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Real Property—Abandonment of Contract for Deed—Berman v. Kieren, ____ Minn. ____, 247 N.W. 2d 405 (1976)

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however, one could argue that the legislative body has already determined which public interests are worthy of protection and that interferences with those interests are presumptively unreasonable.⁴² Therefore, the court's function is limited to the determination of a violation of the statute, the constitutionality of the statute, and the selection of a remedy.⁴³ Once an activity is codified as a nuisance and the literal terms of the ordinance are violated, no other factors need be examined by the court.⁴⁴ Following the *Fry* decision, a manufacturer will be guilty of a violation regardless of attempts to avoid the nuisance, if in the end the nuisance still occurs.

Although the Minnesota courts will not consider a defendant's attempts to avoid the nuisance in determining whether the criminal nuisance statute has been violated, presumably reasonable attempts to avoid the nuisance would have an effect on the court's determination of appropriate punishment. Likewise, the defendant's exercise of due care might bear on the remedy chosen by the court in a civil action for nuisance.

Real Property—ABANDONMENT OF CONTRACT FOR DEED—*Berman v. Kieren*, ___ Minn. ___, 247 N.W.2d 405 (1976).

In the law of real property, abandonment refers to the voluntary relinquishment of an interest in land.¹ Although a perfect legal title may not

802, 420 U.S. 1000 (1974), *modified on other grounds*, 514 F.2d 492 (8th Cir. 1975); Note, *supra* note 15, at 159; Comment, *supra* note 18, at 226.

42. See *State v. Guilford*, 174 Minn. 457, 459-60, 219 N.W. 770, 771 (1928) (prerogative of the legislature to determine that it was in the public interest to declare distribution of scandalous material to be a nuisance; the determination by the legislature is presumptively valid, but not conclusive); *State v. Chicago, M. & St. P. Ry.*, 114 Minn. 122, 130, 130 N.W. 545, 547 (1911) (legislature and city council presumed to have all the necessary facts to make a rational decision on what constitutes a nuisance).

43. See, e.g., *State v. Chicago, M. & St. P. Ry.*, 114 Minn. 122, 130 N.W. 545 (1911) (ordinance prohibiting dense smoke from the burning of soft coal upheld as constitutional; fine imposed on defendant for violating the ordinance); *City of St. Paul v. Gilfillan*, 36 Minn. 298, 31 N.W. 49 (1886) (ordinance prohibiting emission of dense smoke from chimneys held void as unauthorized by the legislature).

44. *State v. Lloyd A. Fry Roofing Co.*, ___ Minn. ___, ___, 246 N.W.2d 692, 695 (1976); *H. Christiansen & Sons v. City of Duluth*, 225 Minn. 475, 483, 31 N.W.2d 270, 275 (1948); *W. PROSSER*, *supra* note 12, § 87, at 576.

1. See *Melco Inv. Co. v. Gapp*, 259 Minn. 82, 85, 105 N.W.2d 907, 909 (1960) (contract for deed); *Mineral Land Inv. Co. v. Bishop Iron Co.*, 134 Minn. 412, 414, 159 N.W. 966, 967 (1916) (mineral lease); *Norton v. Duluth Transfer Ry.*, 129 Minn. 126, 131-32, 151 N.W. 907, 909 (1915) (easement). See generally 5 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF PROPERTY § 2515 (1957 & Supp. 1976). The principles applicable to a determination of abandonment of personal property are discussed at some length in *Erickson v. Sinykin*, 223 Minn. 232, 239-42, 26 N.W.2d 172, 176-77 (1947).

be lost by abandonment,² an easement,³ or an oil and gas lease,⁴ or a purchaser's interest in a contract for deed⁵ may be abandoned. A finding of abandonment is dependent upon all the facts and circumstances present in the case⁶ because a critical element in the determination is the intent of the holder of the interest to relinquish his rights in the property.⁷ When the doctrine of abandonment is asserted against a purchaser under a contract for deed, the most crucial question is whether the purchaser has continued to make payment of the purchase price.⁸ If he has not, the court will determine if by other acts he has continued to assert an active interest in the property. In particular, the court has considered whether the purchaser has taken or retained possession of the property,⁹ sought a judicial declaration of his rights,¹⁰ paid the real estate taxes on the property,¹¹ or neglected to keep in contact with the vendor.¹² The doctrine of abandonment was involved in *Berman v. Kieren*,¹³ where the Minnesota Supreme Court held that the evidence was sufficient to support the conclusion that the purchasers under a contract for deed had abandoned their equitable interest.

