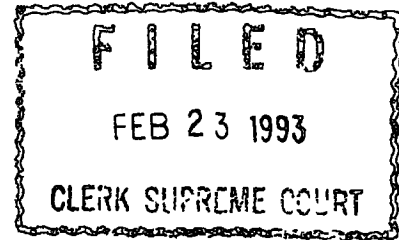


IN THE COURT OF APPEALS OF IOWA

No. 2-544 / 92-338



IN THE MATTER OF PROPERTY SEIZED FROM DENNIS J. SHARKEY,
SR.

RAYMOND JAEGER,

Appellee,

vs.

DUBUQUE COUNTY, IOWA,

Appellant.

Appeal from the Iowa District Court for Dubuque County,
James C. Bauch, Judge.

The county appeals from a district court judgment
determining that a contract concerning certain real property
was properly forfeited and that Jaeger became the sole owner
of the property. **AFFIRMED.**

Fred W. McCaw, County Attorney, for appellant.

Douglas M. Henry and Norman J. Wangberg of Fuerste,
Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for
appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.,
but decided en banc.

DONIELSON, J.

Dubuque County (County) appeals from a district court judgment determining that a contract concerning certain real property was properly forfeited and that Raymond Jaeger is the sole legal owner of that property.

In 1978, Alvin and Susan Blum entered into a real estate contract to sell certain real property to Dennis Sharkey. Sharkey operated a salvage yard on the property from 1978 until 1989 and made regular payments on the contract during this period. In October 1989, the police executed a search warrant on Sharkey's property and discovered a large quantity of stolen property. Sharkey was eventually charged with theft and arrested. In January 1990, the State filed a notice of forfeiture relating to Sharkey's interest in the real estate, the buildings, and the contents of the salvage yard because the property was alleged to be used to facilitate a crime.

In September 1990, Sharkey pleaded guilty to first-degree theft. The State agreed to release the forfeiture of the buildings and contents and of part of the real estate. Sharkey agreed to the forfeiture of the property involved in this case. That property was then transferred to the State of Iowa. In October 1990, Sharkey filed a motion in arrest of judgment and a petition to vacate the judgment of forfeiture.

Meanwhile, between November 13 and 15, 1990, the Blums served a notice of forfeiture of the real estate contract on

Sharkey, the State, and Dubuque County. The notice stated a total payment of \$15,662.76 was required to cure the default.

During the last week in November, Sharkey's good friend and neighbor, Raymond Jaeger, sold some cattle to Sharkey for about \$18,000 in cash. However, as the end of the statutory forfeiture period drew near, Sharkey had no money. Rather than let Dubuque County acquire the property, Sharkey went to Jaeger with the proposition that Jaeger could purchase the Blums' contract interest. Jaeger believed that if the forfeiture occurred, he would acquire property potentially worth \$170,000 for approximately \$18,000.

On December 10, 1990, Jaeger submitted a check for \$17,536.24 to the Blums. On December 11, before the execution of the assignment documents, Jaeger gave Sharkey an additional \$656.09 to take to the Blums' attorney. The total amount paid by Jaeger was the total amount of principal and interest due on the contract. On December 12, the Blums assigned their interest in the contract to Sharkey who, in turn, assigned his interest to Jaeger. The Blums had insisted upon assigning their interest to Sharkey, believing they would be able to get out of this situation with less complication.

The County received notice of the assignment to Sharkey on or about December 12, 1990. On December 13, the County was informed of Sharkey's assignment to Jaeger. That same

day, the County, which had previously obtained the State's interest in the criminal forfeiture property, deposited a warrant of \$18,203.49 with the county clerk to protect its interest in the property. However, the tender was conditional both on the outcome of Sharkey's petition to vacate the judgment of forfeiture and on a determination of the amount which was due on the contract and attributable to the forfeited portion of the property. The County also filed an application for a temporary injunction requesting an order staying the effect of the notice of contract forfeiture until the respective interests of the parties could be determined.

On December 14, 1990, a temporary injunction was issued and Sharkey's petition to vacate the judgment of forfeiture was denied. (Sharkey's criminal conviction and forfeiture were both affirmed on appeal by the supreme court in unpublished opinions filed February 19, 1992. State v. Sharkey, No. 91-132 (Iowa Feb. 19, 1992); In re Property Seized from Sharkey, No. 91-133 (Iowa Feb. 19, 1992.))

In January 1991, Jaeger filed a petition for intervention seeking ownership of the real property because there had been no cure of the forfeiture of the Blum contract. Following a hearing, the district court determined the County's tender to cure default was conditional and thus invalid. Jaeger was then determined to be the owner of the property.

