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ELECTION OF REMEDIES

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THE rule of election of remedies is to the effect that the choice of one among inconsistent remedies bars recourse to the others.[1] The requirements for operation of the rule are all implied in its definition. Two remedies in fact must coexist.[2] Otherwise, choice would be impossible. The remedies must be in law inconsistent.[3] Otherwise, choice of one could not conceivably be prejudicial. The remedies must exist for the same wrong. Otherwise, there could be no necessity for choice.

The entire significance of the rule thus lies in the fact that it works to preclude resort to further remedies. Thereby it makes a choice between inconsistent remedies conclusive and irrevocable from the start. Nothing in the law would seem better settled than this result. It has been repeated in almost identical terms in numberless cases in every jurisdiction.[4] It has attained to the sanctity of a legal maxim, and is quoted with the same platitudinous assurance. In the profound manner of Ulpian when he allowed himself to proclaim that "just as the Greeks say, some laws are written and some unwritten,"[5] so judges thrill to an-

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[1]Moss v. Marks, (1904) 70 Neb. 701, 97 N. W. 1031.

[2]Bierce v. Hutchins, (1906) 205 U. S. 340, 27 S. C. R. 524, 51 L. Ed. 828.

[3]Zimmerman v. Harding, (1912) 227 U. S. 489, 33 S. C. R. 387, 57 L. Ed. 608.

[4]20 Corpus Juris, sec. 18 ff.

[5]Institutes, I, 2, sec. 3.

nounce that "when a man has two inconsistent remedies, by pursuing one he bars resort to the other."

But this rule, of such easy definition and simple consequence, requires a more searching analysis, to enable us to discover its meaning and the basis of its operation. Granted the uniqueness of its effect, which is so consistently admitted, is there any corresponding definiteness in the situations to which it is properly to be applied? The definition can give no more than the formal incidents and conclusion of the rule ex vacuo. The problems lie deeper. When are legal alternatives to be classified as remedies? When and why are they inconsistent in law? What constitutes a choice or election between them?

Anyone who supposes that the rule is of easy application need only glance at the digests, with their hundreds of heterogeneous cases grouped under the caption of "Election of Remedies," to be convinced that the compilers at least have not found it so. Under the purported guidance of the rule, the courts have settled diverse questions of law having few if any points of similarity. The only thread of identity that runs through them all is the assumed conclusiveness of choice. Consider, for instance, this simple statement: "The term has been generally limited to a choice by a party between inconsistent remedial rights,"[6] in support of which the following is adduced:[7]

"Thus, 'if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election: Co. Lit. 145a. So a man may ratify or repudiate an unauthorized act done in his name. . . . He may take the goods or the price when he has been induced by a fraud to sell. . . . He may keep in force or may avoid a contract after the breach of a condition in his favor,' *Bierce v. Hutchins.* 205 U. S. 340, 346, 27 S. C. R. 524, 51 L. Ed. 828."

It will be submitted that none of the examples in fact involve an election between remedies. To suppose the contrary is simply to assert that every irrevocable choice, or election, is an election between remedies. So stated, such an assertion is patently false. Yet from this assertion, implicity made, the confusion in the cases proceeds. *Election of remedies* is taken to comprehend the entire field of *election*: the inevitable consequences of an election in some other department of the law are predicated as of course to an election between remedies. No necessity for dis-

[6] 20 Corpus Juris, sec. 1.
[7] 20 Corpus Juris. sec. 1, N. 3a.

crimination is considered: "Election" and "conclusiveness" are assumed to rest in a preordained and universal harmony.

It is therefore necessary to consider the meaning and scope of "election" as a descriptive term, to ascertain the occasions of its occurrence, and to distribute the cases properly.

ELECTION

"Election," in its generic sense, describes the right or duty of a person faced by a given situation to make a definitive choice between various courses of action. It may as well mean a choice of substantive rights in a given transaction as a selection of remedies for a specific wrong. "An election is the choice between two or more courses of action, rights or things, by one who cannot enjoy the benefits of both."[8] As the nature of the situation is different in almost every case, so a priori the right to elect may mean quite different things. Originally underlying every case is only the simple necessity of selecting one possibility and discarding the others. "For the situation in all classes of cases is to this extent the same: One person is possessed of the right of choice (between two properties, between continuation and termination of a contract, between two remedies), and some other person's interest will be affected by the choice. So far there is identity; but it may very well be that for the proper adjustment of rights, different rules may be found to be necessary for the different classes of cases."[9]

It is a difficult matter to dissolve this complexity of situations. We have found no better analysis or classification than that made by Mr. Ewart in his brilliant polemic on "Waiver Distributed among the Departments: Election etc." He, it is true, was concerned primarily with the demolition of the concept of "waiver." But he found that "waiver" on a true interpretation of the facts can be nothing but an "election" based upon contract, or, less frequently, an estoppel, contract, or release. And he found it possible to classify all the important cases of election in the following way:

"1. Election between two properties;

2. Election (part of the substantive law) between termination and continuation of contractual relations; in other words, election between two legal situations;

[8]Allis v. Hall, (1904) 76 Conn. 322, (339), 56 Atl. 637.
[9]Ewart, Waiver 71.

3. Election (part of the adjective law) between two or more remedies."[10]

It is to the third category, that of election of remedies, that the present inquiry is directed. For to that category only the so-called rule of election of remedies by definition applies. But we shall first briefly discuss the necessity and consequences of an election in the two other categories, with the view of tracing their relationship, if any, to an election between remedies. We shall therefore follow the schema of Mr. Ewart.

