

ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000

EXPLANATORY NOTES

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Commentary on Sections

Part 3: Feuduties

Section 7: Extinction on appointed day

36. *Section 7* extinguishes all remaining feuduties on the day on which the feudal system of land tenure is abolished. This does not affect recovery of arrears of feuduty. The Land Tenure Reform (Scotland) Act 1974 prohibited the imposition of new feuduties and provided for the redemption of existing payments. It is estimated by the Scottish Law Commission that probably less than 10% of properties remain subject to feuduty.

Section 8: Requiring compensatory payment

37. *Section 8* permits a former superior to claim compensation from a former vassal for feuduty extinguished under section 7 by serving a notice on the vassal in the appropriate form. The amount of compensation will be calculated in accordance with section 9. It is an ordinary unsecured debt. If no request for compensation is made, no liability arises.
38. *Subsection (1)* requires the notice demanding compensation to stipulate the sum due by the former vassal. The notice will have to be served within 2 years of the appointed date of abolition. Service would constitute the debt and trigger liability. Failure to serve within the 2 year period would extinguish any right to compensation.
39. *Subsection (2)* makes provision for a cumulo feuduty (which is defined in section 16(2)). Many older feus have come to be divided into smaller parts. The feuduty might be formally allocated among the fragmented parts so that each vassal is liable for a share. There is a possibility, however, that the feuduty will be an unallocated cumulo affecting the whole feu. In theory, the superior is entitled to recover the full amount of feuduty from any one vassal leaving that vassal to pursue neighbours to contribute a share. This provision, however, requires a separate notice to be served in respect of a cumulo feuduty on each former vassal in respect of the sum due by that vassal (see section 9(3) and (4) in relation to the share due by each vassal for a cumulo feuduty). A statutory form of notice is prescribed for such a feuduty in schedule 1.
40. *Subsection (3)* prescribes a statutory form of notice contained in schedule 2 for other feuduties.
41. *Subsection (4)* requires the prescribed explanatory note to be served with each notice of compensation. The note set out in schedule 1 applies for cumulo feuduties and that in schedule 2 for other feuduties.

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42. *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 specified in section 10.

Section 9: Calculation of amount of compensatory payment

43. *Section 9* makes it clear that the basis of the calculation of compensation for the extinction of feuduty is the same as that used for the redemption of feuduty under the Land Tenure Reform (Scotland) Act 1974. The principle is that full compensation should be paid by the vassal to the superior.
44. *Subsection (1)* sets out the same basic formula as is used in the 1974 Act.
45. *Subsection (2)* provides that, except in the case of a cumulo feuduty, the sum produced using the statutory formula is the sum due by the former vassal.
46. In the case of the extinction of a cumulo feuduty, subsection (3) requires the former superior to allocate the compensation due among the former vassals in order to find the share due by each. The allocation requires to be done on a basis which is reasonable in all the circumstances.
47. *Subsection (4)* creates a presumption that an allocation is reasonable if it accords with an existing informal apportionment of a cumulo feuduty.

Section 10: Making compensatory payment by instalments

48. This section provides a scheme for payment by instalments where the sum due is £50 or more.
49. Where a superior is entitled to a compensatory payment of not less than £50, *subsection (1)* requires the superior to serve a completed instalment document and explanatory note in the prescribed form contained in schedule 3 on the former vassal at the same time as the notice calling for payment of the sum due. If the superior does not do so, then the notice has no effect.
50. If the former vassal wishes to take advantage of the option of making the compensatory payment by instalments, *subsection (2)* requires the vassal to sign, date and return the instalment document along with payment of a 10% surcharge within 8 weeks of the date of service of the notice. The surcharge of 10% of the total compensation recognises the administrative and other costs for the former superior where the compensation is to be paid by instalments.
51. *Subsection (3)* has the effect that if a former vassal sells the property after having received a notice to pay compensation to his former superior for the extinction of feuduty, he should no longer have the opportunity to pay by instalments and would be obliged to pay off the remaining compensation in a lump sum if the instalment option has been taken up. The effect is to provide a "clean break" when the property is sold.
52. *Subsection (4)* sets out the details of the instalment scheme. It provides for immediate payment of the balance due if an instalment is unpaid for 42 days and makes it clear that in other cases the balance can be repaid at any time. If the vassal, having previously taken up the instalment option subsequently loses the option of paying compensation by instalments by virtue of having sold the property, then the outstanding balance will be due on the seventh day after the day on which the former vassal ceased to have right to the land. In cases where the vassal loses the right to obtain the option of paying compensation by instalments because the property is sold after service of the notice but before the instalment option has been taken up, *subsection (5)* makes clear that the compensation will wholly be paid within 56 days after due service under section 8(5).

