

# Circumstantial proof for abandonment of real estate purchaser\*

Jae-Kyoung Lee\*\*

## Contents

I. Introduction	III. Determination of Purchaser's Abandonment of Real Estate Contract—Relevant Factors
II. Seller's Claim of Abandonment of Real Estate Contract	IV. Conclusion

## I . Introduction

A purchaser, by his words, acts, and other conduct, may evince an intent to abandon a real estate contract. When this occurs, the seller may treat the contract as a nullity and, depending on the circumstances involved, may pursue various legal remedies for the purchaser's abandonment of the contract.<sup>1)</sup> A real-estate seller's claim that the purchaser has abandoned the contract may be asserted as an affirmative defense to a purchaser's action for specific performance of the contract, or may be asserted affirmatively as a basis for a seller's action for rescission, forfeiture and possession, or a decree

---

\* This paper is mostly based on the presentation for US Contract Law at Graduate School of Konkuk University, dated Sep, 2008.

\*\* Assistant professor of Law school, Konkuk University, Attorney.

1) A Practical Guide to Real Estate Transactions: From Contract to Closing, 59 Bench & B. Minn, 8 (2002 WL 1307251)

quieting title. Regardless of the posture of the case, the seller must prove that the purchaser clearly intended to abandon the contract, as evidenced by acts and conduct of the purchaser effectuating such intent. This article explains the relevant rules of law and evaluates the proof necessary for a seller to establish that a purchaser has abandoned a real estate contract under the particular facts and circumstances.<sup>2)</sup>

The article commences with a detailed discussion of the nature and element s of a real-estate seller's claim of abandonment of the contract by the purchaser, including the meaning of term "abandonment" with regard to the abandonment of real estate contracts, the posture of the case in which the issue of abandonment may be presented and the seller's burden of proof; and the essential elements of proof of the purchaser's intent to abandon the contract. Also discussed is the subject of mutual abandonment and the distinction between rescission and abandonment of real estate contracts.<sup>3)</sup> Next, the article provides a complete analysis of particular acts or omissions of the real-estate purchaser that may be used to establish the purchaser's intent to abandon the contract.<sup>4)</sup>

The courts have evaluated a number of relevant factors in reaching a decision as to whether the purchaser's conduct evinces an intent to abandon the contract, including the purchaser's inability or refusal to perform; delay on the part of the purchaser in tendering performance; the purchaser's default

---

2) It should be noted that the same basic rules and elements of proof apply in cases where the purchaser claims that the seller has abandoned the contract. *Haven Associates v. Donro Realty Corp.*, 121 A.D.2d 504, 503 N.Y.S.2d 826 (2d Dep't 1986); *Saunders v. Sharp*, 840 P.2d 796 (Utah Ct. App. 1992)

3) Recurring issues in rescission cases, 42(1) Tort Trial & Ins. Prac. L.J. 51 (2006 WL 4119822)

4) Rescission doctrine can make a transaction disappear, 112(9) Tax Notes 801 (2006 WL 2616085)

on payments of principal or interest due on the contract; the failure to pay taxes or maintain insurance on the property; the purchaser's possession of the property or relinquishment thereof; oral or written statements made by the purchaser with regard to performance of the contract; the purchaser's acceptance of a tenant status with regard to the property;[] as well as other conduct by the purchaser.<sup>5)</sup>

## II. Seller's Claim of Abandonment of Real Estate Contract

### 1. Purchaser's abandonment of real estate contract

A purchaser of property can abandon all his or her rights and interests in a real estate contract.<sup>6)</sup> When a purchaser abandons a real estate contract, the seller is free to sue for the breach or to accept the abandonment and treat the contract as ended. Upon discovering that the purchaser has abandoned the contract, the seller has the right to conclude that the purchaser intends not to perform his part of the bargain and treat the contract as a nullity, thus leaving the seller with her choice of remedies presented under the particular circumstances.<sup>7)</sup>

In the context of real estate contracts, the term "abandonment" has been used or defined in various ways by the courts, but all generally agree that the term means an intentional, unequivocal relinquishment of one's rights

---

5) Another look at attorney approval clauses, 94(10) Ill. B.J. 523 (2006 WL 3506527)

6) Am. Jur. 2d, Vendor and Purchaser § 545; What constitutes abandonment of land contract by vendee, 68 A.L.R. 2d 581