Election Between Properties

Between Property and Devise. This *doctrine* of election, often known as the doctrine of equitable election, is of restricted operation, and is pertinent in this connection only as it will furnish useful analogies, and as it may help to explain the derivation and basis of the related *rule* of election of remedies. The most familiar instance of the doctrine is that of election under a will, as where a testator in disposing of his own property purports to dispose of property that does not belong to him. X devises land to A upon condition that A transfer his own property to B, or release an obligation running to A from B. A must elect whether to take under the will or against it. Mr. Jarman seemed to consider the doctrine as necessary to the unified interpretation of the will, in order to carry out the testator's intent.[12] "The doctrine of election," he said, "may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it." Mr. Pomeroy thought the doctrine an expression of the Chancellor's maxim that "He who seeks equity must do equity."[13] Mr. Ewart explains it on the ground of the "attachment of a tacit condition to the gift."[14] These are the varying views of the commentators. Among the English Chancellors and Judges there was as great diversity of opinion.

[10]Ewart, Waiver 67.

[11]For analogous cases see Bigelow, Estoppel, 5th Ed., 673 ff.

[12]Jarman, Wills, 6th Eng. Ed., 538. The editors seem to have repudiated Mr. Jarman's idea, for in another place they say: "The doctrine does not depend on any supposed intention of the testator, but is based on a general principle of equity." Ibid. 534. This view is supported by the holding that the doctrine applies when a gift is made under an erroneous belief of ownership. Whistler v. Webster, (1794) 2 Ves. Jun. 367. But see 1 Sw. 401.

[13]Pomeroy, Equity, Jur., 3rd Ed., sec. 395, 461, 466.

[14]Ewart, Waiver 68.

Lord Commissioner Eyre declared: "There never can be a case of election, but upon a presumed intention of the testator."[15] Lord Rossalyn represented Chief Justice de Grey to have referred the doctrine to a natural equity as distinguished from an implied condition.[16] But it has been said that "Lord Chief Justice de Grey meant to state the distinction, not between an implied condition and an equity, but between an express condition, and an equity arising from an implied condition."[17] Lord Redesdale said: "The rule of election, I take to be . . . a rule of law, as well as of equity." But Lord Hardwicke and Lord Eldon described the right as founded on a benevolent equity alone.[18]

In *Sherman v. Lewis*,[19] Judge Mitchell excellently summarized the basis of an election. "It must be clear," he said, "beyond reasonable doubt that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift." Thus, in *Brown v. Brown*,[20] X, the owner of an entire city lot, deeded one quarter to her son A, who built a house and resided there; afterwards X by will devised to A and his two brothers, share and share alike, the entire lot including the quarter previously deeded to A. It was held that A must elect whether to accept the share of the property devised to him and consent to its disposition as provided in the will, or to retain the part he owned.

Between Dower and Devise. We have considered a situation in which the testator gives away property already belonging to the devisee, in return for the devise. Once the law was settled, each case required only a fair interpretation of the document under which the devisee claimed. But the application is complicated when the devisee has only a spouse's interest in the testator's property. If X devises land to his widow A, must A relinquish her right to dower in the other lands disposed of by the will, in order to claim the devise? If X really intended A to take her devise only on condition of giving up her dower interest in the other lands, there would be a clear case for election between her

[15]Crosbie v. Murray, (1792) 1 Ves. Jun. 555 (557).
[16]Rutter v. MacLean, (1799) 4 Ves. 531 (538).
[17]Dillon v. Parker, (1818) 1 Sw. 359, Note at 401 ff.
[18]Birmingham v. Kirwan, (1805) 2 Schoales & Lefr. 444 (450); Gretton v. Haward, (1818) 1 Sw. 409, Note at 425 ff.
[19](1890) 44 Minn. 107, 46 N. W. 318. Acc., Washburn v. Van Steenwyk, (1884) 32 Minn. 336, 30 N. W. 324; Johnson v. Johnson, (1884) 32 Minn. 513, 21 N. W. 725; In Re Gotzian, (1885) 34 Minn. 159, 24 N. W. 920.

claims as devisee and as doweress. But since there was rarely any express direction to this effect, the common law was driven to presumptions. In case of a general devise, A was not required to elect, for it was said that X had not intended the devise in satisfaction of dower. However, if X introduced into the devise a special provision irreconcilable with A's claim of dower, then the expression of the testator's intention was unequivocal, and A was forced to elect between her dower and the benefits under the will.[21] The test was regarded as one of intention to be collected from the whole will.[22]

Since the Statute of 1834, in England dower may be barred by a general disposition of the property, by an incumbrance placed thereon, by a declaration in the will, or by various gifts in satisfaction of dower. In these cases A cannot disappoint the will but must elect between its terms and her right of dower.[23]

The same doctrine of election between dower and devise, where the testator intended the devise to be in lieu of dower, prevails in the United States. Page states the rule as follows:[24]

"Where it is clear, either from specific provisions, or from the will as a whole, that the testator intends a provision for the surviving spouse to be in lieu of the curtesy or dower rights of such surviving spouse, full effect is to be given to such intention, and the surviving spouse must then elect between the two provisions."

This intention may be declared by express language, or may be created by necessary implication, as where it would be impossible to effectuate the provisions of the will if the surviving spouse were allowed to take both devise and dower interest.

By statute Minnesota has repudiated the common law rule.[25] The Statute now in force enacts[26] that if a deceased parent by will

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[20](1890) 42 Minn. 270, 44 N. W. 250.

[21]Jarman, Wills, 6th Eng. Ed., 547 ff.

[22]In Re Harris, [1909] 2 Ch. 206, 23 H. L. R. 138.

[23]3 & 4 Will. 4, c.105.

[24]Page, Wills, sec. 711. Snell, Principles of Equity, Ch. on Election; Stalman, Law of Election, Appendix (1827).

[25]The first statute of the state provided that a devise in the will should be in lieu of a widow's right unless a contrary intention "plainly appears by the will to have been so intended by the testator." See Rev. St. 1851 c.49, sec. 18, 19; Gen. St. 1866, c.48, sec. 18, 19; Page, Wills, sec. 713. Then by statute abolishing dower (Gen. Laws 1875 c.40) the common law rule was revived, under which it was "so well settled that the widow is entitled to both the statutory and testamentary provisions, unless a contrary intention appears from the will . . ., the presumption is that a legacy or devise is intended as a bounty, and not as a purchase or satisfaction of the statutory provision for the wife." McGowan v.

makes provision for a surviving spouse in lieu of statutory rights, if such spouse fails to renounce the provisions of the will by a writing filed in the probate court within six months after probate, such spouse is deemed to elect to take under the will. Further, provision in the will for the surviving spouse is presumed to be in lieu of statutory rights, unless the contrary appears.