2. *E.g.*, *Krueger v. Market*, 124 Minn. 393, 398, 145 N.W.2d 30, 32 (1914); *see Smith v. Glover*, 50 Minn. 58, 74, 52 N.W. 912, 912 (1892).

3. *E.g.*, *Norton v. Duluth Transfer Ry.*, 129 Minn. 126, 131-32, 151 N.W. 907, 909 (1915). *See generally* 2 AMERICAN LAW OF PROPERTY §§ 8.96-.98 (A. Casner ed. 1952).

4. *E.g.*, *Mineral Land Inv. Co. v. Bishop Iron Co.*, 134 Minn. 412, 414, 159 N.W. 966, 967 (1916). *See generally* 2 AMERICAN LAW OF PROPERTY § 10.40 (A. Casner ed. 1952).

5. *E.g.*, *Berman v. Kieren*, ___ Minn. ___, ___, 247 N.W.2d 405, 408 (1976).

6. *See, e.g.*, *Ahlstrand v. McPherson*, 285 Minn. 398, 401, 173 N.W.2d 330, 333 (1969); *Rognrud v. Zubert*, 282 Minn. 430, 437, 165 N.W.2d 244, 250 (1969).

7. *See, e.g.*, *Ahlstrand v. McPherson*, 285 Minn. 398, 401, 173 N.W.2d 330, 333 (1969); *Rognrud v. Zubert*, 282 Minn. 430, 437, 165 N.W.2d 244, 250 (1969).

The intention of the vendor to accept the purchaser's abandonment must also be considered. *Cf. Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 133, 94 N.W.2d 273, 282 (1959) (MINN. STAT. § 559.21 (1976) does not relieve purchaser "from the effect of an abandonment which the vendor accepts").

8. Because the cases in Minnesota have all arisen only after the purchaser has defaulted in payment, *see, e.g.*, *Ahlstrand v. McPherson*, 285 Minn. 398, 173 N.W.2d 330 (1969), it would appear that the vendor would not have a plausible claim of abandonment if the purchaser was current in payments.

9. *See Taryp v. Nowicki*, 286 Minn. 257, 264, 175 N.W.2d 443, 448 (1970) (possession retained through agent and caretaker); *cf. Pratt v. Martig*, 182 Minn. 250, 254, 234 N.W. 464, 466 (1931) (failure of tenant to cultivate farm lands did not constitute abandonment).

10. *See, e.g.*, *Buresh v. Allen*, 296 Minn. 150, 153, 207 N.W.2d 279, 281 (1973) (per curiam) (purchaser brought action for specific performance); *Taryp v. Nowicki*, 286 Minn. 257, 175 N.W.2d 443 (1970) (purchaser sued for rescission).

11. *See, e.g.*, *Berman v. Kieren*, ___ Minn. ___, ___, 247 N.W.2d 405, 408 (1976).

12. *See Rognrud v. Zubert*, 282 Minn. 430, 437-38, 165 N.W.2d 244, 249-50 (1969) (gap in communications between parties for four months could support finding of abandonment, but under facts of case, 11-week break was reasonable); *Melco Inv. Co. v. Gapp*, 259 Minn. 82, 85-86, 105 N.W.2d 907, 909-10 (1960) (under facts of case, four-month period of delay in making payments could not support finding of abandonment); *Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 134, 94 N.W.2d 273, 283 (1959) (purchaser's neglecting performance for 18 months supported finding of abandonment).

13. ___ Minn. ___, ___, 247 N.W.2d 405 (1976).

