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Election of Remedies

Amos S. Deinard

Benedict S. Deinard

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By Amos S. Deinard and Benedict S. Deinard

In Minnesota

THE foregoing, we believe, are the only authentic cases of election between remedies.[16] They stand as the only, isolated applications of the rule. In relation to them, this rule bears no necessary kinship to the doctrines of election between properties, or between substantive rights, which rest upon settled principles of equitable jurisprudence and of the substantive law. Its acceptance could not support, nor its rejection endanger the validity of those doctrines. As we shall later submit, those doctrines lend

*Continued from 6 Minnesota Law Review 362.

[16]Although no other cases have been found *at law*, there should be mentioned a *rule of bankruptcy administration* which prevailed for some time in England until abolished by statute in 1869, except when its obligations are all incurred in the same transaction. A creditor holding a joint and several obligation or security of a partnership was not allowed to prove against both the joint estate of the firm and the separate estate of the partners, but was required to elect against which estate he would go. The rule was established by Lord Talbot in Ex Parte Rowlandson, (1735) 3 P. Wms. 405. "His Lordship held, that as at law, when A and B are bound jointly and severally to J. S. if J. S. sues A and B severally, he cannot sue them jointly, and, on the contrary, if he sues them jointly, he cannot sue them severally, but the one action may be pleaded in abatement of the other; so, by the same reason, the petitioner in the present case ought to be put to his election, under which of the two commissions he would come." This decision settled an arbitrary rule for double mercantile specialties as well, where it was confessedly in violation of the rule of law. Lord Eldon in Ex Parte Bevan, (1804) 10 Ves. 106 (109), said: "The principle seems obvious; yet in bankruptcy for some reason, not very intelligible, it has been said, the creditor shall not have the benefit of the caution he has used. I never could see, why a creditor, having both a joint and a several security, should not go against both estates. But it is settled, that he must elect." In Ex Parte Moult, (1832) Montague's Cases, 321 (337), Sir A. Pell said: "Does the rule correspond with the law? It is admitted it does not. We are, therefore, called upon to give our assent to an arbitrary doctrine, not founded on law or justice."

The rule must therefore be regarded as only an anomalous rule of administration, with no satisfactory legal basis. It was repudiated in the United States in In The Matter of Peter Farnum, (1843) 6 Boston Law Rep. 21, Ames, Cases on Partnership 356, where Sprague J. said as to the right of double proof: "This right, founded both in law and justice, I do not think myself bound or authorized to set aside on account of an arbitrary rule, justly reprobated by the most eminent judges and jurists in England, and never recognized in this country." For a citation of the cases, see Ames, Cases on Partnership 348 N., 359 N. See Collyer, Partnership (1832) 549-554, for the rule prior to its abrogation by statute in England. See also Collyer, Partnership, 6th Ed. Wood's Notes, Sec. 932.

only analogical argument for its validity. But as an independent rule, it would appear to be explicitly and unqualifiedly accepted in the decisions of the supreme court of Minnesota.

"The rule is as undoubted as it is familiar that, where a party has inconsistent rights or remedies, he may claim or resort to one or the other at his election, and that once made his election is irrevocable."[77]

"The doctrine of election of remedies is well settled in this state and is to the effect following: where a party has a right to choose one of two or more appropriate, but inconsistent, remedies and with full knowledge of all the facts and his rights makes a deliberate choice of one of them, he is bound by his election, and is estopped[78] from again electing and resorting to the other remedy."[79]

These quotations are taken from the numerous dicta of the court, and fairly express its avowed attitude. What the cases in reality decide, it is our task to ascertain.

In Dunnell's Digest, under the title "Election of Remedies," the subject matter is classified under the following heads: Definition; Distinguished from Estoppel; Necessity; Forms of Action at Common Law; Finality of Election.[80] Here are annotated some twenty-five decisions of the Minnesota supreme court. In the Supplement of 1916 seven cases are added.[81] From 1916 to date an equal number of cases is to be found similarly indexed in the state reports. One would surely suppose that a rule of such simple operation was now well settled. We shall endeavor to analyze all the cases mentioned in terms of the previous discussion, to ascertain what the cases have precisely held, beyond the stock generalities repeated as prefatory to most of them.