The County now appeals. The County contends the district court erred in failing to set aside the forfeiture. On our review, we affirm the district court.

I. Scope of Review. Initially, we consider the proper scope of review. On appeal, the County contends this case is in equity and should be reviewed de novo. Jaeger contends the scope of review should be for errors of law.

The essential character of a cause of action and the relief it seeks, as shown by the complaint, determine whether an action is at law or equity. Harding v. Willie, 458 N.W.2d 612, 613 (Iowa App. 1990) (citing Moseback v. Blythe, 282 N.W.2d 755, 758 (Iowa App. 1979)). Generally, an action on a contract is treated as one at law. Moseback, 282 N.W.2d at 758. However, forfeiture proceedings are equitable and review is de novo. Decorah State Bank v. Zidlicky, 426 N.W.2d 388, 390 (Iowa 1988).

Here, the County brought this appeal primarily seeking relief from a contract forfeiture. Therefore, our scope of review is de novo. Iowa R. App. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Whether the Tender was Sufficient. On appeal, the County does not directly challenge the district court's finding that the tender was conditional and therefore invalid. However, in order to address the other arguments set forth by the County in its appeal, it is helpful to examine the district court's finding on this issue.

To be effective, a tender must be absolute and unconditional. Decorah State Bank v. Zidlicky, 426 N.W.2d 388, 391 (Iowa 1988); Lyon v. Willie, 288 N.W.2d 884, 894 (Iowa 1980). Where the condition is one upon which the debtor has the right to insist, a tender made subject to that condition is valid. Swanson v. Baldwin, 93 N.W.2d 740, 742 (Iowa 1958). However, if the tender is based upon a condition for which there is no foundation in the contractual relation between the parties, the tender is ineffective. Id.

The County deposited its tender for the property subject to several conditions contained in the County's application for temporary injunction filed on December 13, 1990. The conditions regarding the County's tender or payment under the real estate contract included the following:

10. That Dubuque County stands ready to perform the Buyer's obligations under the real estate contract in order to protect its interest in the forfeited property. That a County Warrant in the amount of \$18,203.49 is tendered to the Court herewith to be paid in the amounts and to the parties deemed to be appropriate by the Court.

12. That Dubuque County should be required to pay only the amount of the principal and interest under the real estate contract attributable to the portion of the property which was forfeited and only in the event the Court denies the "Petition to Vacate Judgment." The amount tendered to the Court is sufficient to pay the entire contract amount together with interest through December 13, 1990.

(Emphasis added.)

By stating the above conditions, the County did not give absolute and unconditional tender. Rather, in the event the County's interest in the land was extinguished by a subsequent invalidation of the criminal forfeiture, the County stated it would not pay the amount due on the real estate contract. Also, the County's tender was only for that portion of the real property which was forfeited through criminal forfeiture to the County. The tender was not for the entire contract balance, and not for the entire amount in default.

None of these conditions relating to the tender had any relationship to the contractual rights or obligations of the buyers and the seller. Rather, these conditions related only to the disputes between Sharkey and the County. Unfortunately, because the tender was conditional, it was also not valid.

III. Whether the Forfeiture Should be Set Aside. In its appeal, the County does not challenge the finding that the tender was conditional. Rather, the County argues the forfeiture should be set aside because: (1) the contract sellers were in default for failing to give adequate notice

of the assignment of the contract to Jaeger, and the lack of such notice made timely performance impossible; (2) Sharkey had pursued inconsistent remedies concerning the real property; and (3) equity demands the forfeiture be set aside.

A. **Failure to Give Notice of the Assignment.** The County contends the forfeiture should be set aside because of the failure of the contract sellers to give the County notice of the assignment to Jaeger. Specifically, the County contends that, because insufficient notice was given, the contract sellers were in default and therefore could not forfeit the contract. In addition, the County contends this failure to give notice resulted in making timely performance of the contract impossible.

A vendor who is in default cannot forfeit his contract. Youngblut v. Wilson, 294 N.W.2d 813, 818 (Iowa 1988). However, on our review of the record, we do not find the contract sellers and the assignees were in default for failing to comply with the contract's requirements on giving notice of assignments.

Paragraph 18 of the real estate contract states, in relevant part:

In case of the assignment of this contract by either of the parties, prompt notice shall be given to the other parties, who shall at the time of such notice be furnished with a duplicate of such assignment by such assignors.

(Emphasis added.)

Here, the assignment from the Blums to Sharkey was dated December 11, 1990. On December 12, the Blums gave notice to Dubuque County of this assignment. The assignment from Sharkey to Jaeger was executed on December 12. On December 13, the county attorney was given notice of the assignment to Jaeger.