In *Berman*, the purchaser's interest had been assigned several times before becoming vested in the defendants in August of 1970. The defendants discontinued making payments on the contract in early 1974. The vendor then discovered that the house on the property was deserted and had fallen into a state of disrepair. To protect his interest, the vendor undertook to have the house repaired and secured a tenant for the property. He then served defendants with notice of cancellation pursuant to section 559.21 of the Minnesota Statutes.¹⁴ However, because his notice contained an incorrect legal description of the property, it was ineffectual in terminating the defendants' interest. He then brought an action to register title.¹⁵ The referee who originally heard the action agreed with the vendor that the purchaser's interest had been extinguished by abandonment.¹⁶ This determination was supported by evidence that the defendants had failed to pay the real estate taxes due on the property for 1974, had vacated the property, had permitted a house built on it to fall into disrepair, and had failed to tender payment even when they were meeting with the vendor following the attempt to cancel their interest. The district court's approval of the referee's decision was affirmed by the supreme court.

The supreme court did not undertake an exhaustive discussion of the reasons for its decision, observing that the defendants had failed to

14. MINN. STAT. § 559.21 (1976) provides, in part:

When default is made in the conditions of any contract for the conveyance of real estate or any interest therein, whereby the vendor has a right to terminate the same, he may do so by serving upon the purchaser . . . a notice specifying the conditions in which default has been made, and stating that such contract will terminate . . . unless . . . the purchaser shall comply with such conditions Such notice must be given notwithstanding any provisions in the contract to the contrary

The purpose of the statute, as stated in *Graceville State Bank v. Hofschild*, 166 Minn. 58, 62, 206 N.W. 948, 949 (1926), was to take "from the vendor in all cases the arbitrary power to terminate the contract without notice." *Accord*, *Enkema v. McIntyre*, 136 Minn. 293, 298, 161 N.W. 587, 589 (1917) (statute "designed to protect those who would pay but cannot, not those who can pay but will not").

The effect of the statute is to terminate the purchaser's interest, but only after he has been given an opportunity to cure default. See MINN. STAT. § 559.21 (1976). The length of time granted the purchaser depends upon the amount he has paid under the contract prior to default. See *id.*

For a discussion of the merits of the statute, see Note, *Cancellation of Contracts for Deed: The Constitutionality of the Minnesota Statutory Procedure*, 58 MINN. L. REV. 247 (1973); Note, *Minnesota Land Contract in Action*, 39 MINN. L. REV. 93 (1954).

15. MINN. STAT. §§ 508.01-.84 (1976 & Supp. 1977), as amended by Act of Mar. 16, 1978, ch. 499, § 3, 1978 Minn. Sess. Law Serv. 94 (West), as amended by Act of Mar. 16, 1978, ch. 500, 1978 Minn. Sess. Law Serv. 95 (West), sets forth the procedure to be followed when land is to be registered. For a discussion of the Torrens Act and the effect of registration of titles, see Note, *Konantz, Koester, McCrossan and Title to Torrens Property*, 4 WM. MITCHELL L. REV. 59 (1978).

16. See ____ Minn. at ____, 247 N.W.2d at 408 (quoting referee's conclusion number three).

assert an active interest in the property.¹⁷ The court noted that defendants could have asserted an active interest merely by tendering payment in their answer to the petition to register title or at any time during the proceedings.¹⁸ Had the defendants tendered payment, the issue of abandonment would have been rendered moot because, as the *Berman* court remarked, "[m]ere failure to pay the purchase price or a short delay in payment or break in communication among the parties does not, absent other circumstances, justify a finding of abandonment."¹⁹ When the action to register title was commenced, the defendants had been in default for about five months.²⁰ In other cases, the court has held that periods of delay for eleven weeks²¹ or four months²² would not justify termination of the purchaser's interest on the ground that they had abandoned it. However, when the period of delay has been more substantial, for example eighteen months,²³ the court will be more willing to conclude that the interest has been abandoned. Thus, if the defendants in *Berman* had tendered payment in their answer to the vendor's petition to register title, their rights in the property would have been protected and a finding of abandonment unwarranted. Failure to tender payment was a significant factor in *Berman* because of the defendants' desertion of the property.

The purchaser's possession of the property is perhaps the most effective method of asserting an interest which would preclude a finding of abandonment. However, failing to be in possession is not conclusive evidence of abandonment if the purchaser has been involuntarily evicted. In *Tarpy v. Nowicki*,²⁴ for example, the court held that a finding of abandonment was not justified when the vendor had forced the purchaser's caretaker to vacate the apartment building which was being sold under the contract for deed.²⁵ Although the purchaser had been in

17. *Id.* at ____, 247 N.W.2d at 409.

