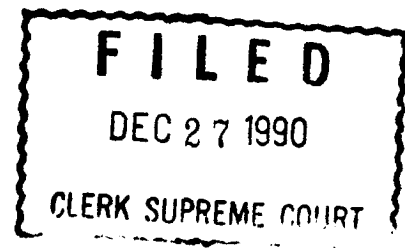


IN THE COURT OF APPEALS OF IOWA

No. 0-544 / 89-1264

**JAMES C. RISSE and KATHRYN K. RISSE,**

Appellees,

vs.

KEITH R. THOMPSON and JANENE F. THOMPSON,

Appellants.

Appeal from the Iowa District Court for Fayette County,
Joseph C. Keefe, Judge.

The Thompsons appeal a district court judgment rescinding the real estate contract between the parties and awarding the Risses \$7,473 plus interest. **AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED.**

W. Wayne Saur of Saur & Johnson, Oelwein, for
appellants.

Larry F. Woods, Oelwein, for appellees.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.,
but decided en banc.

HAYDEN, J.

In 1973 Keith and Beatrice Thompson purchased a home on real property legally described as Lot 23, Knoll Ridge Addition to Fairbanks, Fayette County. The purchase was financed by Home Savings & Loan (Home Savings). The mortgage agreement with Home Savings included a due on sale clause.

Later in 1973 a driveway was added to the north. In 1974 a master bedroom was added on the south. Both improvements were done by John Woods and his Woods Construction Company. Both improvements encroached on the adjoining lots, Lot 22 and Lot 24. Woods owned both adjoining lots. He agreed to sell the encroached portions of the adjacent lots to Thompsons for \$3,400.

It is here the trouble starts. Woods, a certified real estate agent, simply drew up an invoice for portions of the two lots. The descriptions read:

"East 50' of Lot #24"

"South 39' of Lot #22."

Woods included the purchase price of the lots in the overall contract price for the improvements. No real estate contract was ever recorded, nor was a deed to Thompsons prepared.

In 1982 Thompsons put their property up for sale. On January 28, 1984, a contract was signed between the proposed buyers, James and Kathryn Risse, and Thompsons. This contract is the pivotal document in this case. Risses

brought this action for breach and rescission of this contract. It is this contract the trial court eventually declared to be in breach and rescinded.

The contract is a standard Iowa Bar short form real estate contract. The contract described the property to be sold as "Lot 23, Knoll Ridge Addition to Fairbanks, Fayette County, Iowa." The contract price was set at \$60,657.18. The down payment of \$12,000 was paid when the contract was entered into. Monthly payments equal to the mortgage payments were set at \$559. The payments were to commence February 1, 1984.

The contract also noted the property was subject to a mortgage with a due on sale clause. Taxes were to be paid by the sellers up through the date of possession, thereafter by the buyers. Possession date was set at February 1, 1984.

The contract further provided the contract price was due in full if Home Savings exercised the due on sale clause in Thompsons' mortgage. Because of the due on sale clause, the parties apparently agreed not to record the contract until after the Risses sold their existing home.

From February through June 1984, Risses made the monthly payments. However, on June 21 Home Savings exercised the due on sale clause in their mortgage with Thompsons. According to the contract, Risses' contract balance with Thompson was then due.

Upon receiving notice Home Savings was calling the mortgage due, Risses contacted their attorney. The attorney examined the abstract and discovered title to the portions of Lots 22 and 24 had not yet been conveyed to the Thompsons. Risses also now contend they thought they were buying a larger portion of Lots 22 and 24. They contend Thompsons misrepresented the extent of the property to them in their initial dealings.

In July 1984 Thompsons paid off the remaining portion of their contract with John Woods for Lots 22 and 24. They had Woods execute a warranty deed directly to Risses. A survey was done and recorded to ascertain the actual boundaries of the property.

After several delays and problems, the sale was scheduled to close on December 31, 1984. However, due to the unresolved issues, such as back taxes, back interest, survey costs, and closing costs, the closing was not completed. There is conflicting testimony as to whose fault this was.

The attorneys for both parties exchanged offers to settle on the disputed items. It appears the parties were very close at one point. If the attorneys had actually communicated on their best offers, or what they were authorized to settle for, the deal would have been closed. Apparently Thompsons' attorney communicated his best offer, but Risses' attorney did not.

In February 1985 Risses' attorney notified the Thompsons' attorney Risses were withdrawing from the contract. Risses made no payments to the Thompsons after June 1984, although they occupied the home until February 1985.

In February 1985 Risses vacated the premises without notifying Thompsons. The house was left unattended, and some pipes froze, causing approximately \$2,000 damage. Thompsons have counterclaimed for this expenditure.

