

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Real Burdens: Miscellaneous

Section 61: Contractual liability incidental to creation of real burden

274. When a burden is created (whether as a feudal or a non-feudal burden) it also operates as a contract between the parties. *Section 61* prevents dual validity as both a contract and a real burden. In future an obligation will be either a burden or a contract, but it cannot be both. When the deed containing the obligation has been duly registered, the contractual liability will cease to the extent to which it is duplicated by the real burden. A disposition imposing burdens by reference to a deed of conditions is the leading example of a deed into which a constitutive deed is incorporated. The section does not apply in cases where, notwithstanding registration, no real burden is created (e.g. because the obligation does not comply with rules as to content of a real burden set out in section 3). Nor (section 119(7)) does the section apply to constitutive deeds registered before the appointed day, except where the burdens are community burdens.
275. Contractual effect will be extinguished for community burdens regardless of when they were created.
276. *Schedule 13*, paragraph 14 amends section 75 of the 2000 Act to put beyond doubt that contractual obligations which were incidental to feudal burdens should only remain enforceable between the original parties.