Notice of this assignment caused the County to request the trial court issue a temporary injunction that same day against Jaeger. All of these events occurred on December 13, before the thirty-day forfeiture period ran on December 15. Because the County clearly received timely notice, we do not find the contract sellers were in default. There is no evidence the County was prejudiced the contract sellers' failure to furnish the County with a copy of the assignments.

The County also argues the notice made timely performance impossible because the notice did not include Jaeger's address and did not allow the County to locate Jaeger in order to make such payment.

It is a general rule that where performance of a contract has been made impossible, the law does not require the useless formality of tender. Figge v. Clark, 174 N.W.2d 432, 437 (Iowa 1970); Steele v. Northrup, 143 N.W.2d 302, 306 (Iowa 1966). However, on our review, we note the problem with the County's payment was not one of timeliness. Rather, the payment was conditional and therefore invalid. We do not agree that, if the County

knew of Jaeger's address, the tender then would have been unconditional and therefore valid. We decline to set aside the forfeiture on these grounds.

B. Pursuit of Inconsistent Remedies. The County next contends the contract forfeiture should be set aside because of Sharkey's simultaneous pursuit of inconsistent remedies and his assertion of claims adverse to the purchaser's title. Specifically, the County contends Sharkey should be estopped from having the benefit of forfeiture proceedings because he had already elected to attack the County's title.

Election of remedies is a doctrine not favored by the law, and it is ordinarily applied in a strict and limited way. Gottschalk v. Simpson, 422 N.W.2d 181, 185 (Iowa 1988). "In order for such a defense to be available, three elements must be established: (1) the existence of two or more remedies; (2) inconsistency between them; and (3) a choice of one of the remedies." First Sec. Bank v. McClain, 403 N.W.2d 788, 790 (Iowa 1987) (citing Bolinger v. Kiburz, 270 N.W.2d 603, 605 (Iowa 1978)). Inconsistency depends upon whether the facts relied on as the basis for one remedy are contradictory to the facts relied on as the basis for another remedy. Id.

Here, we find no factual inconsistency of remedy. None of the facts relied on as the basis for Sharkey's challenge of the criminal forfeiture are contradictory to the facts relied on as the basis for the contract forfeiture. We do

not agree Sharkey is estopped from having the benefit of forfeiture proceedings or from assigning those benefits to Jaeger.

C. Whether Equity Demands the Forfeiture be Set Aside. Finally, the County contends the forfeiture should be set aside because of the absurd and unconscionable result of the district court's decision.

Initially, we note the County, in its brief, failed to cite any authority in support of this argument. Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 14. However, regardless, we will address this issue.

We certainly agree this case contains a strange set of circumstances which have led to an even stranger result. During the hearing, there was testimony of the thirty-year friendship between Jaeger and Sharkey. Jaeger and Sharkey were neighbors, and their relationship was described as "being like brothers." Following the discovery of the stolen property in 1989, Sharkey disappeared for a period of three months. During that time, Sharkey stayed at Jaeger's farm. Jaeger testified that, although he knew Sharkey was a fugitive, he never informed authorities of Sharkey's presence at his farm. Also, when Sharkey learned he was in danger of losing his property, it was Jaeger whom he approached with the proposition of purchasing the contract rights to that property.

The County received its rights to this property through criminal forfeiture after a large quantity of stolen property was discovered on this land. However, the County was unable to make unconditional tender because of the uncertainty of the impending judicial review of this criminal forfeiture. If the court had invalidated the forfeiture, the County's interest in the land would have been extinguished. If the court had set aside the guilty plea, the County's interest would have become subject to the additional litigation of a seized property claim. If the County's interest was affected in either of these ways, and the \$18,203.49 was paid to Jaeger prior to the loss of the County's interest, the County would have faced the loss of the funds or the prospect of litigation.

Now, because the County was unable to make unconditional tender, Jaeger is the owner of the property which was originally forfeited by the State of Iowa because of Sharkey's criminal activity. The County and the State of Iowa no longer have an interest in this property, and Jaeger owns the property free of the threat of this particular criminal forfeiture.

The law is clear that tender must be absolute and unconditional. Decorah State Bank v. Zidlicky, 426 N.W.2d 388, 391 (Iowa 1988). The conditions imposed by the County clearly were conditions for which there was no foundation in the contractual relation between the parties (Jaeger and the County). See Swanson v. Baldwin, 93 N.W.2d 740, 742

(Iowa 1958). To hold the tender was nevertheless valid would be to recognize a judicially-created exception for state and local entities which are awaiting the outcome of a related criminal forfeiture. We can find no such exception in case law or in statutory law. See, e.g., Iowa Code ch. 656 (1991) (Forfeiture of Real Estate Contracts); Iowa Code ch. 809 (1991) (Disposition of Seizable and Forfeitable Property).