7) Specific performance versus damages for breach of contract: an economic analysis, 84(4) Tex. L. Rev. 831 (2006 WL 1126543)

in the contract. It refers to the voluntary relinquishment of all interests and rights in the contract with no intention of reclaiming them. Abandonment of a contract need not be express; it may be inferred from the attendant circumstances or from a course of conduct which clearly evinces an intent to abandon the contract.<sup>8)</sup>

A purchaser's intent to abandon contract rights need not be shown by the positive testimony of the purchaser, but may be inferred from his acts and conduct. However, to constitute abandonment of a real estate contract by the purchaser, the conduct relied upon by the seller must be positive, unequivocal, and inconsistent with the existence of the contract. Whether a purchaser has abandoned a real estate contract depends upon the concurrence of an intent to abandon, together with some act or omission which warrants the conclusion that the purchaser no longer claims or retains any interest in the contract. No action on the part of the seller is necessary to carry out the abandonment; it is entirely unilateral and when an intention to abandon unites with acts of relinquishment, the abandonment is complete.<sup>9)</sup> Acceptance by the seller is not required and has no bearing on the effectiveness of the abandonment<sup>10)</sup>

Whether a purchaser's acts and conduct amount to an abandonment of a land sales contract is ordinarily a question for the trier of fact, although it may become a matter of law for the court to decide where the purchaser's acts and conduct are decisive and unambiguous. Where there is dispute as to whether an abandonment has occurred, it is usually a question of fact,

---

8) Jones v. Dove, 382 Ill. 445, 47 N.E.2d 447 (1943); Kalman v. Bertacchi, 80 Ill. App. 3d 530, 36 Ill. Dec. 87, 400 N.E.2d 507 (1st Dist. 1980); Savitsky v. Sukenik, 240 A.D.2d 557, 659 N.Y.S.2d 48 (2d Dep't 1997)

9) Bissonnette v. Hanton City Realty Corp., 529 A.2d 139, 141 (R.I. 1987).

10) Mason v. Hasso, 90 Ariz. 126, 367 P.2d 1 (1961).

to be determined from the circumstances of the particular case.<sup>11)</sup>

## 2. Unilateral and mutual abandonment

Depending on the particular circumstances involved, the conduct of the purchaser and seller with regard to their respective rights and obligations under a real estate contract may be such as to indicate an abandonment of the contract by one or both of the parties. In other words, there can be either a unilateral or mutual abandonment of the contract. Although this article focuses on the former type of abandonment, as it specifically relates to the purchaser's abandonment of the contract, it is worth noting the distinction between unilateral and mutual abandonment.

The conduct and statements of the purchaser and seller under a real estate contract may be such as to show a mutual abandonment of the agreement, as where a purchaser fails to perform and the seller acquiesces in the purchaser's conduct. A unilateral abandonment may be shown by conduct of a party which clearly evinces an intent not to go through with the bargain, but a mutual abandonment occurs when "the acts of one party, which are inconsistent with the existence of the contract, are acquiesced in by the other party."<sup>12)</sup> The contract is then dissolved and the parties are placed in their original positions, with no potential suit for breach of contract.<sup>13)</sup>

---

11) *General Mortgage Corp. v. Peacock*, 267 Ark. 1061, 594 S.W.2d 35 (1980); *Bales v. Nelson*, 148 Ill. App. 3d 7, 101 Ill. Dec. 777, 499 N.E.2d 144 (3d Dist. 1986); *Collins v. Collins*, 348 Mich. 320, 83 N.W.2d 213, 68 A.L.R.2d 575 (1957); *Tiley v. Chapman*, 320 Mich. 173, 30 N.W.2d 824 (1948).

12) *Snell v. Salem Ave. Assoc.*, 111 Ohio App. 3d 23, 675 N.E.2d 555 (2d Dist. Montgomery County 1996), quoting *Hunter v. BPS Guard Services, Inc.*, 100 Ohio App. 3d 532, 654 N.E.2d 405, 411 (10th Dist. Franklin County 1995), dismissed, appeal not allowed, 72 Ohio St. 3d 1539, 650 N.E.2d 479 (1995)