Election Between Continuation and Termination of Contractual Relations.

The law of election between properties, it has been shown, applies to one definite and restricted problem. It originates in inconsistent or alternative donations; "a plurality of gifts, with intention, express or implied, that one shall be a substitute for the rest. In the judgment of tribunals, therefore, whose decision is regulated by that intention, the donee will be entitled, not to both benefits, but to the choice of either."[27] On the other hand, the law of election of the second type (described as election between continuation and termination of contractual relations) occurs throughout the substantive law. It is an important part of the law of sales, contracts, insurance, landlord and tenant, etc. It rests not on claims of equity, but on the logical impracticability of the contemporaneous assertion of contrary rights. An investigation of the rights arising from its exercise concerns the substantive law in the branches above mentioned, and would be entirely beyond the purpose of this inquiry, which is to deal primarily with remedial rights, and the nature of an election between them. But a general analysis of the nature of substantive election is necessary here to point the distinction from the other category of election of remedies. For as has been said the rule of election of remedies strictly is concerned only with rules of the adjective law. And the great difficulty into which the subject has fallen is traceable to the disregard of this essential fact. The courts have mingled wholly dissimilar cases; they have refused

Baldwin, (1891) 46 Minn. 477, 49 N. W. 251, (widow not required to elect between her homestead rights and a general devise in her husband's will).

[26] Gen. Laws 1897, c.240; Amending sec. 4472 Gen. St. 1894. R. L. 1913, sec. 7238 (same, R. L. 1905, sec. 3649). Where widow elects under a will in lieu of dower, it bars her dower in property deeded by testator during coverture. Fairchild v. Marshall, (1890) 42 Minn. 14, 43 N. W. 563; Howe v. Parker, (1908) 105 Minn. 310, 117 N. W. 518; Eddy v. Kelly, (1898) 72 Minn. 32, 74 N. W. 1020.

[27] (1818) 1 Sw. 394. N. 6.

to recognize any material distinction between rights and remedies, in considering the necessity and consequences of an election.

This confusion has arisen both from a deficiency in terminology, and from a habit of regarding rights in terms of pleadings. "Election of remedies" has served indiscriminately to describe substantive elections as well as elections between remedial rights, even when the distinction was appreciated. The reason for this interchange is fairly explicable. Historically, perhaps it is truer than any rigid analytical division would be. Researches into the system of common law writs have justified the conclusion that the substantive rights of property and status in our law are largely the creation of specialized remedies. First came the remedies and then the rights. Thus procedural matters were not mere incidents in the enforcement of ascertained rights: they were the presuppositions, and the substantive rights their implications.[28] Even today, when rights are more clearly defined than was true at common law, and remedial law has become of distinctly secondary importance, there are no hard and fast lines of distinction: the substantive and adjective law often merge and become indistinguishable. Nevertheless it remains important to keep the well defined cases of each class distinct.

The other reason for the confusion is closely allied. It arises from the method of viewing rights in terms of the allegations necessary to support a cause of action for their assertion. Especially is this true when acts of substantive election are themselves acts in litigation. So, where the vendee under a fraudulent sale sues in deceit, it is often said that he has exercised an election of remedies and cannot afterwards resort to a suit for recission of the contract of sale, when it is plain that what is meant is that by affirming the sale the vendee is precluded from ever disaffirming, and that commencement of suit for damages is a decisive act of affirmance.[29]

For purposes of clear definition therefore, we shall employ "election of remedies" for the choosing of procedural rights alone,

[28]Law begins by granting remedies; by allowing actions. In time we generalize from these actions and perceive rights behind them." Pound, The Spirit of the Common Law 204.

[29]"It could not affirm the existence of a contract of sale, for the purpose of a recovery under it, and subsequently treat the contract as avoided by the fraud of the vendee. . . . This is the principle upon which is based the doctrine of election of remedies, where two exist in a given case which are substantially inconsistent." Droege v. Ahrens & Ott Etc., (1900) 163 N. Y. 466, 57 N. E. 747.

after a party's substantive rights have been wholly ascertained. B finds that he has a cause of action against A for the wrongful taking of B's horse. His rights are clearly settled. He may redress the wrong by suit in either of two ways: in trover, or in assumpsit. This is the plainest case for an election of remedies. "Election" we shall reserve to describe a choice between substantive rights. We shall defer all consideration of the nature of election of remedies, until we have outlined the character of "election." We shall select only typical situations throughout the substantive law.

Executed Contracts of Sale. Let us suppose the following case. The assignee of an insolvent debtor, who sold goods in fraud of creditors, brings action against the vendee on notes given by him for the price of the goods, and secures the demand by attaching his property, but never brings the action to trial. Later he sues the vendee in trover to recover the value of the goods. He adopts the theory that the sale was void as to creditors, and that he, as representative of the creditors, may avoid the sale and reclaim the goods, or on refusal to deliver sue for the conversion. The vendee pleads the prior action on the notes.

The sufficiency of the plea can be determined only by considering the substantive rights of the assignee when he learns of the fraudulent sale. The sale was not illegal, nor ipso facto void, nor could the fraudulent party avoid it. It was only voidable at the option of the creditors of the vendor or the assignee on their behalf. The assignee may affirm or disaffirm the sale as he pleases, but he is forever bound by his election. If he finds it more beneficial for the creditors to collect the notes than to attempt recovery of the property, he may sue on the notes. But thereby he necessarily affirms the sale and can never more sue to recover the goods. If he sues to recover the goods instead, he disaffirms the sale and repudiates the notes.

