

# **ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000**

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## **EXPLANATORY NOTES**

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#### *Commentary on Sections*

#### **Part 6: Miscellaneous**

##### *Section 53: Discharge of rights of irritancy*

177. "Irritancy" means confiscation of the feu property. 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. An owner who makes a minor deviation from the title conditions is potentially vulnerable to the total loss of the property, without compensation. This section extinguishes the remedy of irritancy and will come into force on Royal Assent.

##### *Section 54: Extinction of superior's rights and obligations qua superior*

178. A superior has certain rights and, sometimes, obligations simply by virtue of being the superior. Such rights and obligations run with the superiority and transmit to successors. Parts 3 and 4 of the Act provide for the extinction (with exceptions) of the two principal rights of a superior namely the right to collect feuduty and the right to enforce real burdens. *Section 54* is concerned solely with any other rights and obligations a superior might have by virtue of being the superior. Accordingly it 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 sections 25, 28(1)(a) and 60(1)(a). Section 75 (saving for contractual rights) makes it clear that contractual rights and obligations are unaffected.
179. *Subsections (2) and (3)* are modelled on the equivalent provisions in section 17 and prevent the enforcement (subject to exceptions) of superior's rights and obligations after the appointed date of abolition.

##### *Section 55: Abolition of thirlage*

180. Thirlage was the obligation on a landowner to take corn to a particular mill to be ground. It is highly unlikely that any obligations of thirlage still exist but this section effects formal abolition.

##### *Section 56: Extinction etc. of certain payments analogous to feuduty*

181. This section applies the provisions of Part 3 of the Act on extinction of feuduties to other payments which, although non-feudal in nature, have similar characteristics. The section follows the approach in the Land Tenure Reform (Scotland) Act 1974, but adds teinds and stipend to the list of burdens being dealt with.

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182. Ground annual is a perpetual payment secured on land and due to a person not otherwise connected with that land. The owner of property burdened with a ground annual does not, however, hold title from the creditor on a ground annual in the same way as a vassal holds title from a superior. Most land subject to a ground annual is itself held on feudal tenure. Extinction of a ground annual will extinguish the security for payment and leave the land unencumbered.
183. Skat is a tribute under udal tenure which equates to feuduty under feudal tenure. In the case of skat, however, this would normally be payable directly to the Crown. Payment of skat has survived only on Orkney and Shetland.
184. Teinds were originally one-tenth of the annual produce of land and were used towards the support of the clergy and after the Reformation towards the minister's stipend. With the standardisation of stipend, teinds are of little or no value. The stipend of a standard value - "standard charge" - is constituted as a real burden on those lands in favour of the General Trustees of the Church of Scotland and is payable at Whitsunday and Martinmas.
185. The section also specifically applies to dry multures which are an annual payment derived from thirlage.
186. *Subsection (4)* makes it clear that the extinction of the payments referred to in this section does not affect the underlying right to hold, occupy or use the land.

***Section 57: Extinction by prescription of obligation to pay redemption money for feuduty, ground annual etc.***

187. Substantial sums of redemption money under the Land Tenure Reform (Scotland) Act 1974 are 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, being 20 years (section 7 of the Prescription and Limitation (Scotland) Act 1973), 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. *Section 57* reduces to 5 years the period of negative prescription for redemption money for feuduty, ground annual etc under the 1974 Act. It is to apply to any obligation to pay redemption money that is still extant at the appointed date of abolition. The section will mean that there is a uniform 5 year prescription period for all matters relating to feuduty and payments analogous to feuduty. It will enable money which may have been on deposit receipt for many years to be returned if the 5 year period has already elapsed.

***Section 58: Crown application***

188. This Act will apply to the Crown. The Crown's position as paramount feudal superior will disappear on the appointed date of abolition and the Crown will not be able to grant new feus. Abolition of the feudal system will not affect property held allodially by the Crown which has never entered a feudal chain. Allodial tenure is complete, or absolute, ownership of property where there is no superior/vassal relationship.
189. The prerogative powers of the Crown will be completely unaffected by the Act. A distinction should be drawn here between the Crown's rights and powers as paramount feudal superior and the Crown's rights and powers as Sovereign. The prerogative powers are preserved generally, but three of them are mentioned specifically for the avoidance of any doubt. Firstly, 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 have their roots in the feudal system. Secondly, the Crown's prerogative rights in relation to ownerless or unclaimed property are also specifically excluded. These cover the Crown's rights as the so called last heir (ultimus haeres) to property which is unclaimed by any heir on the death of the deceased and the Crown's right of property, whether moveable or heritable, which ceases to have an owner (bona vacantia).