### 3. Abandonment distinguished from rescission

Although the two concepts abandonment and rescission are not the same, the courts sometimes use the two terms indiscriminately with reference to failure in the performance of contracts for the purchaser and sale of real estate. The primary distinguishing feature is that an abandonment is brought about by conduct of one party which evidences an intent to forsake the contract and thereby put the other party at liberty to treat it as abandoned, whereas rescission may be pursued as an equitable remedy for such abandonment or other default in performance of the contract, which is designed to terminate the contract for all purposes and create a situation the same as if no contract ever had been made.<sup>14)</sup> In other words, abandonment consists of certain acts or omissions of the abandoning party, which may be asserted by the other party as grounds for rescission or other relief. Where one party has abandoned the contract and neither party thereafter wishes to enforce it, the parties may, of course, mutually agree to rescind the contract without the need to seek judicial rescission. However, as the large body of case law on the subject of abandonment indicates, judicial remedies usually must be pursued since the issue of abandonment is often in dispute and one or both of the parties may claim a right to damages, rescission, specific performance, or some other form of relief for breach of the contract.<sup>15)</sup>

---

13) *Savitsky v. Sukenik*, 240 A.D.2d 557, 659 N.Y.S.2d 48 (2d Dep't 1997); *Snell v. Salem Ave. Assoc.*, 111 Ohio App. 3d 23, 675 N.E.2d 555 (2d Dist. Montgomery County 1996)

14) *Wallace v. Johnson*, 217 Ark. 878, 234 S.W.2d 49 (1950) (noting that "abandonment and rescission are words quite often used indiscriminately"); *Tromp v. Martinez*, 719 P.2d 380 (Colo. Ct. App. 1986) (court's use of rescission when abandonment was meant); *Kalman v. Bertacchi*, 80 Ill. App. 3d 530, 36 Ill. Dec. 87, 400 N.E.2d 507 (1st Dist. 1980) (using rescission and abandonment interchangeably)

#### 4. Posture of seller's claim of abandonment; burden of proof

The issue of whether a purchaser has abandoned a real estate contract may be presented in a number of different types of judicial proceedings. Frequently, a claim of abandonment is asserted by the real-estate seller as an affirmative defense to a purchaser's action for specific performance of the contract, a declaration of contract rights, or rescission of the contract.<sup>16)</sup> Abandonment may also be asserted affirmatively as a basis for a seller's action for rescission, forfeiture and possession, or a decree quieting title.<sup>17)</sup> Regardless of the posture of the case, the seller bears the burden of proving the purchaser's intent to abandon the contract.<sup>18)</sup>

#### 5. Proof of purchaser's intent

The elements of abandonment consist of an intention to abandon plus an overt act by which that intention is carried into effect. Thus, the seller must offer proof of the purchaser's intent to abandon and an external act effectuating that intent.<sup>19)</sup> Although some courts state that "an actual intent

---

15) *Tromp v. Martinez*, 719 P.2d 380 (Colo. Ct. App. 1986) (seller entitled to rescission based on purchaser's abandonment of contract)

16) *Anderson v. Oceanic Properties, Inc.*, 3 Haw. App. 350, 650 P.2d 612 (1982); *McBee v. Gustaaf Vandecnocke Revocable Trust*, 986 S.W.2d 170 (Mo. 1999) (en banc); *Hadlick v. DiGiantommaso*, 154 A.D.2d 338, 545 N.Y.S.2d 816 (2d Dep't 1989); *Bissonnette v. Hanton City Realty Corp.*, 529 A.2d 139 (R.I. 1987)

17) *Krotz v. Sattler*, 586 N.W.2d 336 (Iowa 1998)

18) *McBee v. Gustaaf Vandecnocke Revocable Trust*, 986 S.W.2d 170, 173 (Mo. 1999) (en banc) (an abandonment of contract "must be made to appear affirmatively by the party asserting it, and ... proof of abandonment must be made by clear, unequivocal and decisive conduct.").

19) Actual and virtual specific performance, the theory of efficient breach, and

to abandon contract rights" must be proven, they usually then go on to make statements to the effect that such intent may be established by "acts and conduct consistent with an intention to abandon," as long as the proof of abandonment is established by "clear, unequivocal, and decisive evidence".<sup>20)</sup> In other words, proof of an intent to abandon can be met without resort to proof of specific intent and may be inferred from the purchaser's conduct and the attendant circumstances. The seller need not elicit positive testimony of the purchaser to establish his intent to abandon the contract.<sup>21)</sup> Furthermore, conduct that raises an issue of an intent to abandon is not destroyed by the purchaser's sworn testimony that he did not intend to abandon the contract.<sup>22)</sup>

### III. Determination of Purchaser's Abandonment of Real Estate Contract—Relevant Factors

#### 1. Particular factors affecting determination of abandonment by purchaser

A court's determination of whether the evidence suffices to prove abandonment of the contract by the purchaser must give full consideration of all the facts and circumstances surrounding each case. The question of whether a purchaser has abandoned a real estate contract is primarily one of intent,

---

the indifference principle in contract law, 93 Cal. L. Rev. 975 (2005 WL 27043 57)

20) Flath v. Bauman, 722 S.W.2d 125, 128 (Mo. Ct. App. E.D. 1986).