The situation arose in the leading case of *Butler v. Hildreth*,[30] and Chief Justice Shaw analyzed it in this way:

"The assignee has an election, not of remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other. This results from the plain and very obvious con-

[30] (1842) 5 Met. 49. But see Powers v. Benedict, (1882) 88 N. Y. 605, that effort by the vendor to retake the entire property when successful in part only does not bar his right to pursue the vendee for the value of the unfound portion, nor is his effort a defense to an action to recover possession against one in whose hands the part is found.

sideration, that the assignee cannot affirm the sale in part, and disaffirm it in part; if it is to stand as a valid sale, the property of the goods remains vested in the purchaser, and he remains liable for the price. But if the sale is avoided and set aside, it stands as if it had never been made; the property may be taken possession of by the representative of the creditors as if no sale had been made, and the purchaser ceases to be liable for the price. When therefore the assignee has made that election, if he receives or demands the price, it is equivalent to an express declaration that he does not impeach the sale, and has no claim to the goods. But if he takes possession of the goods, or demands them of the purchaser, on the ground that the sale was void as to creditors, it is equivalent to a renunciation of all claim for the price."

It should be noted that in the instant case, bringing suit was not an election of remedies. Its significance was in the field of real election. It was an unequivocal declaration by the assignee that he had chosen to affirm the sale. All rights were now determined. The assignee could never afterwards lay claim to the property.

Affirmance. From this analysis may be drawn the general legal consequence of a conclusive affirmance of a voidable executed transaction. When the vendee discovers that he has been induced to enter a contract of sale by reason of fraudulent representations of the vendor, he may elect to affirm or repudiate the sale.[31] If with knowledge of his right he commences action for damages in deceit, he is conclusively bound by an election to affirm the sale and cannot afterwards bring action to rescind. Of course, he may sue in deceit and also compel delivery of the goods, since both actions proceed on the theory of affirmance and are therefore consistent. The rights of the defrauded vendor are the same. He may affirm the sale by any decisive step. Commencement of suit on notes given in payment, or acceptance of money with knowledge of his rights conclusively binds him.[32] For instance, in a conditional sale of personalty title may be reserved during the credit period, with option in the vendor in default of payment either to retake possession or to conclude the sale. Suppose the vendee resells, and the vendor files claim in bankruptcy against him. Later he attempts to recover the goods. By filing in bankruptcy the vendor affirms the sale; thereby property passes

[31]Droege v. Ahrens, & Ott, (1900) 163 N. Y. 466, 57 N. E. 747; Moller v. Tuska, (1881) 87 N. Y. 166; Conrow v. Little, (1889) 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693.

[32]N. Y. Land Imp. Co. v. Chapman, (1890) 118 N. Y. 288, 23 N. E. 187; Bulkley v. Morgan (1878) 46 Conn. 393.

irrevocably to the vendee. His resale is legal, and the conditional vendor cannot sue for the goods. This was the decision in *American Process Co. v. Florida White Pressed Brick Co.*, which is, absurdly enough, decided in the language of election of remedies, and cited as a leading case on that subject.

"In this case the plaintiff had its election to maintain its relation as owner of the property or to treat the title as having passed and to sue for the value or price thereof. Either remedy could have been adopted, but not both, for the reason that to do so would assert inconsistent relations between the parties with reference to the property. The plaintiff pursued a remedy in the bankruptcy court for the price of the property, which necessarily conceded that the title to the property had passed from the plaintiff."[33]

Similarly in an unconditional sale action in replevin for chattels by the vendee, or assumpsit by the vendor for the price would be a conclusive affirmance, and preclude further action to rescind.

Disaffirmance. The converse case, where at the time of election there is an attempt to repudiate the sale and recover the property parted with, is more difficult. The difficulty lies generally in the circumstance that, while affirmance is always unifactoral, rescission in the case of the sale of land is bilateral and partakes of the nature of a contractual act. The defrauded vendee in a land contract cannot return title to the vendor by his own act. In the absence of agreement, an equitable action for rescission is necessary. And if plaintiff fails for want of equity, or for some reason that does not go to the merits and foreclose his right of action, his gesture has been impotent. The sale still subsists as a valid transaction. Thereafter the vendee may bring action or damages in deceit and recover judgment, except when barred, as was said, on the familiar principles of res adjudicata. The situa-

[33](1908) 56 Fla. 116, 47 So. 942, 16 Ann. Cas. 1054; Acc. Wright v. Pierce (1875) 4 Hun 351. The case undoubtedly correct, by the doctrine in force in the bankruptcy courts, that a secured creditor cannot prove for the full amount of his claim without surrendering his security. But apart from bankruptcy, it is certainly questionable whether the conditional vendor should be required to choose between the property and an action for the price. Mr. Williston urges that a conditional sale is essentially a chattel mortgage. Williston, Sales, sec. 330, 579. Under that view, the vendor should be allowed to proceed in the same way as the mortgagee of a chattel, by suing for the price and retaining title until his debt be satisfied. The Minnesota court has always taken the contrary position, Minneapolis Harvester Works v. Hally, (1881) 27 Minn. 495, and other cases collected in 3 Dunnell's Dig. sec. 8651 and Dunnell's Suppl. same section.

tion is more simple in the case of a chattel. Here the defrauded vendee may throw back the title by his own act. Whether this is because a rescission of the sale of chattels is non-contractual, or whether, as Mr. Ewart explains,[34] because the original agreement stipulates for such a right in the vendee, is here immaterial. By a positive declaration of his will to rescind, as by tender of the benefit, or by commencement of suit for rescission, the transfer of title is rescinded. The vendee cannot afterwards sue for damages in deceit, or for breach of warranty. Such action would presuppose the existence of a valid obligation. The rights of the vendor of chattels after rescission are similar.[35]

Summary. Now all that has been decided in regard to the necessity and conclusiveness of an election in the foregoing cases is perfectly acceptable. For the requirements of commerce, a great measure of certainty in executed transactions is imperative. Buyers and sellers of goods cannot keep their affairs in an equivocal position for an indefinite time. It is true that there need be no immediate election. For a reasonable time one may wait and consider, and during that time may do acts consistent with either position. But eventually some act must mark "the point at which the line of equivocal acts ends, the dividing of the way after which one step in either direction excludes any progress in the other."[36] For a man "cannot say at one time that a transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage."[37]

