, or in”, “for Scotland kept at Edinburgh, within sixty days from the last date thereof, which the respective keepers of the said registers are hereby authorized and required to do,” “feudal” and from “: Provided always” to the end shall cease to have effect.

(13) In section 93 (proceedings in regard to lands in commonalty etc.), the words “; and if such lands be part of a barony a like notice shall be given to the superior or baron” shall cease to have effect.

(14) In section 100 (deposit of money on refusal to accept redemption), for the word “estate” substitute “right”.

(15) In the preamble to sections 107 to 111, the words “any feu duty, ground annual, casualty of superiority, or” shall cease to have effect.

(16) The side note to section 107 shall be “Requirement to continue certain payments.”.

(17) In section 109 (discharge of part of lands from charge), the words “such feu duty, ground annual, casualty of superiority, or any” shall cease to have effect.

(18) In section 110 (deposit in case of refusal to discharge), the words “feu duty, ground annual, casualty of superiority,” shall cease to have effect.

(19) In section 117 (power to purchase interests in lands the purchase of which may have been omitted by mistake), the word “estate,” in each place where it occurs, shall cease to have effect.

(20) In section 118 (valuation of lands), for the words—

(a) “estate or interests” substitute “right or interest”; and

(b) “estate, or interest” substitute “right, or interest”.

(21) In section 119 (payment of expenses of litigation), for the word “estate”, in both places where it occurs, substitute “right”.

(22) In section 124 (lands to be conveyed to the purchasers), the words from “, by deed” to the end shall cease to have effect.

## *Explanatory Notes*

### *Schedule 8 Part I (cont'd)*

The requirement that the Schedule conveyance has to be registered within sixty days is removed. See *Heriot's Trustees v Caledonian Railway Co* 1915 SC (HL) 52. This provision was a relic of the old rules for recording instruments of sasine, and is not now necessary. At the time of enactment the sixty day period applied to all instruments of sasine. The rule no longer applies elsewhere and there seems no justification for this anomalous application. See also paragraph 9.30 of the report.

The definition of “deed” and “conveyance” in the Titles to Land Consolidation (Scotland) Act 1868 covers the statutory conveyance under section 80.

#### **Section 93**

The reference to lands being held on a barony title is removed following the removal of baronies from land law. See clauses 2 and 57 of the Bill, and paragraphs 2.31 ff of the report.

#### **Section 100**

A reference to “estate” is replaced by appropriate terminology.

#### **Preamble to sections 107 to 111, and sections 109 and 110**

References to feudal terminology and ground annuals are removed.

#### **Section 117**

References to “estate” are removed.

#### **Sections 118 and 119**

References to “estate” are replaced by appropriate terminology.

#### **Section 124**

The rules on the authentication of deeds by the acquiring authority are no longer necessary given the Requirements of Writing (Scotland) Act 1995, and can be repealed. If the acquiring authority is to transfer land usual conveyancing procedures should, so far as possible, apply.

#### **Section 125**

A reference to “estate” is replaced by appropriate terminology.

#### **Section 126**

This section is purely feudal and can be repealed.

#### **Section 127**

This spent provision relating to prison assessments can be repealed.

SCH. 8 (23) In section 125 (effect of word “dispone” in conveyances), for the word “estate” substitute “right”.

(24) Sections 126 (superiorities not to be affected by lands being taken for the purposes of the Act) and 127 (antiquated provisions relating to the prison assessment) shall cease to have effect. 5

(25) Schedule (B.) (form of conveyance in consideration of feu duty or rent-charge) shall cease to have effect.

*Entail Amendment Act 1848 (c.36)*

5.—(1) The Entail Amendment Act 1848 shall be amended in accordance with this paragraph. 10

(2) Sections 1 to 31 (heir born after date of entail may disentail; and heir born before such date may do so with consent of heir apparent under entail, etc.) shall cease to have effect.

(3) In section 32 (form and effect of instrument of disentail etc), the words from “may be in the form” to “in terms of this Act;” shall cease to have effect. 15

(4) Sections 33 to 45 (application to court by heir of entail in possession of entailed estate, etc.) shall cease to have effect.

(5) In section 47 (Act not to be defeated by trusts)—

- (a) for the words “land or estate”, wherever they occur, substitute “land”;
- (b) the words “dated on or after the first day of August one thousand eight hundred and forty-eight” shall cease to have effect; 20
- (c) the words “fee simple”, in each of the three places where they occur, shall cease to have effect;
- (d) for the words “lands or estate, with infeftment thereon in favour of such party” substitute “land”; 25
- (e) the words “the superior of such lands or estate, and of’ shall cease to have effect; and
- (f) for the words “securities thereon” substitute “securities over such land”.

(6) In section 48 (Act not to be defeated by life-rents)—

- (a) for the words “It shall be competent to grant an estate in Scotland limited to a liferent interest in favour only of a party in life at the date of such grant; and where any land or estate” substitute “Where any land”; 30
- (b) the words “dated on or after the first day of August one thousand eight hundred and forty eight”, “fee simple” and “the superior of such lands or estate, and of’ shall cease to have effect; 35
- (c) for the words “such estate” substitute “such land”; and
- (d) for the word “thereon” substitute “over such land”.

(7) In section 49 (Act not to be defeated by leases), the words “or estate”, in both places where they occur, and the words “dated on or after the said first day of August one thousand eight hundred and forty eight” shall cease to have effect. 40

(8) Sections 50 (consents to be in writing and to be irrevocable) and 51 (court may make acts of sederunt) shall cease to have effect.

(9) For section 52, substitute—

“Interpretation. 52. In this Act, the word “land” shall include all heritages.”.

(10) The Schedule (form of instrument of disentail) shall cease to have effect. 45

*Explanatory Notes*

*Schedule 8 Part 1 (cont'd)*

*Entail Amendment Act 1848*

**Sections 1 to 31, 33 to 45, and 50 and 51**

The sections fall to be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

**Section 32**

This provision survives. It relates to the effect of disentailing lands. The statutory disentailing of lands in clause 44 has equivalent effect to disentailing under this provision. As a result some slight amendment is needed to remove reference to the statutory style for an instrument of disentail.

**Section 47**

This section limits the creation of trusts which are intended to have the same effect as entails. Feudal terminology is removed, as are references to "estate". English terminology (such as "fee simple") is also removed. The limitation of the section to deeds dated after 1 August 1848 is no longer necessary given section 8 of the Entail (Scotland) Act 1914.

**Section 48**

This section limits the creation of liferents intended to have the same effect as entails. Following section 18(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 it is only relevant to deeds granted before 25 November 1968. Feudal terminology is removed, as are references to "estate". English terminology (such as "fee simple") is also removed. The limitation of the section to deeds dated after 1 August 1848 is no longer necessary given section 8 of the Entail (Scotland) Act 1914.

**Section 49**

This section prevents the creation of entails by use of leases. Again the limitation to deeds created after 1 August 1848 is no longer necessary. References to "estate" are removed.

**Section 52**

The replacement section removes existing definitions which are covered by the repeal of a number of provisions, and by the Interpretation Act 1978. No definition of Court of Session is necessary now given RCS 14.2(h). The definition of "land" is slightly amended to bring it into line with the Entail (Scotland) Act 1914.

**Schedule**

This is repealed with the abolition of entails, and is consequential upon the amendment of section 32.

*Registration of Leases (Scotland) Act 1857 (c.26)*

SCH. 8

6.—(1) The Registration of Leases (Scotland) Act 1857 shall be amended in accordance with this paragraph.

(2) In section 2 (effectuality of recorded leases), for the words “infefment is  
5 posterior in date to” substitute “title is completed after”.

(3) Sections 4 (assignments in security), 5 (presentation for registration by person who is not original lessee or assignee), 8 (executor’s completion of title by recording notarial instrument), 9 (assignee dying without recording assignation) and 11 (entering trustee on sequestrated estate on register) shall cease to have effect.

10 (4) In section 16(1) (equivalence of registration to possession), for the words “, writs of acknowledgment, and notarial instruments” substitute “and writs of acknowledgment”.

(5) Schedules (C) (form of notarial instrument in favour of party who is not original grantee) and (F) (form of notarial instrument in favour of executor in  
15 recorded lease or assignation in security or of trustee on sequestrated estate) shall cease to have effect.

*Land Registers (Scotland) Act 1868 (c.64)*

7.—(1) The Land Registers (Scotland) Act 1868 shall be amended in accordance with this paragraph.

20 (2) In section 3 (writs of each county to be kept separate in general register of sasines), for the words—

(a) “warrant of registration herein-after provided for,” substitute “application for registration”; and

(b) “said warrant,” substitute “that application”.

25 (3) The side note to section 5 shall be “Recording writ in other county to which it applies.”; and in that section—

(a) for the words from the beginning to “thereon applicable” substitute “Where any writ contains land or heritages in more than one county and application has not been made for registration in relation”;

30 (b) for the word “warrant”, where it occurs for the second time, substitute “application”;

(c) for the words “by a new warrant of registration thereon” substitute “for registration”;

(d) the words “in terms of such new warrant” shall cease to have effect; and

35 (e) for the words “such writ applies, and to which such new warrant is applicable” substitute “it applies”.

(4) In section 6 (provision for writs transmitted by post to general register of sasines), the words “in terms of the warrant of registration thereon” shall cease to have effect.

40 (5) In section 12 (registration in general register of sasines equivalent in certain cases to registration in the books of council and session)—

(a) for the words from the beginning to “being so registered in the said register of sasines,” substitute—

“A writ competent to be registered in the general register of  
45 sasines need not be presented to be registered in the books of council and session for the purpose of—

(a) preservation; or

(b) preservation and execution.

If an application for registration of such a writ in the general  
50 register of sasines specifies that registration is for either of those

## *Explanatory Notes*

### *Schedule 8 Part 1 (cont'd)*

#### *Registration of Leases (Scotland) Act 1857*

##### **Section 2**

The word “infetment” is no longer appropriate, and is replaced with an expression which has an equivalent meaning in post-feudal terms.

##### **Section 4**

This section relating to the grant of assignations in security over registered leases is no longer necessary following section 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

##### **Sections 5, 8, 9, and 11, and Schedules (C) and (F)**

These provisions relate to the completion of title by notarial instruments. Notarial instruments are, largely, to be removed from the system of conveyancing. See paragraphs 7.27 ff of the report. Parties requiring to complete title can use notices of title under section 4 of the Conveyancing (Scotland) Act 1924, which is applied to registered leases by section 24 of that Act.

##### **Section 16**

Given the repeal of sections 5, 8, 9, and 11 the reference to notarial instruments is otiose.

#### *Land Registers (Scotland) Act 1868*

We have recommended that it should no longer be necessary for warrants of registration to be used when deeds are presented for recording in the Register of Sasines. See recommendation 52 and paragraphs 7.34 ff of the report. Deeds will be presented with a duly completed application for registration (which will be in a form to be prescribed).

##### **Sections 3, 5, 6, and 12**

References to warrants of registration are replaced by references to applications for registration. This has meant substantial rewriting of the opening of section 12 to provide that where a writ is being registered for preservation and execution it is not necessary to register it in the Books of Council and Session as long as the application specifies that the writ is to be registered for such a purpose. Recording in the Register of Sasines will continue to be sufficient.

##### **Section 14**

This section is relevant to entails and can be repealed with their abolition.

SCH. 8

purposes, then on registration in that register the writ shall be held to be registered also in the books of council and session for the purpose in question; and the writ registered"; and

(b) the words "and shall be in the form, as nearly as may be, of the Schedule (B.) to this Act annexed," shall cease to have effect. 5

(6) Section 14 (certain clauses in entail no longer necessary) shall cease to have effect.

*Titles to Land Consolidation (Scotland) Act 1868 (c.101)*

8.—(1) The Titles to Land Consolidation (Scotland) Act 1868 shall be amended in accordance with this paragraph. 10

(2) In section 3 (interpretation)—

(a) for the words "The words "superior," "vassal," "grantor,"" substitute "The words "grantor","";

(b) for the words "such superior, vassal, grantor" substitute "such grantor";

(c) the words "The words "Crown writ" shall extend to and include all charters, precepts, and writs from Her Majesty, and from the Prince; and" shall cease to have effect; 15

(d) the definition of "charter" and of "writ" shall cease to have effect;

(e) in the definition of "deed" and of "conveyance", the words "charters," "whether containing a warrant or precept of sasine or not, and", "feu contracts, contracts of ground annual," " , whether such decrees contain warrant to infeft or precept of sasine or not," and " , procuratories of resignation *ad remanentiam*," shall cease to have effect; 20

(f) the definition of "deed of entail" shall cease to have effect;

(g) in the definition of "instrument", the words "authorized by this Act, or by any of the Acts hereby repealed," shall cease to have effect; and 25

(h) the definition of "infeft" and "infeftment" shall cease to have effect.

(3) Sections 4 (Acts repealed), 5 (in conveyances of land etc. not held burgage, certain clauses may be inserted in short forms), 6 (import of clause expressing manner of holding) and 7 (in conveyances of burgage property certain clauses may be inserted in given forms) shall cease to have effect. 30

(4) In section 8 (import of certain clauses)—

(a) for the words "forms Nos. 1 and 2" substitute "form No. 1";

(b) the words " , and to all open procuratories, clauses, and precepts, if any, and as the case may be," shall cease to have effect; 35

(c) for the words "rents in these forms" substitute "rents";

(d) for the words "warrantice in these forms" substitute "warrantice";

(e) for the words "feu duties, casualties, and public burdens, in form No. 1 of schedule (B.) hereto annexed," substitute "public burdens";

(f) for the words "feu duties or other duties and services or casualties payable or prestable to the superior, and of all public, parochial," substitute "public"; 40

(g) the words from " , and the clause of obligation" to "other public, parochial, and local burdens, due from or on account of the lands conveyed prior to the date of entry" shall cease to have effect; and 45

(h) for the words from "in these two forms" to "to them" substitute "shall, unless specially qualified, have the meaning and effect assigned".

(5) Sections 9 (conditions of entail may, in conveyances of entailed lands, be inserted by reference merely) and 10 (real burdens may be referred to as already in the register of sasines) shall cease to have effect. 50

## *Explanatory Notes*

### *Schedule 8 Part I (cont'd)*

#### *Titles to Land Consolidation (Scotland) Act 1868*

##### **Section 3**

Feudal terminology is removed, as are references to the authorisation of the use of notarial instruments. In relation to notarial instruments, see recommendation 51 and paragraphs 7.27 ff of the report. The definition is still necessary, despite our general policy, because sometimes it is used in the Act to refer to past registrations.

##### **Section 4 and Schedule (A)**

This provision is repealed because it is spent.

##### **Section 5**

This can be repealed with the repeal of sections 6 and 7. The definitions in section 8 are now free-standing.

##### **Sections 6, 100, 110, 146 and Schedule (CC) Forms Nos. 1 and 2**

These provisions are repealed because they are purely feudal.

##### **Section 7 and Schedule (B) Form No 2**

This provision relates to burgage tenure, which is abolished along with other feudal tenures.

##### **Section 8**

The amendments remove feudal terminology, and also references to Schedule (B) Form No 2, which applies to burgage tenure.

##### **Section 9**

This section is no longer necessary with the abolition of entails, and its effect can be duplicated using the usual statutory forms of description by reference.

##### **Section 10 and Schedule (D)**

This provision is unnecessary. Its effect is duplicated by section 32 of the Conveyancing (Scotland) Act 1874.

##### **Section 12 and Schedule (F) (Form No 2)**

The references to notarial instruments and warrants of registration are removed. The substance of the section remains in that parties should be able to elect to record or register only part of a deed if they so wish.

##### **Section 14**

This section is no longer necessary with the abolition of entails.

##### **Section 15**

This provision, providing for the direct recording of a conveyance in place of the recording of an instrument of sasine, is no longer necessary. Clause 4 of the Bill renders amendment of this provision unnecessary.

##### **Section 17 and Schedule (J)**

This provision relates to notarial instruments and can be repealed. It is practically obsolete in modern practice.

##### **Section 18**

This provision is obsolete because of section 6 of the Conveyancing (Scotland) Act 1874. In any event it relates to the purely feudal practice of consolidation of the right of a vassal with the right of a superior. It can be safely repealed.

##### **Sections 19, 23 and Schedules (L) and (N)**

The provisions allowing a notarial instrument to be used are unnecessary given the availability of a notice of title under section 4 of the Conveyancing (Scotland) Act 1924.

##### **Sections 24 and 26**

References to warrants of registration are removed.

##### **Section 25 and Schedules (O) and (LL)**

The substituted section 25 makes clear that a liquidator has right to complete title to lands and securities (and by reference to section 24 of the 1924 Act title to leases) and can complete title using the provisions in the 1924 Act. The Schedules are deleted as unnecessary, given the existence of statutory forms in the 1924 Act. This replacement section removes any doubt that a liquidator can complete title to lands (see G L Gretton, "The Title of a Liquidator" 1984 JLSS 357; A J McDonald, "Bankruptcy and the Race to the Register" 1985 JLSS 20; G L Gretton and K G C Reid, "Insolvency and Title: A Reply" 1985 JLSS 109.) See paragraph 7.32 of the report.

##### **Sections 27 to 50**

These provisions are repealed and replaced by new sections 26A-C which are inserted by clause 62 of the Bill. See recommendation 59 and paragraphs 9.21 and 9.22 of the report.

##### **Section 51**

This provides for rule-making powers of the Court of Session in relation to the service of heirs. The section is amended to remove the references to sheriff courts other than the Sheriff of Chancery (who currently deals with all cases). The section is also amended to remove references to matters generally dealt with in secondary legislation (eg the times when court may be held).

- (6) In section 12 (clause directing part of conveyance to be recorded)—
- (a) the words from “with a warrant of registration” to “hereto annexed,” shall cease to have effect;
- (b) for the words “such keeper shall” substitute “the keeper may”; and
- 5 (c) the words from—
- (i) “and warrant of registration;” to “on whose behalf the conveyance is presented”; and
- (ii) “or to expedite and record” to the end, shall cease to have effect.
- 10 (7) Sections 14 (certain clauses in entails no longer necessary), 15 (instrument of sasine no longer necessary), 17 (not necessary to record the whole conveyance or discharge), 18 (instrument of resignation *ad remanentiam* unnecessary), 19 (notarial instruments in favour of general disponees) and 23 (notarial instruments in favour of parties acquiring rights to unrecorded conveyances) shall cease to have effect.
- 15 (8) In section 24 (mode of completing title by judicial factor on trust estate etc.), the words “, with warrant of registration thereon,” shall cease to have effect.
- (9) For section 25 (mode of completing title by trustee in sequestration etc.) substitute—
- “Deduction of 25. The liquidator in the winding up of a company shall, for the  
20 title by liquidator. purposes of sections 3 (disposition etc. by person with unrecorded title) and 4 (completion of title) of the Conveyancing (Scotland) Act 1924 (including those sections as applied to registered leases by section 24 of that Act), be taken to be a person having right to any land belonging to the company.”.
- 25 (10) In section 26 (heritable property conveyed for religious or educational purposes to vest in disponees or their successors), the words “with warrant of registration thereon in terms of this Act, or when followed by notarial instrument expedite, and with warrant of registration thereon recorded” and “feued,” shall cease to have effect.
- 30 (11) Section 27 to 50 (service of heirs: as saved by section 37(1)(d) of the Succession (Scotland) Act 1964) shall cease to have effect.
- (12) In section 51 (power of Court of Session to pass acts of sederunt)—
- (a) the word “said”, where it first occurs; and
- (b) the words from “or Sheriffs of counties” to the end,  
35 shall cease to have effect.
- (13) In section 62 (effect of decree of adjudication or sale), for the words from “feudal titles to said lands” to the end, substitute “title by recording the decree as a conveyance or by using the decree as a midcouple or link of title.”.
- 40 (14) Sections 63 to 93 (Crown writs), 96 (provision for temporary absence or disability of Sheriff of Chancery), 100 (all writs and charters from subject superiors may refer to *tenendas* and *reddendo*) 104 to 109 (ways of completing title where superior did not or could not grant entry), 110 (mode of relinquishing superiority), 111 (investiture by over superior), 112 (forfeiture or relinquishment of rights of superiority does not operate as contravention of entail, etc.), 113 (payment in lieu of  
45 casualties of superiority in case of lands conveyed for religious purposes), 114 and 116 (provisions as respects writs of *clare constat*, etc.) shall cease to have effect.
- (15) For section 117 (heritable securities to form moveable estate; except where conceived in favour of heirs, excluding executors, and *quoad fiscum*) there shall be substituted—

14 & 15 Geo.5 c.  
27.

1964 c.41.

## Explanatory Notes

### Schedule 8 Part I (cont'd)

#### Section 62

Feudal terminology is replaced.

#### Sections 63 to 93

These provisions relate to Crown writs. Their repeal is explained at paragraphs 9.19 and 9.20 of the report.

#### Section 96

This section (relating to the appointment of substitutes for the Sheriff of Chancery) is repealed as being unnecessary. The powers of Sheriff of Chancery are now exercised by the Sheriff Principal of Lothian and Borders and temporary vacancies of that office will be filled in the usual manner, and automatically solve the problem of any temporary vacancy in the office of Sheriff of Chancery.

#### Sections 104 to 109

These provisions relate to entry with a superior and are obsolete given the introduction of implied entry under section 4(2) of the Conveyancing (Scotland) Act 1874. They are also purely feudal.

#### Sections 111, 112 and 145

These provisions are repealed because they are spent.

#### Section 113

This provision has been virtually repealed, relating as it does to payments in lieu of casualties.

#### Sections 114 to 116

These sections, relating to writs of *clare constat* and other deeds granted by superiors, are purely feudal and are accordingly repealed.

#### Section 117

The replacement provision removes the remaining feudal terminology while retaining the essence of the provision, that heritable securities are moveable in succession (although not in relation to legal rights).

#### Sections 118, 119, 121 to 124, 131 to 135 and Schedules (FF), (GG), (HH), (NN) and (OO)

These provisions - applicable to bonds and dispositions in security - are now unnecessary given clause 63 of the Bill, implementing recommendation 62. See paragraph 9.31 of the report.

#### Section 120

This section is amended to remove feudal terminology. It governs the recording and ranking of all heritable securities.

#### Sections 126, 127, 130 and Schedules (JJ), (KK), and (MM)

These provisions for completion of title to heritable securities are repealed because the heritable creditor can use a notice of title under section 4 of the Conveyancing (Scotland) Act 1924. Notarial instruments are generally being removed from conveyancing practice. See paragraphs 7.27 ff of the report.

#### Section 137

This section is repealed as being unnecessary in post-feudal Scotland where there will only be allodial ownership.

#### Section 140

The reference to progressive duty is repealed it having ceased to be payable in 1871.