21) Adair v. Bracken, 745 P.2d 849, 851 (Utah Ct. App. 1987).

22) Defective real estate documents: what are the consequences? 42(2) Real Prop. Prob. & Tr. J. 367 (2007 WL 2930667)

which intent must ordinarily be deduced from the purchaser's conduct under the particular circumstances involved.<sup>23)</sup> Courts evaluate a number of relevant factors in reaching a decision as to whether the purchaser's conduct evinces an intent to abandon the contract.<sup>24)</sup> Particular acts or omissions of the purchaser found to have a significant bearing on the determination of abandonment include: the purchaser's inability or refusal to perform; delay on the part of the purchaser in tendering performance; the purchaser's default on payments of principal or interest due on the contract; the failure to pay taxes or maintain insurance on the property; the purchaser's possession of the property or relinquishment thereof; oral or written statements made by the purchaser with regard to performance of the contract; the purchaser's acceptance of a tenant status with regard to the property; as well as other conduct by the purchaser.<sup>25)</sup> Such evidence of the real-estate purchaser's intent to abandon the contract are analyzed in the sections that follow.

## 2. Purchaser's inability or refusal to perform

Conduct by the purchaser showing an inability or refusal to perform in accordance with the terms of the purchase and sale agreement may constitute an abandonment of the contract by him under the particular circumstances.<sup>26)</sup>

---

23) *Asher v. Hull*, 207 Okla. 478, 250 P.2d 866 (1952)

24) What constitutes abandonment of land contract by vendee, 68 A.L.R. 2d 581.

25) Delayed deeds: what happens if deeds delivered in escrow encounter delays? 152(8) S.J. 22 (2008 WL 899159)

26) *Blackmore v. Honnas*, 141 Ariz. 354, 687 P.2d 362 (Ct. App. Div. 2 1984) (finding that purchaser had abandoned land sales contract six months prior to bringing suit for specific performance where purchaser did not comply with requirements of deposit and receipt agreements by failing to execute promissory notes that did not allow for prepayment of principal or interest);

An inability to perform generally refers to financial inability, usually the inability of the purchaser to make the down payment required by the agreement or to obtain necessary loan financing to secure the purchase of the property.<sup>27)</sup> Evidence of an inability or refusal to perform is often a stronger indicator of a purchaser's intent to abandon a real estate contract than a mere delay in tendering performance. The main difference of course being that evidence of an inability or refusal to perform tends to show that the purchaser does not expect to carry through with the contract, whereas evidence of delay in performing, although perhaps indicative of abandonment, does not necessarily foreclose the possibility that the purchaser may still be capable of performing if permitted to do so under the particular circumstances.<sup>28)</sup>

### 3. Delay of purchaser in tendering performance

A purchaser's delay in tendering performance is a factor often referred to by the courts when evaluating whether the purchaser's conduct indicated

---

Houghton v. Collins, 344 Mich. 175, 73 N.W.2d 208 (1955) (refusal on the part of the purchaser under a contract for the sale of land to pay the purchase money, because he had purchased from a third person who claimed title, constituted an abandonment of the contract so as to discharge the seller's obligations under the contract).

27) For example, where the purchasers had contracted to buy a house, impliedly agreeing to make an application for a loan, and then moved into the house, and while such application was pending they purchased and moved into another house, the court stated that because the purchasers by their words or actions caused the application for approval of the loan to be canceled, they would not be entitled to a return of their earnest money and that such behavior was evidence that the purchasers had abandoned the contract to purchase the property.