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190. Thirdly, this section makes it clear that the *regalia majora* are to be treated as part of the prerogative and so will be unaffected by the Act. The *regalia majora* are royal rights which cannot be alienated by the Crown. Examples are:

the Crown's right in the sea and seabed in respect of public rights of navigation and fishing;

the Crown's right in the foreshore in respect of public rights of navigation, mooring boats and fishing; and

the Crown's right in the water and bed of navigable rivers, again in respect of public rights such as navigation.

***Section 59: Crown may sell or otherwise dispose of land by disposition***

191. There is at present some doubt as to whether the Crown can dispoise, as opposed to feu, land which has never entered the feudal system. For the avoidance of doubt, this section therefore provides that the Crown can grant a disposition of land.

***Section 60: Preserved right of Crown to maritime burdens***

192. The Crown has in the past feued parts of the seabed or (more frequently) the foreshore for various purposes, including the construction of piers, harbours and bridges. Real burdens restricting the use of the parts of the seabed or foreshore feued out may have been imposed in the feudal grant. This section therefore preserves the right of the Crown to enforce such "maritime burdens".

***Section 61: Mines of gold and silver***

193. This section makes 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 (in which case it would be extinguished). The right is of the nature of a royalty and is not intended to be extinguished on feudal abolition.

***Section 62: Jurisdiction and prerogative of Lord Lyon***

194. For the avoidance of any doubt, this section preserves the jurisdiction and prerogatives of the Lord Lyon King of Arms who retains full jurisdiction and control over coats of arms.

***Section 63: Baronies and other dignities and offices***

195. This section deals with the effect of the abolition of the feudal system of land tenure on feudal baronies. A barony title is a feudal grant of land directly from the Crown as superior conferring baronial privileges and responsibilities. The estate and land, which can be bought and sold in the normal way, might be no more than a tiny plot of wasteground, of little or no value in itself, which represents the head place of the barony. But ownership of such an estate and land enables the owner to adopt the title of "Baron of ...". A market in Scottish Baronies has developed in recent years and the expected price for a barony, with no special features and a minimal amount of land of no value, is (the Scottish Law Commission advise in their Report) about £60,000.

196. There are 3 special features of barony titles. First, certain conveyancing peculiarities are attached 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, to add certain special baronial features to the coat of arms. 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.

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197. *Subsection (1)* abolishes any surviving criminal or civil jurisdiction of barony courts. Such jurisdiction is obsolete for all practical purposes. Subsection (1) 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 though they are not expressly mentioned in the titles to the land. Subsection (1) expressly preserves the dignity of baron, which is derived from the direct connection with the Crown as feudal superior of the land held in barony, and any other dignity or office whether or not of feudal origin. The reference to offices is intended to make clear that the abolition of the feudal system will not affect ancient offices in, for example, the Royal Household which might be regarded as relics from the feudal era.
198. *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 heritable property and may be bequeathed by will in the normal way. If a baron dies intestate, the barony would transmit to the eldest son or other heir in accordance with the pre-1964 rules on intestate succession which were preserved by the Succession (Scotland) Act 1964 for "any title, coat of arms, honour or dignity transmissible on the death of the holder". 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. In this way, the social, ceremonial and armorial aspects of baronies will be severed from land ownership and baronies will become non-territorial dignities.
199. *Subsection (3)* is a savings provision for existing heritable securities over barony titles. It makes it clear that from the appointed date of abolition, a security over the former dominium utile will continue (until discharge) to attach to the land and the dignity of baron and the security over the former dominium directum will continue to attach to the dignity alone.
200. *Subsection (4)* makes it clear that "conveyancing privilege" covers, for example, the special rule relating to prescription to salmon fishings and that the reference to "dignity" includes matters of heraldry and precedence incidental to a dignity, such as the addition of certain special baronial features to a coat of arms.

***Section 64: Abolition of Kindly Tenancies***

201. A kindly tenancy is a form of land tenure found in a small part of Dumfriesshire. "Kindly" simply means hereditary. *Section 64* provides for the abolition of kindly tenancies and the conversion of the interest of the kindly tenant to simple ownership. Kindly tenants will therefore enjoy the same kind of ownership as former feudal vassals. Any rent still payable would be extinguished, subject to a claim for compensation, by the operation of section 56 (extinction etc. of certain payments analogous to feuduty).
202. *Subsection (1)* abolishes the tenure of kindly tenancies in equivalent terms to section 1 which abolishes the feudal system of land tenure.
203. *Subsection (2)* converts the interest of the kindly tenant into ownership, which it already is, for all practical purposes. This ownership will remain subject to the same real rights and encumbrances as the kindly tenancy (for example servitudes or standard securities).
204. *Subsection (3)* specifically provides for the right of salmon fishings of kindly tenants. The right to fish for salmon, in so far as it is an unseverable pertinent of the kindly tenancy, will remain as such in the future.