#### Section 141

This is repealed in implementation of recommendation 52 (see paragraphs 7.34 ff of the report) to abolish warrants of registration.

#### Section 142

This section, authorising the direct recording of conveyances in the Register of Sasines, is amended to remove feudal terminology.

#### Section 143

For infefment to take place, a deed must be recorded with warrant of registration endorsed thereon. If the warrant is invalid, then infefment cannot take place. This section authorises the re-recording of the deed. It has been amended to remove feudal terminology and references to warrants of registration.

#### Section 144

This section is no longer necessary with the repeal of the Erasures in Deeds (Scotland) Act 1836 (erasures in deeds are covered by section 54 of the Conveyancing (Scotland) Act 1874) and the removal of notarial instruments.

#### Section 146

This section is not necessary as it is clear that real burdens must appear in full in the title of the servient tenement, and can be referred to in subsequent deeds (Conveyancing (Scotland) Act 1874, s 32). Failure to refer to a real burden in a subsequent deed does not lead to the extinction of the real burden. Omission of real burdens contrary to a specific provision in the burdens can be remedied (by the Conveyancing (Scotland) Act 1924, s 9).

#### Section 147

This section is no longer necessary.

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“Heritable security in succession of creditor in the security. 117. In the succession of the creditor in a heritable security, the security shall be moveable estate; except that in relation to the legal rights of the spouse, or of the descendants, of the deceased it shall be heritable estate.”.

(16) Sections 118 (form of bond and disposition in security) and 119 (import of standard clauses in bond and disposition in security) shall cease to have effect. 5

(17) The side note to section 120 shall be “Securities may be registered.”; and in that section the words—

(a) “, whether dated before or after the commencement of this Act,”; and

(b) the proviso, 10

shall cease to have effect.

(18) Sections 121 to 123 (sale under pre-1970 heritable securities), 124 (form for transfer of pre-1970 heritable security) 126, 127 and 130 (completion of title by notarial instrument), 131 (saving), 132 and 133 (provision for forms as respects pre-1970 heritable securities), 134 (application of the Act to all heritable securities), 135 (applicability of pre-1845 forms for heritable securities), 137 (applicability to lands held by any description of tenure) and 141 (requirement for warrant of registration) shall cease to have effect. 15

(19) In section 140 (additional sheets added to writs), the words “, and subsequent sheets (if any) shall be chargeable with the appropriate progressive duty” shall cease to have effect. 20

(20) In section 142 (recording of conveyances in register of sasines)—

(a) the words “, and all instruments hereby” and “, with warrants of registration written thereon respectively,” shall cease to have effect; and

(b) for the words “, in the same manner as instruments of sasine, or notarial instruments, are at present recorded, and the same” substitute “and”. 25

(21) For section 143 substitute—

“Recording anew. 143. Where there is an error or defect in recording a deed or conveyance in the Register of Sasines it shall be competent to record it anew.”. 30

(22) Sections 144 (erasures), 145 (challenge to pre-1868 warrant of registration), 146 (insertion of real burdens etc. in a conveyance or deed applicable to lands), 147 (nothing in Act to affect prohibition against sub-infeudation or to take away or impair certain rights or remedies competent to a superior), 150 (debts affecting lands exchanged for other lands), 152 (lands held by the tenure of booking), 154 (personal interest of keeper of register), 156 (short form of letters of inhibition), 161 (review of certain judgments etc.), 162 (acts of sederunt for purposes of Act etc.) and 163 (old forms of conveyances may still be used) shall cease to have effect. 35

(23) The Schedules, except Schedules (B.) No.1, (F.) No.1, (G.), (PP.) and (RR.), shall cease to have effect; and in Schedule (B.) No. 1 the words— 40

(a) from “to be holden” to “*as the case may be*];”; and

(b) “feu duties, casualties, and”,

shall cease to have effect.

#### *Conveyancing (Scotland) Act 1874 (c.94)*

9.—(1) The Conveyancing (Scotland) Act 1874 shall be amended in accordance with this paragraph. 45

(2) In section 3 (interpretation)—

(a) in the definition of “Land” or “lands”, for the words “are or may be” substitute “prior to the day appointed by order made under section 65 of the Abolition of Feudal Tenure etc. (Scotland) Act 1998 were, or might be,”; 50

## *Explanatory Notes*

### *Schedule 8 Part I (cont'd)*

#### **Section 150**

This section is repealed because it is obsolete in modern practice, being intended to cover cases where properties excambed are under entail. Most properties have been disentailed and we recommend the disentailing of any remaining entailed land. See Part V of the Bill and paragraphs 9.8 ff of the report.

#### **Section 152**

This section is repealed as a consequence of the abolition of booking tenure (the special form of feudal tenure found in Paisley). See paragraph 8.3 of the report.

#### **Section 154**

This section is no longer necessary.

#### **Section 161**

This provision is not necessary given the ordinary rules for reclaiming and appeals.

#### **Section 162**

This provision is repealed as being unnecessary because the Court of Session and Sheriff Court have general power to make relevant rules.

#### **Section 163**

This section authorises the use of old (pre-1845) feudal forms of deed and is no longer necessary.

### *Conveyancing (Scotland) Act 1874*

#### **Section 3**

Feudal terminology is removed.

#### **Section 4 and Schedules A and B**

The deemed entry with the superior on recording of a deed is removed as unnecessary.

#### **Section 5**

This provision relates to the feudal casualty of composition, and can be repealed.

#### **Sections 6 and 7 and Schedule C**

These provisions relate to the consolidation of different levels of *dominium* in the feudal system, and can be repealed.

#### **Section 8 and Schedule D**

This relates to the allocation of feuduty and can be repealed.

(b) the definitions of “Estate in land” and of “Superior” and “superiority” shall cease to have effect;

5 (c) in the definition of “heritable securities” and “securities”, the words “, and shall also, when used in this Act, include real burdens and securities by way of ground annual” shall cease to have effect; and

(d) the definitions of “Infeftment”, “Feu” and “feu-duty” and “Casualties” shall cease to have effect.

10 (3) Sections 4 (abolition of renewal of investiture), 5 (compositions payable by corporations or trustees or persons having separate interests), 6 (consolidation of superiority with property), 7 (consolidation not to affect or extend superior’s rights) and 8 (memorandum of allocation of feu-duty) shall cease to have effect.

(4) The side note to section 10 (as saved by section 37(1)(d) of the Succession (Scotland) Act 1964) shall be “Completion of title when deceased heir not served”; and in that section —

1964 c.41.

15 (a) the words “neither infeft nor served, but” and “by virtue of this Act,” shall cease to have effect;

(b) for the words “last infeft in” substitute “who held the last recorded title to”;

(c) the words “and assignation” shall cease to have effect;

(d) for the words—

20 (i) “be infeft in” substitute “complete title to”; and

(ii) “be held to be duly infeft in” substitute “shall have a completed title to”; and

(e) the words from “Such petition” to the end shall cease to have effect.

25 (5) Sections 14 (legal remedies to prevent entry preserved), 18 (entails not to bar redemption), 19 (redemption of casualties by a mid-superior), 20 (commutation of carriages and services by agreement etc.), 21 (commuted value to be feu-duty: not barred by entails), 22 (monopolies of superior’s agents annulled), 24 (where feu rights stipulating or inferring casualties are contracted to be granted), 25 (distinction between burgage and feu abolished etc.) and 26 (form of conveyances)

30 shall cease to have effect.

(6) In section 29 (general dispositions forming links of series of titles not objectionable on certain grounds)—

(a) the words “under this Act, and no other decree, instrument, or conveyance” shall cease to have effect; and

35 (b) for the words “last infeft, shall contain” substitute “who last held a recorded title contains”.

(7) Section 30 (conveyances and discharges of real burdens) shall cease to have effect.

40 (8) In section 32 (reservations, conditions and covenants affecting lands may be imported by reference)—

(a) the word “, instrument,”, where it occurs for the first and third times; and

(b) the words “feu or otherwise”,

shall cease to have effect.

(9) In section 35 (registration of a decree of division)—

45 (a) the word “joint” shall cease to have effect;

(b) for the words “infeftment in, or of acquiring a personal right” substitute “deducing title”; and

(c) the words from “, as an assignation” to the end shall cease to have effect.

50 (10) In section 36 (effect of decree of sale of glebe), the words from “, with a holding” to the end shall cease to have effect.

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

**Section 10**

The amendments remove feudal and obsolete terminology.

**Section 14**

This saving provision can be repealed as being spent.

**Sections 18 to 21 and 24 and Schedule G**

These provisions relate to feudal casualties and can be repealed.

**Section 22**

The prohibition of a real burden being used to create a monopoly for the superior's agents is also achieved by the general rules of public policy applicable to real burdens, and the provision is accordingly unnecessary.

**Sections 25 and 26**

Booking and burgage tenures are abolished along with other feudal tenures. The provisions are unnecessary. See paragraphs 8.1 ff of the report.

**Section 29**

Feudal terminology is removed or replaced.

**Section 30**

This section is repealed as being unnecessary in modern practice.

**Section 32**

Feudal terminology is removed.

**Section 35**

Outdated terminology is removed or replaced. The word "joint" is removed for consistency with the rest of the provision which relates to property held in common.

**Section 36**

Feudal terminology is removed.

- SCH. 8 (11) Section 37 (distinction between heritage and conquest abolished) shall cease to have effect.
- (12) In section 44 (provisions for the case of a person appointed by the court to administer a trust)—
- (a) after the words “When a trust title” insert “to land or to a real right in or over land”;
  - (b) for the words “a title by infertment in the estate” substitute “to complete,”; and
  - (c) after the words “thereby appointed,” insert “title to the land or real right”.
- (13) In section 45 (how title is completed when the holder of an office or proprietor is *ex officio* a trustee and his successor in office takes the trust), for the words—
- (a) “estate in land” substitute “land, or any real right in or over land,”; and
  - (b) “by infertment in the estate” substitute “to the land or real right”.
- (14) In section 47 (securities upon land, and relative personal obligations, to transmit against heirs and disponees), for the words—
- (a) “upon an estate in land” substitute “over land, or over a real right in land,”;
  - (b) “such estate” substitute “such land or real right”; and
  - (c) “the estate” substitute “the land or real right”.
- (15) Sections 48 (provisions for disencumbering lands sold under heritable securities when no surplus emerges) and 49 (provision for disencumbering lands of heritable security) shall cease to have effect.
- (16) In section 51 (probate equivalent to will or extract for completing title)—
- (a) the words “production to any notary public of the” shall cease to have effect;
  - (b) for the words “of an exemplification of such probate, shall for the purpose of expediting a notarial instrument, or otherwise completing a title to any estate in land” substitute “an exemplification of such probate, shall for the purpose of completing a title to any land, or real right in land,”; and
  - (c) the words “the production to such notary of” and from “, and it shall not” to the end shall cease to have effect.
- (17) Sections 52 (decrees of service unchallengeable on certain grounds), 53 (form of completing title to heritable securities under a general disposition), 57 (certain offences abolished, and the duties of the Sheriff of Chancery, &c. enlarged) and 58 (provisions as to Chancery office) shall cease to have effect.
- (18) In section 59 (application to lands held of the Crown and Prince) the words “shall apply to lands held of the Crown and of the Prince, in the same way as to lands held of a subject superior, but” shall cease to have effect.
- (19) Section 60 (title to private estates of Her Majesty in Scotland) shall cease to have effect.
- (20) Schedules A (form of notice to be given to a superior of change of ownership), B (form of summons of declarator and for payment of a casualty), C (form of minute for effecting consolidation of lands), D (being the form of memorandum of allocation of feu-duty; and not that Schedule D substituted for Schedule O by section 8(1) of the Conveyancing (Scotland) Act 1924), F (form of discharge of casualties) and G (form of memorandum constituting a feu-duty or additional feu-duty) shall cease to have effect.
- (21) In Schedule H (form of reference to a deed, instrument or writing for reservations, burdens and conditions affecting lands), the word “, *instrument*,” where it last occurs, shall cease to have effect.
- (22) Schedule L (form of certificate where lands are sold under a heritable security and no surplus emerges and form of certificate where lands have been

*Schedule 8 Part I (cont'd)*

**Section 37**

The repeal of this provision will not revive the old distinction. See section 16 of the Interpretation Act 1978.

**Sections 44, 45 and 47**

Feudal terminology is replaced.

**Sections 48 and 49 and Schedule L**

The provisions are unnecessary given clause 63 of the Bill. Replacement provisions can be used from the 1970 Act.

**Section 51**

References to notarial instruments are removed. Part of the provision relating to pre-1874 notarial instruments is spent. It is now obsolete because of the effect of prescription.

**Section 52**

This provision relating to pre-1874 decrees of service can be repealed. It is spent due to the effect of prescription.

**Section 53 and Schedule N**

This section is repealed as a notice of title under the Conveyancing (Scotland) Act 1924 can be used. (See paragraphs 7.27 ff of the report).

**Section 57**

The repeal of the provisions relating to Crown writs (paragraphs 9.19 and 9.20 of the report) allows the repeal of this provision. The provision relating to the holding of courts is procedural and can be replaced by rules of court or practice notes.

**Section 58**

The provision can be repealed as the functions of the director of Chancery are now exercised by the Keeper of the Registers (see Reorganisation of Offices (Scotland) Act 1928, s 7, S R & O 1932 No 148, and Public Registers and Records (Scotland) Act 1948, s 1(2)).

**Section 59**

Feudal references are removed.

**Section 60**

The provision protecting the private estates of the Crown from merging with the *dominium eminens* (the paramount superiority) is unnecessary as a purely feudal provision.

**Schedule H**

Feudal terminology is removed.

**Schedule M**

The reference to teinds and stipends is removed. See paragraphs 3.51 and 9.18 of the report.

redeemed of a heritable security but discharge cannot be obtained) shall cease to have effect.

(23) In Schedule M (form of assignation of right of relief etc.), the words from “, e.g. ],” to “*or as the case may be*” shall cease to have effect.

- 5 (24) Schedule N (form of instrument in favour of a general disponee or his assignee in right of a heritable security) shall cease to have effect.

*Writs Execution (Scotland) Act 1877 (c.40)*

10 10. In section 6 of the Writs Execution (Scotland) Act 1877 (provision that writs registered in the Register of Sasines for preservation only may afterwards be registered for preservation and execution)—

- (a) the words “upon a warrant of registration” shall cease to have effect; and
- (b) for the words “having a warrant of registration written thereon, bearing” substitute “with, written on the extract, a statement to the effect”.

*Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 (c.69)*

15 11.—(1) The Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 shall be amended in accordance with this paragraph.

(2) Sections 1 (limitation of liability of trustees for casualties), 3 (*novodamus* not challengeable because lands not resigned into superior’s hands) and 4 (decree of irritancy not final till extract recorded) shall cease to have effect.

20 (3) The side note to section 5 (letters of administration of will, &c. equivalent to will for authorisation of notary to expedite instrument) shall be “Letters of administration of will etc. equivalent to will for completing title.”; and in that section—

- (a) the words “The production to any notary public of” shall cease to have effect;
- 25 (b) for the words “or of an exemplification” substitute “or an exemplification”;
- (c) the words “expediting a notarial instrument, or otherwise” shall cease to have effect;
- (d) for the word “estate” substitute “land or real right”; and
- (e) the words from “; and it shall not” to the end shall cease to have effect.

30 *Stamp Act 1891 (c.39)*

12. In the Stamp Act 1891, the headings beginning—

- (a) “Disposition in Scotland, containing constitution of feu or ground annual right”; and
  - (b) “Feu Contract in Scotland”,
- 35 which are specified in Schedule 1 to that Act shall cease to have effect.

13. Paragraph 12 of this Schedule and, in so far as relating to the Stamp Act 1891, section 70 of, and Schedule 9 to, this Act shall not affect any instrument executed before the appointed day.

*Military Lands Act 1892 (c.43)*

40 14. In section 25 of the Military Lands Act 1892 (application to Scotland), after subsection (1) there shall be added—

“(1A) Any reference to an “estate” in land shall be construed as a reference to a right in land and as including a reference to ownership of land.”.

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Writs Execution (Scotland) Act 1877*

**Section 6**

The references to warrants of registration are removed. See paragraphs 7.34 ff of the report.

*Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887*

**Sections 1 and 3**

These sections are purely feudal relating respectively to feudal casualties and charters of novodamus.

**Section 4**

This section falls to be repealed with removal of a superior's right to irritate a feu. See clause 47 of the Bill and paragraph 4.89 of the report.

**Section 5**

This section is amended to replace references to notarial instruments, and to remove spent provision regarding challenges to pre-1887 deeds (no longer relevant because of prescription).

*Stamp Act 1891*

**Schedule 1**

Feudal terminology is removed.

For stamp duty purposes any deeds executed before the appointed day will continue to be chargeable for stamp duty, even if relating to a feudal interest.

*Military Lands Act 1892*

**Section 25**

The Act makes the Lands Clauses Consolidation Acts of 1845 available for the purchase of military lands. It is in English form but contains an application to Scotland section. The new subsection (1A) clarifies the meaning of the word "estate" in land following abolition of feudal estates.

SCH. 8

*Heritable Securities (Scotland) Act 1894 (c.44)*

15.—(1) The Heritable Securities (Scotland) Act 1894 shall be amended in accordance with this paragraph.

(2) In section 6 (power to lease security subjects for seven years or under), for the words “disponed in security” substitute “by virtue of an adjudication”. 5

(3) In section 7 (sheriff may grant power to lease security subjects for longer periods, not more than 21 years for heritable property in general and 31 years for minerals)—

(a) for the words “disponed in security”, where they first occur, substitute “by virtue of an adjudication”; and 10

(b) where they occur for the second time they shall cease to have effect.

(4) Sections 8 (provisions for security holders becoming proprietors of security subjects), 9 (completion of title of security holders etc.) and 10 (purchaser’s title indefeasible) shall cease to have effect.

(5) In section 12 (provisions anent procedure), the word “, eight,” shall cease to have effect. 15

(6) The side note to section 13 (provisions of Act to have effect notwithstanding incapacity of debtor etc.) shall be “Rights and powers under heritable security exercisable notwithstanding incapacity of debtor etc.”; and in that section, for the words— 20

(a) “conferred by this Act” substitute “under a heritable security”;

(b) “under this Act” substitute “by a creditor in exercise of those rights and powers”; and

(c) “such debtor, proprietor,” substitute “the debtor, proprietor, other”.

(7) Sections 14 (provision as respects security holders under Registration of Leases (Scotland) Act 1857), 15 (jurisdiction of sheriff in all cases instituted under or in connection with Act), 16 (provision as to notice where debtor has died and heir cannot be traced) and 17 (saving) shall cease to have effect. 25

(8) Schedule (D.) (form of decree whereby security holder becomes proprietor of security subjects) shall cease to have effect. 30

*Entail (Scotland) Act 1914 (c.43)*

16.—(1) The Entail (Scotland) Act 1914 shall be amended in accordance with this paragraph.

(2) In section 2 (Entail Act 1685 not to apply to future deeds)—

(a) for the words “The Entail Act, 1685, shall not apply to any” substitute “No”; 35

(b) for the words “, the effect of which would be” substitute “shall be effective”; and

(c) the words “and any clause of consent to registration in the register of entails”, and the provisos, shall cease to have effect. 40

(3) Sections 3 to 8 (further facilities for disentail, etc.) shall cease to have effect.

(4) In section 10 (interpretation), the words “, unless the contrary intention appears,” and “, and the words “heir of entail” shall include the institute” shall cease to have effect.

*Conveyancing (Scotland) Act 1924 (c.27)* 45

17.—(1) The Conveyancing (Scotland) Act 1924 shall be amended in accordance with this paragraph.

## *Explanatory Notes*

### *Schedule 8 Part I (cont'd)*

#### *Heritable Securities (Scotland) Act 1894*

##### **Sections 6 and 7**

These sections are used in the enforcement of adjudications, allowing an adjudger to grant leases of the adjudged lands. See Stair Memorial Encyclopaedia vol 8, para 202. The amendments make it clear that the provisions apply only to adjudications, and that they no longer have any application for pre-1970 Act heritable securities, which are covered by the conversion provision in clause 63 of the Bill. See paragraph 9.31 of the report.

##### **Sections 8 to 10 and Schedule (D.), and sections 14 to 16**

The provisions are unnecessary given clause 63 of the Bill.

##### **Section 12**

The amendment is consequential on the repeal of section 8.

##### **Section 13**

The amendments confirm that a heritable creditor can exercise rights under a heritable security even if the debtor does not have legal capacity. They mean that the provision is not limited in effect to the 1894 Act, and are necessary given the repeal of sections 119 and 134 of the 1868 Act.

##### **Section 17**

This spent provision can be repealed.

#### *Entail (Scotland) Act 1914*

##### **Section 2**

This section makes future entails ineffective. The amendments make the provision self-standing by removing references to the Entail Act 1685 (which is to be repealed). The amendments preserve the effect of the section for the time being.

##### **Sections 3 to 8**

These sections are unnecessary with the abolition of entails. See Part V of the Bill and paragraphs 9.8 ff of the report.

##### **Section 10**

This section is amended to take account of the repeal of sections 3 to 8.

#### *Conveyancing (Scotland) Act 1924*

##### **Section 2**

The references to ground annuals are removed. See clause 50 of the Bill and paragraph 3.54 of the report.

##### **Sections 3 to 5**

Feudal terminology is replaced. References to ground annuals are removed. In relation to section 4 the effect of recording a notice of title is now provided for by clause 4(1)(b) of the Bill (see clause 4(3)(a) for the definition of conveyance).

##### **Section 6**

This section is no longer necessary or helpful.

(2) In section 2(1)(b) (definition of “heritable securities” and “securities”), the words from “real burdens” to “them, and” shall cease to have effect.

(3) The side note to section 3 (disposition etc. by person uninfert) shall be “Disposition etc. by person with unrecorded title.”; and in that section—

- 5 (a) the words “last infert or” shall cease to have effect; and  
 (b) for the words from “in all respects” to the end substitute “completed”.

(4) In section 4 (completion of title)—

- (a) in subsection (1), for the words “last infert” substitute “having the last recorded title”;  
 10 (b) in subsection (2)—  
     (i) for the words “last infert” substitute “having the last recorded title”; and  
     (ii) the words “by infertment” shall cease to have effect;  
 (c) in subsection (3)—  
 15 (i) the words from “, or in the case” to “that Schedule” shall cease to have effect; and  
     (ii) for the words from “last infert” to the end substitute “having the last recorded title to the heritable security”; and  
 (d) in subsection (4)—  
 20 (i) for the words “infert him therein and in” substitute “completed his title thereto and to”;  
     (ii) the words “, or in the case of a ground annual in or as nearly as may be in the terms of Form No. 6 of that Schedule” and from “And on such notice” to the end, shall cease to have effect.