In April 1985 Thompsons forfeited the contract against Risses. In June 1985 Risses filed suit for rescission and breach of contract, claiming Thompsons did not own all the property they were purporting to sell to them. Thompsons filed a counterclaim for unjust enrichment and for a deed to the portions of Lots 22 and 24 deeded by Woods to Risses. Risses claim this forfeiture action constituted an election of remedies. They assert Thompsons are now barred from bringing a counterclaim for damages.

Home Savings moved to foreclose on the property. Apparently Thompsons had already purchased another house and could not afford the double payments. Thompsons borrowed \$7,000 from relatives to avoid foreclosure. In December 1985 they deeded Lot 23 back to Home Savings in lieu of a mortgage foreclosure.

In January 1986 Risses quit claimed their interest in Lots 22, 23, and 24 to Home Savings for \$3,500. Essentially Risses were selling the portions of Lots 22 and

24 which they had obtained by warranty deed from Woods. It was on the allegedly deficient title in these parcels Risses based their claim for breach and rescission.

Following trial, the district court ordered a rescission of the contract. Risses were awarded return of their down payment, plus other miscellaneous expenses, minus an amount for eight months' rent. Thompsons filed this appeal. In this appeal Risses concede they owe back rent for the full thirteen months they occupied the property.

Risses have raised as an affirmative defense the forfeiture of the real estate contract. They claim this constitutes an election of remedies, and Thompsons are foreclosed from counterclaiming on the contract.

This case was brought in both law and equity. It was tried to the district court sitting in equity. Therefore, our review is de novo. Iowa R. App. 4. We address the issues in a different order than presented by the parties.

The forfeiture is not contested in this appeal. Therefore, we assume for purposes of this appeal Thompsons lawfully forfeited Risses out on the contract. See Watson v. Chapman, 244 Iowa 56, 60, 55 N.W.2d 555, 557 (1955). Additionally, the record reveals the statutory procedures of Iowa Code section 656 were followed.

The forfeiture, once completed, is conclusive as to the buyer. The buyer loses his prior investment in the property. See cf., Lett v. Grummer, 300 N.W.2d 147, 149

(Iowa 1981); Waston, 244 Iowa at 63, 55 N.W.2d at 559. The buyer thereafter generally may not maintain an action for return of purchase money. 92 C.J.S. Vendor and Purchaser § 466 (1955). The only exception to this last rule appears to be where the seller has failed to provide marketable title. Id.

Risses are attempting to avoid the usual consequences of a forfeiture on the buyer. They wish to regain their purchase money. Although it is neither clearly pleaded nor argued, we surmise it is the alleged failure by Thompsons to deliver marketable title on which Risses rely to avoid the forfeiture.

I. MARKETABLE TITLE

Risses claim Thompsons breached the contract because they could not deliver marketable title to the portions of Lots 22 and 24. Thompsons' mortgage with Home Savings had a due on sale clause. Because of this clause, the parties had agreed at the time of entering into the contract Risses would not record it until they sold their existing house. Risses sold their house in April of 1984, but did not record the contract.

The sale contract stated in pertinent part:

This property is subject to a mortgage to Home Savings and Loan Association, Waterloo, Iowa, and the above payments include taxes and insurance, which may be adjusted annually by the mortgage holder, and the payments vary accordingly. Further, if the above mortgage holder elects to exercise any due on sale clause therein, the entire balance of this contract shall be

simultaneously due and payable. Payments shall first be applied to interest owing and the balance applied to principal.

Home Savings called the mortgage due on June 21, 1984. Risses claim Thompsons did not have marketable title to the two parcels on that date, therefore were in breach of the contract.

A. Timely Deliverance

The record shows Thompsons immediately paid Woods the remainder of the contract price for the portions of Lots 22 and 24. They had Woods execute a warranty deed for the portions directly to Risses.

We note initially Risses correctly point out an inability to render marketable title to these parcels would be a material breach of the contract. Without these two side parcels, the property was essentially unmarketable. Access to the house would be constrained, and the master bedroom would be situated on the neighbor's property. With these parcels, the property may be conveyed as a unified whole.

We further observe Thompsons acted promptly in rectifying the situation. They performed even better than they were required to. Not only did they acquire clear title from Woods, they arranged to convey warranty title directly to Risses without additional consideration. Thompsons absorbed the costs of this move themselves.

It is uncontested Thompsons owned the property in question. This is substantiated both by the evidence and by the swiftness in which they acquired and conveyed warranty title to the Risses.

The general rule is the seller may perfect title any time before closing. Fitchner v. Walling, 225 Iowa 8, 14, 279 N.W. 417 (1938); Nelson v. Chingren, 132 Iowa 383, 387, 106 N.W. 936 (1906). "It is not material, of course, that they did not have title at the time of the contract. The necessity for title arose and became absolute when the time came for making conveyance." Fitchner, 225 Iowa at 15, 279 N.W. at 421.

