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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

FREDERICK NICKLAS and N. CHARLENE NICKLAS, Appellants, v. LLOYD J. WOODS and BARBARA D. WOODS, JOHN C. STODDARD and FEROL E. STODDARD, and RAMCO, INC., Appellees.	)	Filed May 20, 1977 155 2-58645

Appeal from Linn District Court - Robert Osmundson, Judge.

Appeal from trial court's sustaining of motion to dismiss petition in equity on grounds that defendant Woods abandoned his interest in certain real property. Reversed and remanded.

N. E. Lillios and Humphreys & Warner, of Cedar Rapids, for appellants.

Robert Stenander, of Tipton, and Richard D. Raymon, of Cedar Rapids, for appellees.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiffs appeal trial court's grant of defendant's motion to dismiss at close of plaintiffs' evidence. Plaintiffs, judgment creditors of defendant Woods, brought suit to determine Woods' interest in real property located in Cedar Rapids. Defendant Ramco, Inc. asserted Woods possessed no interest in the property since Woods conveyed his interest to it. Trial court found against Ramco on its contention but granted its motion to dismiss on grounds that Woods abandoned his interest in the real property. We reverse and remand.

Abandonment is the intentional relinquishment of a known right. *See* Ball v. Williams, 250 Iowa 216, 222-223, 93 N.W.2d 723 (1959). *See also*, Sioux City v. Johnson, 165 N.W.2d 762 (Iowa 1969).

Ramco's first stumbling block in its affirmative defense is that it is apparent that any abandonment of Woods' right was with reference to Ramco only because of its security interest rather than without reference to any person or purpose. *See* Ball v. Williams, supra at 223, 1 C.J.S., Abandonment § 4 (c) (1936). Secondly, for an abandonment to occur the party must have actual knowledge of the facts and of his interest in the property such that, the person has the unequivocal intent to abandon it. *See* Ward v. Town of Clover Hills, 240 Iowa 900, 905, 38 N.W.2d 109 (1949). Although the evidence is conflicting, it is best summarized by Woods' testimony in which he believed that he had somehow "lost", that is, forfeited the property in March of 1971. His belief that the property had somehow been forfeited is not the equivalent of an actual intent to abandon. Ramco's evidence on Woods' intent to abandon is further deficient in that the evidence shows that one week after Woods was notified of Ramco's assertion of ownership, he attempted to convey the property to another.

Such an act is manifestly inconsistent with an intent to abandon. Mere non-use of the property is not an abandonment. Sioux City v. Johnson, 165 N.W.2d 762 (Iowa 1969). Defendant failed to establish abandonment by clear and convincing evidence, but rather, merely shows Woods' acquiescence to Ramco's acts. Ward v. Town of Clover Hills, supra at 905. It is further noted, Ramco's motion to dismiss was made at the close of plaintiffs' evidence in this equity proceeding. Having failed to cross appeal, trial court's finding that Woods' assignment and conveyance of the real property to Ramco in return for a $5000 loan was in fact a security interest, hereby is affirmed. *See* Sitzler v. Peck, 162 N.W.2d 449, 452 (Iowa 1968).

Trial court's judgment is reversed and remanded to determine only the extent of Woods' equitable interest in the real property.