25 (5) In section 5 (deduction of title)—

- (a) in subsection (1)—  
     (i) for the words “any estate or interest in or security over” substitute “any real right in”;  
     (ii) after the words “instrument could” insert “(before the day appointed by order made under section 65 of the Abolition of Feudal Tenure etc. (Scotland) Act 1998)”; and  
     (iii) for the words “an estate or interest in or security over” substitute “a real right in”;  
 30 (b) in subsection (2)(a)—  
     (i) the words “infert or uninfert, or” shall cease to have effect; and  
     (ii) for the words “and seventh sections” substitute “section”; and  
 35 (c) in subsection (3)(a), the words “last infert or” shall cease to have effect.

(6) Section 6 (notice of title equivalent to notarial instrument) shall cease to have effect.

40 (7) In section 8 (description by reference), subsection (2) shall cease to have effect.

(8) In section 9 (amendment of law as to reference to conditions of title)—

- (a) in subsection (1), the words—  
     (i) “, whether prohibitory, irritant, resolute or otherwise,”;  
 45 (ii) “, instrument”, where it secondly occurs;  
     (iii) “(including any disposition granted by a creditor to himself pursuant to section eight of the Heritable Securities (Scotland) Act, 1894)”; and  
     (iv) from “, and where” to the end; and  
 50 (b) in subsection (4), the words “, although the warrant of registration thereon shall be on behalf of the granter only”,  
 shall cease to have effect.

## *Explanatory Notes*

### *Schedule 8 Part I (cont'd)*

#### **Section 8 (2)**

This subsection is no longer necessary with the abolition of entails. See Part V of the Bill and paragraphs 9.8 ff of the report.

#### **Section 9**

Unnecessary references to notarial instruments, warrants of registration, and repealed statutory provisions are removed. Other amendments take account of the repeals in the 1894 Act.

#### **Section 10 and Schedule F, and Notes to Schedule F**

This provision is unnecessary with abolition of warrants of registration. See clause 5(1) of the Bill and paragraphs 7.34 ff of the report.

#### **Section 11 and Schedule G**

Consolidation is a purely feudal matter and the provision can be repealed.

#### **Sections 12 and 13 and Schedule H**

The provisions are repealed following the extinction of feuduty. See Part III of the Bill and Part 3 of the report.

#### **Section 19**

Feudal terminology is removed.

#### **Section 20**

This spent provision can be repealed.

#### **Section 23**

This provision relates solely to ground annuals and can be repealed.

#### **Section 24**

References to feudal terminology and notarial instruments are removed. References to bonds and dispositions in security are also removed given the conversion provision in clause 63 of the Bill for pre-1970 heritable securities.

#### **Section 25**

This section relates to the form of bonds and dispositions in security. It has not been possible to grant such a security since the coming into force of section 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970. The provision can be safely repealed. If necessary, given clause 63 of the Bill (see paragraph 9.31 of the report), replacement provision can be used from the 1970 Act.

#### **Section 26**

This section is repealed following the extinction of feuduty and ground annuals.

#### **Sections 28 to 39, and Schedules K, L, and M, and Notes to Schedule K**

These provisions are unnecessary given clause 63 of the Bill.

#### **Section 40**

The repeal of sections 28 to 39 means that certain explanatory words are required. References to feuduty, ground annuals and stipends are removed. See clauses 7 and 50 of the Bill, and Part 3 of the report. This provision is applied to standard securities by the 1970 Act.

SCH. 8

(9) Sections 10 (warrants of registration), 11 (consolidation of superiority and property), 12 (abolition and commutation of grain, etc., feu-duties) and 13 (allocation of feu-duty) shall cease to have effect.

(10) In section 19 (applicability of forms prescribed by Act), the words “or fee” shall cease to have effect. 5

(11) Sections 20 (ratification by married woman) and 23 (assignation of ground-annuals) shall cease to have effect.

(12) In section 24 (registered leases: assimilation of forms)—

(a) the words “, including power of sale and other rights under a bond and disposition in security,” and “, and such forms shall have the same force and effect as the corresponding forms prescribed by the Registration of Leases (Scotland) Act 1857,” shall cease to have effect; 10

(b) in paragraph (1) of the proviso—

(i) after the word ““lessee”” there shall be inserted “and”; and

(ii) the words from “, for “infest”” to the end shall cease to have effect; and 15

(c) in paragraph (5) of the proviso, the words from “by notarial instrument” to “law and practice” shall cease to have effect.

(13) Sections 25 (form of bond and disposition in security) and 26 (heritable creditors’ remedies for recovery of feu-duties and ground-annuals) shall cease to have effect. 20

(14) Sections 28 to 39 (provisions as respects heritable securities) shall cease to have effect.

(15) The side note to section 40 (exposure in lots and apportionment of feu-duty) shall be “Exposure in lots” and in subsection (1) of that section— 25

(a) for the words “The land, or any part thereof,” substitute “Land, or any part thereof, sold in exercise of a power of sale under a bond and disposition in security”; and

(b) the words “feu-duty, ground-annual, stipend,” and “feu-duty and casualties, ground annual, stipend or” shall cease to have effect. 30

(16) In section 41(1) (purchasers protected), for the words “under sections thirty-two to forty, inclusive, of this Act” substitute “relating to the redemption or calling up of, or a sale under, a bond and disposition in security”.

(17) Sections 42 (mode of disburdening land sold under power of sale in heritable security) and 43 (application of Act to all heritable securities) shall cease to have effect. 35

(18) In section 49 (saving), subsection (1) shall cease to have effect.

(19) In Schedule A—

(a) the heading to Form No. 1 shall be—

“CLAUSE OF DEDUCTION OF TITLE IN A DISPOSITION OF LAND WHERE THE GRANTEE DOES NOT HAVE A RECORDED TITLE”; and 40

(b) in Form No. 1, for the words—

(i) “*last infest*” substitute “*having last recorded title*”; and

(ii) “*infestment*” substitute “*recorded title*”. 45

(20) In Schedule B (notice of title)—

(a) in Form No. 1, for the words—

(i) “*last infest*” substitute “*having last recorded title*”; and

(ii) “*infestment*” substitute “*recorded title*”;

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

**Section 41**

The repeal of sections 32 to 39 means that reference to those sections must be removed and explanatory text substituted therefor. This provision is applied to standard securities by the 1970 Act.

**Section 42 and Schedule N**

The provision is unnecessary given clause 63 of the Bill.

**Section 43**

This provision is no longer necessary.

**Section 49 (1)**

This saving provision is spent.

**Schedule A, Form No 1**

Feudal terminology is replaced.

**Schedule B, Form No 1**

Feudal terminology is replaced.

**Schedule B, Form No 3**

Feudal terminology is removed.

**Schedule B, Forms Nos 4 and 6**

These forms are repealed with the extinction of ground annuals.

**Schedule B, Notes**

Feudal terminology is replaced.

- (b) in Form No. 3, the words “*last infeft therein, or*” shall cease to have effect; and  
 (c) Forms Nos. 4 and 6 shall cease to have effect.

(21) In the Notes to Schedule B—

- (a) in Note 1, for the word “infefment” substitute “recorded title”; and  
 5 (b) in Note 3—  
     (i) for the words “infefment upon” substitute “title to”; and  
     (ii) for the words “including a ground annual has been taken”  
     substitute “has been completed”.

(22) Schedules F (warrants of registration), G (minute of consolidation) and H  
 10 (memorandum of allocation of feu duty not endorsed on a deed), and the Notes to  
 Schedule F, shall cease to have effect.

(23) Schedules K, L, M and N (forms relating to bonds and dispositions in  
 security), and the Notes to Schedule K, shall cease to have effect.

*Church of Scotland (Property and Endowments) Act 1925 (c.33)*

15 18.—(1) The Church of Scotland (Property and Endowments) Act 1925 shall be  
 amended in accordance with this paragraph.

(2) In section 22 (burgh churches)—

- (a) in subsection (2)(h), the word “feuing,”; and  
 (b) in subsection (3), the word “feu,”,  
 20 shall cease to have effect.

(3) Section 27 (proceedings relating to certain matters) shall cease to have  
 effect.

(4) In section 28 (transfer of rights in parish churches and manses)—

- (a) in subsection (3)(b)—  
 25 (i) for the words “all rights of property in” substitute “the  
 ownership of”; and  
 (ii) the words from “, to the same effect” to the end shall cease to  
 have effect; and  
 (b) subsection (6) to (8) shall cease to have effect.

30 (5) In section 30(3) (orders relating to glebes)—

- (a) in paragraph (c), the words from “, whether as” to “in place of the  
 minister”;  
 (b) in paragraph (e), the words ““feu-duties and Government or other” and  
 from “under or in pursuance” to “made by a minister”; and  
 35 (c) paragraph (f),  
 shall cease to have effect.

(6) Section 31 (redemption of feu-duty affecting glebe) shall cease to have  
 effect.

(7) In section 34 (provisions relating to *quoad sacra* parishes)—

- 40 (a) in subsection (1)—  
     (i) in paragraph (b), the words “and certified by the Clerk of  
     Teinds”; and  
     (ii) paragraph (e);  
 (b) subsection (3); and  
 45 (c) in subsection (4)(iii), the words “feu-duties, ground annuals, bonds of  
 annual rent, or other”, “with the sanction of the Court of Teinds” and “or  
 payment of the feu-duty thereon”,  
 shall cease to have effect.

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Church of Scotland (Property and Endowments) Act 1925*

We have recommended the abolition of teinds, stipends and standard charges. See recommendation 18, which is implemented by clause 50 of the Bill, and paragraphs 3.51 and 9.18 of the report. Some provisions of this Act require to be amended or repealed in consequence of such abolition.

**Section 22**

Feudal terminology is removed.

**Section 27**

This provision is repealed as a consequence of the repeal of the Ecclesiastical Buildings and Glebes (Scotland) Act 1868.

**Section 28**

In subsection (3)(b) feudal terminology is removed or replaced.

Subsections (6) to (8) are no longer necessary.

**Section 30(3)(c) and (e)**

Feudal terminology is removed.

**Section 30(3)(f)**

This paragraph is repealed as it is contrary to the general policy of the Bill to allow the creation of new perpetual periodical payments from land. See Part III of the Bill in conjunction with clause 50, and Part 3 of the report.

**Section 31**

This section can be repealed with the extinction of feuduty. See Part III of the Bill and Part 3 of the report.

**Section 34**

References to feuduties and teinds are removed.

**Section 35**

Feudal terminology is removed.

**Section 36**

The proviso is obsolete following the abolition of stipend and standard charge.

**Section 37**

The reference to "heritor" is no longer appropriate following the abolition of teinds.

**Sections 39 to 41**

With the abolition of teinds, stipends and related matters (such as the Court of Teinds) these provisions can be repealed.

**Section 42**

The reference to teinds is removed.

- SCH. 8 (8) In section 35(7) (interpretation), the words “uninfert or infert” shall cease to have effect.
- (9) In section 36 (requirements of parish to be first charge on endowments), the proviso shall cease to have effect.
- (10) In section 37 (powers of General Trustees), the words “heritor or other” shall cease to have effect. 5
- (11) Sections 39 (allocation of certain money by General Trustees), 40 (redemption of manse mail, etc.) and 41 (provisions relating to Court of Teinds) shall cease to have effect.
- (12) In section 42 (application to Crown lands), the words from “, and to the teinds” to the end shall cease to have effect. 10
- (13) Sections 45 (saving for obligations of relief) and 46 (saving for superiors) shall cease to have effect.
- (14) In section 47 (interpretation)—
- (a) in subsection (1), in the definition of “Stipend”, the words “, including any allowance for communion elements payable by heritors out of teinds”; and 15
- (b) subsections (2) and (3), shall cease to have effect.
- (15) The First to the Seventh Schedules shall cease to have effect. 20
- Church of Scotland (Property and Endowments) Amendment Act 1933 (c.44)*
- 19.—(1) The Church of Scotland (Property and Endowments) Amendment Act 1933 shall be amended in accordance with this paragraph.
- (2) In section 7 (suppression or union of parishes)—
- (a) paragraph (ii) of the proviso; and 25
- (b) the word “and” immediately preceding that paragraph, shall cease to have effect.
- (3) In section 8(1) (obligation of third party as respects endowments of parish *quoad sacra* etc.), the words “, or any obligation at common law for payment of the stipend or part of the stipend of the parish being a parish *quoad omnia*” shall cease to have effect. 30
- (4) In section 9 (rights of superiors and others)—
- (a) subsections (1) and (2) shall cease to have effect; and
- (b) in subsection (3)—
- (i) for the word “heritor”, in both places where it occurs, substitute “person”; and 35
- (ii) the words “or take in feu” and “or feu-duty” shall cease to have effect.
- (5) Sections 10 (vesting of stipends of ministers of burgh churches, etc.) and 11 (vesting of glebe feu-duties etc.) shall cease to have effect. 40
- Conveyancing Amendment (Scotland) Act 1938 (c.24)*
- 20.—(1) The Conveyancing Amendment (Scotland) Act 1938 shall be amended in accordance with this paragraph.
- (2) Sections 6 (actions of declarator of irritancy) and 8 (prohibition of subinfeudation annulled) shall cease to have effect. 45
- (3) For section 9 there shall be substituted—

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

**Section 45**

This section can be repealed with the abolition of stipends and standard charges.

**Section 46**

This provision saves the rights of superiors, and can be repealed on abolition of the feudal system.

**Section 47**

The definition of stipend is amended to take account of the abolition of stipends, standard charges and teinds.

**Schedules 1 to 7**

These are repealed as a consequence of the other reforms.

*Church of Scotland (Property and Endowments) Amendment Act 1933*

**Section 7**

The paragraph is obsolete and can be repealed.

**Section 8(1)**

The reference to stipend is repealed following the abolition of teinds, stipends and standard charges. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

**Section 9**

Feudal terminology is removed, as are references to “heritors”, with the abolition of teinds.

**Sections 10 and 11**

These sections are repealed as they are unnecessary given the current arrangements for paying Church of Scotland ministers.

*Conveyancing Amendment (Scotland) Act 1938*

**Section 6**

This section is repealed as unnecessary following the abolition of a superior’s right of irritancy. See clause 47 of the Bill and paragraph 4.89 of the report.

**Section 8**

This section is repealed as unnecessary following feudal abolition.

**Section 9**

This section is re-enacted to remove all feudal terminology, although the section continues to be applicable to rights of pre-emption created in grants in feu, which have been converted to neighbour burdens under the notice procedure in clause 17 of the Bill.

“Limitation of  
effect of  
conditions as to  
pre-emption.

5

9.—(1) Any right of pre-emption of land, being a right created in a deed or other writing executed after 1st September 1974 or in a grant in feu of any date, in favour of any person, in the event of a sale of, or of any part of, the land by the proprietor for the time being (whether or not the right purports to be exercisable on more than one occasion) shall, with all irritant clauses applicable to the right, be null and void and not capable of being enforced as regards the land or part unless within—

10

(a) twenty-one days after an offer has been made by the proprietor to the person in whom the right is vested; or

(b) such shorter period after an offer has been so made as may be specified in the writing stipulating for the right, the person accepts the offer.

15

(2) Subsection (1) above is without prejudice to section 16 (extinction of superior’s rights) of the Abolition of Feudal Tenure etc. (Scotland) Act, 1998.

20

(3) Any such offer may be made by delivering it to the person (or to the agent or factor of the person) or by sending it by registered letter to the person (or to such agent or factor) at his usual or last known address or, if the person is unknown or cannot be found, to the Extractor of the Court of Session.

(4) Either—

25

(a) an acknowledgment endorsed on the offer, or on a copy of the offer, by the person (or by his agent or factor); or

(b) where the offer is sent by registered letter, a certificate subscribed by the proprietor (or the proprietor’s solicitor) that the offer was duly posted, with the Post Office receipt for the registered letter attached,

30

shall be sufficient evidence that the offer was duly made on the date stated in the acknowledgment or, as the case may be, on the date of the Post Office receipt.”.

*National Parks and Access to the Countryside Act 1949 (c.97)*

21.—(1) The National Parks and Access to the Countryside Act 1949 shall be amended in accordance with this paragraph.

35

(2) For section 26 substitute—

“Application of  
Part III to  
Scotland.

26. In the application of this Part of this Act to Scotland the expression “limited owner”, in relation to land, means a liferenter in possession of that land.”.

40

(3) In section 114(1) (interpretation), in the definition of “owner”—

(a) after the words “except in Part III of this Act” insert “or in relation to Scotland,”; and

(b) the words “and as respects Scotland has the meaning assigned to it by section twenty-six of this Act” shall cease to have effect.

*Town and Country Planning (Scotland) Act 1954 (c.73)*

45

22. The Town and Country Planning (Scotland) Act 1954 shall be amended in accordance with this paragraph.

(2) In section 55 (compensation for damage to requisitioned land), for subsection (2) substitute—

50

“(2) The said values are—

(a) the value, at the time when the compensation accrues due, of the land in question (it being presumed that the land is subject to any servitude or

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*National Parks and Access to the Countryside Act 1949*

**Section 26**

The substituted section replaces a definition which was feudal in nature.

**Section 114**

The amendment is consequential upon the amendment to section 26 of this Act.

*Town and Country Planning (Scotland) Act 1954*

**Section 55**

The substituted provision replaces feudal terminology.

**Section 69**

This provision is purely feudal and can be repealed.

SCH. 8

other restriction then affecting it but otherwise is free from burdens); and

- (b) the value which such land would have at that time (on the same presumption as is mentioned in paragraph (a) above) if the land were then in the state in which it was when possession was taken in the exercise of emergency powers.”

5

(3) Section 69 (interpretation) shall cease to have effect.

*Land Powers (Defence) Act 1958 (c.30)*

23. In section 25(2) of the Land Powers (Defence) Act 1958 (interpretation), after paragraph (b) there shall be inserted—

10

- “(bb) any reference to an “interest” in land, however expressed, shall be construed as a reference to a right in, or interest in, land and as including a reference to ownership of land;”

*Opencast Coal Act 1958 (c.69)*

24. In section 52 of the Opencast Coal Act 1958 (general application to Scotland)—

15

(a) in subsection (1)—

(i) in the definition of “freehold interest”, the words “of the dominium utile” shall cease to have effect; and

(ii) for the definition of “owner” substitute—

20

““owner”, in relation to land which is subject to a lease of 99 years or more, means the tenant under the lease;”; and

(b) subsections (6) to (8) shall cease to have effect.

*Caravan Sites and Control of Development Act 1960 (c.62)*

25. In section 32(1) of the Caravan Sites and Control of Development Act 1960 (application of Part I of Act to Scotland), for paragraph (d) substitute—

25

- “(d) the reference in subsection (3) of section one of this Act to an estate or interest in land shall be construed as a reference to a right in, or to, land and the references in that subsection and in section twelve of this Act to a licence in respect of land shall be construed as not including a tenancy of land;”

30

*Flood Prevention (Scotland) Act 1961 (c.41)*

26. In section 15(1) of the Flood Prevention (Scotland) Act 1961 (interpretation), in the definition of “interest”, for the words “estate in or right” substitute “right in or”.

*Land Compensation (Scotland) Act 1963 (c.51)*

35

27.—(1) The Land Compensation (Scotland) Act 1963 shall be amended in accordance with this paragraph.

(2) In section 10 (consolidation of proceedings on claims in respect of several interests in the same land), for the words “acquisition of the several interests” substitute “acquisition of several interests”.

40

(3) In section 20 (consideration in respect of discharge of feu-duty etc.)—

(a) in subsection (1), the words “the *dominium utile* in”, in both places where they occur, shall cease to have effect;

(b) in subsection (2), the words “feu-duty, or ground annual or other” and “(not being stipend or standard charge in lieu of stipend)” shall cease to have effect;

45

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Land Powers (Defence) Act 1958*

**Section 25(2)(bb)**

The expression "interest in land" is used throughout this Act. The new paragraph makes it clear that this refers to rights in land, including those of the owner.

*Opencast Coal Act 1958*

**Section 52**

Feudal terminology is removed. The new definition of owner in section 52(1) replaces an existing definition which uses English terminology. For the purposes of this Act, an owner includes a tenant under a 99 year or longer lease.

*Caravan Sites and Control of Development Act 1960*

**Section 32(1)**

This Act refers to estates and interests in land (see paragraphs 9.3 ff of the report) and a translation provision is necessary.

*Flood Prevention (Scotland) Act 1961*

**Section 15 (1)**

The reference to "estate" has been replaced with appropriate terminology.

*Land Compensation (Scotland) Act 1963*

**Section 10**

The amendment takes account of the abolition of feudal estates in land. See clause 2 of the Bill.

**Section 20**

Feudal terminology is removed or replaced.

- (c) in subsection (3), for the words "*dominium utile*" substitute "land";
- (d) in subsection (7), the words "*dominium utile* in any" shall cease to have effect; and
- 5 (e) in subsection (8), the words "the *dominium utile* in" shall cease to have effect.

(4) In section 27(3) (application for certificate of alternative development), the words "and that interest is the *dominium utile* of the land," "feu-duty or ground annual or other" and "(not being stipend or standard charge in lieu of stipend)" shall cease to have effect.

- 10 (5) In section 28 (provisions as respect certain regulations under section 275(1)(c) of the Town and Country Planning (Scotland) Act 1997)—

(a) in paragraph (e), the words "the *dominium utile* of" and, in both places where they occur, "feu-duty or"; and

- (b) in paragraph (f), the words "the *dominium utile* of",  
15 shall cease to have effect.

(6) In section 32(6)(b) (provision for notification to planning authority in certain circumstances), for the words "*dominium utile*" substitute "ownership".

(7) In section 45 (interpretation)—

(a) after subsection (1) insert—

- 20 "1A) Any reference in this Act to an "interest" in land shall be construed as a reference to a right in land and as including a reference to ownership of land."; and

(b) subsections (8) and (9) shall cease to have effect.

- (8) In Schedule 2 (acquisition of houses which do not meet the tolerable  
25 standard), in paragraph 2(2), the words "the superior of, and" shall cease to have effect.

*Local Government (Development and Finance)(Scotland) Act 1964 (c.67)*

28. In section 7 of the Local Government (Development and Finance)(Scotland) Act 1964 (power to make advances for erection of buildings), for subsection (6)  
30 substitute—

"(6) The security for an advance made under this section shall be taken at the time of making or, in the case of an agreement to sell or let the land, at the time of the conveyance or of the lease."

*Forestry Act 1967 (c.10)*

- 35 29.—(1) The Forestry Act 1967 shall be amended in accordance with this paragraph.