Executory Contracts. The general principles governing the rights of a person induced to enter into a contract voidable for fraud or other reason, are well settled.[38] The analysis of the previous cases of executed transactions is determinative of them. In general these actions are decisive acts of affirmance: a suit for specific performance by either party (possible only in land contracts and other exceptional obligations); a suit for reformation and enforcement as reformed; an action for damages for breach, or to recover a specific sum due upon the contract, or for damages in deceit.[39] In general, the following conclude a party's disaffirm-

[34]Ewart, Waiver 75.
[35]Williston, Sales, sec. 567-569. Cf. Nash v. Minn. Title Ins. Co., (1895) 163 Mass. 574 40 N. E. 1039.
[36]16 Law Quar. Rev. 161.
[37]Smith v. Baker, (1873) L. R. 8 C. P. 350, 5 Moak's Rep. 323.
[38]McGibbon v. Schmidt, (1916) 51 Cal. Dec. 195, 4 Cal. L. R. 346.
[39]Connihan v. Thompson, (1873) 111 Mass. 270.

ance: assumpsit to recover the purchase price paid in accordance with the contract, when pursued far enough to effect rescission; replevin for goods delivered in pursuance of the agreement; ejectment for recovery of possession of land, etc. Where they are consistent, one action does not bar the other. For example, where a lender of money recovers judgment on a note given as security, the judgment unsatisfied is no bar to a further action for damages for fraudulent representation.[40]

Principal and Agent. Another instance of substantive election is found in the doctrine of ratification of unauthorized acts, a branch of the law of principal and agent. C, without authority, presumes to contract with A in the name of, or on behalf of B. If B adopts and ratifies the act of C, it becomes binding on him as if he had been originally a party to it, from the date of inception of the agreement. Of course, B may ignore what C has assumed to do for him, or may affirmatively repudiate it, and then no contractual obligation arises. But if B elects to accept, he "becomes immediately liable upon the contract, and liable as well for any fraud committed by the agent in its formation, or any tort connected with its performance."[41] If B elects to ratify, but does so under misapprehension of the essential facts relating to the transaction, he may afterwards repudiate all liability. But when made with full knowledge, ratification, by claim of benefits or otherwise, is conclusive upon him.[42]

In a very recent case before the Court of Appeals in England,[43] the facts showed that B had delivered margarine to C, forwarding agent and carrier, to be carried to Hull, and then forwarded as B should direct. The goods had been originally consigned to A, a buying agent of B; but on arrival at Hull B instructed C not to deliver to A. Contrary to orders, C did deliver to A, who resold. After notice of the misdelivery, B invoiced the goods to A, sued and recovered judgment for the price of the goods as sold and delivered, and proceeded in bankruptcy against A. Now B

[40]Oben v. Adams, (1915) 89 Vt. 158, 94 Atl. 506, 15 Col. L. R. 631.

[41]Huffcut, Agency, 2nd Ed., 60; Mechem, Agency, 2nd Ed., sec. 490 ff.

[42]Robb v. Voss, (1894) 155 U. S. 13, 15 S. C. R. 4, 39 L. Ed. 52; Huffcut, agency, 2nd Ed., 42ff.

[43]Verschures Creameries Ltd. v. Hull & Netherlands S. S. Co. Ltd.., [1921] 2 K. B. 608. Though no precedents were cited on the point, the case was governed by a line of authorities, chiefly Armstrong v. Allen, (1893) 67 L. T. 738; Smith v. Baker, (1873) L. R. 8 C. P. 350. See also 16 Law Quar. Rev. 160, for criticism of the case of Rice v. Reed, (1900) 1 Q. B. 54, answered in 16 Law Quar. Rev. 379.

sues C for negligence and breach of duty. C pleads that B was concluded by his election to sue A. Judgment is given for C, and affirmed on appeal. The ground of the decision is not so well defined as one might wish. Scrutton L. J. intimates that the case is one of waiving a conversion and suing in assumpsit—a true case of election of remedies. But Bankes and Atkins L. JJ. base the decision on the conclusiveness of the ratification of C's act. Per Bankes L. J:

"When the appellants discovered this (the misdelivery) they had a right to elect; they might refuse to recognize the action of the respondents in delivering the goods to Beilin (A), and sue them for conversion or breach of duty, or they might recognize and adopt the act of the respondents and sue Beilin for goods sold and delivered. They elected to take the latter course, and they sued Beilin to judgment. Having elected to treat the delivery to him as an authorized delivery they cannot treat the same act as a conversion."[4]

In a like connection Mr. Ewart criticizes the statement, so often found in the cases, that the rule of election of remedies is to be found when "it is held that one who has sued on the theory that an unauthorized act done in his name has been ratified, cannot afterwards maintain an action on the theory that such act, and the assumed agency of the person by whom it was performed have been repudiated," in this terse manner:

"This is a case of election between two rights and not between two remedies. It is not a case of choice between different methods of enforcing one ascertained right but a selection of the right to be enforced. It is an option between two legal situations; and, when one of them has been selected, there are not two possible remedies

[4] For an uncritical comment on the case see 35 H. L. R. 209. The note-writer argues that by suing Beilin, B acknowledges that he has title, but does not relieve C from liability for breach of duty. The two cases cited in support of this contention are no authority for such a doctrine. Pacific Vinegar & Pickle Works v. Smith, (1907) 152 Cal. 507, 93 Pac. 85 would allow recovery against the agent after ratification of a sale made by him only in case the agent had ostensible authority to make the sale, and the principal therefore could not have rescinded the sale. Robinson Machine Works v. Vorse, (1879) 52 Ia. 207, 2 N. W. 1108, is either decided on the ground that there was no ratification in law, or is unsupportable. No cases were cited in the opinion. See Huffcut, Agency, 2nd Ed., 60-61; Mechem, Agency, 2nd Ed., Sec. 490-494, 440, 1249, 1268, 1324. See Triggs v. Jones, (1891) 46 Minn. 277, 48 N. W. 1113: "by a ratification of an unauthorized act, the principal absolves the agent from all responsibility for loss or damage growing out of the unauthorized transaction, and [that] thenceforward the principal assumes the responsibility of the transaction, with all its advantages and all its burdens," per Mitchell J. Whether a contrary doctrine might not have been preferable is quite a different question, and is, of course, arguable.

but one only. If the act be ratified there is but one remedy; and if it be repudiated there is another. The two remedies do not co-exist."[45]

The probable reason for confusion in these cases is that the act determinative of the plaintiff's right is the commencement of a legal action.

