

fortuitous legal externality of urban and industrial growth. The subtext of much nineteenth-century litigation on feudal law is the question of to what extent the old rules of real feudalism were to be applied to this new pseudo-feudalism, to what extent factories and shops and warehouses and suburban housing estates were to be controlled by the *consuetudines* of medieval Lombardy and by the *constitutiones* of the Holy Roman Emperors³.

- 1 See the Highland Services Act 1715 (c 54) (often known as the Clan Act 1715), and the Tenures Abolition Act 1746 (c 50). Of course feudalism was already in decline by the eighteenth century, partly as a result of legislation (where the fifteenth-century statute book is very significant), and partly by changing *mores*. The considerable success of James VI (1567–1625) in bringing the feudal lords under control must also be mentioned.
- 2 See the discussion of feufarm in para 68 below.
- 3 '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, per Lord Fraser.

(2) FEUDAL OWNERSHIP

47. Feudal and allodial. Feudal tenure is contrasted with allodial ownership¹, which simply means ownership in the civilian sense, ownership of land in the same sense as ownership of goods². A car is not held feudally of a superior, and neither is allodial land. The *dominium eminens* or ultimate superiority of the Crown is allodial, because not held of a higher lord, except of God³. Other land is held feudally⁴. The term 'tenure' strictly implies feudality, but by an excusable inaccuracy is sometimes used of other rights to land. Thus the expression 'allodial tenure' is sometimes encountered. Originally a 'tenant' was a person who held in tenure⁵, in other words as a vassal not as a lessee, but the original meaning has long since been reversed, so that in modern usage a 'tenant' is a lessee not a vassal⁶. But to this rule that all land is feudal there are certain exceptions. The first is udal land in Orkney and Shetland, which is, as the name indicates, allodial⁷. The second is the land occupied by the kirks and kirkyards of the Established Church⁸. But kirks are now by statute held by the Church of Scotland General Trustees as vassals of the Crown⁹. Kirkyards appear to remain allodial¹⁰. Although Erskine states that manses and glebes are allodial¹¹, the better view is that they are held of the Crown¹². It is sometimes said that land which passes through the process of compulsory purchase thereby becomes allodial, but it is more accurate to say that, like manses and glebes, such land is allodial *de facto* but in theory still feudal¹³. In these various cases of nominal feudality, it would be difficult to specify the mode of tenure.

Ownership of land must be either allodial or feudal. Rights other than ownership cannot be allodial, for allodality implies ownership, but rights other than ownership can be feudal or non-feudal. Leases and servitudes are examples of non-feudal rights. To what extent heritable securities may be considered feudal will be considered later¹⁴.

- 1 'Allodial' is a word of Germanic origin, as Craig correctly surmises: *Jus Feudale* 1,9,24. The word 'udal' is cognate with it, so that udal land is allodial land.
- 2 '*Mobilia autem omnia allodialia sunt*' (All moveables are allodial): Craig *Jus Feudale* 1,9,25.
- 3 In Germany the estate at the top of the feudal chain was called, in a striking image, *Sonnenlehn* (feu of the sun).
- 4 The principle that all land, subject to minor exceptions, is held ultimately of the Crown was probably adopted from England. On the continent, at least in many places, there seems to have been a widespread survival of allodial ownership right through the middle ages.

Thus in feudalism landownership and sovereignty coincided, so that the Crown's sovereignty over Scotland and its *dominium eminens*, its ultimate tenurial superiority, were the same thing, were identical concepts⁴. Since sovereignty involved jurisdiction, landownership implied jurisdiction, so that the royal courts could dispense justice because the Crown was the ultimate superior, and every subordinate owner of land likewise had the right to hold courts, and in fact did so⁵. Taxation was likewise raised by the Crown as superior rather than as sovereign, though more accurately it should be said that to the feudal mind no such distinction could be conceived. Land tenure penetrated every institution; land was not so much an asset, to be bought and sold, as today, but rather a focus of social relations. Even religion was feudalised. The Crown held Scotland as the vassal of God, and in prayer the act of holding the hands together was adopted from the feudal ceremony of homage, the *immixtio manuum*, so that the worshipper was binding himself as the vassal of God.

Two themes of feudalism require particular notice. The first is that the distinction between public law and private law, a distinction intrinsic to the law of the Roman Empire and to modern legal systems, was absent in feudalism. Feudalism involves a systematic denial of the distinction, as will be apparent from what has already been said. The other point is that ownership of land, something taken for granted by the Romans as by the moderns, did not exist under feudalism. Feudalism involves the absolute denial that land can be owned. Indeed, the very concept of a real right can hardly be said to exist under feudalism. Land rights are personal, not real. Land is not owned, but held in tenure, and tenure means a personal relationship with other people, the superior and the oversuperior, with the vassals and tenants. For the same reason land cannot, in the pure feudal conception, be sold or bequeathed. The power of sale and bequest go close to the heart of ownership, but no one can sell or bequeath what he does not own, and no one could own land. It is true that today we speak of *dominium utile* and *dominium directum*, and of course *dominium* means ownership. But these terms are not feudal, but result from the attempt made in the later middle ages, when feudalism was declining, to reconstruct it in accordance with civilian concepts. More will be said of this later.

1 Historiography is subject to passing fashions, of which this tendency may be one. One of the problems is how to distinguish western European feudalism from other systems with which it shares common features, such as ancient Japan. See *Les Liens de Vassalité* (Société Jean Bodin, 2nd edn, Brussels, 1958).

2 F W Maitland *Constitutional Law of England* (1st edn, 1900) pp 23, 24.

3 F L Ganshof *Qu'est-ce que la féodalité?* (1944, in English as *Feudalism*), Introduction. This is a classic study of the subject, and more legal in its approach than the other classic study, M Bloch *La Société Féodale* (1939/40, in English as *Feudal Society*). Ganshof includes an extensive bibliography. See also D Herlihy *History of Feudalism* (1970). English feudalism was a major influence in Scotland. The literature on it is very large. See in particular S F C Milsom *Legal Framework of English Feudalism* (1976). Scots literature will be mentioned later.

4 We still have a relic of this in the rule that the Crown cannot dispose but only feu, for to dispose would, in the feudal scheme of things, be to alienate not only land but also sovereignty.

5 There were certain exceptions.

43. Origin of feudalism. The traditional opinion was that feudalism emerged in the fifth century, on the fall of the Roman Empire in the west, but this is now known to be inaccurate. Thus we have a conveyancing styles book by one Marculfus, written at Paris about 660, which does not indicate the existence of feudalism¹. There is no real trace of feudalism in the *Edicta* of the Lombard kings such as Rothair (issued in 643) or Liutprand (issued 713–735). It seems that it emerged in the eighth century, in the Kingdom of the Franks². Its social and economic causes cannot be traced here, and are perhaps not fully