(2) In section 5(3) (recording of forestry dedication agreement affecting land in Scotland), in the proviso, for the words "completed by infetment" substitute "title has been completed".

- 40 (3) In section 34(3) (Scottish interpretation of expression "owner"), the words "the proprietor of the *dominium utile* or, in the case of land other than feudal land, is" shall cease to have effect.

(4) In section 49 (interpretation), subsection (3) shall cease to have effect.

- (5) In Schedule 2 (conveyancing and other provisions connected with forestry  
45 dedication), in paragraph 4, for sub-paragraph (1) substitute—

"(1) In the case of land in Scotland, a liferenter in possession of the land shall have power to enter into forestry dedication agreements relating to, or to any part of, the land."

## *Explanatory Notes*

### *Schedule 8 Part I (cont'd)*

#### **Section 27 (3)**

References to feudal terminology, ground annuals, and standard charges are removed.

#### **Section 28**

Feudal terminology is removed.

#### **Section 32 (6) (b)**

Feudal terminology is replaced.

#### **Section 45 (1A)**

The expression "interest in land" is used some 50 or more times in the Act. The definition makes it clear that it includes rights in land, including ownership.

#### **Section 45 (8) and (9)**

These subsections deal with *dominium utile* and purchase by way of feu. They can be repealed.

#### **Schedule 2**

Feudal terminology is removed.

### *Local Government (Development and Finance) (Scotland) Act 1964*

#### **Section 7(6)**

The substituted subsection has the effect of repealing section 7(6)(b) which was inconsistent with section 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970. The amendment also removes feudal terminology.

### *Forestry Act 1967*

#### **Section 5 (3)**

Feudal terminology is replaced.

#### **Section 34 (3)**

Feudal terminology is removed.

#### **Section 49 (3)**

This subsection is purely feudal.

#### **Schedule 2**

The substituted sub-paragraph replaces an earlier provision which referred to entails. Entails are being abolished. See Part V of the Bill and paragraphs 9.8 ff of the report.

## SCH. 8

*Countryside (Scotland) Act 1967 (c.86)*

30.—(1) The Countryside (Scotland) Act 1967 shall be amended in accordance with this paragraph.

(2) In section 6 (powers in relation to development projects or schemes)—

(a) in each of subsections (1)(a) and (2), the word “feu,” shall cease to have effect; and 5

(b) in subsection (4), in the proviso, for the words “completed by infertment” substitute “title has been completed”.

(3) In section 13(4) (certain persons who have power to enter access agreements), for the words “person, being the liferenter or the heir of entail,” substitute “liferenter”. 10

(4) In section 16 (effect of access agreement or order on rights and liabilities of persons interested in land)—

(a) in each of subsections (6)(a) and (7)(a), for the words “an interest” substitute “a right”; and 15

(b) in subsection (9), for the words “completed by infertment” substitute “title has been completed”.

(5) In each of sections 24(1) (acquisition, by planning authority, of land for public access) and 25(1) (acquisition, by Secretary of State, of land for public access), the word “feu,” shall cease to have effect. 20

(6) In section 38(5) (recording of public path creation agreement), in the proviso, for the words “completed by infertment” substitute “title has been completed”.

(7) In section 49A (management agreements)—

(a) in subsection (5), for the words “person, being the liferenter or the heir of entail,” substitute “liferenter”; and 25

(b) in subsection (9), for the words “completed by infertment” substitute “title has been completed”.

(8) In section 78(1) (interpretation), in the definition of “interest”, for the words “the ownership of an interest in land” substitute “ownership”. 30

*Countryside Act 1968 (c.41)*

31.—(1) The Countryside Act 1968 shall be amended in accordance with this paragraph.

(2) In section 15(6) (modification of section in its application to Scotland), in the proviso to the inserted subsection (4), for the words “completed by infertment” substitute “title has been completed”. 35

(3) In section 24(2) (acquisition of land for planting trees in interests of amenity), the word “feu,” shall cease to have effect.

*Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)*

32.—(1) The Conveyancing and Feudal Reform (Scotland) Act 1970 shall be amended in accordance with this paragraph. 40

(2) In section 1 (variation and discharge of land obligations)—

(a) in subsection (2)—

(i) after the word “is”, where it first occurs, insert “—

(a)”; 45

(ii) for the words “an interest in land” substitute “land or of a real right in land”;

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Countryside (Scotland) Act 1967*

**Section 6**

Feudal terminology is removed or replaced.

**Section 13(4)**

References to entails are removed as a consequence of their abolition. See Part V of the Bill and paragraphs 9.8 ff of the report.

**Section 16**

The term "interest" is replaced with appropriate post-feudal terminology. See paragraph 9.5 of the report. Feudal terminology is also replaced.

**Sections 24 and 25**

Feudal terminology is removed.

**Section 38(5)**

Feudal terminology is replaced.

**Section 49A**

Feudal terminology is replaced and references to entails are removed.

**Section 78(1)**

The definition of "interest" has been amended to take account of the abolition of feudal estates. See paragraph 9.5 of the report.

*Countryside Act 1968*

**Section 15(6)**

Feudal terminology is replaced.

**Section 24 (2)**

Feudal terminology is removed.

*Conveyancing and Feudal Reform (Scotland) Act 1970*

**Section 1**

References to "interest in land" are replaced with terminology which is more specific following feudal abolition. See paragraph 9.5 of the report.

The definition of "land obligation" in section 1(2) is amended to include the new conservation burdens and maritime burdens. If these burdens were not introduced into the scheme of land obligations capable of variation and discharge by the Lands Tribunal for Scotland the servient proprietor would have been placed in a poorer position by abolition of the feudal system.

- (iii) for the words “another interest in that land, or of an interest in other land” substitute “that or other land, or of a real right in that or other land”; and
- (iv) at the end of the first paragraph insert—
- 5 “(b) a conservation burden; or  
(c) a maritime burden.”;
- (b) in each of subsections (3) and (4), for the words “interest in land” substitute “land or real right in land”;
- (c) after subsection (6) add—
- 10 “(7) In subsection (2) above “conservation burden” and “maritime burden” have the meanings given respectively by sections 22(1) and 54(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 1998.”.
- (3) In section 2 (provisions supplementary to section 1), in subsection (6)—
- 15 (a) in the definition of “benefited proprietor” and of “burdened proprietor”—
- (i) after the words “land obligation” insert “such as is mentioned in—
- (a) subsection (2)(a) of that section”;
- (ii) for the words “an interest”, in each of the four places where
- 20 they occur, substitute “land or of a real right”;
- (iii) after “enforce the obligation;” insert—
- “(b) subsection (2)(b) of that section, means the conservation body (within the meaning of Part IV of the Abolition of Feudal Tenure etc. (Scotland) Act 1998) having the right to the conservation burden; and
- 25 (c) subsection (2)(c) of that section, means the Crown.”;
- and
- (iv) for the words “that interest” substitute “that land or real right”;
- 30 (b) the definition of “interest in land” shall cease to have effect; and
- (c) after the definition of “land obligation” insert the following definitions—
- ““proprietor”, in any reference to the proprietor “of a real right in land”, means the holder of such right; and
- 35 “real right in land” means any such right, other than ownership, which is capable of being held separately and to which a title may be recorded in the Register of Sasines.”,
- and subsection (7) shall cease to have effect.
- 40 (4) Sections 3 to 6 (allocation of feuduties and ground annuals) shall cease to have effect.
- (5) The heading immediately preceding section 7 (provisions for contracting out of sections 1 to 6 to be void) shall be—
- “Provisions for contracting out of sections 1 and 2 to be void”;
- 45 the side note to that section shall be—
- “Provisions for contracting out of sections 1 and 2 void.”; and in that section, for the words “1 to 6” substitute “1 and 2”.
- (6) In section 9 (which introduces the form of heritable security known as a

## *Explanatory Notes*

### *Schedule 8 Part 1 (cont'd)*

#### **Section 2**

References to "interest in land" are replaced with terminology which is more specific following feudal abolition.

The definitions of "benefited" and "burdened" proprietors are amended to take account of conservation and maritime burdens.

#### **Sections 3 to 6**

These provisions are repealed following the extinction of feuduties and ground annuals. See clauses 7 and 50 of the Bill, and Part 3 of the report.

#### **Section 7**

This is a consequential amendment following the repeal of sections 3 to 6.

- SCH. 8 standard security)—
- (a) in subsection (2), for the words “interest in land” substitute “land or real right in land;”;
- (b) in subsection (3), for the words “an interest” substitute “land or a real right”; 5
- (c) in subsection (4), for the words “of an interest” substitute “of land or of a real right”; and
- (d) in subsection (8)—
- (i) in paragraph (a), for the word “interest”, in both places where it occurs, substitute “land or real right”; 10
- (ii) in paragraph (b), for the definition of “interest in land” substitute—
- ““real right in land” has the same meaning as it has for the purposes of sections 1 and 2 of this Act;” and
- (iii) in paragraph (c), the words “feuduty, ground annual,” shall 15  
cease to have effect.
- (7) In section 10(2) (clause of warrandice to import absolute warrandice), for the word “interest” substitute “land or real right”.
- (8) In section 11(1) (effect of recorded standard security), for the words from “the interest” to “a security” substitute “in the grantee a real right in security”. 20
- (9) The side note to section 12 (standard security may be granted by person uninfert) shall be “Standard security may be granted by person with unrecorded title”; and in that section—
- (a) in subsection (1)—
- (i) for the words “an interest” substitute “land or a real right”; 25
- (ii) the words “having right to that interest, but” shall cease to have effect; and
- (iii) for the word “interest”, where it last occurs, substitute “land or real right”;
- (b) in subsection (2)— 30
- (i) for the word “interest” substitute “land or real right in land”; and
- (ii) for the words “last infert” substitute “having the last recorded title”.
- (10) In section 13(1) (ranking of standard securities), for the words “interest in land or any part thereof, or of the subsequent assignation or conveyance of that interest” substitute “land or real right in land or over any part thereof, or of the subsequent assignation or conveyance of that land or real right,”. 35
- (11) In section 15(1) (restriction of standard security)—
- (a) for the word “interest”, where it first occurs, substitute “land or real right”; and 40
- (b) for the words from “to the interest” to “and the interest in land” substitute “to the land or real right contained in the standard security other than the part of that land or real right disburdened by the deed; and the land or real right”.
- (12) In section 16 (variation of standard security)— 45
- (a) in each of subsections (1) and (2), for the word “interest” substitute “land or real right”; and
- (b) in subsection (4), for the words “interest in land, or” substitute “land or real right in land, or over”.
- (13) In section 17 (discharge of standard security), for the word “interest” 50  
substitute “land or real right”.

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

**Sections 9 to 13 and 15 to 18**

References to "interest in land" are replaced with terminology which is more specific following feudal abolition. References to feuduty and ground annuals are removed.

**Section 11**

The substituted words in subsection (1) confirm that a standard security is a real right in security (that is to say a subordinate real right) and does not operate to convey the land to the creditor (as might be suggested by the current wording).

- (14) In section 18(3) (redemption of standard security), for the word “interest” substitute “land or real right”.
- (15) In section 19 (calling-up of standard security)—
- 5 (a) in subsection (2), for the words “last infeft in” substitute “having the last recorded title to”; and
- (b) in subsection (3), for the words—
- (i) “last infeft in” substitute “having the last recorded title to”; and
- (ii) “last infeft have” substitute “having the last recorded title have”.
- 10 (16) In section 30 (interpretation)—
- (a) in subsection (1), for the definition of “interest in land” substitute—
- ““real right in land” has the meaning assigned to it by the said section 9(8);” and
- (b) in subsection (2), the definition of “infeft” shall cease to have effect.
- 15 (17) Sections 33 (form of notice calling-up heritable security), 34 (amendment of section 34 of Conveyancing (Scotland) Act 1924), 35 (power of creditor in bond and disposition in security to sell to include power to sell by private bargain) and 39 (amendment of section 8 of Heritable Securities (Scotland) Act 1894) shall cease to have effect.
- 20 (18) In section 41(1) (restriction on effect of reduction of certain discharges of securities)—
- (a) for the words “to any subsequent interest in the land, acquired” substitute “who subsequently acquires the land or a real right in or over it”; and
- (b) the words “of the interest” shall cease to have effect.
- 25 (19) In section 43(1) (interpretation), the definition of “the Act of 1894” shall cease to have effect.
- (20) Section 49 (abolition of heritor’s right of pre-emption of glebe) shall cease to have effect.
- (21) In section 51 (application to the Crown), for the words “held of the Crown and of” substitute “owned by the Crown or by”.
- 30 (22) In Schedule 1 (land obligations not subject to variation or discharge under section 1 of Act), in paragraph 1, the words “feuduty, ground annual,” and “skat, dry multure, teind, stipend, standard charge” shall cease to have effect.
- (23) In the Notes to Schedule 2 (which relates to forms of standard security)—
- 35 (a) for note 1 substitute—
- “*Note 1.*—The security subjects shall be described sufficiently to identify them; but this note is without prejudice to any additional requirement imposed as respects any register.”.
- (b) in note 2—
- 40 (i) the words “*ground annual* or” shall cease to have effect; and
- (ii) for the word “infeftment” substitute “recorded title”; and
- (c) in note 3—
- (i) for the words “has been infeft in” substitute “has a recorded title to”;
- 45 (ii) for the words “has not previously been infeft in” substitute “does not have a recorded title to”;
- (iii) the words “*ground annual* or” shall cease to have effect;
- (iv) for the words “last infeft in” substitute “who last had a recorded title to”; and

## *Explanatory Notes*

### *Schedule 8 Part I (cont'd)*

#### **Section 19**

Feudal terminology is replaced.

#### **Section 30**

References to "interest in land" are replaced with terminology which is more specific following feudal abolition. Feudal terminology is removed.

#### **Sections 33 to 35**

These provisions are unnecessary given clause 63 of the Bill (see paragraph 9.31 of the report). Replacement provision can be used from Part II of the Act.

#### **Section 39**

This spent provision can be repealed.

#### **Section 41**

References to "interest in land" are replaced with terminology which is more specific following feudal abolition.

#### **Section 49**

Repeal of this section does not revive the old rule. (See Interpretation Act 1978, section 16.)

#### **Section 51**

Feudal terminology is replaced.

#### **Schedule 1**

References to feuduty, ground annuals, and other similar periodical payments are removed following their extinction. See Part III of the Bill and Part 3 of the report.

#### **Schedule 2**

##### **Note 1**

The amendment implements recommendation 63. A particular description is no longer needed for a standard security. Any description will suffice, be it particular or general. See paragraphs 9.33 ff of the report. References to ground annuals are also removed.

##### **Notes 2 and 3**

Feudal terminology is replaced and the reference to ground annuals is removed.

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(v) for the word “infefment” substitute “recorded title”.

(24) In Schedule 3 (the standard conditions), in condition 10(3), the words “feuduties, ground annuals or, as the case may be,” shall cease to have effect.

(25) In the Notes to Schedule 4 (which relates to forms of deeds of assignation and of restriction etc.), in note 3, for the words “infefment upon a standard security has been taken” substitute “title to a standard security has been completed”. 5

(26) In Schedule 8 (excluded enactments)—

(a) the heading which immediately precedes paragraph 2 shall be, and shall be deemed always to have been—

“Registration of Leases (Scotland) Act 1857”; and 10

(b) paragraphs 2, 3, 7 to 14, 16 and 17, 18 to 22, 24 and 26 to 30 shall cease to have effect.

*Agriculture Act 1970 (c.40)*

33.—(1) Section 33 of the Agriculture Act 1970 (miscellaneous amendments relating to amalgamations) shall be amended in accordance with this paragraph. 15

(2) In subsection (2)—

(a) in paragraph (b), for the words “in which an estate or interest is held by a liferenter or an heir of entail” substitute “which is held by a liferenter”;

(b) for the words “the liferenter or the heir of entail” substitute “or the liferenter”; and 20

(c) for the words “that estate or interest” substitute “the land”.

(3) Subsection (5) shall cease to have effect.

*Housing (Financial Provisions)(Scotland) Act 1972 (c.46)*

34. In section 78(1) of the Housing (Financial Provisions)(Scotland) Act 1972 (interpretation), in the definition of “land”, for the word “estate” substitute “right”. 25

*Prescription and Limitation (Scotland) Act 1973 (c.52)*

35.—(1) The Prescription and Limitation (Scotland) Act 1973 shall be amended in accordance with this paragraph.

(2) For sections 1 and 2 there shall be substituted—

“Validity of right. 1.—(1) If land has been possessed by any person, or by any person and his successors, for a continuous period of ten years openly, peaceably and without any judicial interruption and the possession was founded on, and followed— 30

(a) the recording of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in— 35

(i) that land; or

(ii) land of a description *habile* to include that land; or

(b) registration of a real right in that land, in favour of that person, in the Land Register of Scotland, subject to an exclusion of indemnity under section 12(2) of the Land Registration (Scotland) Act 1979, 40

then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge. 45

(2) Subsection (1) above shall not apply where—

(a) possession was founded on the recording of a deed which is invalid *ex facie* or was forged; or

## *Explanatory Notes*

### *Schedule 8 Part I (cont'd)*

#### **Schedule 3, standard condition 10(3)**

The reference to ground annuals and feuduty is removed.

#### **Schedule 4, Notes to Schedule 4, note 3**

Feudal terminology is replaced.

#### **Schedule 8**

The reference to the Registration of Leases (Scotland) Act 1857 is corrected.

The other repeals relate to provisions which, by virtue of section 32 of the Act, do not relate to standard securities, and which have been recommended for repeal elsewhere in this Schedule. The paragraphs can safely be repealed.

### *Agriculture Act 1970*

#### **Section 33**

The amendments are consequential upon the abolition of entails. See Part V of the Bill and paragraphs 9.8 ff of the report.

### *Housing (Financial Provisions) (Scotland) Act 1972*

#### **Section 78(1)**

The word "estate" is replaced by appropriate terminology. See paragraph 9.4 of the report.

### *Prescription and Limitation (Scotland) Act 1973*

#### **Sections 1 and 2**

References to "interest in land" are replaced with terminology which is more specific following feudal abolition: see paragraph 9.5 of the report. The sections were originally drafted on the premise that land was feudal, with different levels of ownership. This created the conceptual difficulty that the right, or interest, in land required to be possessed and not the land itself. The removal of superiorities means that the section can be appropriately recast, and can focus on the key element of possession of the land. The amended provisions make clear that servitudes are not covered (currently achieved by an exclusionary reference in the definition of "interest in land" in section 15 of the Act).

5 (b) possession was founded on registration in the Land Register of Scotland proceeding on a forged deed and the person appearing from the Register to have the real right in question was aware of the forgery at the time of registration in his favour.

10 (3) In subsection (1) above, the reference to a real right is to a real right which is registrable in the Land Register of Scotland or a deed relating to which can competently be recorded; but this section does not apply to servitudes or public rights of way.

(4) In the computation of a prescriptive period for the purposes of this section in a case where the deed in question is a decree of adjudication for debt, any period before the expiry of the legal shall be disregarded.

15 (5) Where, in any question involving any foreshore or any salmon fishings, this section is pled against the Crown as owner of the *regalia*, subsection (1) above shall have effect as if for the words "ten years" there were substituted "twenty years".

(6) This section is without prejudice to section 2 of this Act.

Special cases. 20 2.—(1) If—

(a) land has been possessed by any person, or by any person and his successors, for a continuous period of twenty years openly, peaceably and without any judicial interruption; and

25 (b) the possession was founded on, and followed the execution of, a deed (whether recorded or not) which is sufficient in respect of its terms to constitute in favour of that person a real right in that land, or in land of a description *habile* to include that land,

30 then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge except on the ground that the deed is invalid *ex facie* or was forged.

(2) This section applies—

(a) to the real right of the lessee under a lease; and

35 (b) to any other real right in land, being a real right of a kind which, under the law in force immediately before the commencement of this Part of this Act, was sufficient to form a foundation for positive prescription without the deed constituting the title to the real right having been recorded,

40 but does not apply to servitudes or public rights of way.

(3) This section is without prejudice to section 1 of this Act or to section 3(3) of the Land Registration (Scotland) Act 1979."

45 (3) In section 5(1) (provision as to what is to be treated as a deed for the purposes of sections 1, 2 and 3 of the Act), for the words "title to an interest in land shall be treated as a deed sufficient to constitute that title" substitute "right in land shall be treated as a deed sufficient to constitute that right".

(4) In section 15(1) (interpretation), the definition of "interest in land" shall cease to have effect.

(5) In Schedule 1 (obligations affected by certain prescriptive periods)—

50 (a) in paragraph 1, heads (iii) and (iv) of sub-paragraph (a); and

(b) in paragraph 2(f), the words "terce, courtesy," shall cease to have effect.

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

**Section 5**

References to "interest in land" are replaced with terminology which is more specific following feudal abolition.

**Section 15(1)**

The definition of "interest in land" is removed.

**Schedule 1**

Provisions relating to feuduty and other periodical payments are removed as unnecessary. However, there is a transitional provision to provide for the extinction, under short negative prescription, of those obligations to pay feuduty and other periodical payments which fell due on or before the appointed day.

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36. Paragraph 35(1) and (5)(a) of this Schedule, and the provisions of Schedule 9 to this Act in so far as relating to Schedule 1.1(a)(iii) and (iv) to the Prescription and Limitation (Scotland) Act 1973, shall not affect the application of section 6 of that Act to any obligation falling due on or before the appointed day.

*Land Compensation (Scotland) Act 1973 (c.56)*

5

37. In section 80 of the Land Compensation (Scotland) Act 1973 (interpretation), after subsection (1) insert—

“(1A) Any reference in this Act to an “interest” in land shall be construed as a reference to a right in land and as including a reference to ownership of land.”.

10

*Offshore Petroleum Development (Scotland) Act 1975 (c.8)*

38.—(1) The Offshore Petroleum Development (Scotland) Act 1975 shall be amended in accordance with this paragraph.

(2) In section 14(1) (power to require information as to interests in land), the word “superior,” shall cease to have effect.

15

(3) In section 16 (disposal of land for erection of churches, etc.), for the word “feu” substitute “disposition”.

(4) In section 20 (short title, interpretation and extent)—

(a) in subsection (2)—

(i) in the definition of “Crown interest”, the words “estate or” shall cease to have effect; and

20

(ii) for the definition of “land” substitute—

““land” includes the foreshore and other land covered with water and, except where the context otherwise requires—

25

(a) any interest in, or right over, land; and

(b) any other heritable property;”;

(b) in subsection (3), the words “estate or” shall cease to have effect.

*Scottish Development Agency Act 1975 (c.69)*

39.—(1) The Scottish Development Agency Act 1975 shall be amended in accordance with this paragraph.