28) Anderson v. Oceanic Properties, Inc., 3 Haw. App. 350, 650 P.2d 612 (1982).

an abandonment of the real estate contract. In a number of cases, the courts reached the conclusion that the length of time during which the purchaser delayed tendering performance showed a clear intent to abandon the contract.<sup>29)</sup>

Still, a mere lapse of time without the purchaser's tender of performance under a real estate contract does not necessarily amount to an abandonment of the contract when considered together with all of the other circumstances involved. Importantly, a purchaser's delay in performance may not constitute an abandonment of the contract where the parties have not made time of the essence in performance of the contract.<sup>30)</sup> The courts frequently note that time is not presumed to be of the essence in performance of a real estate contract unless the parties specifically express such an intent in their agreement. Thus, when a contract for the sale of real property does not make time of the essence, the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific

---

29) *Glad Tidings Church of America v. Hinkley*, 71 Ariz. 306, 226 P.2d 1016 (1951) (six year delay by purchaser in asserting rights under alleged contract); *Stamato v. Agamie*, 24 N.J. 309, 131 A.2d 745 (1957) (purchaser's tender of performance one year after date set for closing and 19 months from execution of purchase and sale memorandum); *Krisher v. Murphy*, 11 N.J. Super. 231, 78 A.2d 276 (App. Div. 1951) (purchaser waited nearly nine years from date set for closing to seek specific performance of contract); *Reutt v. Jordan*, 207 Va. 869, 153 S.E.2d 197 (1967) (abandonment established where purchaser s left town without giving any information as to why, when, or where they were going, or when they were coming back, did not tender any money, gave no assurances concerning contract performance, and returned five months after the closing date specified in the contract).

30) *Sullivan v. Esterle*, 268 S.W.2d 919 (Ky. 1954) (31/2 year delay in tendering performance did not constitute abandonment where the delay was due to the necessity of procuring the signatures of guardians of infant heirs in another state and the purchaser continuously insisted that he was ready, willing and able to perform)

date for performance. What constitutes a reasonable time to perform turns on the facts and circumstances of the case.<sup>31)</sup>

Even where time was not made of the essence in the original contract, it is important to note that one party may subsequently give notice making time of the essence. However, such notice must be clear, distinct and unequivocal, must fix a reasonable time within which to perform, and must inform the other party that if he does not perform by that date, he will be considered in default. It does not matter that the date is unilaterally set. A party need not state specifically that time is of the essence, as long as the notice specifies a time on which to close and warns that failure to close on that date will result in default.<sup>32)</sup>

#### 4. Default on contract payments

A real-estate purchaser's default on payments due on the contract is an important factor considered by courts when evaluating whether the purchaser intended to abandon the contract. Although a default on payments of principal or interest is not necessarily indicative of a purchaser's intent to abandon a real estate contract, there are many cases under the circumstances presented, in which such default was an important or deciding factor in the determination that the purchaser had abandoned the agreement.<sup>33)</sup>

---

31) *Sohayegh v. Oberlander*, 155 A.D.2d 436, 547 N.Y.S.2d 98 (2d Dep't 1989)

32) *Sohayegh v. Oberlander*, 155 A.D.2d 436, 547 N.Y.S.2d 98 (2d Dep't 1989)  
(communications from seller's attorney advising purchaser that seller was granting a "final adjournment of closing until June 6, 1985" and threatening to hold purchaser in default converted the contract into one in which time was of the essence)

33) *Insisting on time of essence closing may backfire*, N.J.L.J., January 25, 2008, (2008 WL 217796)

Where it is shown that the seller has waived the requirement of strict compliance with the dates of payment stated in the earnest money agreement, usually by habitually accepting irregular or late payments, and has not thereafter given the purchaser notice and a reasonable time to perform before insisting upon holding him strictly to those time requirements, most courts have ruled that the purchaser has not abandoned the contract by failing to make payments in a timely manner. However, if the seller subsequently notifies the buyer he will no longer tolerate anything less than full compliance and will insist upon exercising his rights under the contract unless the default is paid within a reasonable time the waiver is no longer effective.<sup>34)</sup> Nevertheless, notice of default may be excused where other conduct of the purchaser provides clear evidence of an intent to abandon the contract. Thus, in one case, even though the seller continued to accept monthly payments for approximately six months past the date set for a final balloon payment under the contract, the court found that the seller's failure to ever serve the purchaser with a notice of default was excused because other conduct by the purchaser clearly revealed an intent to abandon the contract, where shortly after making his latest monthly payment toward the past due balance of the purchase price, the purchaser moved from the premises, failed to make any more payments after that time, and never made a tender of the purchase price. The court noted that "ordinarily, acceptance by the vendor of payments out of time and of less than the amount due waives the default" and then makes it necessa