The closing date, and not the date Home Savings called Thompsons' mortgage due, is the critical date. The parties state various dates were set for closing. However, the one date which appears on the record and on which both parties agree is December 31, 1984. Although the closing did not take place then due to various disagreements, the evidence shows the property had marketable title as of that date.

We hold Thompsons fulfilled their end of the bargain in delivering marketable title by the closing date. It is uncontested they had marketable title to Lot 23. This was their original lot. They obtained and delivered marketable title to the necessary portions of Lots 22 and 24 by the closing date. Risses are not entitled to return of their purchase money on this ground.

B. Equitable Estoppel

Risses' attempt to avoid the contract on the basis of failure to deliver marketable title is somewhat specious considering the surrounding circumstances. When Home Savings called the mortgage due, this activated Risses' duty to pay in full on the real estate contract. Almost immediately, Thompsons went to Woods and paid the remainder of the contract price for the two parcels. They directed Woods to deliver a warranty deed directly to Risses. Woods did this.

In June 1985 Risses sued Thompsons for rescission and breach based on failure to deliver marketable title to Lots 22 and 24. Then, in January 1986, Risses quit claimed their interest in these parcels to Home Savings for consideration of \$3,500. Thompsons had just given Home Savings a deed in lieu of foreclosure on Lot 23. They had been forced to default on their mortgage obligation to Home Savings due to Risses' defaulting on their contract obligations. They also had to borrow \$7,000 to avoid a deficiency judgment on their mortgage.

It is a time honored maxim: "He who seeks equity must do equity." Myers v. Smith, 208 N.W.2d 919, 921 (Iowa 1973). "This doctrine requires a person seeking equitable relief to accord, or offer to accord, the other party all his equitable rights with respect to the subject matter." Id.

It is clear in this case Risses have not done equity in regard to Thompsons' rights to the two parcels. Risses had already filed this action for breach and rescission. Their case was in litigation. They cannot claim they rightfully kept the \$3,500 to offset their not-yet-returned down payment. Their case had not yet been adjudicated. They did not know if they would be entitled to anything. Risses' selling of the parcels and retaining the benefit thereof amounted to a ratification of the real estate contract.

It is well settled that a purchaser who takes and retains possession under the contract cannot refuse to pay the purchase price because of alleged lack of title in the vendor unless he rescinds and restores possession. Where a purchaser who learns of defects in vendor's title does not rescind he can retain possession only upon condition that he pays the purchase price.

Creel v. Hammans, 234 Iowa 532, 539, 13 N.W.2d 305, 309 (1944).

Where one having the right to accept or reject a transaction takes or retains the benefits thereunder, he ratifies the transaction, is bound by it, and cannot avoid its obligations or effect by taking a position inconsistent therewith, and the estoppel thus created is operative against his personal representative.

Bates v. First Savings Bank, 219 Iowa 1358, 1365, 261 N.W. 797, 801 (1935) (emphasis ours).

A party is estopped from taking advantage of one position first, then taking advantage of another inconsistent position later. Schuetz v. International Harvester Co., 167 Iowa 634, 641, 149 N.W. 855, 857-58

(1914). "Of course the choice of one of two inconsistent positions is a waiver of the other." Id., 167 Iowa at 639, 149 N.W. at 857.

We determine Risses are equitably estopped from claiming a failure by Thompsons to deliver marketable title to property which Risses subsequently sold for their own profit.

We note Risses have not sued for cancellation of the forfeiture, as did the plaintiff in Lett v. Glummer, 300 N.W.2d 147 (Iowa 1981). Neither has fraud been pleaded or argued, although Risses do claim misrepresentation as to the boundaries.

C. Boundaries

Risses claim Thompsons represented the property to be larger than what they actually owned. They claim if they knew the actual extent of the boundaries, they never would have entered into the agreement in the first place.

Risses' allegation of misrepresentation of boundaries is contradicted by the clear words of the contract. The contract only refers to Lot 23 in the description of the property. The additional parcels were not even listed in the contract. The warranty deeds of Lots 22 and 24 were delivered to Risses in July 1984.

If Risses had serious doubts as to the extent of what they were buying, they should have contracted for a survey before they signed the contract. As they neither cured nor

contested the forfeiture, this question is now moot. Additionally, because of their subsequent course of action regarding the two side parcels, they are equitably estopped from raising this issue.

Risses' claim of failure to deliver marketable title is without merit. We reverse the trial court on this issue.

II. FORFEITURE

Risses contend the forfeiture constitutes an election of remedies. Thus, they argue, Thompsons are precluded from any further action in this case, including their counterclaim for waste and unjust enrichment. To analyze this claim, we must first examine the law of forfeiture.