30

(2) In section 9 (acquisition and disposal of land), in subsection (1)(a), the word “feu,” shall cease to have effect.

(3) In section 11(1) (power to obtain information), the word “superior,” shall cease to have effect.

35

(4) In section 25(1) (interpretation), for the definition of “land” substitute—

““land” includes—

(a) the foreshore and other land covered with water;

(b) any interest in, or right over, land; and

(c) any other heritable property;”.

40

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Land Compensation (Scotland) Act 1973*

**Section 80(1A)**

The expression “interest in land” is used throughout this Act. The definition makes it clear that it covers rights in land, including ownership.

*Offshore Petroleum Development (Scotland) Act 1975*

**Section 14**

Feudal terminology is removed.

**Section 16**

Feudal terminology is replaced.

**Section 20**

References to “estate in land” are removed with the abolition of feudal estates.

*Scottish Development Agency Act 1975*

**Sections 9 and 11**

Feudal terminology is removed.

*Aircraft and Shipbuilding Industries Act 1977 (c.3)*

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40. In section 56(3) (interpretation of expressions relating to land in Scotland), for paragraph (b) substitute—

- 5 “(b) “rights of ownership” means the rights—  
 (i) of an owner; or  
 (ii) of a tenant under a lease;”.

*Land Registration (Scotland) Act 1979 (c.33)*

41.—(1) The Land Registration (Scotland) Act 1979 shall be amended in accordance with this paragraph.

- 10 (2) In section 2(1)(a) (provision for registration in the land register)—  
 (a) in sub-paragraph (i)—  
 (i) for the words “feu, long lease or security by way of contract of  
 ground annual” substitute “long lease”; and  
 (ii) for the words “feuar, lessee or debtor in the ground annual”  
 15 substitute “lessee”; and  
 (b) in sub-paragraph (v), for the words “, udal tenure or a kindly tenancy”  
 substitute “or udal tenure”.
- (3) In section 3 (effect of registration)—  
 (a) in subsection (3), paragraph (c) shall cease to have effect;  
 20 (b) in subsection (4), paragraph (b) shall cease to have effect; and  
 (c) in subsection (6)—  
 (i) for the words “an uninfert proprietor” substitute “an  
 unregistered holder”;  
 (ii) for the words “the uninfert proprietor” substitute “him”;  
 25 (iii) for the word “infert” substitute “registered as entitled to the  
 interest”;  
 (iv) the words “by person uninfert” shall cease to have effect; and  
 (v) after “uninfert” insert “and section 25(b) of the Abolition of  
 Feudal Tenure etc. (Scotland) Act 1998 (completion of title to  
 30 conservation burden)”.
- (4) In section 6 (title sheets)—  
 (a) in subsection (1)(a), for the words “*dominium utile*” substitute “land”; and  
 (b) in subsection (3), the words “over-feuduty or”, in both places where they  
 occur, shall cease to have effect.
- 35 (5) In section 12 (indemnity in respect of loss)—  
 (a) in subsection (3)(m), the words “a superior, a creditor in a ground annual or”,  
 “the feu writ, the contract of ground annual or”, “, as the case may be,”,  
 “superior, creditor or” and, in both places where they occur, “feuduty,  
 ground annual or”; and  
 40 (b) in subsection (4)(a) the words “over-feuduty or”,  
 shall cease to have effect.
- (6) In section 15 (simplification of deeds relating to registered interests)—  
 (a) in subsection (2)(a), the words “sections 10 and 146 of and Schedule D to the  
 Titles to Land Consolidation (Scotland) Act 1868,” shall cease to have  
 45 effect; and  
 (b) for subsection (3) substitute—  
 “(3) It shall not be necessary, in any deed relating to a registered  
 interest in land, to deduce title if evidence of sufficient midcouples or  
 links between the unregistered holder and the person last registered as

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Aircraft and Shipbuilding Industries Act 1977*

**Section 56**

Terminology is made post-feudal.

*Land Registration (Scotland) Act 1979*

**Section 2**

References to feudal terminology, ground annuals (see clause 50 of the Bill and paragraphs 3.51 ff of the report) and kindly tenancies (see clause 58 of the Bill and paragraphs 8.4 ff of the report) are removed.

**Section 3**

References to feudal terminology and kindly tenancies are removed in subsections (3) and (4).

In subsection (6) feudal terminology is replaced.

**Section 6**

References to feuduty are removed and feudal terminology is replaced.

**Section 12**

Feudal terminology is removed, and also the references to ground annuals.

**Section 15**

In subsection (2) references to statutory provisions which are to be repealed are removed.

Subsection (3) is recast to ensure that a deduction of title clause is not necessary in any deed relating to a registered interest in land. This accords with the existing practice of the Keeper. However, the subsection as currently framed (by specifying statutory provisions) would require a deduction of title clause in, for example, a discharge of a standard security (given that Schedule 4, note 1 to the Conveyancing and Feudal Reform (Scotland) Act 1970 is not specified).

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entitled to the interest are produced to the Keeper on registration in respect of that interest in land.”.

- (7) In section 16 (omission of certain clauses in deeds)—
- (a) subsection (2); and
  - (b) in subsection (3)(b), the words “feuduties, ground annuals,” and “and, in the case of a grant of land in feu, of all feuduties payable by the grantor to his superiors from and after the date of entry”, shall cease to have effect. 5
- (8) In section 20 (tenants-at-will)—
- (a) in subsection (3), paragraph (ii), and the word “; and” immediately preceding that paragraph, shall cease to have effect; 10
  - (b) in subsection (5), for the words “, restriction or redemption” substitute “or restriction”;
  - (c) in subsection (6), the words “, and all such feuduties, ground annuals or other periodical payments as are mentioned in subsection (3)(ii) above” shall cease to have effect; and 15
  - (d) in subsection (8)(a), sub-paragraph (ii) shall cease to have effect.
- (9) In section 21 (provisions supplementary to section 20)—
- (a) in subsection (8), for the words “infert in” substitute “owner of”;
  - (b) for subsection (9) substitute— 20
    - “(9) Any condition or provision to the effect that a person with an interest in land shall be entitled to a right of pre-emption in the event of a sale of the land, or of any part of the land, by the proprietor for the time being, shall not be capable of being enforced where the sale is by a landlord to his tenant-at-will under section 20 of this Act.”; and 25
  - (c) in subsection (10) for the words “grant by him of a feu” substitute “disposition by him”.
- (10) In section 26 (application to Crown), for the words “held of the Crown and of” substitute “owned by the Crown or by”. 30
- (11) In section 28(1) (interpretation)—
- (a) the definition of “feu” shall cease to have effect;
  - (b) in the definition of “incorporeal heritable right”, after the word “include” insert “a right of ownership of land, the right of a lessee under a long lease of land, a right to mines or minerals or”; 35
  - (c) for the definition of “interest in land” substitute—
    - ““interest in land”—
    - (a) means any right in or over land, including any heritable security or servitude but excluding any lease which is not a long lease; and 40
    - (b) where the context admits, includes the land;”.

*Ancient Monuments and Archaeological Areas Act 1979 (c.46)*

42.—(1) The Ancient Monuments and Archaeological Areas Act 1979 shall be amended in accordance with this paragraph.

(2) In section 12(9) (certain persons acquiring rights to monuments in Scotland not bound by guardianship deeds), in paragraph (b), for the words “completed by infertment” substitute “title has been completed”. 45

(3) In section 18(4) (capacities relevant to limited ownership), in paragraph (c), the words “or heir of entail” shall cease to have effect.

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

**Section 16**

References to feudal terminology and ground annuals are removed.

**Section 20**

References to feudal terminology, ground annuals etc, and kindly tenancies are removed.

**Sections 21 and 26**

Feudal terminology is replaced with appropriate post-feudal terms.

**Section 28**

Feudal terminology is removed or replaced.

*Ancient Monuments and Archaeological Areas Act 1979*

**Section 12**

Feudal terminology is replaced.

**Section 18(4)**

A reference to the heir of entail is removed as a consequence of the abolition of entails. See Part V of the Bill and paragraph 9.8 ff of the report.

**Section 57**

Feudal terminology is removed.

(4) In section 57(1) (power to require information), the words “of the dominium utile,” shall cease to have effect.

*Education (Scotland) Act 1980 (c.44)*

43.—(1) The Education (Scotland) Act 1980 shall be amended in accordance  
5 with this paragraph.

(2) In section 16(2)(b) (method of effecting transference of school), in sub-paragraph (i), for the words “interest in the land to be transferred” substitute “transferee’s right in the land”.

(3) In each of sections 20(1)(a) (power of education authority to acquire land) and  
10 22(1)(a) (power of education authority to sell land), the word “feu,” shall cease to have effect.

*Water (Scotland) Act 1980 (c.45)*

44.—(1) The Water (Scotland) Act 1980 shall be amended in accordance with this  
paragraph.

15 (2) In section 20 (power to hold or dispose of land), the word “feu,” shall cease to have effect.

(3) In section 65 (power of council to make charging order for expenses of executing works)—

(a) in subsection (5)—

20 (i) the word “estates,”; and

(ii) paragraph (a),

shall cease to have effect;

(b) in subsection (7), for the words “absolute order made under and in terms of the Improvement of Land Act 1864” substitute “a standard security”; and

25 (c) in subsection (8), the words “or rentcharge” shall cease to have effect.

(4) In Schedule 4 (provisions to be incorporated in orders relating to water undertakings), in paragraph 8, the words “feuduties, ground annuals,” shall cease to have effect.

*British Telecommunications Act 1981 (c.38)*

30 45. In Schedule 2 to the British Telecommunications Act 1981 (provisions as to transfers of property, rights and liabilities), in paragraph 1(3), for the words from “Sub-paragraph (2)” to “that sub-paragraph” substitute “In the application of sub-paragraph (2)”.

*Mobile Homes Act 1983 (c.34)*

35 46. In section 5 of the Mobile Homes Act 1983 (interpretation), at the end add—

“(4) In relation to land in Scotland, any reference in this Act to an “estate or interest” shall be construed as a reference to a right in, or to, the land.”.

*Roads (Scotland) Act 1984 (c.54)*

40 47. In each of sections 53(4) (enforceability against third parties of agreements as to use of land near roads) and 72(3) (enforceability against third parties of agreements as to stopping up of private access to land) of the Roads (Scotland) Act 1984, for the words “completed by infestment” substitute “title has been completed”.

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Education (Scotland) Act 1980*

**Section 16**

A reference to “interest in land” is removed and replaced by appropriate post-feudal terminology. See paragraph 9.5 of the report.

**Sections 20 and 22**

Feudal terminology is removed.

*Water (Scotland) Act 1980*

**Section 20**

Feudal terminology is removed.

**Section 65**

Feudal terminology, including references to “estates”, is removed. A reference to the Improvement of Land Act 1864 is removed with its repeal.

**Schedule 4**

Feudal terminology is removed.

*British Telecommunications Act 1981*

**Schedule 2**

Alteration is made for purposes consequential on feudal abolition.

*Mobile Homes Act 1983*

**Section 5**

A definition of “estate or interest” is necessary to apply the definition of “owner” to Scotland.

*Roads (Scotland) Act 1984*

**Sections 53 and 72**

Feudal terminology is replaced.

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## Companies Act 1985 (c.6)

48.—(1) The Companies Act 1985 shall be amended in accordance with this paragraph.

(2) In—

- (a) section 395(1)(a)(ii) (charges void unless registered) unless the 5  
circumstance mentioned in sub-paragraph (4) below arises; or
- (b) section 410(4)(a) (charges void unless registered) if that circumstance does  
arise,

the words “, ground annual” shall cease to have effect.

(3) If the amendment in head (b) above falls to be made, the amendment in head (a) 10  
above shall, on section 92 of the Companies Act 1989 coming into force, have effect.

(4) The circumstance is that section 92 of the Companies Act 1989 has not come into  
force by the date on which this Schedule comes into force.

(5) In Schedule 4, in paragraph 93 (interpretation of Schedule), the words “is the 15  
proprietor of the *dominium utile* or, in the case of land not held on feudal tenure,” and “;  
and the reference to ground-rents, rates and other outgoings includes feu-duty and  
ground annual” shall cease to have effect.

(6) In Schedule 9, in paragraph 36 (interpretation of Schedule), the words “is the 20  
proprietor of the *dominium utile* or, in the case of land not held on feudal tenure,” and “;  
and the reference to ground-rents, rates and other outgoings includes a reference to  
feu-duty and ground annual” shall cease to have effect.

## Housing Associations Act 1985 (c.69)

49. In section 106(2) of the Housing Associations Act 1985 (application of Act in 25  
Scotland), in the definition of “heritable security”, for the words “interest in land by  
disposition or assignation of that interest” substitute “land, or real right in land, by  
disposition of the land, or assignation of the real right.”

## Housing (Scotland) Act 1987 (c.26)

50.—(1) The Housing (Scotland) Act 1987 shall be amended in accordance with this 30  
paragraph.

(2) In section 16 (disposal of land for erection of churches etc.), for the word  
“feu” substitute “disposition”.

(3) In section 84A (application of right to buy to cases where landlord is lessee), for  
the word “interest”, wherever it occurs, substitute “real right”.

(4) In section 125(2) (notice to certain persons of time and place at which 35  
question of demolishing building will be considered), the words “of the superior of  
whom such owner holds, and” shall cease to have effect.

(5) In section 132, subsection (1) (notice to superiors of certain proceedings in  
relation to lands and heritages) shall cease to have effect.

(6) In section 155(1) (power to require information), for the words “an estate” 40  
substitute “a right”.

(7) The side note to section 175 (protection of superiors and owners) shall be  
“Protection of owners.”; and in subsection (1) of that section—

- (a) the words “superior or” shall cease to have effect; and
- (b) for the word “estate” substitute “right”. 45

(8) In section 177(b) (interpretation), for the words “an estate” substitute “a  
right”.

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Companies Act 1985*

**Sections 395 and 410**

Section 410 of the 1985 Act is due to be replaced when section 92 of the Companies Act 1989 comes into force. The drafting ensures that the words "ground annual" will be deleted with either occurrence.

**Schedules 4 and 9**

Feudal terminology is removed.

*Housing Associations Act 1985*

**Section 106**

The amendment removes "interest in land" and replaces it by appropriate post-feudal terms.

*Housing (Scotland) Act 1987*

**Section 16**

Feudal terminology is replaced.

**Section 84A**

References to "interest" are replaced by terminology which is more specific following feudal abolition: see paragraph 9.5 of the report.

**Section 125**

Feudal terminology is removed.

**Section 132(1)**

This purely feudal provision is repealed.

**Section 155**

The reference to an "estate in land" is replaced by an appropriate post-feudal term, given the abolition of feudal estates.

**Section 175**

Feudal terminology is removed and the reference to "estate" is replaced by an appropriate post-feudal term.

**Sections 177, 179, 180 and 186**

References to feudal estates are replaced by appropriate post-feudal terms.

- (9) In section 179 (general effect of control order)—
- (a) in subsection (1)(b), for the words “an estate” substitute “a right”; and
  - (b) in subsection (2), for the words “under this section have an interest amounting to an estate in” substitute “own”.
- 5 (10) In section 180 (effect of control order on occupier)—
- (a) in subsection (2)—
    - (i) in paragraph (a), for the words “an estate” substitute “a right”; and
    - (ii) in paragraph (b), for the words “an estate in” substitute “ownership of”; and
  - (b) in subsection (6), for the words “an estate” substitute “a right”.
- (11) In section 186 (appeal against control order), in each of subsections (1) and (2), for the words “an estate” substitute “a right”.
- (12) In section 190(1) (interpretation), in the definition of “licence”, for the words “an estate or interest therein” substitute “ownership, tenancy or a real right”.
- 15 (13) Section 334 (power of heir of entail to sell land for housing purposes) shall cease to have effect.
- (14) In section 338(1) (interpretation)—
- (a) in the definition of “land”, for the word “estate” substitute “right”; and
  - (b) the definitions of—
    - (i) “sell” and “sale”; and
    - (ii) “superior”,
 shall cease to have effect.
- 20 (15) In Schedule 9 (recovery of expenses by charging order), in paragraph 7, for the words “bond and disposition in” substitute “standard”.
- (16) In Schedule 11 (houses in multiple occupation: control orders)—
- (a) in paragraph 4(1), for the words “an estate” substitute “a right”; and
  - (b) in paragraph 5(3), for the words—
    - (i) “an estate” substitute “a right”; and
    - (ii) “that estate” substitute “that right”.
- 30

*Consumer Protection Act 1987 (c.43)*

51. In section 23(3) of the Consumer Protection Act 1987 (interpretation), in paragraph (b) of the definition of “relevant interest”, for the words “*dominium utile*” substitute “ownership”.

35 *Income and Corporation Taxes Act 1988 (c.1)*

52.—(1) The Income and Corporation Taxes Act 1988 shall be amended in accordance with this paragraph.

(2) In section 15(1) (in which is set out Schedule A), in Schedule A, in paragraph 1(3)(b), the words “, ground annuals and feu duties” shall cease to have effect.

40

(3) In section 25(2) (deductions from rent: general rules), in the definition of “permitted deductions”, in paragraph (d), the words “, ground annual, feuduty” shall cease to have effect.

(4) In section 28 (deductions from receipts other than rent), in paragraph (b), the words “, ground annual, feuduty” shall cease to have effect.

45

(5) In section 119 (rent etc. payable in connection with mines, quarries and similar concerns), in subsection (3), in the definition of “rent”, the word “, feuduty” shall cease to have effect.

## *Explanatory Notes*

### *Schedule 8 Part I (cont'd)*

#### **Section 190**

The reference to “an estate or interest” is replaced with appropriate post-feudal terminology. See paragraphs 9.3 ff of the report.

#### **Section 334**

This section is repealed with the abolition of entails. See Part V of the Bill and paragraphs 9.8 ff of the report.

#### **Section 338**

Feudal terminology is removed or replaced with appropriate post-feudal terms.

#### **Schedule 9**

This amendment is consequential upon clause 63 of the Bill. See paragraph 9.31 of the report.

#### **Schedule 11**

References to an “estate” are replaced by appropriate post-feudal terminology.

### *Consumer Protection Act 1987*

#### **Section 23**

Feudal terminology is replaced.

### *Income and Corporation Taxes Act 1988*

#### **Section 15(1), Schedule A, paragraph 1(3)(b)**

The reference to ground annuals and feuduties is removed with their extinction. See clauses 7 and 50 of the Bill and Part 3 of the report.

#### **Sections 25(2), 28 and 119**

References to ground annual and feuduty are removed with their extinction.

#### **Section 776**

Feudal terminology is replaced with appropriate post-feudal terms.

#### **Section 832**

This Act includes a number of references to “estates in land”. This is now a purely English term, and appropriate translation provision is necessary. A post-feudal definition is therefore substituted. See paragraph 9.3 ff of the report.

SCH. 8

(6) In section 776 (transactions in land: taxation of capital gains), in subsection (6), in the definition for Scotland of “freehold”, for the words “estate or interest of the proprietor of the *dominium utile* or, in the case of property other than feudal property,” substitute “interest”.

(7) In section 832(1) (interpretation of the Tax Acts), after the definition of “distribution” insert—

““estate in land”, in relation to any land in Scotland, includes the land;”.

*Capital Allowances Act 1990 (c.1)*

53. In section 125(1) of the Capital Allowances Act 1990 (interpretation), for paragraph (b) substitute—

“(b) in Scotland, the interest of the owner or an agreement to acquire such an interest.”.

*Natural Heritage (Scotland) Act 1991 (c.28)*

54.—(1) The Natural Heritage (Scotland) Act 1991 shall be amended in accordance with this paragraph.

(2) In section 22(1) (interpretation), in the definition of “land”, the word “estate,” shall cease to have effect.

(3) In Schedule 1 (constitution and proceedings of Scottish National Heritage), in paragraph 19—

(a) in sub-paragraph (1), after the words “to land” insert “which or”; and

(b) for sub-paragraph (2) substitute—

“(2) In sub-paragraph (1) above—

“interest” includes any right over the land, whether exercisable by virtue of ownership or by virtue of a licence or agreement and, without prejudice to that generality, includes sporting rights; and

“land” includes—

(i) land covered by water; and

(ii) salmon fishings.”.

*Coal Mining Subsidence Act 1991 (c.45)*

55.—(1) The Coal Mining Subsidence Act 1991 shall be amended in accordance with this paragraph.

(2) In section 52(1) (interpretation), in the definition of “owner”, paragraph (b) shall cease to have effect.

(3) In Schedule 1 (determination of amount of depreciation payments), in paragraph 2(6)—

(a) in the definition of “fee simple”, for the words “, in the case of feudal property, the estate or interest of the proprietor of the *dominium utile* or, in the case of property other than feudal property, the estate or” substitute “the”; and

(b) the definition of “incumbrance” shall cease to have effect.

(4) In Schedule 2 (recipients of depreciation payments: special cases)—

(a) in paragraph 3(2), head (b); and

(b) in paragraph 4(2)(b), the words “an entail or”, shall cease to have effect.

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Capital Allowances Act 1990*

**Section 125 (1)**

The substituted paragraph replaces feudal terminology with appropriate post-feudal terms.

*Natural Heritage (Scotland) Act 1991*

**Section 22(1)**

The reference to “estate” is removed following the abolition of feudal estates.

**Schedule 1**

The original definitions of “interest” and “land” referred back to definitions in section 114 of the National Parks etc. Act 1949. This was mainly an English Act. The definition of “interest” is not now suitable for Scotland. The substituted provisions preserve the substance of the 1949 definitions but are now framed in a specifically Scottish form.

*Coal Mining Subsidence Act 1991*

**Section 52(1)(b)**

This is a purely feudal definition which can be repealed.

**Schedule 1**

Feudal terminology is removed.

**Schedule 2**

Feudal terminology, and references to entails, are removed.

**Schedule 6**

Feudal terminology is removed or replaced with appropriate post-feudal terms.

(5) In Schedule 6 (farm loss payments), in paragraph 1(5)—

- (a) in head (a), for the words “an interest as infeft proprietor of” substitute “a right as proprietor with completed title to”; and  
 (b) the words “, but do not include references to an interest as a superior only” shall cease to have effect.

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*Crofters (Scotland) Act 1993 (c.44)*

56.—(1) The Crofters (Scotland) Act 1993 shall be amended in accordance with this paragraph.

(2) In section 16 (provisions relating to conveyance)—

- (a) in subsection (3), the words “estates or” shall cease to have effect;  
 (b) in subsection (5), for the words “is infeft in” substitute “has a completed title to”; and  
 (c) subsection (7) shall cease to have effect.

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(3) In section 17(3) (certain conditions or provisions to be unenforceable), in paragraph (a), the words “or (b)” and in paragraph (b) the word “other”, shall cease to have effect.