Section 11: Service under section 8(1)

53. This section 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 (see section 12 - extinction by prescription of requirement to make compensatory payment).
54. *Subsection (1)* along with subsection (5) sets out the normal rule for service. Service on each former vassal is required either personally or by registered post or recorded 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. Where the land is owned in common, there should be separate service on each *pro indiviso* owner.
55. *Subsection (2)* provides that a signed acknowledgement by the former vassal will be evidence that he has received the documents. Alternatively a certificate accompanied by the postal receipt where they are sent by registered post or the recorded delivery service will suffice. If the documents are sent by post but are returned to the former superior because they could not be delivered, they may be sent on to the Extractor of the Court of Session, and that will be equivalent to serving the vassal with the documents.
56. *Subsection (4)* defines the date of service as the date of delivery or of posting in compliance with subsection (1) or (2).

Section 12: Extinction by prescription of requirement to make compensatory payment

57. This section provides that the obligation to pay compensation prescribes, or ceases to be legally enforceable, after 5 years. Prescription starts to run from the date when the obligation becomes enforceable, i.e. the date of service of the notice.

Section 13: Arrears of feuduty etc.

58. This section deals with transitional arrangements for feuduty. Unpaid arrears will be unaffected by this legislation.
59. *Subsection (1)* makes it clear that arrears of feuduty for any period before the appointed date of abolition are still recoverable. It further provides that feuduties which relate to that period but which have not yet fallen due will fall due on the appointed day for abolition. The persons who were liable for payment of the arrears before the appointed day will continue to be liable after that date.
60. *Subsection (2)* abolishes the security (*debitum fundi*) which a superior previously had over the feudal property for unpaid feuduty and redemption money.
61. *Subsection (3)* abolishes the corresponding security (*hypothec*) which the superior had over moveable property. The former superior will still be able to recover arrears as a personal debt in the usual way.
62. *Subsection (4)* preserves the right of any superior to pursue actions based on *debitum fundi* or *hypothec* which commenced before the appointed day for abolition and also any rights or preferences founded on that basis which are claimed in a sequestration or other ranking process which have commenced before that date.

Section 14: Duty of collecting third party to disclose information

63. This section 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. The duty is not, however, absolute, since the collector could be subject to an obligation of confidentiality or might genuinely have lost the records in a fire or flood. He is therefore

required to comply only in so far as it is practical for him so to do. The duty will come into force on Royal Assent (see section 77(1) - short title and commencement) in order to allow a superior time to investigate cumulo feuduties. Most cumulo feuduties which are not formally allocated may be informally apportioned, ie divided up for payment among the various vassals. If a superior collects feuduty 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 duty to disclose the apportionment to the superior should ensure that the share of the compensation payment is fairly arrived at.

Section 15: Duty to disclose identity etc. of former vassal

64. This section relates to the situation where a property subject to a feuduty has been sold or transferred prior to the appointed day for abolition of the feudal system but the sale or transfer did not give rise to the compulsory redemption of feuduty under the Land Tenure Reform (Scotland) Act 1974. Feuduty will therefore be extinguished on the appointed day and the former superior will be able to claim compensation. If the former superior wishes to claim a compensatory payment he will have to do so from the vassal who had right to the property immediately before the appointed day. The former superior may try to trace that person by searching in the property registers. If, however the property had changed hands, the property registers may not disclose the new owner, if either the new owner had not yet presented their title, or the Register of Sasines has not been updated to show the new owner's title. It would still show the original owner as the owner of the house, but having sold or transferred the property, the original owner is not the person who is to pay the compensation. If liability rested with the person shown as owner in the property registers, the new owner could avoid liability by delaying in registering his title. This section provides a mechanism to assist a superior relying on the information in the property registers to identify the person who was the vassal or owner at the relevant time. An obligation is placed on the person who owned the property before the vassal or owner who is obliged to pay the compensation (ie the vassal who had right to the property immediately before the appointed day) to help the superior to find that vassal or owner by telling him the name and address of the vassal or owner if he knows it or any other relevant information.

Section 16: Interpretation of Part 3

65. This section defines certain terms used in Part 3 of the Act.
66. *Subsection (1)* makes it clear that blench duty is extinguished along with feuduty. This arises where land is held under blench tenure. It has been described as a small illusory rent which is rarely collected. *Subsection (1)* also 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 has not been completed. This is to take account of the situation where property is in the process of changing hands before the appointed date of abolition. A purchaser could otherwise avoid liability for compensation simply by delaying registration until after the appointed day. The seller would then be left with the bill.
67. The definitions of "cumulo feuduty" and "feu" cover the case where part of the cumulo has been allocated. The definition of "cumulo feuduty" in *subsection (2)* embraces (a) the whole cumulo feuduty where no part has been allocated and (b) the unallocated balance of a cumulo remaining exigible from more than one part of a feu where part has already been allocated. The definition of "feu" in *subsection (3)* embraces (a) the original feu where there has been no allocation of the cumulo, (b) those parts of a feu which are subject to the unallocated balance of a cumulo and (c) each part of a feu on which part of a cumulo has been allocated.
68. *Subsection (4)* makes it clear that where a feu or any part of a feu is held as common property, the former superior may recover all of the compensation from one of the co-owners, subject to a right of relief based on the size of their pro indiviso share. Any co-

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owner could therefore be called upon to pay the former superior, but would then have a right of relief against fellow owners.