

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 Emperors<sup>3</sup>.

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 feusfarm 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 ownership<sup>1</sup>, which simply means ownership in the civilian sense, ownership of land in the same sense as ownership of goods<sup>2</sup>. 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 God<sup>3</sup>. Other land is held feudally<sup>4</sup>. The term 'tenure' strictly implies feudalism, 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 tenure<sup>5</sup>, 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 vassal<sup>6</sup>. 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, allodial<sup>7</sup>. The second is the land occupied by the kirks and kirkyards of the Established Church<sup>8</sup>. But kirks are now by statute held by the Church of Scotland General Trustees as vassals of the Crown<sup>9</sup>. Kirkyards appear to remain allodial<sup>10</sup>. Although Erskine states that manses and glebes are allodial<sup>11</sup>, the better view is that they are held of the Crown<sup>12</sup>. 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 feudal<sup>13</sup>. In these various cases of nominal feudalism, 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 allodiality 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 later<sup>14</sup>.

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.