Insurance. A much more difficult situation arises in the case of an ordinary insurance policy, for instance, a fire policy. The contract generally provides that it shall be void in a number of events, e. g., if the insured is not the sole and unconditional owner of the property, or if there is other prior insurance, of if inflammable materials be brought upon the premises. In any of these events, the insurance company has the right to cancel the policy. This, Mr. Ewart argues with much persuasiveness, is a plain case of election: the policy does not become ipso facto void upon breach, but only voidable at the election of the company.[46] By this analysis a duty rests on the company to communicate promptly to the insured its election to terminate, for silence on its part will be evidence of election to continue the contract, or by lapse of time will put an end to its right to elect. The courts generally take a different view of the problem, and reason that the breach of condition is itself a forfeiture of the policy; then the insured may introduce testimony of a "waiver" of the forfeiture (more correctly, of the breach) and revivor of the policy by the company.[47] That is to say, the insured is allowed to testify that the agent of the company knew of the facts constituting the breach of contract when he delivered the policy, accepted the premium, or otherwise treated the policy as in force. This leads to the inference that the parties intended to ignore the condition or its breach. It is a question of insurance law, not pertinent here, whether in reality the insured incurs a true forfeiture making the policy ipso facto void, and requiring a waiver by the company to reinstate it, or, on the other hand, whether the breach allows the company, for whose protection the condition was made, to elect to cancel the contract or not as it pleases.

Landlord and Tenant. The simplest case is this: The ordinary lease of real property provides that the lease shall be void if

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[45]Ewart, Waiver 70.

[46]Ewart, Waiver; 12 Col. L. R. 619; 13 Col. L. R. 51; 18 H. L. R. 364; 29 H. L. R. 458; 29 H. L. R. 724; Williston, Sales, sec. 192.

[47]See Vance, Insurance 346 ff; 12 Col. L. R. 134.

the tenant defaults in the rent on the stipulated rent days. Usually, this does not mean that the lease will then become automatically void; it will only be voidable by reentry or otherwise at the option of the landlord. On breach of the covenant to pay rent, the landlord has his election: He may cancel the lease on account of the breach, or he may continue the tenancy notwithstanding the breach. If he cancels the lease, it cannot be revived except by the creation of a new tenancy. If he elects to continue, his right to terminate is then lost, until there is another default in the rent, or other breach sufficient to warrant a forfeiture.[48] This is an election between substantive rights. Whichever course he pursues, the remedies available are all consistent with his determined rights. If he elects to terminate, he may sue to recover possession and may also collect back rent, though not subsequent rent. If he elects to continue the tenancy, he may sue for rent and upon the covenant for any damages he has sustained.[49]

We have here followed the same analysis of Mr. Ewart; but, since the question of "waiver" is of much less importance than it has become in insurance law, the ordinary analysis by the courts in terms of forfeiture of lease, and "waiver" of breach, leads to identical conclusions as to the substantive rights of the parties, through terminology less exact, but sufficiently adequate for the simplicity of the transaction.[50]

The same situation exists at the termination of a lease; the landlord may elect to permit the former lessee to remain there longer as a tenant, or to treat him merely as a trespasser. If the landlord elects to treat him as a trespasser, the former lessee by remaining in possession does not enlarge the character of the tenancy. Therefore the landlord cannot later enforce a claim for rent, unless there has been a new contract of tenancy.[51]

Partnership. One important instance of election in the law of partnership has arisen, and should be considered here because it is often incorrectly cited as a case for the application of the rule of election of remedies, whereas in fact the election is one between substantive rights. In *Scarf v. Jardine*,[52] A and B carrying on

[48]1 Underhill, Landlord and Tenant 649.

[49]Cole, Ejectment 82 (Preliminary points). But see also Ibid 408-410 (waiver of forfeiture), Jones v. Carter (1846) 15 Mees. & W. 718.

[50]See Croft v. Lumley, (1858) 6 H. L. C. 705, 27 L. J. Q. B. 321, per Bramwell B.; Conger v. Duryee, (1882) 90 N. Y. 600.

[51]1 Wood, Landlord and Tenant 38, sec. 13.

[52][1882] 7 A. C. 345, 16 Law Quar. Rev. 160.

business as B & Co, dissolved partnership by the retirement of A. B took another partner, C, and with C carried on business under the old firm style of B & Co. Plaintiff, a customer of the old firm of A and B, sold and delivered goods to the new firm of B and C after the change, but without notice of it. On receiving notice of the change, he sued B and C for the price, and upon their bankruptcy proved against their estate. Now he brings action against A for the price. The court holds that plaintiff at his option might have sued A and B, or B and C, but not the three together; and that by electing to sue B and C he had abandoned his right to sue A.