***Section 65: Creation of proper liferent***

205. A liferent may be created either by reservation or by grant. An owner of land may either grant a right of liferent to a second party (i.e. the right to occupy and use the property during the second party's lifetime), or convey the land to a second party while reserving in the conveyance a right of liferent to the original owner. *Section 65* restates, in non-

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feudal language, the established rules for the creation of the real right of proper liferent. It does not affect trust liferents ("improper liferents").

206. *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).
207. *Subsection (2)* follows section 3(2) of the Land Registration (Scotland) Act 1979 in saving any special rule of the common law or statute. As with section 4, this would accommodate cases involving survivorship destinations. The most important in practice is the rule that where land is conveyed to A and B and the survivor, ownership of A's pro indiviso share passes automatically to B in the event that A predeceases B without evacuating the destination.

***Section 66: Obligation to make title deeds and searches available***

208. 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. Demand for deeds will usually stop when the title to land has become registered in the Land Register (because then title flows from the Register and not from the deeds). It may, however, 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. *Section 66* provides a replacement obligation to make title deeds and searches available which is not confined to former superiors. The obligation will only be owed to a person who has, or is entitled to acquire, a real right.

***Section 67: Prohibition on leases for periods of more than 175 years***

209. The prohibition on leases for periods of more than 175 years is designed to prevent the feudal system from being replaced by a system of leasehold tenure with many of the same defects. Leases of residential property are already restricted to 20 years by section 8 of the Land Tenure Reform (Scotland) Act 1974. There is, however, no restriction on the length of other leases. Leases of 999 years or longer have at times been common in certain areas of Scotland.
210. *Subsection (1)* provides that no lease of land executed after the section comes into force on Royal Assent may continue for longer than 175 years. Leases, whatever their term, will come to an end automatically when the end of the 175 year period is reached.
211. *Subsection (2)* prohibits the use of leases containing obligations to renew in order to avoid the effect of subsection (1).
212. "Tacit relocation" is the legal doctrine whereby a lease may be tacitly continued for up to a year at a time if the tenant continues in occupation and nothing is done to bring the lease to an end. *Subsection (3)* makes it clear that tacit relocation is not affected by section 67. *Subsection (3)* also preserves the effect of any enactment under which the duration of a lease may be extended (for example the Tenancy of Shops (Scotland) Acts 1949 and 1964).
213. *Subsection (4)* stipulates 3 exceptions to the rule that non-residential leases should be subject to a limit of 175 years. First, the rule will not apply where a contractual obligation (such as missives) was entered into prior to Royal Assent to grant a lease in excess of the prohibited duration. Second, the 175 years rule will not apply to a lease executed before Royal Assent which has been renewed after Royal Assent in implement of a provision of that lease. This is to cover the position of, for example, Blairgowrie leases which are for 99 years but contain an obligation for automatic renewal at the end of the 99 years for a further 99 years and would thus exceed the proposed limit of 175 years. Last, the 175 years rule will not apply to circumstances where a lease has been entered into before Royal Assent which still has more than 175 years to run and it is desired to grant a sublease for the full residue of the head lease.

***Section 68: Certain applications to Sheriff of Chancery***

214. 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 infefment. They were repealed by the Succession (Scotland) Act 1964, but the repeal did not affect the "making up of title to any part of the estate of any person who died before" 10 September 1964 "or the right to take legal proceedings with respect to any such matters". This partial repeal meant that (a) archaic rules were preserved for cases involving deaths before 10 September 1964 and (b) 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 for a declarator that he was entitled to act as trustee.
215. *Section 68* completes the repeal of sections 27 to 50 of the 1868 Act and replaces the provisions on the service of heirs with 3 sections which enable the same results to be achieved in a simpler way.

***Section 69: Application of 1970 Act to earlier forms of heritable security***

216. The conveyancing statutes contain many provisions, often extremely detailed, relating to old forms of heritable security which are now rarely encountered in practice. *Section 69* enables many of these obsolete provisions 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.

***Section 70: Ownership of land by a firm***

217. It is generally believed that a Scottish firm (i.e. a partnership) cannot own feudal property, even though the firm has a separate legal personality in Scots law. It is, however, generally accepted that a firm can own moveable property and can hold the right of a tenant under a lease.
218. *Section 70* resolves any doubt as to the position of partnerships by making it clear that partnerships having a separate legal personality (as all Scottish partnerships have) can themselves own land.