Forfeiture is a statutory procedure. See Iowa Code § 656. All the provisions of the statute must be strictly complied with to complete the forfeiture. Iowa Code § 656.1. Provision for forfeiture must be contained in the contract being forfeited. Abodeely v. Cavras, 221 N.W.2d 494, 498 (Iowa 1974).

Forfeiture extinguishes the liability of the buyer for unpaid purchase money. Risken v. Clayman, 398 N.W.2d 833, 838 (Iowa 1987); Gray v. Bowers, 332 N.W.2d 323, 325 (Iowa 1983); Abodeely, 221 N.W.2d at 498. By forfeiting the contract, the seller converts the debt into property and takes the property in satisfaction of the debt. Farmers & Merchants Saving Bank v. Farm Bureau Mutual Insurance Co., 405 N.W.2d 834, 838 (Iowa 1987); Risken, 398 N.W.2d at 839.

Forfeiture is like bidding in the judgment at a foreclosure sale. Farmers & Merchants Saving Bank, 405 N.W.2d at 838; Risken, 398 N.W.2d at 839. Moreover, a forfeiture operates to terminate the contract and the respective parties' rights thereunder. Gray v. Bowers, 332 N.W.2d at 325.

The forfeiture, once completed, is conclusive as to the buyer. The buyer loses his prior investment in the property. See, e.g., Lett, 300 N.W.2d at 149; Waston, 244 Iowa at 63, 55 N.W.2d at 559, 92 C.J.S. Vendor and Purchaser § 466 (1955). The buyer thereafter generally may not maintain an action for return of purchase money, unless it can be shown the seller failed to deliver marketable title. 92 C.J.S. Vendor and Purchaser § 466 (1955).

Forfeiture is a summary type of procedure. The seller regains the property without granting the buyer the protection afforded in a foreclosure. As a result, forfeiture is a harsh remedy. The buyer loses all rights and interest he may have acquired in the property. Consequently, forfeiture is not favored by the courts. Risken, 398 N.W.2d at 839; Lett, 300 N.W.2d at 149; Keokuk State Bank v. Eckley, 354 N.W.2d 785, 787 (Iowa App. 1984).

[E]quity abhors forfeitures. By the same token, forfeitures are not favorites of either law or equity, and when enforced, those claiming under them should show the equities are clearly on their side.

Lovlie v. Plumb, 250 N.W.2d 56, 63 (Iowa 1977).

Forfeitures are a narrow, rather than a broad, remedy, and are strictly construed. "[Forfeitures] are enforced only when it is shown the equities clearly require forfeiture." Babb's, Inc. v. Babb, 169 N.W.2d 211, 213 (Iowa 1969).

With these principles in mind, we now turn to an examination of the doctrine of election of remedies.

III. ELECTION OF REMEDIES

Essentially, the doctrine of election of remedies provides a party may not pursue two or more inconsistent remedies. The election of one precludes pursuing the other. Risken, 398 N.W.2d at 838; 25 Am. Jur. 2d Election of Remedies § 1 (1966)

The Iowa Supreme Court has stated:

Election of remedies is an equitable defense. Because it is not favored, it is applied narrowly. Friederichsen v. Renard, 247 U.S. 207, 213, 38 S. Ct. 450, 452, 62 L. Ed. 1075, 1084 (1918) ("At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended . . ."). Its purpose is to protect a person from the vexation of contradictory claims by a single party.

The question of applicability of the doctrine is one of law for the court to decide.

Three elements must be established by a party relying on the doctrine: (1) existence of two or more remedies, (2) inconsistency between them, and (3) a choice of one of them.

* * *

Remedies are inconsistent within the meaning of the election of remedies doctrine if the party against whom the doctrine is asserted has pursued one remedy to the point he adopts a contradictory position in attempting to pursue the other. One position must negate or repudiate the other.

Bolinger v. Kiburz, 270 N.W.2d 603, 605-06 (Iowa 1978).
See also Feldhahn v. R.K.B. Quality Corp., 356 N.W.2d 226,
229 (Iowa 1984) (election of remedies doctrine largely
obsolete).

A. Alternatives to Forfeiture

When a buyer like the Risses defaults in performance of
a real estate contract, the seller has a number of remedies
available:

- (1) keep good its tender of performance, demand the
balance of the purchase price, and sue for specific
performance;
- (2) terminate the contract because of vendee's
breach, keep the land, and sue for damages for the
breach;
- (3) rescind the contract in toto; or
- (4) enforce a forfeiture.

Risken, 398 N.W.2d at 838; Abodeely, 221 N.W.2d at 497-98;
First National Bank v. LeBarron, 201 Iowa 853, 856, 208
N.W. 364, 366 (1926).

Additionally, if the contract so provides, the seller
may institute a foreclosure action. The seller may employ
a non-judicial foreclosure after giving thirty days' notice
of an intent to accelerate default. See Iowa Code § 655A.
The regular judicial foreclosure avenue is available as
well. Iowa Code § 654.