It is necessary as a preliminary consideration to notice those cases where the court has stated that the rule of election of remedies applied, but where in fact on analysis, the rule could not possibly operate since no election of any sort was involved.

The simplest case is that of submission to the power of a court in spite of a jurisdictional defect, in order to be able to come into court and have the litigation decided on its merits. This was the situation in *Rheiner v. Union Depot*,[82] after a railway

[77]Per Mitchell J., In re Van Norman, (1889) 41 Minn. 494, 43 N. W. 334.

[78]The court uses "estopped" only in the non-technical sense of barred.

[79]Aho v. Republic Iron & Steel Co., (1908) 104 Minn. 322, 116 N. W. 590.

[80]I Dunnell's Digest, sec. 2910-2914.

[81]Dunnell's Digest, Suppl. 1916, sec. 2910, 2914, 2914a.

company had petitioned for condemnation of plaintiff's property. The proceedings instituted on the petition were defective for lack of jurisdiction of the person of the plaintiff. Plaintiff, however, appealed from the decision of condemnation, and thereby discarded the objection he might have raised to the jurisdiction of the tribunal. Later plaintiff brought action to restrain defendant from occupying his land. The court held that the remedy sought was inconsistent with his former appeal, and that he was thereby barred.

"At the time when plaintiff appealed from the award of the Commissioner, two courses lay before him, either one of which he might pursue. As yet, the proceedings having been without jurisdiction as to himself, he might seek relief on that ground; or, the jurisdictional defects being such that he might waive them, he might disregard them and accept the award; or, if that was deemed inadequate, appeal to the district court. Having chosen the latter course, he is precluded by his own election from availing himself of the former. . . . The two remedies are inconsistent. Having made his election between them, and having waived the defects for the purpose of securing what benefit he might in a reassessment of his damages before the court and jury on appeal, he is precluded thereby, and cannot now be allowed to recall his waiver, and make again invalid what his own acquiescence had rendered valid."

It will be noted that the court, rested its decision equally on a waiver and an election. It is submitted that the case really depends on neither. Since the procedure of condemnation was defective, the court did not acquire jurisdiction over the plaintiff, unless he consented and chose thereby to confer that jurisdiction which the court hitherto lacked. When he consented and the court acquired jurisdiction, plaintiff surrendered his defense on that ground. Appeal to the district court was simply conclusive as to his consent. He did not elect between his remedies, for he had only one, and he surrendered that one by consenting to the irregular proceeding. If by "waiver" the court meant only a failure to raise an available defense to the action, and by "election" a determination so to "waive," the language of the opinion is wholly inadequate and obscures the ratio decidendi of the case.

A case that is just as clearly distinguishable from cases involving an election of remedies is *Wright v. Robinson*.[82] The court had appointed B receiver of the property of A. C, a judgment creditor of A, caused a levy to be made on a portion of the prop-

[82](1883) 31 Minn. 289, 17 N. W. 623.
[83](1900) 79 Minn. 272, 82 N. W. 632.

erty in the hands of B. On motion of B, the court made an order restraining C from levying, but providing for retention by B, who was to sell the property, of sufficient money from the sale to satisfy the execution, awaiting any steps C might take to protect his rights. C availed himself of this part of the order, and sued B to recover the money. Later C appealed from the order. B was holding the money pending determination of the suit against him. C's appeal was dismissed. The court based its decision on the ground that:

"The creditor had an election of inconsistent remedies. It could appeal, and thus have its rights determined as against the receiver; or could do what it did do,—institute the action to determine whether or not it was entitled to the money. . . . It could not do both. . . . As soon as the choice was made, and one of these alternative remedies proffered by the law, adopted, the act operated as a final and absolute bar as regards the other."