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(4) In section 19(4) (heritable securities)—

- (a) paragraph (a); and  
 (b) in each of paragraphs (b) and (c), the words “otherwise than in feu”, shall cease to have effect.

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(5) In section 20(3) (interpretation), in paragraph (a), for the word “feuing” substitute “disposing”.

*Coal Industry Act 1994 (c.21)*

57.—(1) The Coal Industry Act 1994 shall be amended in accordance with this paragraph.

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(2) In section 8 (exploitation rights: territorial waters and continental shelf), in subsection (6), for the words “a proprietor of the *dominium utile*” substitute “an owner”.

(3) In section 9 (exploitation rights: oil and gas), in subsection (4)(b), for the words “proprietor of the *dominium utile* as respects” substitute “an owner in”.

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(4) In section 10 (protection for certain interests in coal and coal mines), in subsection (7), paragraph (b) and the word “and” immediately preceding that paragraph shall cease to have effect.

*Value Added Tax Act 1994 (c.23)*

58. In section 96(1) of the Value Added Tax Act 1994 (interpretation) in the definition of —

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(a) “fee simple”, in paragraph (a), the words “estate or interest of the proprietor of the *dominium utile* or, in the case of land not held on feudal tenure, the estate or” shall cease to have effect; and

(b) “major interest”, for the words from “—(a) the estate” to “tenure, the estate or” substitute “the”.

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*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Crofters (Scotland) Act 1993*

**Sections 16, 17(3), 19(4) and 20(3)**

Feudal terminology is removed or replaced by appropriate post-feudal terms.

*Coal Industry Act 1994*

**Sections 8 and 9**

Feudal terminology is replaced.

**Section 10(7)(b)**

This paragraph is removed as being purely feudal.

*Value Added Tax Act 1994*

**Section 96**

Feudal terminology is removed.

## SCH. 8

*Requirements of Writing (Scotland) Act 1995 (c.7)*

59. In section 1 of the Requirements of Writing (Scotland) Act 1995 (writing required for certain contracts, obligations, trusts, conveyances and wills)—

- (a) in subsection (2), in each of paragraphs (a)(i) and (b), for the words “an interest” substitute “a real right”; and
- (b) in subsection (7), for the words ““interest in land” means any estate, interest or” substitute ““real right in land” means any real”.

5

*Atomic Energy Authority Act 1995 (c.37)*

60. In section 1 of the Atomic Energy Authority Act 1995 (schemes for transfer of property, rights and liabilities), for subsection (6) substitute—

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“(6) In the application of subsection (3)(b) above to Scotland, the reference to the fee simple estate shall be construed as a reference to the interest of the owner.”.

*Town and Country Planning (Scotland) Act 1997 (c.8)*

61.—(1) The Town and Country Planning (Scotland) Act 1997 shall be amended in accordance with this paragraph.

15

(2) In section 191 (disposal of land held for planning purposes), subsection (9) shall cease to have effect.

(3) In section 272(2) (matters as to which information may be required), in paragraph (b), the word “superior,” shall cease to have effect.

20

(4) In section 277 (interpretation)—

(a) in subsection (1), in the definition of—

(i) “disposal”, the words “, except in section 191(9),”; and

(ii) “heritable security”, in paragraph (a), the words “a security by way of ground annual and”,

25

shall cease to have effect; and

(b) subsection (8) shall cease to have effect.

(5) In Schedule 15 (general vesting declarations)—

(a) in paragraph 7, the words “feuduty, ground annual or”; and

(b) in paragraph 34, the words “a feuduty, ground annual,”,

30

shall cease to have effect.

## PART II

## MINOR AND CONSEQUENTIAL AMENDMENTS RELATING TO THE NATIONAL TRUST FOR SCOTLAND

*National Trust for Scotland Order Confirmation Act 1935 (ch.ii)*

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62.—(1) The Order contained in the Schedule to the National Trust for Scotland Order Confirmation Act 1935 (incorporation, conferring of powers etc.) shall be amended in accordance with this paragraph.

(2) In section 4(2) (powers of National Trust), the word “feu” shall cease to have effect.

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(3) In section 6(2) (completion of title by National Trust), the words “notarial instrument or” shall cease to have effect.

*Explanatory Notes*

*Schedule 8 Part I (cont'd)*

*Requirements of Writing (Scotland) Act 1995*

**Section 1**

References to "interest in land" are replaced with terminology which is more specific following feudal abolition. See paragraph 9.5 of the report.

*Atomic Energy Authority Act 1995*

**Section 1(6)**

Feudal terminology is replaced by appropriate post-feudal terminology.

*Town and Country Planning (Scotland) Act 1997*

**Sections 191(9) and 272(2)**

Feudal terminology is removed.

**Section 277(1)**

References to ground annuals are removed following their abolition. See clause 50 of the Bill and paragraphs 3.51 ff of the report. Amendment is made consequential upon the repeal of section 191(9).

**Section 277(8)**

Feudal terminology is removed.

**Schedule 15**

References to feuduty and ground annual are removed following their abolition. See Part III of the Bill and Part 3 of the report.

**Schedule 8 Part II**

This Part of the schedule contains consequential amendments to private Acts relating to the National Trust for Scotland.

*National Trust for Scotland Order Confirmation Act 1935*

**The Schedule, section 4**

Feudal terminology is removed.

**The Schedule, section 6**

The reference to notarial instrument is removed (see paragraphs 7.27 ff of the report). Subsection (2) authorises the National Trust to complete title by using a notice of title.

## National Trust for Scotland Order Confirmation Act 1947 (ch.xxxviii)

SCH. 8

63.—(1) The Order contained in the Schedule to the National Trust for Scotland Order Confirmation Act 1947 (extension of powers of National Trust etc.) shall be amended in accordance with this paragraph.

5 (2) In section 3(a) (extension of powers of National Trust: feuing of land for feu duties etc.)—

(a) for the word “feus” substitute “dispositions”; and

(b) the words from “feu duties” to “any” shall cease to have effect.

(3) In section 4 (exercise of extended powers)—

10 (a) in subsection (2)—

(i) for the word “feu”, where it first occurs, substitute “dispone”; and

(ii) for the words “feu charter feu contract” substitute “disposition”; and

15 (b) in subsection (4), for the word “feued” substitute “disponed”.

## SCHEDULE 9

Section 70(2).

## REPEALS

## PART I

## REPEALS: GENERAL

20	Chapter	Short title	Extent of repeal
	1592 c.31 ( <i>Act of the Parliaments of Scotland</i> )	Mines and Metals Act 1592.	The words “or feu”.
25	1597 c.17 ( <i>Act of the Parliaments of Scotland</i> ).	Feu-duty Act 1597.	The whole Act.
30	1661 c.243 ( <i>Act of the Parliaments of Scotland</i> ).	Registration Act 1661.	The whole Act.
	1672 c.24 ( <i>Act of the Parliaments of Scotland</i> ).	Ann Act 1672.	The whole Act.
35	1685 c.26 ( <i>Act of the Parliaments of Scotland</i> ).	Entail Act 1685.	The whole Act.
40	1690 c.61 ( <i>Act of the Parliaments of Scotland</i> ).	Udal Tenure Act 1690.	The whole Act.

## *Explanatory Notes*

### *Schedule 8 Part II (cont'd)*

#### *National Trust for Scotland Order Confirmation Act 1947*

##### **The Schedule, sections 3 and 4**

These provisions relate to inalienable land held by the National Trust. Currently, the National Trust can feu land which would otherwise be inalienable, if certain statutory tests are satisfied, and the National Trust receives the consent of the Lord Advocate. Feuing will not be possible after feudal abolition. Accordingly, feudal terminology is removed or is replaced with appropriate post-feudal equivalents. The statutory tests remain.

### **Schedule 9 Part I**

This schedule deals with the large number of repeals made necessary or possible as a result of the abolition of the feudal system and the related reforms recommended in the report. It eliminates a great deal of obsolete legislation. See paragraphs 9.1 to 9.20 and 9.29 to 9.32 of the report. Part I deals with repeals in general and Part II deals with private Acts relating to the National Trust for Scotland.

#### *Mines and Metals Act 1592*

See the Notes to Schedule 8 - Part I.

#### *Feu-duty Act 1597*

This Act can be repealed with the abolition of feuduty. See Part III of the Bill and Part 3 of the report.

#### *Registration Act 1661*

This relates to registration of comprisings and can be repealed as comprisings were superseded by adjudications as a result of the Adjudications Act 1672.

#### *Ann Act 1672*

This Act can be repealed entirely with the abolition of stipends. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Entail Act 1685*

This Act authorised the creation of entails and can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

#### *Udal Tenure Act 1690*

This Act dealt with certain rights of vassals of the Kirk who had apparently come to hold on feudal tenure, whose land did not exceed a value of 20 pounds Scots (about £1.66). The provisions are now spent, and repeal will not revive any long since prescribed rights.

#### *Teinds Act 1690*

This Act can be repealed with the abolition of teinds. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Registration Act 1698*

Feudal terminology is removed.

#### *Tenures Abolition Act 1746*

This Act abolished wardholding and made other feudal reforms. With feudal abolition the whole Act falls to be repealed save sections 21 and 22 which are specific to leases.

#### *Entail Improvement Act 1770*

This Act can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

#### *Thirlage Act 1799*

This Act is repealed with the abolition of thirlage. See clause 49 of the Bill, and paragraph 9.23 of the report. This implements recommendation 60.

#### *Teinds Act 1808*

This Act can be repealed with the abolition of teinds. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

## SCH. 9

Chapter	Short title	Extent of repeal	
1690 c.63 ( <i>Act of the Parliaments of Scotland</i> ).	Teinds Act 1690.	The whole Act.	
1698 c.4 ( <i>Act of the Parliaments of Scotland</i> ).	Registration Act 1698.	The words "Chartors granted by Subjects".	5
20 Geo.2 c.50.	Tenures Abolition Act 1746.	The whole Act except sections 21 and 22.	10
10 Geo.3 c.51.	Entail Improvement Act 1770.	The whole Act.	
39 Geo.3 c.55.	Thirlage Act 1799.	The whole Act.	
48 Geo.3 c.138.	Teinds Act 1808.	The whole Act.	15
5 Geo.4 c.87.	Entail Provisions Act 1824.	The whole Act.	
10 Geo.4 c.19.	Register of Sasines Act 1829.	The whole Act.	
3 & 4 Will.4 c.13.	Public Revenue (Scotland) Act 1833.	In section 1, the words from "or in relation to the issuing or paying any stipend" to "behalf, or others entitled thereto;"; and the words "granting tacks of teinds, or to the".	20 25
4 & 5 Will.4 c.41.	New Churches (Scotland) Act 1834.	The whole Act.	
6 & 7 Will.4 c.33.	Erasures in Deeds (Scotland) Act 1836.	The whole Act.	
6 & 7 Will.4 c.42.	Entail Powers Act 1836.	The whole Act.	30
1 & 2 Vict. c.70.	Entail Act 1838.	The whole Act.	
1 & 2 Vict. c.118.	Court of Session (No.2) Act 1838.	The whole Act.	35
2 & 3 Vict. c.36.	Court of Session Act 1839.	The whole Act.	
3 & 4 Vict. c.48.	Entail Sites Act 1840.	The whole Act.	
7 & 8 Vict. c.44.	New Parishes (Scotland) Act 1844.	The whole Act.	40
8 & 9 Vict. c.19.	Lands Clauses Consolidation (Scotland) Act 1845.	In section 7, the words "heirs of entail," "estate or", "married women seised in their own right or entitled to terce or dower, or any other right or interest, husbands," "or feoffees", "and as to such married women as if they were sole," and, in the last two places where they occur, "married women," In section 8, the words from "power herein" to	45 50 55

## *Explanatory Notes*

### *Schedule 9 Part I (cont'd)*

#### *Entail Provisions Act 1824*

This Act can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

#### *Register of Sasines Act 1829*

This Act is repealed, its provisions (validating old instruments of sasines) now being spent.

#### *Public Revenue (Scotland) Act 1833*

References to teinds and stipend are removed following their abolition. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *New Churches (Scotland) Act 1834*

This obsolete statute can be repealed.

#### *Erasures in Deeds (Scotland) Act 1836*

This Act is unnecessary. Erasures in deeds are covered by section 54 of the Conveyancing (Scotland) Act 1874.

#### *Entail Powers Act 1836*

This Act can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

#### *Entail Act 1838*

This Act can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

#### *Court of Session (No 2) Act 1838*

The surviving section of this Act (section 27) (the rest of the Act having been repealed by the Court of Session Act 1988) deals with the Court of Commissioners for teinds. With the abolition of teinds this Act can now be repealed. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Court of Session Act 1839*

This Act makes provision for the regulation of the Court of Teinds. This is no longer necessary given the abolition of teinds. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report. As these provisions are the sole surviving sections, the whole Act can be repealed.

#### *Entail Sites Act 1840*

The repeal of this Act is recommended as part of our general proposals for the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report. In our Discussion Paper on Real Burdens (DP No 146 at para 8.69) we proposed the repeal of this Act. See paragraph 9.14 (footnote 10) of the report.

#### *New Parishes (Scotland) Act 1844*

This Act regulated the creation of new parishes. The Act presupposes the existence of heritors (that is to say landowners in the parish liable for stipend) and titulars of teinds. These will disappear with the abolition of stipends. The remainder of the Act deals with matters which can be dealt with adequately by the Church under their general powers. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Lands Clauses Consolidation (Scotland) Act 1845*

See the Notes to Schedule 8 - Part I.

Chapter	Short title	Extent of repeal
<p>8 &amp; 9 Vict. c.19.— <i>cont.</i></p> <p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p> <p>50</p> <p>55</p>	<p>Lands                      Clauses Consolidation (Scotland) Act 1845.—<i>cont.</i></p>	<p>“therewith, and the”; and, in both places where they occur, the words “feudal duties, ground annuals.”</p> <p>Sections 10 and 11.</p> <p>In section 12, the word “feudal”, in both places where it occurs.</p> <p>In section 67, the words “heir of entail”, “married woman seised in her own right or entitled to terce or dower or any other right or interest, husband”, “on the same heirs, or”, “, or affecting succeeding heirs of entail in any such lands, whether imposed and constituted by the entailer, or in virtue of powers given by the entail, or in virtue of powers conferred by any Act of Parliament” and “same heirs, and the”.</p> <p>In each of sections 69 and 70, the word “coverture,” and the word “husbands,”.</p> <p>Section 73.</p> <p>In section 79, the words “feudal or” and “, and of re-entailing any of such lands,”.</p> <p>In section 80, the words “feudal and”, in both places where they occur; and the words “the particular register of sasines kept for the county, burgh, or district in which the lands are locally situated, or in”, “for Scotland kept at Edinburgh, within sixty days from the last date thereof, which the respective keepers of the said registers are hereby authorized and required to do,” “feudal” and from “: Provided always” to the end.</p> <p>In section 93, the words “; and if such lands be part of a barony a like notice shall be given to the superior or baron”.</p>

*Explanatory Notes*

## SCH. 9

Chapter	Short title	Extent of repeal
8 & 9 Vict. c.19.— <i>cont.</i>	Lands                      Clauses Consolidation (Scotland) Act 1845.— <i>cont.</i>	In the preamble to sections 107 to 111, the words “any feu duty, ground annual, casualty of superiority, or”.      5 In section 109, the words “such feu duty, ground annual, casualty of superiority, or any”. In section 110, the words “feu      10 duty, ground annual, casualty of superiority.” In section 117, the word “estate,” in each place where it occurs.      15 In section 124, the words from “, by deed” to the end. Sections 126 and 127. Schedule (B.).
8 & 9 Vict. c.35.	Infetment Act 1845.	The whole Act.      20
11 & 12 Vict. c.36.	Entail Amendment Act 1848.	Sections 1 to 31. In section 32, the words from “may be in the form” to “in terms of this Act;”.      25 Sections 33 to 45. In section 47, the words “dated on or after the first day of August one thousand eight hundred and forty- eight”, “fee simple” in each of the three places where they occur and “the superior of such lands or estate, and of”.      30 In section 48, the words “dated on or after the said first day of August one thousand eight hundred and forty eight”, “fee simple”      40 and “the superior of such lands or estate, and of”. In section 49, the words “or estate” in both places where they occur and      45 “dated on or after the said first day of August one thousand eight hundred and forty eight”. Sections 50 and 51.      50 The Schedule.
12 & 13 Vict. c.51.	Judicial Factors Act 1849.	In section 7, the words from “and if the estate be held under entail,” to “could have charged the estate”      55

*Explanatory Notes*

*Schedule 9 Part I (cont'd)*

*Infestment Act 1845*

This Act providing for the giving of sasine by recording an instrument of sasine can be repealed with abolition. New provisions on land transfer are found in Part II of the Bill.

*Entail Amendment Act 1848*

See the Notes to Schedule 8 - Part I.

*Judicial Factors Act 1849*

**Section 7**

The words repealed relate to entails and can be removed with their abolition. See Part V of the Bill and paragraphs 9.8 ff of the report.

Chapter	Short title	Extent of repeal
12 & 13 Vict. c.51.— <i>cont.</i>	Judicial Factors Act 1849. — <i>cont.</i>	under the said Acts, or either of them;”.
5 16 & 17 Vict. c.94.	Entail Amendment Act 1853.	The whole Act.
20 & 21 Vict. c.26.	Registration of Leases (Scotland) Act 1857.	Sections 4, 5, 8, 9 and 11. Schedules (C) and (F).
10 22 Vict. c.12.	Defence Act 1859.	In section 3, the words “feus and”, in both places where they occur; the word “feudal”; and the words from “: provided always” to the end.
15 23 & 24 Vict. c.95.	Entail Cottages Act 1860.	The whole Act.
20 23 & 24 Vict. c.106.	Lands Clauses Consolidation Acts Amendment Act 1860.	Section 3. In each of sections 4 and 5, the words “, annual feu duty or ground annual”, in each place where they occur. In section 8, the words “, or of the Lands Clauses Consolidation (Scotland) Act, 1845, in all matters in which it relates to the said Act respectively.”.
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30 25 & 26 Vict. c.58.	Parochial Buildings (Scotland) Act 1862.	The whole Act.
26 & 27 Vict. c.47.	Church of Scotland Courts Act 1863.	In section 2, the words from “, and at the same time” to “shall subsist”. In section 3, the words from “, and to apportion” to the end.
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27 & 28 Vict. c.33.	Fish Teinds (Scotland) Act 1864.	The whole Act.
40 27 & 28 Vict. c.114.	Improvement of Land Act 1864.	The whole Act.
29 & 30 Vict. c.71.	Glebe Lands (Scotland) Act 1866.	The whole Act.
29 & 30 Vict. c.75.	Parochial Buildings (Scotland) Act 1866.	The whole Act.
45 31 & 32 Vict. c.30.	United Parishes (Scotland) Act 1868.	The whole Act.
31 & 32 Vict. c.64.	Land Registers (Scotland) Act 1868.	In section 5, the words “in terms of such new warrant”. In section 6, the words “in terms of the warrant of registration thereon”. In section 12, the words “and shall be in the form, as nearly as may be, of the
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## *Explanatory Notes*

### *Schedule 9 Part I (cont'd)*

#### *Entail Amendment Act 1853*

The Act can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

#### *Registration of Leases (Scotland) Act 1857*

See the Notes to Schedule 8 - Part I.

#### *Defence Act 1859*

#### **Section 3**

Feudal terminology is removed.

#### *Entail Cottages Act 1860*

The Act can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

#### *Lands Clauses Consolidation Acts Amendment Act 1860*

#### **Section 3**

This section extended power to sell in consideration of feuduty or ground annual, which payments are extinguished under the Bill. See Part III and clause 50 of the Bill and Part 3 of the report.

#### **Sections 4 and 5**

Feudal terminology is removed, together with references to ground annuals.

#### **Section 8**

With the removal of references to feuduties and ground annuals the Act is no longer applicable to Scotland. Accordingly, the provision extending the construction of the Lands Clauses Consolidation (Scotland) Act 1845 can be removed.

#### *Parochial Buildings (Scotland) Act 1862*

This Act can be repealed with the removal of heritors following the abolition of teinds and stipends. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Church of Scotland Courts Act 1863*

#### **Sections 2 and 3**

References to stipend and heritors are removed. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Fish Teinds (Scotland) Act 1864*

This Act can be repealed with the abolition of teinds. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Improvement of Land Act 1864*

This Act provided for those with "limited interests" in land, such as heirs of entail in possession, to raise money for specified improvements on the security of land. The improvements envisaged by this Act were railways and canals but by later enactments this list of qualifying improvements was extended. The Act was English and Irish in origin and has been little known in Scotland. The sole reference to it in contemporary textbooks is in the context of entails (see Gordon, *Scottish Law Land* para 18-34). This statute is obsolete in practice, and with the abolition of entails (see Part V of the Bill and paragraphs 9.8 ff of the report), it can be repealed.

#### *Glebe Lands (Scotland) Act 1866*

This Act made provision for the letting and feuing of glebe lands. All glebes formerly covered by this Act are now vested in the Church of Scotland General Trustees as a result of section 30 of the Church of Scotland (Property and Endowments) Act 1925. The Act presupposes the existence of heritors and the Court of Teinds. These are to be abolished. The Act can be repealed. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Parochial Buildings (Scotland) Act 1866*

This amends and explains the Parochial Buildings (Scotland) Act 1862, and can be repealed for the same reasons.

#### *United Parishes (Scotland) Act 1868*

This Act presupposes the existence of the Court of Teinds and of section 8 of the New Parishes (Scotland) Act 1844 and can be repealed. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Land Registers (Scotland) Act 1868*

See the Notes to Schedule 8 - Part I.

## SCH. 9

Chapter	Short title	Extent of repeal
31 & 32 Vict. c.64.— <i>cont.</i>	Land Registers (Scotland) Act 1868.— <i>cont.</i>	Schedule (B.) to this Act annexed,”.
31 & 32 Vict. c.84.	Entail Amendment (Scotland) Act 1868.	The whole Act. 5
31 & 32 Vict. c.96.	Ecclesiastical Buildings and Glebes (Scotland) Act 1868.	The whole Act.
31 & 32 Vict. c.101.	Titles to Land Consolidation (Scotland) Act 1868.	In section 3, the words “The words “Crown writ” shall extend to and include all charters, precepts, and writs from Her Majesty, and from the Prince; and”; the definition of “charter” and of “writ”; in the definition of “deed” and of “conveyance”, the words “charters,” “whether containing a warrant or precept of sasine or not, and”, “feu contracts, contracts of ground annual,” “, whether such decrees contain warrant to infert or precept of sasine or not,” and “, procuratories of resignation <i>ad remanentiam</i> ,”; the definition of “deed of entail”; in the definition of “instrument”, the words “authorized by this Act, or by any of the Acts hereby repealed,”; and the definition of “infert” and “infertment”. Sections 4 to 7. In section 8, the words “, and to all open procuratories, clauses, and precepts, if any, and as the case may be,”; and the words from “; and the clause of obligation” to “other public, parochial, and local burdens, due from or on account of the lands conveyed prior to the date of entry”. Sections 9 and 10. In section 12, the words from “with a warrant of registration” to “hereto 55

*Explanatory Notes*

*Schedule 9 Part I (cont'd)*

*Entail Amendment (Scotland) Act 1868*

This Act can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

*Ecclesiastical Buildings and Glebes (Scotland) Act 1868*

This Act presupposes the existence of heritors. It is rendered otiose by section 27 of the Church of Scotland (Property and Endowments) Act 1925. It can be repealed.

