FAREWELL TO FEUDALISM

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"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". So runs the Sixth Act to be passed in the first term of the reconvened Scottish Parliament, The Abolition of Feudal Tenure etc (Scotland) Act 2000. The Act is welcome. By the end of the second millennium the feudal system had long outlived its usefulness, even as a legal construct, and had few, if any defenders. As the Scottish Law Commission commented in 1999, "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 some-thing which, in the case of many but not all superiors, is little more than an instrument for extracting money".

The demise of feudalism brings to an end a story which began almost a thousand years ago, and which has involved all of Scotland's leading families.

In England the advent of feudalism is often associated with the Norman Conquest of 1066. That Conquest certainly marked a new beginning in landownership which paved the way for the distinctive Anglo-Norman variety of feudalism. There was a sudden and virtually clean sweep of the major landowners. By the date of the Domesday Survey in 1086, only two major landowners of pre-Conquest vintage were left south of the River Tees holding their land direct of the crown: Thurkell of Arden (from whom the Arden family descend), and Colswein of Lincoln. Both, incidentally, bear Scandinavian rather than Anglo-Saxon names.

In Scotland the story was quite different. The feudalism which took root in Scotland was certainly Anglo-Norman in form, but it was promoted by the kings of the Scots themselves, and its advent was both later and more gradual than in England. The reigns of David I (1124-53) and his grandsons Malcolm IV (1153-65) and William I (1165-1214) saw the spread of the feudal system. Malcolm and William, indeed, were famously said by a contemporary chronicler to have held themselves out as Frenchmen by race, manners, language and culture. They were no doubt well aware of their descent from Charlemagne through their grandmother Elizabeth of Vermandois. Certainly at that time many from outwith Scotland - Normans, Bretons, Flemings and others - were granted land. The Flemings, it has even been claimed, brought the science of heraldry to Scotland, although that claim has still to be fully made out. Prominent among the Normans was Robert de Brus, granted Annandale by King David for the service of ten knights. Other Norman families included the Somervilles, Sinclairs, Hays and Haigs, among names which are still familiar, and Avenel, de Morville and de Soulis among those which are not. The most prominent family of Breton stock were the Stewarts whose ancestor was dapifer or steward to the Bishop of Dol in Brittany. Many Flemings were granted land in the valley of the Clyde, including Thankard, who gave his name to Tankerton, Wice in Wiston, Lambin in Lamington and William, the ancestor of the family of Douglas. Further north, Freskin the Fleming was granted land in Moray, and founded the families of Murray and Sutherland.

However, in contrast to England, there was no wholesale displacement of native lords in Scotland. As Professor Geoffrey Barrow has pointed out, in 1200 all the earls north of

Forth and Clyde were still of Celtic descent; and as late as 1286, eight of the earldoms in Scotland were still in the hands of those of native stock. Many native lords were granted or confirmed in their lands in feudal form. As early as 1136, the leading Celtic magnate, the Earl of Fife, had a feudal grant of his earldom. Other native landowners, such as the Earls of Atholl, Strathearn and Lennox are soon to be found making feudal grants to their followers. Within a few generations, regular intermarriage and the Wars of Independence had elided most of the differences between native and incomer, although not those between Highlander and Lowlander.

Terminology and Types of Tenure

The terminology of feudalism was soon in universal use: the superior who granted the feu; the vassal who rendered feudal service in return for the grant; and the all important ceremony of sasine (seisin), by which the vassal was given symbolic possession by the superior or his representative on the lands in question, and without which the vassal could not be said to be properly infeft, or "clothed with" the feu.