18. *Id.*

19. *Id.* at ____, 247 N.W.2d at 408 (emphasis added); *accord*, *Rognrud v. Zubert*, 282 Minn. 430, 437, 165 N.W.2d 244, 249-50 (1969); *Melco Inv. Co. v. Gapp*, 259 Minn. 82, 86, 105 N.W.2d 907, 910 (1960).

20. *See* ____ Minn. at ____, 247 N.W.2d at 409. By the time the case reached the supreme court, payments were over two years in arrears, a fact which the court noted. *Id.*

21. *See Rognrud v. Zubert*, 282 Minn. 430, 437-38, 165 N.W.2d 244, 249-50 (1969).

22. *See Melco Inv. Corp. v. Gapp*, 259 Minn. 82, 85-86, 105 N.W.2d 907, 909-10 (1960).

23. *See Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 134, 94 N.W.2d 273, 283 (1959).

24. 286 Minn. 257, 175 N.W.2d 443 (1970). The purchaser in *Tarpy* sued the vendor for rescission of the contract and for damages. The vendor had attempted a statutory cancellation pursuant to MINN. STAT. § 559.21 (1976), but failed to give the purchaser the requisite 90-day notice. As a result, the statutory termination was not valid. 286 Minn. at 263, 175 N.W.2d at 448.

25. 286 Minn. at 264, 175 N.W.2d at 448. The vendor apparently believed that under MINN. STAT. § 559.21 (1976), he was entitled to possession of the property once he had served the purchaser with notice of cancellation. *See* 284 Minn. at 259, 175 N.W.2d at 445-46.

default for a number of months, the court did not conclude that her failure to retain possession was voluntary. On the other hand, departure from the property due to adverse financial conditions can be considered voluntary, as the decision in *Stadelmann v. Boothroyd*²⁶ illustrates. There, the court indicated that had the purchaser remained in possession until evicted pursuant to a judicial decree, a finding of abandonment could not have been made.²⁷

In *Berman*, the fact that the vendor had secured a tenant for the property apparently did not constitute an eviction of the vendee within the meaning of the rule set forth in *Tarpy*. Although the defendants in *Berman* were effectively precluded from taking possession of the property once the vendor's tenant began occupancy, the vendor in *Berman* did not oust the defendants or their tenant from possession. He obtained his own tenant after having found the property deserted. Thus, unlike in *Tarpy*, the purchaser's departure in *Berman* was voluntary, and the reasoning which was applied in *Tarpy* was inappropriate in *Berman*.

Other than by taking possession of the property, a purchaser may assert an interest by paying the real estate taxes²⁸ or by commencing an action for a judicial declaration of rights.²⁹ In *Buresh v. Allen*,³⁰ the purchaser could not have abandoned his interest in the contract for deed when he brought a suit for specific performance within five months of the execution of the contract.³¹ However, in the early case of *McDermid*

26. 170 Minn. 430, 212 N.W. 908 (1927).

27. See *id.* at 433, 212 N.W. at 909.

28. The *Berman* court listed "failure to pay real estate taxes" as one of four factors which it considered in arriving at the conclusion that the defendants had abandoned their interest under the contract for deed. See ____ Minn. at ____, 247 N.W.2d at 408. However, the weight attributed to nonpayment of real estate taxes depends upon the facts of the case. See, e.g., *Tarpy v. Nowicki*, 286 Minn. 257, 259, 175 N.W.2d 443, 445 (1970) (purchaser's failure to pay taxes would not justify finding of abandonment when vendor unlawfully evicted purchaser's caretaker from possession of property).

29. See *Buresh v. Allen*, 296 Minn. 150, 153, 207 N.W.2d 279, 281 (1973) (per curiam) (purchaser brought suit for specific performance); *Tarpy v. Nowicki*, 286 Minn. 257, 175 N.W.2d 443 (1970) (purchaser brought suit for rescission); *Melco Inv. Co. v. Gapp*, 259 Minn. 82, 85-86, 105 N.W.2d 907, 909-10 (1960) (purchaser brought suit for specific performance). But see note 33 *infra* and accompanying text.