---

34) U. S. Aircraft Financing, Inc. v. Jankovich, 407 N.E.2d 287, 29 U.C.C. Rep. Serv. (CBC) 708 (Ind. Ct. App. 4th Dist. 1980) (although seller gave purchaser permission to make three payments of interest only during a time of financial difficulty, court found that seller did not waive strict compliance with contract since after the three months had elapsed, the seller's continued acceptance of late and irregular payments of interest only was done under protest).

ry for the seller to provide notice of default to the purchaser, but that the notice requirement is excused where the purchaser "has acted so as to cause the vendor to reasonably believe he has abandoned the contract."<sup>35)</sup> Moreover, even if the seller is deemed to have waived strict compliance with the time of contract payments, such waiver does not mean that compliance with other contract terms has been waived, such as the payment of insurance or property taxes. Thus, the purchaser's breach of such other provisions may provide sufficient grounds for finding abandonment, depending on the particular circumstances.<sup>36)</sup>

## 5. Failure to pay taxes or maintain insurance

A purchaser's failure to pay property taxes or maintain insurance, as required by the terms of the real estate contract, may support a finding of abandonment of the contract. In a number of cases, such failure to pay taxes or insurance was regarded as an important factor tending to show the purchaser's intent to abandon the contract. However, the failure to pay taxes or maintain insurance is just one factor and, when considered in combination with other facts and circumstances, may not be sufficient to establish the purchaser's intent to abandon the contract. For example, even though the purchaser has failed to make the required payments for property taxes or insurance, but has continued to make monthly installment payments due under the contract,<sup>37)</sup> or

---

35) *Flath v. Bauman*, 722 S.W.2d 125, 128 (Mo. Ct. App. E.D. 1986).

36) *Estate of Barth v. Schlagen*, 249 Ill. App. 3d 70, 188 Ill. Dec. 565, 618 N.E.2d 1135 (1st Dist. 1993) (even though seller apparently waived compliance with monthly installment payments, seller did not waive compliance with date of final balloon payment due under contract; thus, purchaser abandoned contract by never making any payments on contract).

37) *Kelso v. Ulrich*, 67 Cal. App. 2d 698, 155 P.2d 407 (2d Dist. 1945); *Martin*

has otherwise made substantial payments toward the purchase price, a finding of abandonment may not be supported by the evidence.<sup>38)</sup>

## 6. Possession of property

The fact that a real-estate purchaser never took possession of the property in question may support a finding that the purchaser intended to abandon the contract. Conversely, the fact that the purchaser is in possession of the premises is one factor tending to indicate that he has not abandoned the agreement.<sup>39)</sup> In one case, for example, although finding that the conduct of the purchaser of an aviation company's realty and personalty in making late payments, failing to pay taxes, committing waste, and failing to insure the property, amounted to a breach of contract, the court ruled that such conduct did not constitute abandonment because the purchaser remained in

---

v. Butter, 93 Cal. App. 2d 562, 209 P.2d 636 (1st Dist. 1949); Tromp v. Martine z, 719 P.2d 380 (Colo. Ct. App. 1986); Bales v. Nelson, 148 Ill. App. 3d 7, 101 Ill. Dec. 777, 499 N.E.2d 144 (3d Dist. 1986); Mitteness v. Dahl, 351 N.W.2d 685 (Minn. Ct. App. 1984); Engen v. Kincannon, 79 N.W.2d 160 (N.D. 1956); Atteberry v. Aulick, 204 Okla. 540, 231 P.2d 993 (1951) Murray v. Powell, 153 S.W.2d 347 (Tex. Civ. App. Austin 1941); Timpanogos Highlands, Inc. v. Harper, 544 P.2d 481 (Utah 1975)

38) Jameson v. Wurtz, 396 P.2d 68 (Alaska 1964) (even though purchaser was in default on contract payments as well as on tax and insurance payments, no abandonment of the contract resulted where purchaser had paid 88.3 percent of the purchase price of \$47,000, plus over \$4,000 in interest, and was in default for 11 months only because he was without funds).