The question before us is two-fold. First, does the
forfeiture action, which the record reveals was duly
completed by the Thompsons, preclude any further action on
the contract by either party? Second, assuming legal

action on the contract is precluded, are any other remedies, either legal or equitable, available to the parties?

As we consider these questions, we are mindful of the Iowa Supreme Court's expressed distaste both for forfeiture and for the doctrine of election of remedies. We note a relationship between these two, as both are exclusive and often harsh. Both tend to cut off actions that otherwise could be brought. Both are absolute in their proscription. Both leave little room for the extreme variations in circumstances which may accompany the transaction. Instead they group together all like transactions and administer a single, non-sensitive, and sometimes nonsensical remedy.

B. Contract Damages after Forfeiture

The cases are clear on the issue of contract damages after forfeiture. Forfeiture terminates the contract. Gray, 332 N.W.2d at 325. The seller receives back the property in full payment of the contract debt. See Risken, 398 N.W.2d at 839. The buyer loses his prior investment in the property, unless he can show fraud or failure to deliver marketable title. (See preceding discussion.)

The contract has been canceled. Each party is only entitled to what they took under the forfeiture. The Risses' debt on the contract is extinguished. The

Thompsons received back their property in full payment of the contract obligation. We have already addressed the Risses' contention of failure to deliver marketable title.

We conclude both parties are precluded from suing on the contract. Any holding of the trial court to the contrary is reversed. All the parties' claims predicated upon the contract itself are dismissed.

C. Postforfeiture Actions

We now address the somewhat novel question of claims not based on the contract arising out of the same course of events. We have discovered no Iowa cases directly on point, nor have the parties cited any in their briefs.

Again, we turn to the Iowa Supreme Court for guidance.

We agree that the doctrine of election of remedies does not preclude distinct and independent grounds of action arising from the same transaction and which may be concurrently or consecutively pursued to satisfaction. Bolinger v. Kiburz, 270 N.W.2d 603, 606 (Iowa 1978); 25 Am. Jur. 2d Election of Remedies § 13 (1966). But this abstract legal proposition is not dispositive of the present dispute. We conclude that under our holdings, plaintiff's recovery is precluded by a substantive legal doctrine which is separate and distinct from the common law doctrine of election of remedies.

This conclusion has reference to our holding in Abodeely v. Cavras, 221 N.W.2d 494, 497-98 (Iowa 1974) that when a vendor exercises a right of forfeiture against a defaulting vendee, the liability of the latter for the unpaid purchase money is extinguished. While it is true that this result is triggered by the election of a remedy, i.e., the forfeiture of the contract, the end result is not dependent on the doctrine of election of remedies. Such a result instead flows from the fact that the contract between the parties has been terminated, thereby extinguishing any right to recover the unpaid purchase price.

The same result has been reached in cases involving abandonment or rescission of the contract. [Citations omitted.]

Gray v. Bowers, 332 N.W.2d 323, 324-25 (Iowa 1983) (emphasis added).

A well-reasoned and thoughtful Note on the status of postforfeiture remedies in Iowa was published in a recent edition of the Iowa Law Review. Note, A Rescission Approach to Vendor's Damages After Forfeiture of an Installment Real Estate Contract, 74 Iowa L. Rev. 901 (1989). The author argues the Iowa courts should recognize postforfeiture actions by parties to real estate contracts. Such actions are not based upon the forfeited contract, but rather upon equitable remedies such as for waste or unjust enrichment, or legal remedies arising from negligence.

Although no published Iowa cases have been found directly on point, they do leave open the possibility other remedies, not based on the contract, may be available. Other states have allowed actions for waste in postforfeiture proceedings where the injury to the property is extensive and severe. See, e.g., Meyer v. Hansen, 373 N.W.2d 392 (N.D. 1985). This result is better reasoned and more fair than strict application of the election of remedies doctrine. It also comports more closely to equitable principles.

The Am. Jur. 2d section cited by the Risses in support of the proposition an election of one remedy is a waiver of others continues:

. . . it has been held that the fact that the contract provides a remedy in favor of the vendor does not of itself preclude his recourse to other possible remedies. The vendor's right to legal relief will depend upon the terms of the contract, but his right to equitable relief will depend upon the particular facts and circumstances of the case. The vendor must do more than assert a bare equitable right. He must show himself, by the allegations of his pleading, to be entitled under the established principles of equity jurisprudence to the relief prayed for.