Therefore, although we agree the result is absurd, we are bound by existing law to affirm the finding of the district court. We find the district court did not err in determining the property was properly forfeited pursuant to the real estate contract, and Jaeger was the sole owner of that property.

The costs of this appeal are taxed to Jaeger.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED.

All judges concur, except Sackett, J., who dissents.

SACKETT, J. (dissenting)

The issue is who should be the titleholder to real estate Dennis Sharkey was purchasing on an installment sale contract from Blums when the State of Iowa forfeited Sharkey's interest in the real estate because the real estate was used in the commission of a crime.

I would find title to the real estate should be in Dubuque County, Iowa. The State of Iowa has assigned its interest to Dubuque County. I would, however, subject the property to an equitable lien against the property in favor of defendant-appellee Raymond Jaeger for amounts paid by Jaeger to pay off the balance due Blums, the contract sellers.

Sharkey pled guilty to first-degree theft and agreed the real estate in question, where considerable stolen property had been kept, be forfeited to the State.

At the time the real estate was forfeited to the State of Iowa, there was a principal balance owed on Sharkey's contract to purchase of \$14,500.

In October Sharkey filed a motion in arrest of judgment and a petition to vacate the forfeiture of the real estate to the State of Iowa.

On November 13 and November 15, 1990, the Blums served a notice of forfeiture of real estate on Sharkey, the State, and Dubuque County. The notice stated the real estate contract had not been complied with, and there was a

delinquent principal payment, delinquent interest, and delinquent real estate taxes totaling \$15,662.76.

At this point, Sharkey convinced Jaeger he could get the real estate, allegedly valued at \$170,000, if he paid the Blums the balance due on the real estate contract. Jaeger did make the payment to Blums and Blums, on December 12, 1990, assigned the contract to and quit claimed to Sharkey all their interest in the property, and then recited the deed was an assignment of their interest in the real estate contract. On December 12, 1990, Sharkey assigned the contract to and quit claimed his interest to Jaeger. The Sharkey/Jaeger deed carried the identical recitation about assignment of contract. All instruments were recorded December 12, 1990, Blum/Sharkey assignment at 4:10 p.m., Blum/Sharkey quit claim deed at 4:11 p.m., Sharkey/Jaeger assignment at 4:13 p.m., and Sharkey/Jaeger quit claim deed at 4:13 p.m.

On December 12, Sharkey's attorney advised the county about the transactions. On December 13, Dubuque County, with Sharkey and his attorney present, sought an injunction to keep the property from being forfeited. The trial court granted a temporary injunction to keep the property from being forfeited, finding Dubuque County had left with the court a warrant for \$18,203.49 and represented its willingness to perform. The trial court stayed the effect of the notice of forfeiture and enjoined and restrained

Sharkey, Blums and Jaeger¹ from selling or disposing of the property.

On December 14 Sharkey's motion attacking his guilty plea and seeking to set aside the transfer of real estate to the State of Iowa was denied. No appeal was taken.

This action came to trial and the trial court found the property was Jaeger's because the forfeiture had been completed. The majority has affirmed.

First, I agree with the county, this is an equity action and our review is de novo.

Secondly, my review of the facts convinces me Sharkey and Jaeger engaged in a scheme intending to deprive the county of their interest in the contract.

Thirdly, there is no equity in the result reached by the trial court and affirmed by the majority.

Fourth, I do not agree with the trial court and the majority that the vendee's interest in the contract was ever forfeited. The trial court's December 13, 1990 order stayed forfeiture.

Furthermore, any doubt should be resolved against forfeiture. Section 656 is strictly construed against forfeiture. See Jensen v. Schreck, 275 N.W.2d 374, 386 (Iowa 1979). Forfeitures are not favored. Person seeking

1. On the injunction the name was spelled Yager.

forfeiture has the burden of proving facts that entitle them to forfeiture. Keokuk State Bank v. Eckley, 354 N.W.2d 785, 790 (Iowa App. 1984).

Even if thirty days had expired, a real estate contract may not stand forfeited if equity should not permit it. See Lett v. Grummer, 300 N.W.2d 147, 149 (Iowa 1981); Keokuk State Bank, 354 N.W.2d at 793. Equity clearly should not permit the forfeiture of this contract.

However, equity is best served if Jaeger is allowed a lien against the property for the amount he paid, \$17,536.24 plus interest at the maximum legal rate from December 12, 1990. Under the facts of this case, it is equitable for Jaeger to have a lien for the money he advanced. See Klotz v. Klotz, 440 N.W.2d 406, 410 (Iowa App. 1989).