

## **Abandoning Principles The Right and Wrong of Abandonment of Land in Scots Law**

### **ABSTRACT**

Land is normally characterised and professionally valued as a desirable commodity. This means that many people will aspire to ownership of land or, for those who already own land, they will generally seek to retain ownership of it. If and when landowners wish to rearrange their affairs and no longer own a particular piece of land, the normal course of action would be to transfer that land to one of those aspiring owners (for a suitable price). In a buoyant market, this will often be an easy process, but this will not always be the case. For example, environmental regulation may operate to render land of negative value (that is to say, the capital value of the land is less than the costs of remediation, similar to a standard case of negative equity in homeownership, or the ongoing costs of preventing further damage make the land unviable as a going concern). Alternatively, there might be a land designation that renders certain land uses impossible. There might also be fiscal reasons continued ownership of land is unattractive, owing to (for example) rates associated with domestic or non-domestic land.

In such situations, a landowner who no longer wishes to own that land will find it hard to find a willing transferee, even when asking for a low or indeed no price. The very same reasons that have encouraged a landowner to extricate herself from the quicksand of ownership can discourage others from seeking ownership. To what extent, then, can a landowner escape such a quagmire by unilateral action?

The extent to which it is, or should be, possible for a landowner to abandon land in Scotland will be analysed in this seminar. This is something that has not been analysed closely in Scots law scholarship, although one recent case, which involved land that had been mined for coal, did consider the issue and ultimately ruled that a landowner could not simply walk away from land (and in turn costs associated with preventing pollution). With the wider ongoing land reform agenda in Scotland, close analysis of that case, together with consideration of three relatively recent and rather different statutes, will shine a light on whether the Scottish approach is the right one. Property law theory will also be considered to explain why some people may wish to abandon land, and in what circumstances a permissive regime for this is desirable.

The first piece of Scottish legislation is the Abolition of Feudal Tenure etc. (Scotland) Act 2000. This cut the feudal chain that previously existed in Scottish land law to leave only one level of landownership. This raises novel questions about abandonment by the outright owner who, since 28 November 2004, has had no feudal superior to answer to. The second is the Community Empowerment (Scotland) Act 2015. This introduced a right for communities to acquire wholly or mainly neglected or abandoned land. What “abandoned” means in that context could feasibly be aimed at the likes of derelict buildings, not unlike the way “abandoned” is used in common parlance. But in a property law sense, the meaning is different. For that statutory wording to be meaningful, the interplay between these different senses must be considered. Finally, the Land Registration etc. (Scotland) Act 2012 and the associated drive to complete the coverage of the Land Register to the whole of Scotland has the potential to bring this issue to a head. It might do so where land ownership is somehow unclear and any “owner” is not minded to assist the Keeper when it comes to providing information about the land. Will this provide an opportunity to abandon?

In addition to those questions, this paper will also consider whether the Court of Session's suggested approach to abandoned land is fit for purpose. Where a potential new owner is available but for whatever reason does not want to or cannot simply transact with the current owner, is the existing system of positive prescription suitable? Under the Prescription and Limitation (Scotland) Act 1973, ownership can be acquired after the registration of a suitable deed and with ten years of associated possession. Might a shorter period of time be suitable here?