77 Am. Jur. 2d Vendor and Purchaser § 404 (1975).

We have examined the Iowa cases denying damages to sellers in postforfeiture proceedings. An interesting and logical trend is revealed. All the cases examined denied damages not on the election of remedies doctrine, but because the damages sought were predicated in some manner on the forfeited contract. See, e.g., Farmers & Merchants Savings Bank, 405 N.W.2d at 838 (sellers' rights to insurance proceeds measured by unpaid contract balance; forfeiture extinguishes debt, therefore extinguishes right); Risken, 398 N.W.2d at 837 (same); Gray, 332 N.W.2d at 324-25 (promissory note and mortgage by buyer to seller were "additional security" and thus part of contract; forfeiture precluded an action by seller to recover on them); Abodeely, 221 N.W.2d at 504 (seller not allowed to avoid forfeiture in an action for specific performance on the contract or the unpaid contract balance).

Indeed, the Gray case directly states the doctrine of election of remedies is not the decisive factor in actions for postforfeiture damages. Gray, 332 N.W.2d at 324-25. Rather, the forfeiture of the contract "extinguish[es] any right to recover the unpaid purchase price." Id. at 325.

We conclude either party may establish a claim for damages not based on the contract.

IV. RESCISSION OF THE CONTRACT

The trial court ordered rescission of the contract. However, the contract had been forfeited. The only defense to the forfeiture is failure to deliver marketable title. See 92 C.J.S. Vendor and Purchaser § 466 (1955). We have determined this defense is not available to Risses. Additionally, Risses have not attempted to cure and/or contest the forfeiture.

Forfeiture terminates the contract. Gray, 332 N.W.2d at 325. Therefore, there was no contract for the trial court to rescind.

The trial court awarded Risses refund of their purchase money. Both the \$12,000 down payment and the five contract installment payments were included in the award. The trial court ordered Risses to pay fair rental value of \$475 for the five months. It ordered an offset from Risses' award for this amount. It also ordered an offset for \$3,500 received by Risses for the sale of Lots 22 and 24.

The contract has been terminated by the forfeiture. It cannot now be rescinded or sued upon for breach. By the forfeiture, Risses lost their prior investment in the property. Thus, they have no right to refund of their purchase money. See 92 C.J.S. Vendor and Purchaser § 466 (1955).

We reverse the trial court on this issue.

V. EQUITABLE DAMAGES

Risses have not claimed nor proven any damages other than those based on the forfeited contract. Accordingly, they may not recover anything in this action. Thompsons, on the other hand, have pleaded and proven several equitable claims not based on the contract.

A. Back Rent

The trial court awarded Thompsons rent for eight months. In a separate offer to confess judgment, Risses concede they owe Thompsons rent for thirteen months they occupied the premises. However, Risses paid the installments the first five months. Therefore, they only owe rent for the final eight months. We modify accordingly.

The trial court found the total rental value for eight months to be \$4,472. This averages out to be \$559 per month, the same as the monthly contract installments. It appears the trial court relied on the forfeited contract in

making its determination. Just as neither party may maintain an action on the contract, neither may the court refer to the forfeited contract for considering damages.

The only amount in the record either party refers to as monthly rent is \$450. Mr. Thompson testified he had agreed to this amount with another party just prior to the initial contact with the Risses. Neither party contests this figure. We therefore award Thompsons monthly rent of \$450 for eight months, or \$3,600.

We modify the trial court on this issue.

B. Payment to Avoid Foreclosure

Thompsons also counterclaim for the \$7,000 they had to pay the bank to avoid foreclosure. However, they paid the bank this amount in December 1985. The forfeiture was in April 1985.

The \$7,000 was in lieu of foreclosure. Thompsons paid this amount to prevent a deficiency judgment by Home Savings on their mortgage. The mortgage agreement was between Thompsons and Home Savings. Risses were not parties to this agreement.

Additionally, Thompsons allowed the property to sit vacant for eight months after the forfeiture. Prior to that, they permitted Risses to reside there for eight months without paying the contract installments.

Thompsons did not avail themselves of the available remedies for almost sixteen months. There is not sufficient evidence to show they adequately mitigated their damages caused by Risses' breach.

Thompsons' counterclaim for the \$7,000 mortgage payment is dismissed. We affirm the trial court on this issue.

C. Waste

Thompsons have additionally claimed for waste. The trial court denied this claim. It found Thompsons failed to show the waste was Risses' fault.

Risses vacated the property in February 1985. They gave no notice to Thompsons of their intent to vacate. Pipes froze after Risses vacated the property. The contractor who did the repairs testified about \$2,000 worth of damage resulted.

It is reasonable to expect an occupant to notify the responsible party when the occupant vacates the premises, especially in the middle of an Iowa winter. Frozen pipes are a foreseeable result of failure to so notify.

This type of waste is characterized as "permissive waste." Note, A Rescission Approach to Vendor's Damages after Forfeiture of an Installment Real Estate Contract, 74 Iowa L. Rev. 901, 910 (1989).

Waste is classified as either active or permissive: Active waste occurs when the possessing party alters or attempts to alter the property; permissive waste occurs when the possessing party's inaction results in injury to the property.