*Titles to Land Consolidation (Scotland) Act 1868*

See the Notes to Schedule 8 - Part I.

Chapter	Short title	Extent of repeal
<p>31 &amp; 32 Vict. c.101.— <i>cont.</i></p> <p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p> <p>50</p> <p>55</p>	<p>Titles to Land Consolidation (Scotland) Act 1868.—<i>cont.</i></p>	<p>annexed);” the words from “and warrant of registration;” to “on whose behalf the conveyance is presented”; and the words from “or to expedite and record” to the end.</p> <p>Sections 14 to 19. Section 23.</p> <p>In section 24, the words “, with warrant of registration thereon,”</p> <p>In section 26, the words “with warrant of registration thereon in terms of this Act, or when followed by notarial instrument expedite, and with warrant of registration thereon recorded”; and “feued,”.</p> <p>Sections 27 to 50.</p> <p>In section 51, the word “said”, where it first occurs; and the words from “or Sheriffs of counties” to the end.</p> <p>Sections 63 to 116. Sections 118 and 119.</p> <p>In section 120, the words “, whether dated before or after the commencement of this Act;” and the proviso.</p> <p>Sections 121 to 127. Sections 130 to 137.</p> <p>In section 140, the words “, and subsequent sheets (if any) shall be chargeable with the appropriate progressive duty”.</p> <p>Section 141.</p> <p>In section 142, the words “, and all instruments hereby” and “, with warrants of registration written thereon respectively,”.</p> <p>Sections 144 to 147. Sections 150 to 154. Section 156. Sections 162 and 163.</p> <p>The Schedules, except Schedules (B.) No.1, (F.) No.1, (G.), (PP.) and (RR.).</p> <p>In Schedule (B.) No. 1, the words from “to be holden” to “<i>as the case may be</i>];”;</p>

*Explanatory Notes*

## SCH. 9

Chapter	Short title	Extent of repeal
31 & 32 Vict. c.101.— <i>cont.</i>	Titles to Land Consolidation (Scotland) Act 1868.— <i>cont.</i>	and the words “feu duties, casualties, and”.
32 & 33 Vict. c.116.	Titles to Land Consolidation (Scotland) Amendment Act 1869.	The whole Act. 5
33 & 34 Vict. c.56.	Limited Owners Residences Act 1870.	The whole Act.
34 & 35 Vict. c.84.	Limited Owners Residences Act (1870) Amendment Act 1871.	The whole Act. 10
37 & 38 Vict. c.82.	Church Patronage (Scotland) Act 1874.	In section 8, the words from “, or the right to teind” to the end. 15
37 & 38 Vict. c.94.	Conveyancing (Scotland) Act 1874.	In section 3, the definitions of “Estate in land” and of “Superior” and “superiority”; in the definition of “heritable 20 securities” and “securities”, the words “, and shall also, when used in this Act, include real burdens and securities by way of ground 25 annual”; and the definitions of “Infeftment”, “Feu” and “feu-duty” and “Casualties”. Sections 4 to 8. 30 In section 10 (as saved by section 37(1)(d) of the Succession (Scotland) Act 1964), the words “neither infeft nor served, but”, “by 35 virtue of this Act,” “and assignation” and from ““Such petition” to the end. Sections 14 to 26. In section 29, the words 40 “under this Act, and no other decree, instrument, or conveyance”. Section 30. In section 32, the word “, 45 instrument,”, where it occurs for the first and third times; and the words “feu or otherwise”. In section 35, the word 50 “joint”; and the words from “, as an assignation” to the end. In section 36, the words from “, with a holding” to the 55

## *Explanatory Notes*

### *Schedule 9 Part I (cont'd)*

#### *Titles to Land Consolidation (Scotland) Amendment Act 1869*

This Act's amendments of the 1868 Act have largely been repealed by this Bill. The provisions are now spent.

#### *Limited Owners Residences Act 1870*

This Act enables "limited owners" (see the Note on the Improvement of Land Act 1864) to charge estates for the purpose of building mansion houses etc. This had been possible for an heir of entail in Scotland from 1770. The Act was not initially intended to apply to Scotland, but was so extended by section 2 of the Improvement of Land Act 1899. This Act is obsolete in practice, and appears relevant only to heirs of entail. Entails are to be abolished. See Part V of the Bill and paragraphs 9.8 ff of the report. The Act can be repealed.

#### *Limited Owners Residences Act (1870) Amendment Act 1871*

This replaced provisions in the 1870 Act (see above). Like that Act it can now be repealed.

#### *Church Patronage (Scotland) Act 1874*

### **Section 8**

With the abolition of teinds, references to teinds can be removed. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Conveyancing (Scotland) Act 1874*

See the Notes to Schedule 8 - Part I.

Chapter	Short title	Extent of repeal
37 & 38 Vict. c.94.— <i>cont.</i>	Conveyancing (Scotland) Act 1874.— <i>cont.</i>	end. Section 37. Sections 48 and 49. In section 51, the words “production to any notary public of the”; the words “the production to such notary of”; and the words from “, and it shall not” to the end. Sections 52, 53, 57 and 58. In section 59, the words “shall apply to lands held of the Crown and of the Prince, in the same way as to lands held of a subject superior, but”. Section 60. Schedules A to C. Schedule D (being the form of memorandum of allocation of feu-duty; and not that Schedule D substituted for Schedule O by section 8(1) of the Conveyancing (Scotland) Act 1924). Schedules F and G. In Schedule H, the word “, <i>instrument</i> ,” where it last occurs. Schedule L. In Schedule M, the words from “, <i>e.g.</i> ],” to “ <i>or as the case may be</i> ”. Schedule N.
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38 & 39 Vict. c.61.	Entail Amendment (Scotland) Act 1875.	The whole Act.
39 & 40 Vict. c.11.	United Parishes (Scotland) Act 1876.	The whole Act.
40 & 41 Vict. c.40.	Writs Execution (Scotland) Act 1877.	In section 6, the words “upon a warrant of registration”.
41 & 42 Vict. c.28.	Entail Amendment (Scotland) Act 1878.	The whole Act.
45 & 46 Vict. c.38.	Settled Land Act 1882.	The whole Act.
45 & 46 Vict. c.53.	Entail (Scotland) Act 1882.	The whole Act.
50 & 51 Vict. c.69.	Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887.	Sections 1, 3 and 4. In section 5, the words “The production to any notary public of”; “expediting a notarial instrument, or otherwise”; and from “; and it shall not” to the end.
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## *Explanatory Notes*

### *Schedule 9 Part I (cont'd)*

#### *Entail Amendment (Scotland) Act 1875*

The Act can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

#### *United Parishes (Scotland) Act 1876*

This Act presupposes the existence of the Court of Teinds and of glebes vested in ministers and also of the New Parishes (Scotland) Act 1844. Following the abolition of teinds and the repeal of the New Parishes (Scotland) Act 1844, it can be repealed. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Writs Execution (Scotland) Act 1877*

See the Notes to Schedule 8 - Part I.

#### *Entail Amendment (Scotland) Act 1878*

The Act can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

#### *Settled Land Act 1882*

This Act did not originally apply to Scotland but was extended for the purpose of extending the list of qualifying improvements under the Improvement of Land Act 1864. It was applied to Scotland by section 2 of the Improvement of Land Act 1899. The reasons for the repeal are explained in the Note on the 1864 Act. The bulk of this Act has been repealed already for England and Wales.

#### *Entail (Scotland) Act 1882*

The Act can be repealed with the abolition of entails. See Part V of the Bill, and paragraphs 9.8 ff of the report.

#### *Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887*

See the Notes to Schedule 8 - Part I.

## SCH. 9

Chapter	Short title	Extent of repeal
52 & 53 Vict. c.39.	Judicial Factors (Scotland) Act 1889.	In section 6, the words "the Entail (Scotland) Act, 1882,".
52 & 53 Vict. c.55.	Universities (Scotland) Act 1889.	In section 24, the words " without prejudice to the rights of Her Majesty as superior of the said garden and buildings, and to the rights of any subject superior in and to the said garden and buildings,".
53 & 54 Vict. c.69.	Settled Land Act 1890.	The whole Act.
54 & 55 Vict. c.9.	Registration of Certain Writs (Scotland) Act 1891.	The whole Act.
54 & 55 Vict. c.39.	Stamp Act 1891.	In Schedule 1, the whole of the headings mentioned in paragraph 12 of Schedule 8 to this Act.
57 & 58 Vict. c.44.	Heritable Securities (Scotland) Act 1894.	In section 7, the words "disposed in security", where they occur for the second time. Sections 8 to 10. In section 12, the word " eight,". Sections 14 to 17. Schedule (D.).
62 & 63 Vict. c.46.	Improvement of Land Act 1899.	The whole Act.
63 & 64 Vict. c.20.	Ecclesiastical Assessments (Scotland) Act 1900.	The whole Act.
4 & 5 Geo.5 c.43.	Entail (Scotland) Act 1914.	In section 2, the words "and any clause of consent to registration in the register of entails"; and the provisos. Sections 3 to 8. In section 10, the words " unless the contrary intention appears," and " and the words "heir of entail" shall include the institute".
4 & 5 Geo.5 c.48.	Feudal Casualties (Scotland) Act 1914.	The whole Act.
9 & 10 Geo.5 c.97.	Land Settlement (Scotland) Act 1919.	Section 4.
10 & 11 Geo.5 c.34.	Duplicands of Feu-duties (Scotland) Act 1920.	The whole Act.
11 & 12 Geo.5 c.58.	Trusts (Scotland) Act 1921.	In section 4(1), paragraph (b). In section 6, the words from "sell subject to" to "be

## *Explanatory Notes*

### *Schedule 9 Part I (cont'd)*

#### *Judicial Factors (Scotland) Act 1889*

##### **Section 6**

The reference to the Entail (Scotland) Act 1882 can be removed with its repeal.

#### *Universities (Scotland) Act 1889*

##### **Section 24**

This is a purely feudal saving which can be removed.

#### *Settled Land Act 1890*

This Act amends earlier Settled Land Acts. It did not originally apply to Scotland. It was extended for the purpose of extending the list of qualifying improvements under the Improvement of Land Act 1864 by section 2 of the Improvement of Land Act 1899. The reasons for the repeal are explained in the Note on the 1864 Act. This Act was repealed for England and Wales in 1925.

#### *Registration of Certain Writs (Scotland) Act 1891*

This statute creates separate registration divisions for Orkney and Zetland. The repeal does not revive any former requirement to keep separate divisions (Interpretation Act 1978, section 16).

#### *Stamp Act 1891*

See the Notes to Schedule 8 - Part I.

#### *Heritable Securities (Scotland) Act 1894*

See the Notes to Schedule 8 - Part I.

#### *Improvement of Land Act 1899*

This Act amended the Improvement of Land Act 1864 and related Acts, and extended various Acts to Scotland. The reasons for the repeal are explained in the Note on the 1864 Act.

#### *Ecclesiastical Assessments (Scotland) Act 1900*

Following abolition of heritors and teinds, this Act can be repealed in its entirety. See clause 50 of the Bill and paragraphs 3.51 and 9.18 of the report.

#### *Entail (Scotland) Act 1914*

See the Notes to Schedule 8 - Part I.

#### *Feudal Casualties (Scotland) Act 1914*

This Act provided a scheme of compensation for the abolition of feudal casualties, and can be repealed with abolition of the feudal system.

#### *Land Settlement (Scotland) Act 1919*

##### **Section 4**

This section relates to the power to pay feuduty or ground annual for smallholdings and can be repealed with their abolition. See Part III and clause 50 of the Bill and Part 3 of the report.

#### *Duplicands of Feu-duties (Scotland) Act 1920*

This Act can be repealed with the abolition of feuduty. See Part III of the Bill and Part 3 of the report.

#### *Trusts (Scotland) Act 1921*

##### **Section 4(1)(b)**

The power to feu is no longer appropriate and is removed.

##### **Section 6**

The words removed relate to feuduty or ground annual and are repealed following their abolition. See Part III and clause 50 of the Bill and Part 3 of the report.

Chapter	Short title	Extent of repeal
11 & 12 Geo.5 c.58.— <i>cont.</i> 5	Trusts (Scotland) Act 1921. — <i>cont.</i>	lawful to”. In section 12(1), the words from “on any charge or” to “1899, or”.
13 & 14 Geo.5 c.34. 10	Agricultural Credits Act 1923.	Section 13. Section 3(4) and (5). In section 5, in paragraph (a), the definitions of “freehold or copyhold land”, “mortgage”, “devisee” and “incumbrance”; and paragraph (b).
14 & 15 Geo.5 c.27. 15	Conveyancing (Scotland) Act 1924.	In section 2(1)(b), the words from “real burdens” to “them, and”. In section 3, the words “last infeft or”. In section 4, in subsection (2), the words “by infeftment”; in subsection (3), the words from “, or in the case” to “that Schedule”; and in subsection (4), the words “, or in the case of a ground annual in or as nearly as may be in the terms of Form No. 6 of that Schedule” and from “And on such notice” to the end. In section 5, in subsection (2)(a), the words “infeft or uninfeft, or”; and in subsection (3)(a), the words “last infeft or”. Section 6. In section 8, subsection (2). In section 9, in subsection (1), the words “, whether prohibitory, irritant, resolute or otherwise,” “, instrument”, where it secondly occurs, “(including any disposition granted by a creditor to himself pursuant to section eight of the Heritable Securities (Scotland) Act 1894)” and from “, and where” to the end; and in subsection (4), the words “, although the warrant of registration thereon shall be on behalf of the granter only”.
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*Explanatory Notes*

*Schedule 9 Part I (cont'd)*

**Section 12(1)**

This repeal follows the repeal of the Improvement of Land Acts.

**Section 13**

This section is repealed as consequence of the repeal of the Improvement of Land Act 1864.

*Agricultural Credits Act 1923*

**Section 3(4)**

This subsection can be repealed following the repeal of the Improvement of Land Act 1864.

**Section 3(5)**

This subsection can be repealed with the repeal of the Settled Land Act 1882, the Settled Land Act 1890 and the Improvement of Land Act 1899.

**Section 5(a)**

These definitions are removed as being unnecessary following the repeal of certain provisions of this Act.

*Conveyancing (Scotland) Act 1924*

See the Notes to Schedule 8 - Part I.

## SCH. 9

Chapter	Short title	Extent of repeal
14 & 15 Geo.5 c.27.— cont.	Conveyancing (Scotland) Act 1924.— <i>cont.</i>	<p>Sections 10 to 13. In section 19, the words “or fee”.</p> <p>Sections 20 and 23. 5</p> <p>In section 24, the words “, including power of sale and other rights under a bond and disposition in security,” and “, and such forms shall have the same force and effect as the corresponding forms prescribed by the Registration of Leases (Scotland) Act 1857,”; in paragraph (1) of the proviso, the words from “, for “infest”” to the end; and in paragraph (5) of the proviso, the words from “by notarial instrument” to “law and practice”. 10</p> <p>Sections 25, 26 and 28 to 39. In section 40(1), the words “feud-duty, ground-annual, stipend,” and “feud-duty and casualties, ground-annual, stipend or”. 15</p> <p>Sections 42 and 43. In section 49, subsection (1). 20</p> <p>In Schedule B, in Form No. 3, the words “<i>last infest therein, or</i>”; and Forms Nos. 4 and 6. 25</p> <p>Schedules F to H and the Notes to Schedule F. 30</p> <p>Schedules K to N and the Notes to Schedule K. 35</p>
15 & 16 Geo.5 c.33.	Church of Scotland (Property and Endowments) Act 1925.	<p>Part I.</p> <p>In section 22, in subsection (2)(h), the word “feuing,”; and in subsection (3), the word “feud,”. 40</p> <p>Section 27.</p> <p>In section 28, in subsection (3)(b), the words from “, to the same effect” to the end; and subsections (6) to (8). 45</p> <p>In section 30(3), in paragraph (c), the words from “, whether as” to “in place of the minister”; in paragraph (e), the words “feud-duties and Government or other” and from “under or in 50</p> <p>55</p>

## *Explanatory Notes*

### *Schedule 9 Part I (cont'd)*

*Church of Scotland (Property and Endowments) Act 1925*

#### **Part I**

This Part deals with teinds, stipends and standard charges which are extinguished by clause 50 of the Bill. See paragraphs 3.51 and 9.18 of the report.

For the other repeals see the Notes to Schedule 8 - Part I.

Chapter	Short title	Extent of repeal	
15 & 16 Geo.5 c.33.— <i>cont.</i>	Church of Scotland (Property and Endowments) Act 1925. — <i>cont.</i>	pursuance" to "made by a minister"; and paragraph (f).	
5		Section 31.	
10		In section 34, in subsection (1), in paragraph (b), the words "and certified by the Clerk of Teinds", and paragraph (e); subsection (3); and in subsection (4)(iii) the words "feu- duties, ground annuals, bonds of annual rent, or other", "with the sanction of the Court of Teinds" and "or payment of the feu-duty thereon".	
15		In section 35(7), the words "uninfest or infest".	
20		In section 36, the proviso. In section 37, the words "heritor or other".	
25		Sections 39 to 41. In section 42, the words from ", and to the teinds" to the end.	
30		Sections 45 and 46. In section 47, in subsection (1), in the definition of "Stipend", the words " including any allowance for communion elements payable by heritors out of teinds"; and subsections (2) and (3).	
35		Schedules 1 to 7.	
19 & 20 Geo.5 c.13.		Agricultural Credits (Scotland) Act 1929.	In section 6(2), the words "or to the superior of the lands occupied by the society", "or superior" and "or feuduty".
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23 & 24 Geo.5 c.44.	Church of Scotland (Property and Endowments) Amendment Act 1933.	In section 7, paragraph (ii) of the proviso; and the word "and" immediately preceding that paragraph.	
45		In section 8(1), the words " or any obligation at common law for payment of the stipend or part of the stipend of the parish being a parish quoad omnia".	
50		In section 9, subsections (1) and (2); and in subsection (3), the words "or take in	
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*Explanatory Notes*

*Schedule 9 Part I (cont'd)*

*Agricultural Credits (Scotland) Act 1929*

**Section 6(2)**

Feudal terminology is removed.

*Church of Scotland (Property and Endowments) Amendment Act 1933*

See the Notes to Schedule 8 - Part I.

## SCH. 9

Chapter	Short title	Extent of repeal	
23 & 24 Geo.5 c.44.— <i>cont.</i>	Church of Scotland (Property and E n d o w m e n t s ) Amendment Act 1933. <i>—cont.</i>	feu” and “or feu-duty”. Sections 10 and 11.	5
1 Edw.8 & 1 Geo.6 c.28.	Harbours, Piers and Ferries (Scotland) Act 1937.	In section 31(1), in the definition of “owner”, the words “deed of entail or other”.	10
1 & 2 Geo.6 c.24.	Conveyancing Amendment (Scotland) Act 1938.	Sections 6 and 8.	
8 & 9 Geo.6 c.43.	Requisitioned Land and War Works Act 1945.	In section 60(4), the words “the dominium utile or, in the case of land other than feudal land,”.	15
9 & 10 Geo.6 c.59.	Coal Industry Nationalisation Act 1946.	In section 64, in subsection (2), the words “, and does not include any stipend”; and subsection (3).	20
11 & 12 Geo.6 c.17.	Requisitioned Land and War Works Act 1948.	In section 18(4), the words “the <i>dominium utile</i> or, in the case of land other than feudal land,”.	
11 & 12 Geo.6 c.57.	Public Registers and Records (Scotland) Act 1948.	In section 1(2), the words “, the Register of Entails”.	25
12, 13 & 14 Geo.6 c.97.	National Parks and Access to the Countryside Act 1949.	In section 114(1), the words “and as respects Scotland has the meaning assigned to it by section twenty-six of this Act”.	30
2 & 3 Eliz.2 c.49.	Long Leases (Scotland) Act 1954.	Part I. Section 30. The Schedules.	35
2 & 3 Eliz.2 c.73.	Town and Country Planning (Scotland) Act 1954.	Section 69.	
5 & 6 Eliz.2 c.30.	Church of Scotland (Property and Endowments)(Amend- ment) Act 1957.	The whole Act.	40
6 & 7 Eliz.2 c.24.	Land Drainage (Scotland) Act 1958.	In section 18(1), in the definition of “owner”, paragraph (a).	45
6 & 7 Eliz.2 c.69.	Opencast Coal Act 1958.	In section 52, in subsection (1), in the definition of “freehold interest”, the words “of the dominium utile”; and subsections (6) to (8).	50
7 & 8 Eliz.2 c.70.	Town and Country Planning (Scotland) Act 1959.	In section 27(5)(d), the words “, feu duty”. In section 44, the words “such an interest in”, “dominium	55

## *Explanatory Notes*

### *Schedule 9 Part I (cont'd)*

*Harbours, Piers and Ferries (Scotland) Act 1937*

#### **Section 31(1)**

The amendment is consequential upon the abolition of entails. See Part V of the Bill and paragraphs 9.8 ff of the report.

*Conveyancing Amendment (Scotland) Act 1938*

See the Notes to Schedule 8 - Part I.

*Requisitioned Land and War Works Act 1945*

#### **Section 60**

Feudal terminology is removed.

*Coal Industry Nationalisation Act 1946*

#### **Section 64**

Feudal terminology, and references to stipend, are removed.

*Requisitioned Land and War Works Act 1948*

#### **Section 18**

Feudal terminology is removed.

*Public Registers and Records (Scotland) Act 1948*

The repeal follows the closure of the Register of Entails. See clause 46 of the Bill and paragraph 9.16 of the report.

*National Parks and Access to the Countryside Act 1949*

See the Notes to Schedule 8 - Part I.

*Long Leases (Scotland) Act 1954*

#### **Part I (sections 1-25) and the Schedules**

This Part gave tenants under certain long leases an option to convert the long leases of their properties to feus. The option had to be exercised by 1 September, 1959. The provisions can be repealed as they are spent. The Schedules provided statutory forms, which are similarly spent.