The appellant here is presented as acting under an interlocutory order in receivership proceedings by taking advantage of the rights secured to him by that order, and, pending action to determine those rights, attempting also to appeal from the order. The grounds of appeal are his right to levy upon and take immediate possession of the property, and the impropriety of remitting him to further action against the avails of the sale. The court in effect refuses to hear him as to the impropriety, for the reason that he has already debarred himself by taking advantage of the order. This refusal of the court is undoubtedly correct. There is abundant authority for the principle that one who takes the benefits of a judicial order cannot at the same time appeal from it; his conduct amounts to a release of errors, and he will not be heard to say that it was unjust.[*] But the mere fact that a litigant in a court of justice will not be allowed to acquire advantages by assuming inconsistent positions, in no way argues that it is a case for the application of the rule of election of remedies. It is true that remedies, it is always said, must be held inconsistent in order to require election between them. But there must always be the two remedies. The right of appeal is not a remedy for the alleged wrong; the only remedy is that against the receiver; the repugnancy resides in accepting and repudiating the identical remedy; because of this repugnancy the litigant forfeits his right to appeal by pursuing the remedy.

[*]Exhaustive note, 29 L. R. A. (N.S.) 1.

An unusual situation arose in *Pederson v. Christofferson.*[85] In that case, C, the natural daughter of the deceased, filed a petition in the probate court. The petition stated that the deceased had left an estate, and a last will and testament (as she was informed and believed), that she was the daughter of the deceased, and a legatee under the will, and set out the names of the other known heirs and legatees. The petition prayed that probate be granted to her. The will was in the possession of the probate court. On the day set, hearing was adjourned on application of the other heirs, to enable them to offer proof of the will and to file objections to granting letters to C. On the adjourned day, these heirs appeared in support of the will. C now filed objections to its allowance on the grounds of improper execution, lack of testamentary capacity, and undue influence. The court admitted the will to probate; C took an appeal to the district court; the heirs moved to dismiss the appeal on the ground that C had elected to take under the will, and was thereby barred from contesting it. The court found that the heirs were themselves estopped from raising the objection. The court thus avoided a decision as to whether in the absence of such estoppel of the heirs, C would have barred herself from contesting the will.

"Such being the case it is unnecessary to consider what the respective rights of the parties would have been if the proponents had seasonably asserted the claim that the contestant had elected to have the will probated and is therefore estopped from contesting it."

But the court did not hesitate to say that the situation facing C was one calling for an election of remedies.

"Briefly stated, the claim of the proponents is that the contestant was at liberty to institute proceedings for the probate of the will or to contest it, but she could not do both, and, having elected to institute proceedings for the probate of the will, she is estopped from changing her position. This presents the question of election of remedies, not an election under the will; for, if the will be valid the contestant would, upon its being probated, take as legatee although she may have contested the will."

It is submitted that this statement of the court is correct in only one point, that it is not the case of an election under a will. The doctrine of election under a will, as drawn probably from the civil law,[86] applied in Scotland, and later introduced into equity,

[85](1906) 97 Minn. 491, 106 N. W. 958.
[86]1 Sw. 396, 398; 2 Story, Equity Juris, sec. 1078, 1080 ff.

is limited to the case where a testator bequeaths property to A and directs A in turn to give certain of his own property to B. If A accepts the bequest he must surrender his property; if he refuses to surrender he renounces the bequest. A must take his choice: therein lies his election.[87] That is all of the doctrine. Obviously it does not apply to the instant case.

Just as clearly there is no choice between substantive rights. For it is admitted that if C is in fact named as legatee in the will, she must be allowed to take whether she propounds or contests it. Participation in the proceedings for probate is not relevant to the question of her rights as legatee. What she demands, and what the heirs deny her, is only a locus standi in court to take part in the contest. The inherent vice in her assertion is that she has previously taken a wholly inconsistent position in propounding the will. It may well be as the court intimates, though the proposition is certainly doubtful, that C has forfeited her right because of this inconsistency. Some support may be found in the decision that a creditor acquiescing by any significant act in a general assignment is debarred from attacking it.[88] Still as in the case of *Wright v. Robinson*,[89] there was only one remedy available to C: the question at issue is whether that remedy remains to her. There is no basis for any estoppel: C makes no representation by filing her petition; the heirs are neither misled nor damaged by it. At worst, C has played various roles. The false assumption that anything smacking of contradictory attitudes