Id.

The Iowa Code authorizes actions for waste. Iowa Code § 658. Triple damages may be awarded. Iowa Code § 658.1. In this case, the Thompsons have not requested triple damages, so we do not consider whether they would otherwise be appropriate.

We determine Risses are at fault. The damage was caused by their failure to notify Thompsons they were vacating the premises in the middle of winter. The frozen water pipes and consequential damage resulted.

Thompsons are entitled to \$2,000 for waste to their property for damage resulting from frozen pipes. We reverse the trial court on this issue.

D. Sale of Lots 22 and 24 by Risses

Finally, we address the issue of Risses' selling the portions of Lots 22 and 24 to Home Savings for \$3,500. It is undisputed Risses did not pay any separate consideration for these lots. The trial court found for Thompsons on this issue and awarded them \$3,500, the amount received by Risses from Home Savings. We address this issue due to the ambiguity of the trial court's ruling in favor of Thompsons on this matter. The trial court awarded rescission in favor of Risses due to lack of marketable title in the very parcels they sold and conveyed.

Thompsons paid the full purchase price and had the warranty deeds made out to Risses as grantors. They did this to secure marketable title for Risses.

Risses had taken contradictory positions regarding these parcels. We view this as critical. The dispute over marketability of these parcels is the very premise on which Risses base this action. They claimed failure to deliver marketable title, then sold and conveyed the very parcels they claim were unmarketable. They kept the proceeds, even though they had paid no consideration for lots 22 and 24.

A party is equitably estopped from taking inconsistent legal positions. Schuetz, 167 Iowa at 639-41, 149 N.W. at 857-58. Risses filed this action in June 1985. They sold the parcels in January of 1986, while this case was pending. Risses' action in selling these parcels and retaining the proceeds is inconsistent with their position alleged in their petition.

We determine Risses were equitably estopped from selling and retaining the sale proceeds from these parcels after pleading failure to deliver marketable title. Thompsons are entitled to the proceeds of \$3,500 for sale of Lots 22 and 24 parcels.

Our holding on this issue is based on an additional ground as well. Even though Risses had legal title to the property, Thompsons retained an equitable interest in it. As such, Thompsons were entitled to an equitable lien on the parcels.

An equitable lien ... is implied and declared by a court of equity out of general considerations of a right and justice as applied to the relations of the parties and the circumstances of their dealings.

Tubbs v. United Central Bank, N.A., 451 N.W.2d 177, 185 (Iowa 1990).

We affirm the trial court on this issue.

VI. RULING

Neither party contests the forfeiture. We have not discovered any reason for avoidance of the forfeiture. We hold Risses have been lawfully forfeited out and the contract terminated. Neither party is entitled to damages based on the contract. The trial court erred in awarding a refund of purchase money to Risses and awarding rent to Thompsons calculated by the contract installments. We reverse on this issue.

The trial court determined Thompsons are entitled to rent for eight months. We agree. However, we adjust the trial court's award to reflect a monthly fair rental value of \$450, or \$3,600. We modify on this issue.

Risses received \$3,500 from Home Savings for Lots 22 and 24. They are estopped from selling these and retaining the proceeds. Thompsons had an equitable lien on these parcels. Therefore, Risses are ordered to pay \$3,500 to Thompsons for these two parcels. We affirm on this issue.

The trial court denied damages for the frozen pipes and resulting damage to the property. We determine Thompsons are entitled to \$2,000 for waste to their property. Risses vacated the house without notice in the middle of winter.

Resulting damage from the frozen pipes could have easily have been avoided. Thompsons are awarded \$2,000 for waste. We reverse on this issue.

Thompsons are awarded a total of \$9,100, with statutory interest from the date of filing of the petition.

Costs on appeal are taxed to Risses.

AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED.

All judges concur except Sackett, J., who concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

This case comes to us in an extremely confusing posture. However, the basic issue is what remedies, if any, a buyer and a seller should have against each other after a real estate contract has been forfeited under Iowa Code section 656. The trial court granted the buyers' petition for the rescission. The majority has modified the trial court's decision by refusing the buyers rescission and awarding damages to the sellers.

I agree with the majority's decision that under the facts of this cause the trial court should not have granted the buyers' prayer for rescission. I disagree with the majority's decision to award damages to the sellers. I would dismiss the buyers' claim and the sellers' counterclaim. I would tax costs on appeal one-half to each party.