#### **Section 30**

This provision is unnecessary.

*Town and Country Planning (Scotland) Act 1954*

See the Notes to Schedule 8 - Part I.

*Church of Scotland (Property and Endowments) (Amendment) Act 1957*

The repeal of this Act is consequential on the repeal of section 38 of the Church of Scotland (Property and Endowments) Act 1925.

*Land Drainage (Scotland) Act 1958*

#### **Section 18(1)**

Feudal terminology is removed.

*Opencast Coal Act 1958*

See the Notes to Schedule 8 - Part I.

*Town and Country Planning (Scotland) Act 1959*

#### **Sections 27(5), 44 and 54(7)**

Feudal terminology is removed.

Chapter	Short title	Extent of repeal
7 & 8 Eliz.2 c.70.— <i>cont.</i>	Town and Country Planning (Scotland) Act 1959.— <i>cont.</i>	utile in the” and “feu duty, any ground annual and any”.
5		In section 54, subsection (7).
9 & 10 Eliz.2 c.62.	Trustee Investments Act 1961.	In Schedule 1, Part II, in paragraph 14, the words “, and in feu-duties or ground annuals in Scotland”.
10		
1963 c.51.	Land Compensation (Scotland) Act 1963.	In section 20, in subsection (1), the words “the <i>dominium utile</i> in”, in both places where they occur; in subsection (2), the words “feu-duty, or ground annual or other” and “(not being stipend or standard charge in lieu of stipend)”; in subsection (7), the words “ <i>dominium utile</i> in any”; and in subsection (8), the words “the <i>dominium utile</i> in”.
15		
20		
25		In section 27(3), the words “and that interest is the <i>dominium utile</i> of the land,” “feu-duty or ground annual or other” and “(not being stipend or standard charge in lieu of stipend)”.
30		
35		In section 28, in paragraph (e), the words “the <i>dominium</i> <i>utile</i> of” and, in both places where they occur, “feu-duty or”; and in paragraph (f), the words “the <i>dominium</i> <i>utile</i> of”.
40		Section 45(8) and (9).
1964 c.40.	Harbours Act 1964.	In Schedule 2, in paragraph 2(2), the words “the superior of, and”.
45		In section 57(1), in the definition of “owner”, in paragraph (a), the words “, if the land is feudal property, the proprietor of the <i>dominium utile</i> or, if the land is not feudal property,”.
50		
1964 c.41.	Succession (Scotland) Act 1964.	In section 18, subsection (1).
1965 c.36.	Gas Act 1965.	In section 28(1), in the definition of “owner”, in paragraph (a), the words “, if the land is feudal
55		

## *Explanatory Notes*

### *Schedule 9 Part I (cont'd)*

*Trustee Investments Act 1961*

#### **Schedule 1, Part II**

Reference to feuduties or ground annuals is removed with their abolition. See Part III and clause 50 of the Bill and Part 3 of the report

*Land Compensation (Scotland) Act 1963*

See the Notes to Schedule 8 - Part I.

*Harbours Act 1964*

#### **Section 57**

Feudal terminology is removed.

*Succession (Scotland) Act 1964*

#### **Section 18(1)**

This repeal is consequential on the abolition of entails. See Part V of the Bill and paragraphs 9.8 ff of the report.

*Gas Act 1965*

#### **Section 28**

Feudal terminology is removed.

## SCH. 9

Chapter	Short title	Extent of repeal
1965 c.36.— <i>cont.</i>	Gas Act 1965.— <i>cont.</i>	property, the proprietor of the <i>dominium utile</i> or, if the land is not feudal property,”. 5
1967 c.10.	Forestry Act 1967.	In section 34(3), the words “the proprietor of the <i>dominium utile</i> or, in the case of land other than feudal land, is”. 10
1967 c.86.	Countryside (Scotland) Act 1967.	In section 49, subsection (3). In section 6, in each of subsections (1)(a) and (2), the word “feu,”. 15
1968 c.41.	Countryside Act 1968.	In each of sections 24(1) and 25(1), the word “feu,”.
1968 c.41.	Countryside Act 1968.	In section 24(2), the word “feu,”.
1968 c.70.	Law Reform (Miscellaneous Provisions)(Scotland) Act 1968.	In section 18(2), paragraph (c). 20
1969 c.10.	Mines and Quarries (Tips) Act 1969.	In section 36(3)(b)(i), the words “the <i>dominium utile</i> or, in the case of land not held on feudal tenure, the proprietor, of”. 25
1970 c.35.	Conveyancing and Feudal Reform (Scotland) Act 1970.	In section 2, in subsection (6), the definition of “interest in land”; and subsection (7). 30 Sections 3 to 6. In section 9(8)(c), the words “feuduty, ground annual,”. In section 12(1), the words “having right to that interest, but”. 35 In section 30(2), the definition of “infert”. Sections 33 to 35. Section 39. 40 In section 41(1), the words “of the interest”. In section 43(1), the definition of “the Act of 1894”. Section 49. 45 In Schedule 1, in paragraph 1, the words “feuduty, ground annual,” and “skat, dry multure, teind, stipend, standard charge”. 50 In the Notes to Schedule 2, in each of notes 2 and 3, the words “ <i>ground annual</i> or”. In Schedule 3, in condition 10(3), the words “feuduties, 55

*Explanatory Notes*

*Schedule 9 Part I (cont'd)*

*Forestry Act 1967*

See the Notes to Schedule 8 - Part I.

*Countryside (Scotland) Act 1967*

See the Notes to Schedule 8 - Part I.

*Countryside Act 1968*

See the Notes to Schedule 8 - Part I.

*Law Reform (Miscellaneous Provisions) (Scotland) Act 1968*

**Section 18(2)(c)**

This saving for superiors can be repealed with feudal abolition.

*Mines and Quarries (Tips) Act 1969*

**Section 36(3)(b)(i)**

Feudal terminology is removed.

*Conveyancing and Feudal Reform (Scotland) Act 1970*

See the Notes to Schedule 8 - Part I.

Chapter	Short title	Extent of repeal
5	1970 c.35.— <i>cont.</i> Conveyancing and Feudal Reform (Scotland) Act 1970.— <i>cont.</i>	ground annuals or, as the case may be,” In Schedule 8, paragraphs 2, 3, 7 to 14, 16 and 17, 18 to 22, 24 and 26 to 30.
10	1970 c.40. 1973 c.52. Agriculture Act 1970. Prescription and Limitation (Scotland) Act 1973.	In section 33, subsection (5). In section 15(1), the definition of “interest in land”. In Schedule 1, in paragraph 1(a), heads (iii) and (iv); and in paragraph 2(f), the words “terce, courtesy,”.
15	1974 c.38. Land Tenure Reform (Scotland) Act 1974.	Part I, except section 2. In section 2, the words “(other than feuduty)” and “a payment of teind, stipend or standard charge,”.
20		Sections 14 and 15.
25		In section 22, the words “held of the Crown and of the Prince and Steward of Scotland, and to land in which there is any other interest”.
30	1975 c.8. Offshore Petroleum Development (Scotland) Act 1975.	In section 23(1), the words “ground annual or other”. Schedules 1 to 4.
35		In section 14(1), the word “superior,”. In section 20, in subsection (2), in the definition of “Crown interest”, the words “estate or”; and in subsection (3), the words “estate or”.
40	1975 c.69. Scottish Development Agency Act 1975.	In section 9(1)(a), the word “feu,”.
45	1979 c.33. Land Registration (Scotland) Act 1979.	In section 11(1), the word “superior,”. In section 3, in subsection (3), paragraph (c); in subsection (4), paragraph (b); and in subsection (6), the words “by person uninfert”.
50		In section 6(3), the words “over-feuduty or” in both places where they occur.
55		In section 12, in subsection (3)(m), the words “a superior, a creditor in a ground annual or”, “the feu writ, the contract of ground annual or”, “, as the case may be,” “superior,

## *Explanatory Notes*

### *Schedule 9 Part I (cont'd)*

#### *Agriculture Act 1970*

See the Notes to Schedule 8 - Part I.

#### *Prescription and Limitation (Scotland) Act 1973*

See the Notes to Schedule 8 - Part I.

#### *Land Tenure Reform (Scotland) Act 1974*

##### **Part I and Schedules 1 to 4**

This part, with the exception of section 2 which prohibits the creation of future ground annuals etc, is repealed given the provisions in Part III and clause 50 of the Bill on the extinction of feuduties and like payments. The provisions on redemption of feuduties etc are, from the appointed day, unnecessary. See Part 3 of the report.

##### **Section 14**

The section of the Crofters (Scotland) Act 1955 amended by this section has been repealed. See Crofters (Scotland) Act 1993.

##### **Section 15**

This section is unnecessary with the extinction of feuduties, and the abolition of irritancy (see clause 47 of the Bill and paragraph 4.89 of the report).

##### **Section 22**

Feudal terminology is removed.

##### **Section 23**

The reference to ground annuals is otiose.

#### *Offshore Petroleum Development (Scotland) Act 1975*

See the Notes to Schedule 8 - Part I.

#### *Scottish Development Agency Act 1975*

See the Notes to Schedule 8 - Part I.

#### *Land Registration (Scotland) Act 1979*

See the Notes to Schedule 8 - Part I.

## SCH. 9

Chapter	Short title	Extent of repeal
1979 c.33.— <i>cont.</i>	Land Registration (Scotland) Act 1979.— <i>cont.</i>	creditor or” and, in both places where they occur, “feuduty, ground annual or”; and in subsection 5 (4)(a), the words “over- feuduty or”. In section 15(2)(a), the words “sections 10 and 146 of and 10 Schedule D to the Titles to Land Consolidation (Scotland) Act 1868.” In section 16, subsection (2); and in subsection (3)(b) the words “feuduties, ground 15 annuals,” and “and, in the case of a grant of land in feu, of all feuduties payable by the grantor to his superiors from and after the 20 date of entry”. In section 20, in subsection (3), paragraph (ii), and the word “; and” immediately 25 preceding that paragraph; in subsection (6), the words “; and all such feuduties, ground annuals or other periodical payments as are mentioned in subsection 30 (3)(ii) above”; and subsection (8)(a)(ii). In section 28(1), the definition of “feu”.
1979 c.46.	Ancient Monuments and Archaeological Areas Act 1979.	In section 18(4), the words “or 35 heir of entail”. In section 57(1), the words “of the dominium utile.”
1980 c.13.	Slaughter of Animals (Scotland) Act 1980.	In section 1, the word “feu,”. 40
1980 c.44.	Education (Scotland) Act 1980.	In each of sections 20(1)(a) and 22(1)(a), the word “feu,”.
1980 c.45.	Water (Scotland) Act 1980.	In section 20, the word “feu,”. In section 65, in subsection 45 (5), the word “estates,” and paragraph (a); and in subsection (8), the words “or rentcharge”. In Schedule 4, in paragraph 8, 50 the words “feuduties, ground annuals,”.
1985 c.6.	Companies Act 1985.	In section 395(1)(a)(ii) or (if section 92 of the Companies Act 1989 has 55

*Explanatory Notes*

*Schedule 9 Part I (cont'd)*

*Ancient Monuments and Archaeological Areas Act 1979*

See the Notes to Schedule 8 - Part I.

*Slaughter of Animals (Scotland) Act 1980*

**Section 1**

Feudal terminology is removed.

*Education (Scotland) Act 1980*

See the Notes to Schedule 8 - Part I.

*Water (Scotland) Act 1980*

See the Notes to Schedule 8 - Part I.

*Companies Act 1985*

See the Notes to Schedule 8 - Part I.

Chapter	Short title	Extent of repeal
1985 c.6.— <i>cont.</i>	Companies Act 1985.— <i>cont.</i>	not come into force by the date on which, subject to paragraph 48(3) of Schedule 8 to this Act, that Schedule and this Schedule come into force) in section 410(4)(a), the words “, ground annual”.
5		
10		In Schedule 4, in paragraph 93, the words “is the proprietor of the <i>dominium utile</i> or, in the case of land not held on feudal tenure,” and “; and the reference to ground-rents, rates and other outgoings includes feu-duty and ground annual”.
15		
20		In Schedule 9, in paragraph 36, the words “is the proprietor of the <i>dominium utile</i> or, in the case of land not held on feudal tenure,” and “; and the reference to ground-rents, rates and other outgoings includes a reference to feu-duty and ground annual”.
25		
30	1986 c.45. Insolvency Act 1986.	In Schedule 1, in paragraph 2, the word “feu,”.
		In Schedule 2, in paragraph 2, the word “feu,”.
35	1987 c.18. Debtors (Scotland) Act 1987.	In section 15(1), in the definition of “adjudication for debt”, paragraph (b) and the word “or” immediately preceding that paragraph.
40		In section 99(1), the words “or superior’s” and “or feuduty”.
45		In section 101, the words “(other than an action under section 23(5) of the Conveyancing (Scotland) Act 1924)”.
	1987 c.26. Housing (Scotland) Act 1987.	In section 125(2), the words “of the superior of whom such owner holds, and”.
50		Section 132(1). In section 175(1), the words “superior or”.
		Section 334.
55		In section 338(1), the definitions of “sell” and

*Explanatory Notes*

*Schedule 9 Part I (cont'd)*

*Insolvency Act 1986*

**Schedules 1 and 2**

Feudal terminology is removed.

*Debtors (Scotland) Act 1987*

**Section 15(1)**

The repeal is consequential on the repeal of section 23 of the Conveyancing (Scotland) Act 1924.

**Section 99**

Feudal terminology is removed.

**Section 101**

The words are removed consequential on the repeal of section 23 of the Conveyancing (Scotland) Act 1924, and the abolition of ground annuals (see clause 50 of the Bill and paragraphs 3.51 ff of the report).

*Housing (Scotland) Act 1987*

See the Notes to Schedule 8 - Part I.

## SCH. 9

Chapter	Short title	Extent of repeal
1987 c.26.— <i>cont.</i> 1988 c.1.	Housing (Scotland) Act 1987.— <i>cont.</i> Income and Corporation Taxes Act 1988.	“sale” and of “superior”. In section 15(1), in Schedule A, in paragraph 1(3)(b), the words “, ground annuals and feu duties”. 5 In section 25(2), in the definition of “permitted deductions”, in paragraph (d), the words “, ground annual, feuduty”. 10 In section 28, in paragraph (b), the words “, ground annual, feuduty”. 15 In section 119(3), in the definition of “rent”, the word “, feuduty”.
1989 c.39.	Self-Governing Schools etc. (Scotland) Act 1989.	In section 39(4)(a), the words “an interest in”. 20 In section 80(1), the definition of “interest in land”.
1990 c.35.	Enterprise and New Towns (Scotland) Act 1990.	In section 10(1), the word “superior.”. In section 36(2), the words “estate or”. 25
1991 c.28.	Natural Heritage (Scotland) Act 1991.	In section 22(1), in the definition of “land”, the word “estate,”.
1991 c.45.	Coal Mining Subsidence Act 1991.	In section 52(1), in the definition of “owner”, paragraph (b). 30 In Schedule 1, in paragraph 2(6), the definition of “incumbrance”. 35 In Schedule 2, in paragraph 3(2), head (b); and in paragraph 4(2)(b), the words “an entail or”.
1991 c.55.	Agricultural Holdings (Scotland) Act 1991.	In Schedule 6, in paragraph 1(5), the words “, but do not include references to an interest as a superior only”. 40 In section 74, the words “estate or” and “dominium utile of the”. 45 In section 75, in subsection (1), the words “dominium utile of the”; and in subsection (3), the words “dominium utile of the” and “absolute”. 50
1993 c.44.	Crofters (Scotland) Act 1993.	In section 16, in subsection (3), the words “estates or”; and subsection (7). 55

## *Explanatory Notes*

### *Schedule 9 Part I (cont'd)*

*Income and Corporation Taxes Act 1988*

See the Notes to Schedule 8 - Part I.

*Self-Governing Schools etc. (Scotland) Act 1989*

#### **Section 39(4)**

The removal of the words "an interest in" is consequential on amendments to the Prescription and Limitation (Scotland) Act 1973.

#### **Section 80**

The definition of interest in land is removed in furtherance of general policy. See paragraph 9.5 of the report.

*Enterprise and New Towns (Scotland) Act 1990*

#### **Section 10**

Feudal terminology is removed.

#### **Section 36**

Reference to "estate" is removed with the abolition of feudal estates.

*Natural Heritage (Scotland) Act 1991*

See the Notes to Schedule 8 - Part I.

*Coal Mining Subsidence Act 1991*

See the Notes to Schedule 8 - Part I.

*Agricultural Holdings (Scotland) Act 1991*

#### **Sections 74 and 75**

Feudal terminology is removed.

*Crofters (Scotland) Act 1993*

See the Notes to Schedule 8 - Part I.

Chapter	Short title	Extent of repeal	
5 10 15 20 25 30 35 40 45	1993 c.44.— <i>cont.</i>  1994 c.21.  1994 c.23.   1997 c.8.    1997 c.9.	<p>Crofters (Scotland) Act 1993.—<i>cont.</i></p> <p>Coal Industry Act 1994.</p> <p>Value Added Tax Act 1994.</p> <p>Town and Country Planning (Scotland) Act 1997.</p> <p>Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997.</p>	<p>In section 17(3), paragraph (a); the words “, or (b)”;</p> <p>and in paragraph (b) the word “other”.</p> <p>In section 19(4), paragraph (a); and, in each of paragraphs (b) and (c), the words “otherwise than in feu”.</p> <p>In section 10(7), paragraph (b) and the word “and” immediately preceding that paragraph.</p> <p>In section 96(1), in the definition of “fee simple”, in paragraph (a), the words “estate or interest of the proprietor of the dominium utile or, in the case of land not held on feudal tenure, the estate or”.</p> <p>In section 191, subsection (9).</p> <p>In section 272(2), in paragraph (b), the word “superior,”.</p> <p>In section 277, in subsection (1), in the definition of “disposal”, the words “, except in section 191(9),” and in paragraph (a) of the definition of “heritable security”, the words “a security by way of ground annual and”; and subsection (8).</p> <p>In Schedule 15, in paragraph 7, the words “feuduty, ground annual or”; and in paragraph 34, the words “a feuduty, ground annual,”.</p> <p>In section 81, subsection (7).</p>

*Explanatory Notes*

*Schedule 9 Part 1 (cont'd)*

*Coal Industry Act 1994*

See the Notes to Schedule 8 - Part 1.

*Value Added Tax Act 1994*

See the Notes to Schedule 8 - Part 1.

*Town and Country Planning (Scotland) Act 1997*

See the Notes to Schedule 8 - Part 1.

*Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997*

**Section 51(7)**

Feudal terminology is removed.

SCH. 9

## PART II

## REPEALS RELATING TO THE NATIONAL TRUST FOR SCOTLAND

Chapter	Short title	Extent of repeal	
1935 ch.ii.	National Trust for Scotland Order Confirmation Act 1935.	In the Order contained in the Schedule, in section 4(2), the word "feu" and, in section 6(2), the words "notarial instrument or".	5
1947 ch.xxxviii.	National Trust for Scotland Order Confirmation Act 1947.	In the Order contained in the Schedule, in section 3(a), the words from "feu duties" to "any".	10

*Explanatory Notes*

**Schedule 9 Part II**

This Part of the schedule contains repeals to private Acts relating to the National Trust for Scotland.

*National Trust for Scotland Order Confirmation Act 1935*

See the Notes to Schedule 8 - Part II.

*National Trust for Scotland Order Confirmation Act 1947*

See the Notes to Schedule 8 - Part II.

## Appendix B

### List of those who submitted written comments on Discussion Paper No 93

The Association for the Protection of Rural Scotland  
Badenoch and Strathspey District Council  
Badenoch and Strathspey Labour Party  
J M Ballantine, Solicitor  
O Barratt  
C E Beresford-Green  
W Beswick  
R F Callander  
R Chalmers, Solicitor  
The Church of Scotland  
D M Clark, Solicitor (Scotland), Crown Estate Commissioners  
The Cockburn Conservation Trust  
The Committee of Scottish Clearing Bankers  
The Convention of the Baronage of Scotland  
Convention of Scottish Local Authorities  
Council of Mortgage Lenders  
Dr J S Davidson  
J Davison  
H N Dedecker  
J G Dickson, Solicitor  
East Kilbride District Council  
C Engel  
Faculty of Advocates  
Faculty of Solicitors of the Highlands  
R C H Fernie  
G P Fletcher, Solicitor  
Galloway Preservation Society  
Professor W M Gordon, University of Glasgow  
Highland Regional Council  
J S Hodge, Solicitor  
G Jamieson, Solicitor  
R F Jamieson  
Keeper of the Registers of Scotland  
Miss E H Keith, Millbrae Gardens Owners' Association  
The Killearn Welfare Trusts  
Lands Tribunal for Scotland  
The Law Society of Scotland  
The Lord Lyon King of Arms  
The Lord President  
Professor A J McDonald, Messrs Thorntons, WS  
L D Most, Solicitor  
Murray - Usher Foundation

Mrs M Napier  
The National Trust for Scotland  
The New Decade for Women: Scottish Joint Action Group  
S M Notley, Solicitor  
Property Managers Association Scotland Limited  
C T Reid, University of Dundee  
K G C Reid, University of Edinburgh  
G and Mrs J Robb  
The Royal Faculty of Procurators in Glasgow<sup>1</sup>  
The Royal Institution of Chartered Surveyors in Scotland  
S E Scammell  
Scottish Chambers of Commerce  
The Scottish Churches Committee  
Scottish Consumer Council  
Scottish Homes  
Scottish Landowners' Federation  
Scottish Law Agents Society  
Scottish Natural Heritage  
Sheriffs' Association  
Sheriffs Principal  
Society of Advocates  
Society of Writers to H M Signet<sup>2</sup>  
Messrs Stewart and Osborne, Solicitors  
Messrs Tait and Peterson, Solicitors  
Messrs Thorntons, WS<sup>3</sup>  
A T Towns, City Solicitor, City of Aberdeen  
United Kingdom Association of Preservation Trusts (Scottish Area)  
University of Aberdeen (Faculty of Law)<sup>4</sup>  
R W Wishart, Solicitor

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<sup>1</sup> The response was submitted by Professor J A M Inglis.

<sup>2</sup> The response was written by Professor I W Noble, K M Griffiths, Mrs A S M Thornton, and R B Wood, and while it was approved by the Council of the Society, according to their normal practice, it has not been formally adopted by them.

<sup>3</sup> The response was prepared by S Brymer, C T Graham, and Professor A J McDonald.

<sup>4</sup> The response was prepared by a committee of the Faculty of Law comprising M Christie, Professor D J Cusine, and Professor M Meston.