39) Weaver v. Gilbert, 214 Ark. 800, 218 S.W.2d 353 (1949); U. S. Aircraft Financing, Inc. v. Jankovich, 407 N.E.2d 287, 29 U.C.C. Rep. Serv. (CBC) 708 (Ind. Ct. App. 4th Dist. 1980); Collins v. Collins, 348 Mich. 320, 83 N.W.2d 213, 68 A.L.R.2d 575 (1957); Tarpv v. Nowicki, 286 Minn. 257, 175 N.W.2d 443 (1970); Carson v. Douglas, 12 Utah 2d 424, 367 P.2d 462 (1962).

possession and continued to carry on the business of running the airport. Likewise, one court held that the purchasers' failure to make payments for a three-year period, or to contact the sellers for over a year to work out new payment arrangements, did not evince an intent to abandon their land sales contract where, during the same period, the purchasers visited and used the land several times and gave a relative proxy to vote as landowners at a meeting to discuss a proposed water users' association.<sup>40)</sup> Nevertheless, where a purchaser in possession refuses to complete his contractual obligations, he may be held to have abandoned the contract regardless of the fact that he remains in possession of the property.[5]

## 7. Relinquishment of possession

The fact that the purchaser under a land sales contract went out of possession, either by abandonment of the premises, express surrender of possession, or otherwise, when considered in conjunction with other conduct by the purchaser, may be a strong indicator that he or she has abandoned the agreement.<sup>41)</sup> In one case, the court relied on a response in the purchaser's answer to the seller's counterclaim for forfeiture, which denied that the purchaser continued to hold possession of the property, as a factor in determining that the contract had been abandoned. Still, regardless of the circumstances, it does

---

40) *Adair v. Bracken*, 745 P.2d 849 (Utah Ct. App. 1987).

41) *Jones v. Dove*, 382 Ill. 445, 47 N.E.2d 447 (1943); *Bales v. Nelson*, 148 Ill. App. 3d 7, 101 Ill. Dec. 777, 499 N.E.2d 144 (3d Dist. 1986); *Twyford v. Twyford*, 243 S.W.2d 930 (Ky. 1951); *Flath v. Bauman*, 722 S.W.2d 125 (Mo. Ct. App. E.D. 1986); *Tucker v. Edwards*, 1962 OK 229, 376 P.2d 253 (Okla. 1962); *Asher v. Hull*, 207 Okla. 478, 250 P.2d 866 (1952); *Huckleberry v. Wilson*, 284 S.W.2d 205 (Tex. Civ. App. El Paso 1955), dismissed; *Robertson v. Bindel*, 67 Wash. 2d 172, 406 P.2d 779 (1965).

not automatically follow that the purchaser's relinquishment of possession will amount to an abandonment of the contract.<sup>42)</sup> Further, the purchaser's mere temporary absence from the property, or nonuse thereof, is ordinarily insufficient evidence of abandonment

## 8. Oral and written statements of purchaser

A real-estate purchaser's abandonment of a contract may be evidenced by writing or by parol as long as a clear intention to abandon is shown. In a number of cases, evidence of certain writings or statements of the purchaser had a significant bearing on the court's determination that the purchaser had abandoned the real estate contract.<sup>43)</sup> However, particular statements or writings of the purchaser, like other evidence proffered to prove abandonment, must be evaluated in light of all the surrounding circumstances, so that there are many other cases in which the statements or writings of the purchaser did not suffice to establish an intent to abandon the agreement.

---

42) *Wallace v. Johnson*, 217 Ark. 878, 234 S.W.2d 49 (1950); *Stockmen's Supply Co. v. Jenne*, 72 Idaho 57, 237 P.2d 613 (1951); *Staebell v. Bennie*, 83 A.D.2d 765, 443 N.Y.S.2d 487 (4th Dep't 1981); *Ford v. Hofer*, 79 S.D. 257, 111 N.W.2d 214 (1961).

43) *Mason v. Hasso*, 90 Ariz. 126, 367 P.2d 1 (1961); *Wallace v. Johnson*, 217 Ark. 878, 234 S.W.2d 49 (1950); *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, 37 Cal. 2d 16, 230 P.2d 629, 31 A.L.R.2d 1 (1951); *Wolford v. James E. Kolls Inv. Co., Inc.*, 61 Ill. App. 3d 405, 18 Ill. Dec. 678, 377 N.E.2d 1314 (2d Dist. 1978); *Houghton v. Collins*, 344 Mich. 175, 73 N.W.2d 208 (1955); *Nelson v. Cross*, 152 Neb. 197, 40 N.W.2d 663 (1950); *Asher v. Hull*, 207 Okla. 478, 250 P.2d 866 (1952); *Hull v. Clemens*, 200 Or. 533, 267 P.2d 225 (1954); *Huckleberry v. Wilson*, 284 S.W.2d 205 (Tex. Civ. App. El Paso 1955), dismissed.