There were different types of feudal tenure, the classic example being military tenure, in which the return for infeftment was military service. On the west coast there was a distinctively Scottish variant of this. Grants might be made in return for a specified naval service: thus Robert I granted Colin Campbell the lands of Lochawe and Ardscotnish (Kilmartin) in free barony for the service of a galley of 40 oars; while David II granted Malcolm MacLeod two thirds of Glenelg for a galley of 26 oars and Torquil MacLeod the lands of Assynt for a galley of 20 oars. Another type of tenure, as in England, was blench tenure, in which the service required was more nominal. Thus the barony of Penicuik, near Edinburgh, was held for the service of blowing three blasts on the horn on that part of the burgh muir of Edinburgh known as the Forest of Drumsheugh when the king hunted there; the Douglases held Galloway between the rivers Nith and Cree for the annual rendering of a white rose at the castle of Dumfries; and the Campbells held Kilmun in Cowal for the rendering of a pair of gloves at the Glasgow Fair.

However, the type of feudal tenure which came to pre-dominate in Scotland was tenure in return for a sum of money, generally paid twice a year, at Whitsunday and Martinmas. This was known as feu ferme tenure, and the sum due in perpetuity was known as feu duty. For example, the burgh of Edinburgh was granted its lands in feu in 1329 for an annual payment of £34.13.4d.

One difference between England and Scotland was the position regarding subinfeudation, that is, the granting of sub-feus which added another vassal to the feudal chain. This was at first competent in England, as in Scotland, and could lead to longer and longer chains of tenure, and ever more complicated questions of ownership. In the thirteenth century, for example, the lands of Paxton in Huntingdonshire were held by Roger of St German of Robert of Bedford who held in turn from Richard of Ilchester who held of Alan of William le Boteler who held of Gilbert Neville who held of Chartres who held of Dervorguilla Balliol who held the lands of the King of Scotland who held them of the King of England! In England further subinfeudation was prohibited in 1290 by Edward I's statute Quia Emptores. In Scotland, however, subinfeudation continued to be competent for as long as feudal tenure survived, being used in the twentieth century, for example, by builders and property developers.

Succession and Jurisdiction

Feudal holding also affected succession to land and patterns of jurisdiction. Scotland followed England in favouring males to females in succession to heritage (land), and in

operating primogeniture among males related in the same degree. When the succession did open to females, the property was divided equally between those in the same degree. Remarkably, these rules continued to be followed by Scots law until 1964.

In matters of feudal jurisdiction, however, Scotland resembled the Continent rather than England, in that for many hundreds of years franchise jurisdictions existed in Scotland, alongside the ordinary courts of common law. Grants might be made in liberam baroniam, that is, in free barony, or in liberam regalitatem, in free regality. These rights of jurisdiction were much prized. Barony jurisdiction included infangthief, the right to try a thief found with the stolen goods still on him, and also the right to try a manslayer caught red-handed. Both offences incurred the death penalty, and many barons were proud of their gallows, which were usually prominently displayed. As the name suggests, regality jurisdiction conferred a semi-regalian power, which covered all save the pleas of the crown. These franchise jurisdictions were granted in considerable numbers and continued to be a notable feature of Scots law until the eighteenth century.

This could result in a remarkably complex patchwork of jurisdiction. For example, the lands in the small Highland glen of Glen Urquhart, near Inverness, were divided between at least five separate baronial jurisdictions in the sixteenth century. Most lay within the barony of Urqhuart possessed by John Grant of Freuchie, chief of the name, but some lay within the barony of Corrimony belonging to his son Iain Og, and others lay in the barony of Glenmoriston, belonging to his illegitimate son Iain Mor. The lands of Achmonie in the glen were part of the Bishop of Moray's barony of Kinmylies, while Buntait, at the top of the glen, belonged to Fraser of Lovat.

Scotland produced one writer on feudal law of European eminence, Thomas Craig (1538-1608). Craig's Jus Feudale, written about 1600, is not only a brilliant exposition of the feudal law of Scotland, but also an essay in comparative legal history. Craig was able to discern the origins of both Scottish and English feudalism, and to set both in a European context. His Jus Feudale was used as a textbook on the Continent, an edition being published in Leipzig as late as 1716. Craig's motives for writing were complex: in part he wished to support King James VI's scheme for an encompassing union of England and Scotland, but in part also he wished to glorify the feudal system for which he had an almost mystic regard.