"He [plaintiff] had the undoubted right to select his debtor, to hold either the old firm or the new firm responsible to him for the fulfillment of the contract; but I know of no authority for the proposition that the respondent could hold his contract to have been made with both firms, or that having chosen to proceed against one of these firms for recovery of his debt he could thereafter treat the other firm as his debtor."[53]

When a "corporation by estoppel" incurs liability, there may be the same election by its creditors to treat the members as an association or as individuals. In *Clausen v. Head*,[54] an action was brought against defendants as partners. They had pretended to be a corporation, and had now assigned for creditors. Plaintiff had presented his claim to the assignee, but the assignee had disallowed it. The case squarely raised the question whether former action against the defendants had barred the plaintiff's suit. The court discussed the rights of the creditor in this way:

"He could proceed against the association outside of or in the assignment proceedings, as a corporation, or against the members thereof as partners. Having made an election between two courses with knowledge of the facts, he waived the one not chosen. . . . At best he had two remedies which were inconsistent, one against the corporation, and one against the members thereof. He was where he could take either of two roads, but not both. The roads reached out in different directions, so that to travel one necessarily required the abandonment of the other. . . . His situation was no better than that of a person who had dealt with another as principal, when such other is in fact the agent for third persons, such person can pursue either the ostensible or actual principal at his election, but not both."[55]

[53]For criticism of the decision see Ewart, Estoppel 516-518, 526-528; Burdick, Partnership, 3rd Ed., 71; Lindley, Partnership, 7th Ed., 78.

[54](1901) 110 Wis. 405, 85 N. W. 1028, 84 A. S. R. 933.

[55]The illustration is unfortunate, for there seem to be no cases that hold a third person barred, short of merger of the cause of action by judgment, Kingsley v. Davis, (1870) 104 Mass. 178; Wambaugh, Cases

Election Between Remedial Rights

"Election," we have seen, describes generically the act of choosing one of several rights or remedies. We have traced the effect of an election in two of the great categories, namely, between properties, and between substantive rights. We have found that election had significant legal effect only when the rights or properties to be chosen from were mutually inconsistent. The equitable doctrine of election requires one who accepts benefits under a deed or will, to conform to the entire intention expressed in the instrument and to abandon every right which would defeat its provisions. It is described briefly as the rule that in equity one cannot occupy two inconsistent positions. Similarly the principle of substantive election, as that one cannot affirm and disaffirm the same contract, rests upon the logic that a man cannot at different times insist on the truth of each of two inconsistent provisions. The third type of election now to be considered, is by definition though unfortunately not always by use, confined to procedural rights alone. It deals with the method of enforcing a determined right. The rule of election of remedies describes the legal effect of making a choice between remedial rights. Its effect, so all the authorities repeat, is to bar recourse to any inconsistent remedies.

An appreciation of this fact, that the rule of election of remedies is a matter of pleading, concerned with the adjective law and not with the substantive law, is a point of departure for a discrim-

on Agency 702; Priestly v. Fernie, (1865) 3 Hurl. & C. 977, Wambaugh, Cases 698; (contra, Beymer v. Bonsall, (1875) 79 Pa. 298, that even unsatisfied judgment was no bar to a subsequent action), by an election to regard either the agent or the undisclosed principal responsible, though there seems also to be no reason on principle why the doctrine should not apply. Merrill v. Kenyon, (1880) 48 Conn. 314, Wambaugh, Cases on Agency 720; Curtiss v. Williamson, (1874) L. R. 10 Q. B. 57, Wambaugh, Cases 713; Hutchinson v. Wheeler, (1862) 3 Allen (Mass.) 577, Wambaugh, Cases 725; Cobb v. Knapp, (1877) 71 N. Y. 348, 27 Am. Rep. 51, Wambaugh, Cases 726. Thus in Lindquist v. Dickson, (1906) 98 Minn. 369, 107 N. W. 958, an action to recover from defendant as an undisclosed principal on a contract made by her husband, as her agent, defendant pleaded in bar a prior judgment against the agent. The court adopted the rule of Kingsley v. Davis, supra, saying: "We therefore hold upon principle, and what seems to be the weight of judicial opinion, that: If a person contracts with another who is in fact an agent of an undisclosed principal, and, after learning all the facts, brings an action on the contract and recovers judgment against the agent, such judgment will be a bar to an action against the principal. But an unsatisfied judgment against the agent is not a bar to an action against the undisclosed principal when discovered, if the plaintiff was ignorant of the facts as to the agency when he prosecuted his action against the agent."

ination of the cases. That a vendee who has sued for breach of warranty in sale of a chattel, cannot afterwards rescind and sue for his money back is a clear proposition of law. But we have seen that it treats only of substantive rights. The vendee had an election to treat the contract as in force or to sue to annul it. That he cannot do both must be obvious. But it is not a case for an election of remedies. A true election of remedies arises only after the plaintiff has determined his substantive rights, and finds that he has two forms of action available to redress the identical wrong.

The extent of the rule, in its specific sense, is thus strictly limited. Only after subtracting the cases that involve a choice of substantive rights, can we discover the genuine cases of election of remedies. But even after such a subtraction, when all substantive rights are known to be determined, it is hornbook knowledge that in the great preponderance of cases a suitor may prosecute one or all of his remedies. "He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final."[56] Until satisfaction is had, in the absence of facts creating an equitable estoppel or merger by judgment, or bar by res adjudicata, it is axiomatic that pursuit of one remedy does not preclude resort to the others. The question is regularly dismissed with the statement that the remedies are analogous, consistent, and concurrent. Thus, "all consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedy."[57] Examples of this fact might be cited at will. Restitution proceedings and ejectment for land are cumulative remedies, and election of one does not bar the other.[58] Similarly, a creditor holding collateral security for his claim may prosecute simultaneously his actions on the principal and collateral obligations, e. g., on a promissory note and on the original debt,[59] on the property pledged or against the pledgor personally.[60] And one

[56]Dilley v. Simmons Nat. Bank, (1913) 108 Ark. 342, 158 S. W. 144.

[57]"No matter what right the party wronged may have of electing between remedies or of pursuing different defendants for the same cause of action, when he once obtains full satisfaction from one source, his cause of action ends, and he can assert it no further," McLendon v. Finch, (1908) 2 Ga. App. 421, 58 S. E. 690.

[58]McKinnon v. Johnson, (1910) 59 Fla. 332, 52 So. 288.

[59]Alexander v. Righter, (1912) 21 Pa. Dist. 842. Likewise on the debt of a partnership and the collateral note of a partner, Parsons Partnership, 4th Ed., sec. 89, page 95, note 1. Also Corn Exchange Ins. Co. v. Babcock, (1867) 8 Abb. Pa. (N.S.) 256.