No case has arisen in Minnesota in which a purchaser has sought a judicial determination of interests in a contract for deed pursuant to the Uniform Declaratory Judgment Act, MINN. STAT. §§ 555.01-.16 (1976). The Act has been the basis of actions in which the terms of a lease of real property, see *Mid-Continent Petroleum Corp. v. Narverud Motor Co.*, 238 Minn. 84, 55 N.W.2d 626 (1952), and a deed, see *Ketterer v. Independent School Dist. No. 1*, 248 Minn. 212, 79 N.W.2d 428 (1956), have been in issue. It would therefore be possible for the Act to form the basis of an action to determine the interests under a contract for deed.

30. 296 Minn. 150, 207 N.W.2d 279 (1973) (per curiam). The purchaser in *Buresh* had also taken steps to arrange financing, to have the land surveyed, and to close the transaction before commencing his suit for specific performance.

31. *Id.* at 153, 207 N.W.2d at 281; cf. *Tarpy v. Nowicki*, 286 Minn. 257, 262-63, 175 N.W.2d 443, 448 (1970) (purchaser's action for rescission not barred by delay).

v. McGregor,³² the court held that the purchaser's suit for specific performance was barred by abandonment as well as laches because he failed to take action for approximately one year.³³ In *Berman*, the purchaser's act of defending in the vendor's action to register title was not a sufficient assertion of a property interest to negate a finding of abandonment.³⁴

Berman v. Kieren, while not a unique or unusual decision, thus illustrates the doctrine of abandonment as applied to the relinquishment of a purchaser's interest in a contract for deed. Neither a mode of transferring title³⁵ nor a doctrine denying relief due to a failure to assert an interest for a lengthy period of time,³⁶ the doctrine of abandonment is, as Chief Justice Gilfillan wrote over eighty years ago, "a means by which rights or titles may be lost or extinguished . . ."³⁷ Dependent upon the intention of the parties,³⁸ the doctrine exists not to deprive a person of property rights,³⁹ but to clear title to land in situations which could otherwise leave the title in doubt.

may be sufficient to foreclose an inquiry into whether he has abandoned his interest under the contract for deed, it does not foreclose the vendor from asserting any other defense he may have against the purchaser. *See, e.g., Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 133-36, 94 N.W.2d 273, 282-83 (1959) (although purchaser's assignee proceeded diligently to protect his interests by bringing suit for specific performance, specific performance was not granted because he had failed to meet his obligations under the contract for deed).

32. 21 Minn. 111 (1874).

33. *Id.* at 115. *See also* *Ahlstrand v. McPherson*, 285 Minn. 398, 402, 173 N.W.2d 330, 333 (1969) (purchaser's suit for specific performance unfounded because, as trial court was justified in concluding, it was probable that suit would not have been commenced had vendor conveyed abandoned property to purchaser's uncle instead of to unrelated third party); *Stadelmann v. Boothroyd*, 170 Minn. 430, 212 N.W. 908 (1927) (purchaser's action for rescission could not be maintained when he was in default under contract for deed and had previously abandoned interest in land by vacating premises).

34. ____ Minn. at ____, 247 N.W.2d at 409 (by implication).

35. *See, e.g., Vought v. Porter*, 128 Minn. 43, 46, 209 N.W. 642, 642-43 (1926) (property cannot be abandoned in favor of any person); *Smith v. Glover*, 50 Minn. 58, 74, 52 N.W. 912, 912 (1892) (same).

36. *See, e.g., Melco Inv. Co. v. Gapp*, 259 Minn. 82, 86, 105 N.W.2d 907, 910 (1960) (abandonment requires intent to relinquish rights; laches merely refers to lengthy delay in asserting rights); *Smith v. Glover*, 50 Minn. 58, 74, 52 N.W. 912, 912 (1892) (lapse of time controlling consideration in applying laches; in abandonment, lapse of time may be important, but it is not essential).

37. *Smith v. Glover*, 50 Minn. 58, 74, 52 N.W. 912, 912 (1892).

38. *See* note 7 *supra* and accompanying text.

39. If the court finds that a purchaser has abandoned his interest in the property, it is merely an acknowledgment by the court of his relinquishment of rights. *See, e.g., Mathwig v. Ostrand*, 132 Minn. 346, 350, 157 N.W. 589, 590 (1916). Thus, although one may lose a title to real property through the application of the doctrine of abandonment, it cannot be said that one is being deprived of his rights when he has intentionally departed with them.