Feudalism, wrote Craig, had so commended itself for centuries past to the nations of Europe that there "is not in all Christendom a single people (not excluding the unspeakable Turk) which has not freely borrowed from it in forming its own laws and institutions." Craig suggested to James VI that feudalism, "in the willing hands of a heaven-endowed prince", might be used for "the perfect attainment of law and equity, than which nothing in the world could be more excellent, nor more pleasing to Almighty God whose living image on earth a prince is."

Register of Sasine 1617

Shortly after Craig's death, a remarkably forward looking statute of 1617 set up a public land register, known the Register of Sasines, in which all documents conveying title to land were to be recorded. The Register became one of the glories of Scots conveyancing, and has been maintained ever since. The symbolic ceremony of granting sasine, however, also continued. A notice on the castle esplanade of Edinburgh presented by the Province of Nova Scotia in Canada records that:

"Near this spot in 1625 Sir William Alexander of Menstrie, Earl of Stirling, received sasine or lawful possession of the royal province of Nova Scotia by the ancient and symbolic ceremony of delivery of earth and stone from Castlehill by a representative of the King. Here also (1625-1637) the Scottish baronets of Nova Scotia received sasine of their distant aronies."

Franchise jurisdiction continued until the Jacobite risings of the eighteenth century. Readers of Waverley will remember Cosmo Comyne Bradwardine, Baron of Bradwardine and Tully-Veolan, who boasted that his lands had been erected into a free barony by King David I, "cum liberali potest. habendi curias et justicias, cum fossa et furca [lie pit and gallows] et saka et soka, et thol et theam, et infang-thief et outfangthief, sive hand-habend. sive bak-barand." "The peculiar meaning of these cabalistical words", continues Scott, "few or none could explain; but they implied on the whole, that the Baron of Bradwardine might, in case of delinquency, imprison, try, and execute his vassals at pleasure." Or, as it is expressed in 1066 and All That, "infangthief is damgudthing".

The Heritable Jurisdictions Act 1746 put an end to the major feudal jurisdictions while paying handsome compensation to the holders. At the same time all surviving military tenures were converted into blench holdings. Barony jurisdiction in minor matters, however, was preserved, but gradually fell into desuetude. There have been the occasional latter day revivals, as when the Baron Court of Corstorphine was reconstituted as a vehicle for the Forrester family association. More recently in 1998 the Baron Courts of Prestoungrange and Dolphinstoun were revived to support and extend the work of the Heritage Museum on the baronial lands.

Barony jurisdiction is finally abolished by the 2000 Act. The Act, however, specifically preserves barony title, that is, the dignity of a feudal or territorial baron, although this has now been divorced from both jurisdiction and territory. A distinct Section of this Volume records the final holders of such title of the feudal age. There has lately been a lively market in barony titles, comparable to the English market in lordships of the manor, but after the 2000 Act they are only transferable as "incorporeal heritable property".

In the nineteenth and early twentieth centuries there were further important reforms. The use of Latin in feudal grants came to an end. The symbolic granting of sasine on the lands was superseded in 1845. Infeftment became dependent on entry in the Sasine Register. However, these reforms were largely technical, and the underlying structure and terminology remained the same. By the mid-twentieth century the need for more radical reform was urgent.

"Feudalism" had become a term of abuse. As the Halliday Committee noted in 1966, the use of archaic terms such as "feudal", "superior", "feuduty" and "vassal" all suggested to a proprietor of land that his status was inferior, and detracted from a sense of full ownership. In 1969 the Westminster Government of the day accepted that root and branch reform was the only answer, and that the feudal system of land tenure should be brought to an end. A number of preliminary measures were put in train, including provision for the compulsory redemption of feu duties, and the setting up of a new Register of Title, but somehow the impetus was lost, and final reform had to wait until the 2000 Act.