First, I sympathize with the majority's efforts to extract the relevant facts from a very confusing record. I find the following facts which I consider relevant to my decision. Defendants-appellants Keith R. Thompson and Janene Thompson, as sellers, and plaintiffs-appellees James Charles Risse and Kathryn Kay Risse, as buyers, entered into a real estate contract on January 28, 1984, for \$60,657.18, for the sale of Lot 23, Knoll Ridge Addition to

Fairbanks, Fayette County, Iowa. The house on Lot 23 overlapped on Lots 22 and 24 of the Addition. Buyers made a down payment of \$12,000. Buyers took possession on February 1, 1984, and made monthly payments of \$559, to be applied first to interest at 9 percent per annum, payable monthly, and then to principal. Buyers were to make the monthly payments directly to the savings and loan. They were in the amount of the monthly payments sellers were required to make on the mortgage. The balance on the contract was due in full if the savings and loan called the balance in accordance with a due on sale clause. Buyers made five monthly payments of \$559.00.

On June 21, 1984, Home Savings called the loan and advised no further payments on the loan would be accepted. Buyers quit making monthly payments. At that point both parties made good faith efforts to close the transaction.

John Wood owned the parts of the adjoining Lots 11 and 24 where the house abutted. On July 3, 1984, sellers had John Wood deed those parts of the lots to buyers. On February 21, 1985, buyers advised sellers they would get out of the matter and sue for rescission. By at least February 22, 1984, sellers were aware buyers had abandoned the property.

On March 7, 1985, defendants served plaintiffs with a notice of forfeiture of real estate contract based on sellers' failure to pay \$48,377.57 plus interest of

\$3,264.98. The interest claimed due appears to be interest that had accrued on the balance due between the time buyers ceased making payments and sellers sought forfeiture. In April 1985 an affidavit in support of forfeiture of real estate contract signed on April 8, 1985, was recorded by the sellers stating sellers had served the notice on March 7, 1985, and sought forfeiture based on failure to pay \$48,377.57 plus interest of \$3,264.98, and the amount had not been paid and the contract should stand forfeited. The suit and countersuit that formed the basis for this appeal were filed on June 25, 1985 and July 17, 1985, respectively.

I.

I agree with the majority that the sellers did what was necessary to be ready to convey merchantable title. In fact, they did more than was necessary in actually conveying title to the two adjacent lots directly to buyers. I therefore agree with the majority that the trial court incorrectly found the buyers proved the contract should be rescinded and that buyers should have judgment for the amounts paid.

II.

I strongly disagree, however, with the majority decision to go forward and award damages to the sellers. I do not find their decision to be in accord with existing law. See Risken v. Clayman, 398 N.W.2d 833, 839 (Iowa

1987)). I find the majority is seeking to establish a precedent that will create a new area of claims and will give sellers who have elected forfeitures under 656 an array of additional and unfair remedies.

When sellers elected to forfeit the contract they had made a \$12,000 down payment and five other payments. The basis of their forfeiture was the failure to pay principal and interest that had accrued since buyers ceased making monthly payments. The sellers had reason to know the buyers had vacated the house, the sellers knew they had deeded parts of the two adjacent lots to buyers. Sellers at this point had a series of remedies. See Risken, 398 N.W.2d at 838; Adobeely v. Cavaras, 221 N.W.2d 494, 497-98 (Iowa 1974). The remedies then available to sellers would have allowed them to be compensated for the amount the majority now seeks to award them if the damages were equitable considering the respective equities of both parties.

However, unlike forfeiture which the sellers preserved, the other remedies would have also provided protection for the buyers. See generally Risken, 398 N.W.2d at 839; Lett v. Grummer, 300 N.W.2d 147, 149 (Iowa 1981); Keokuk State Bank v. Eckley, 354 N.W.2d 785, 787 (Iowa App. 1984).

Sellers did not seek any of these other remedies which would have offered the buyers protection. Instead, sellers chose forfeiture, allowing them to get the property back and keeping the payments the buyers had made.

I find a serious danger in the majority decision extending to a seller who has elected forfeiture additional remedies. Forfeitures have been criticized because very summarily over a course of a thirty-day period a buyer can lose a piece of real estate in which the buyer has substantial equities. Furthermore, the additional remedy adopted by the majority will cause confusion in the area of real estate law and can result in considerable unfairness.

I find no equitable basis to allow an additional remedy to a seller who elects a summary procedure to forfeit real estate, thereby extinguishing a buyer's equity in the property summarily, and find no equitable basis to allow these sellers additional remedies. In so deciding, I have considered the fact the sellers had had portions of the two adjacent lots deeded to buyers. Sellers had other remedies which they chose not to elect (example reformation and foreclosure) which could have imposed their lien on these adjacent lots. Sellers elected forfeiture and kept buyers' \$12,000 down payment. Sellers can show no inequity to them in losing the adjacent lots.

The buyers had agreed rent could be subtracted from their judgment. The buyers' judgment having been set aside, I find no basis to require buyers to pay rent. Part of the basis for forfeiture was buyers' failure to pay interest for the period that buyers had possession. There is no basis for giving the sellers rent for this period.