## 9. Purchaser's acceptance of status as tenant

The purchaser's acceptance of a tenant status with regard to the property in question may be one factor tending to show that the purchaser no longer intends to purchase the property and has thus abandoned the real estate contract. However, the fact that the purchaser is paying rent on the subject property is not conclusive evidence of abandonment, and depends on the particular circumstances under which rental payments are being made by the purchaser. In this regard, the issue of whether rental payments constitute clear evidence of an intent to abandon a real estate contract may arise in the context of a lessee's option to buy the leased property.<sup>44)</sup> An option, when accepted and exercised according to its terms, becomes a present contract for the sale of the premises. Upon exercise of the option, the former relationship of lessor and lessee terminates and the parties occupy the relationship of purchaser and seller.<sup>45)</sup>

---

44) *Artful Dodger Pub, Inc. v. Koch*, 230 Ill. App. 3d 806, 172 Ill. Dec. 760, 596 N.E.2d 39 (1st Dist. 1992) (payment of rent by lessee-optionee not evidence of abandonment of option to purchase under the circumstances).

45) *Cities Service Oil Co. v. Viering*, 404 Ill. 538, 89 N.E.2d 392, 13 A.L.R.2d 1448 (1949); *Artful Dodger Pub, Inc. v. Koch*, 230 Ill. App. 3d 806, 172 Ill. Dec. 760, 596 N.E.2d 39 (1st Dist. 1992).

## IV. Conclusion

Whether particular acts or omissions on the part of a real-estate purchaser are such as to indicate a clear intent to abandon the contract. A claim of abandonment may be asserted by the real-estate seller as an affirmative defense to a purchaser's action for specific performance of the contract, or may be asserted affirmatively as a basis for a seller's action for rescission, forfeiture and possession, or a decree quieting title. We reviewed the relevant rules of law and evaluates the proof necessary for a seller to establish that a purchaser has abandoned a real estate contract under the particular facts and circumstances.

**Key Words** : proof of circumstance, real estate purchaser, abandonment, intent, claim, remedies, rescission, forfeiture

[국문요약]

## 부동산 매수인의 이행포기에 관한 정황증거

이 재 경\*

부동산매매계약을 체결한 이후, 매수인의 이행 거절이 발생하는 경우, 매도인은 매매계약 불이행을 이유로 그에 따른 손해배상 등 법률상 대응방안을 마련할 수 있다. 명시적인 의사표시로 이행거절이 발생할 수도 있으나, 법률적인 측면 또는 쟁송법적인 측면에서는 매수인에 대하여 묵시적으로 이행거절의 의사표시가 있었는지 여부가 당사자 사이에서 다투어지는 경우가 중요한 의미를 가질 수 있다. 이에 미국 판례법상 정황증거를 통하여 매수인의 부동산매매계약상 이행거절의 의사표시가 이루어진 것으로 판단되는 사례들을 귀납적으로 살펴보는 작업은 우리나라 판례 및 법리와 비교를 통하여 구체적인 사례 해결에 적절한 해답을 제시할 것이다.

미국 판례법에서는 주로 매수인의 파산, 매수인의 매매대금 납부기일 경과에 따른 이행지체, 세금의 이행지체, 부동산의 점유 이전, 매수인의 구두 또는 서면 통지 내용 등의 다양한 사례를 통하여 매수인의 묵시적인 이행거절에 따른 매매계약상 매도인의 보호를 다루고 있고, 나아가 그의 판단을 위한 검토목록까지 제시하고 있다. 그러므로, 미국 판례에서 나타난 다양한 사례 및 쟁점 등에 대한 분석을 통하여, 매수인의 부동산매매계약상 이행거절 여부 판단에 대한 우리나라 판례법의 적절한 기준을 정립할 수 있기를 기대해본다.

---

\* 건국대학교 법학전문대학원 조교수, 변호사

**주제어** : 부동산거래, 부동산 매매계약, 매수자, 포기, 정황증거, 계약이행, 이행거절, 입증, 묵시적 의사, 손해배상