[60]Ricks v. Johnson, (1917) 62 Okl. 125, 162 Pac. 476.

suing in assumpsit under a statute for damages from a fraud may after dismissal bring an action on the case for the same fraud.[61] Another clear instance is the case of a joint wrong. An action against a bank to recover stock or its value does not bar action against the defendant for false representations in obtaining the stock from the plaintiff.[62] All these are cases where the rule of election admittedly does not apply to co-existing remedies.

What then are the authentic cases in which courts have applied the rule of election to remedies? It must be already apparent that the possible residuum that must embrace every such case is fairly restricted. Even then, in view of the confident assertions to be found everywhere, the result revealed by a search of the cases is astonishing. It is said that "the doctrine of election is not restricted to any class of remedies. Thus a party may be required to elect between two or more actions ex contractu, or two or more ex delicto, or between remedies one or more of which belong to one class and one or more to the other or between remedies all equitable, or remedies one or more of which are equitable and the residue of legal cognizance."[63] But the results belie such extravagant statements. In the books there seem to be only two cases where the rule has ever in fact been applied to remedies. We shall set them out at some length, but without any analysis of their theoretical justification.

The most important case is the wrongful taking of a chattel. Originally the remedies of the plaintiff were confined to the writs of trover, trespass, and, in case the property remained in the possession of the wrongdoer, replevin. But in order to facilitate redress, the remedy of assumpsit was added. Dean Ames writes:[64] "It was decided accordingly in *Phillips v. Thompson*,[65] 1675, that assumpsit would not lie for the proceeds of a conversion. But in the following year the usurper of an office was charged in assumpsit for the profits of the office, no objection being taken to the form of action[66] . . . Assumpsit soon became concurrent with trover, where the goods had been sold.[67] Finally, under the influence of Lord Mansfield, the action was so much encouraged that it became almost the universal remedy where the defendant

[61]Mintz v. Jacob, (1910) 163 Mich. 280, 128 N. W. 211.
[62]Maxwell v. Martin ,(1909) 130 App. Div. 80, 114 N. Y. S. 349.
[63]20 Corpus Juris, sec. 6.
[64]Ames, Lectures Legal History 164.
[65]3 Lev. 191.
[66]Woodward v. Aston, (1616) 2 Mod. 95.
[67]Lamine v. Dorrell, (1705) Ld. Raym. 1216.

had received money which he was 'obliged by the ties of natural justice and equity to refund.' "[68]

Thus today it is well settled that the owner may sue in tort for the value or in assumpsit for the price. And while a replevin action is not barred by an action in trover which has not gone to judgment, it is equally well settled that the rule is to the contrary, when either action is on implied contract. A non-suit in trover would not prevent replevin any more than a non-suit in account would prevent debt. But when the suit is in assumpsit, the rule is different. Thus in *Thompson v. Howard,*[69] plaintiff sued in tort for enticement of his minor son into the service of the defendant. The defendant pleaded a prior action in assumpsit for the value of the boy's services, which had been discontinued by disagreement of the jury. It was held that the plaintiff was barred. "The election involved in the first suit precluded the plaintiff from maintaining this action for the wrong." Though the plaintiff could have brought another action in assumpsit, he could no longer sue in tort. Even when the defendants are joint tort feasors by joinder in the conversion, the result is the same. In *Terry v. Munger,*[70] it was held that an unsatisfied judgment against one of two joint tort feasors, obtained in an action in assumpsit, was a bar to an action in trover against the other tort feasor. But on this point there is authority to the contrary.[71]

The other instance is that of election between an action in assumpsit for rents and profits, and action in ejectment coupled with damages for mesne profits, in case of a cotenancy. A and B are tenants in common of an estate. A takes the whole of the rents and profits, though B is entitled to a moiety. At common law no action would lie unless A had been appointed bailiff by B.[72] But by early statute in England[73] an action of account was provided, as though A were in fact bailiff. The statute was held to

[68]Jacob v. Allen, (1703) 1 Salk. 27; Longchamp v. Kenney, (1779) 1 Doug. 137; Hambly v. Trott, (1776) 1 Cowp. 371 (375); Addison, Torts 33.

[69](1875) 31 Mich. 312 Acc. Nield v. Burton (1882) 49 Mich. 53, where the suit in assumpsit failed because the court did not have jurisdiction.

[70](1890) 121 N. Y. 161, 24 N. E. 272, 18 A. S. R. 803, 8 L. R. A. 216.

[71]Huffman v. Hughlett, (1883) 11 Lea (Tenn.) 549; Kirkman v. Phillips' Heirs, (1871) 7 Heisk. (Tenn.) 222; Cohen v. Goldman, (1878) 43 N. Y. Super. Ct. 436.

[72] Co. Lit. 172a, 200b; Wheeler v. Horne, (1740) Willes 208; Bac. Abr. Joint-tenants, (L) Vol. IV, p. 517 (7th Ed.), Dane's Abr. Ch. 8, Art. 3, Sec. 13; Vin. Abr., Joint-tenants (R a. pl. 14). See Hurley v. Lamoreaux, (1882) 29 Minn. 138, 12 N. W. 447.

[73]4 & 5 Anne, c. 16, sec. 27.

be a part of the common law of Massachusetts.[74] B need only allege and prove his tenancy, and that A has received more than his just share. Where the action of account at law is obsolete or abolished, indebitatus assumpsit in the same case undoubtedly lies. But suppose B sued in ejectment or by real action instead, and recovered judgment on his title and possession. He could then recover the profits for the intermediate time in an action of trespass, but his remedy in assumpsit would be gone.[75]

(To be continued)

[74]Brigham v. Eveleth, (1813) 9 Mass. 538; Jones v. Harraden, (1813) 9 Mass. 540 N.

[75]Munroe v. Luke, (1840) 1 Met. 459; Bigelow, Estoppel 718.