[87]The earlier dicta on the point of forfeiture were later repudiated, and the doctrine authoritatively declared as follows: that if A refuse to give up the property, of which the testator had assumed to dispose, he did not absolutely forfeit the bequest, but was only obliged to compensate B for his disappointment, and equity would sequester the bequest for that purpose. But this rule of compensation applies only where the election is to take against the will, not where the election is to take under it. See the learned annotation to the case of Gretton v. Haward, (1818) 1 Sw. 409, 433; Ker v. Wauchope (1819) 1 Bli. [25], for Lord Eldon's statement of the doctrine; Van Dyke's Appeal, (1869) 60 Pa. St. 481: but contra, Sugden, Powers, 8th Ed. sec. 576. That where the legatee has no assignable interest in the property with which the testator professes to deal there can be no election, see re Lord Chesham, (1886) 31 Ch. Div. 466, 54 L. T. 154, 55 L. J. Ch. 401, per Chitty J. The English cases are fully considered in Jarman, Wills, 6th English Ed., 531-557.

[88]Rapalee v. Stewart, (1863) 27 N. Y. 310. Acc., that a creditor accepting under a general assignment as a valid trust for creditors cannot afterwards petition the assignor into bankruptcy, by reason of the inconsistency, although if others petition the assignor into bankruptcy, he may share in the estate, In Re Romanow, (1899) 92 Fed. 510, Williston, Cases in Bankruptcy 114.

[89](1909) 79 Minn. 272, 82 N. W. 632.

must be a case for the application of the rule of election of remedies forces the court to the laborious creation of a counter-estoppel of dubious validity—erecting one straw man to destroy another.

The rule of election of remedies, by definition, applies only when remedies are inconsistent with each other. There are many cases of alternative remedies for the same cause of action, which are analogous and concurrent, and involve no inconsistency. Thus trespass, trover and replevin all proceed upon the ground of continued ownership in the plaintiff, and may be brought for the same wrong. And at common law either covenant or debt would lie for breach of an agreement under seal.[90] An action for malicious trespass in seizing plaintiff's goods under an execution against a stranger is not inconsistent with a replevin suit to recover the goods.[91] The cases might be multiplied indefinitely. But when action is once pursued to satisfaction in one form of action, the plaintiff cannot avail himself of suit by any other remedy. For satisfaction discharges the cause of action and operates as a bar. The rule is the same where there are several defendants, even when each remedy is available against one defendant alone. Thus if the defendant against whom judgment has been recovered and satisfied was one of joint tort-feasors, his associates are no longer answerable. Where the parties are not equally responsible, as in cases of insurance and guaranty, discharge of one by satisfaction also discharges the others. But where the party secondarily liable has satisfied a judgment against him, the party primarily liable is still answerable to him, on the familiar principles of subrogation.

In *Carlson v. Minneapolis Street Ry. Co.*,[92] a scavenger in the employ of plaintiff was killed in a collision with defendant's streetcar. The state Workmen's Compensation Act had added to the common law remedy (or actionable negligence in case of injury, or under Lord Campbell's Act in case of death) a statutory remedy against the employer for compensation. Though the court said that "if he elects to pursue the former remedy, he waives the latter," what is really meant is that he can be satisfied only once, for the court quoted and approved the following statement:

[90]For a nonsuit on an action on account is no bar to an action of debt, Co. Lit. 146.

[91]Crockett v. Miller, (1901) 112 Fed. 729, 50 C. C. A. 447.

[92](1919) 143 Minn. 129, 173 N. W. 405.

"It is conceded, as the fact is, that, in case of an employee, in the course of his employment, being injured by the actionable negligence of a third person, a statutory remedy accrues to him for compensation, against his employer and a common law remedy against such third person though he can (not) have but one satisfaction."[33]

Just as the plaintiff will not be allowed to harass the defendant on a cause of action which has been discharged by satisfaction, so by the operation of the rule of res adjudicata, he will not be permitted to sue in an action when the issues involved have been fully tried and decided against him in a prior suit. The entire doctrine of conclusiveness of judgment depends upon adherence to this salutary rule. If B thinks he has a cause of action against A for the wrongful taking of his chattel he may declare in assumpsit or in trover. If he sues in trover, and on the trial it appears that the chattel in fact belonged to A, and judgment is thereupon given for A, B can never make use of his alternative action in assumpsit. But this is not because the rule of election of remedies operates against him, but because in one action it has appeared that he could have no rights in any action. The issue in suit is res adjudicata.

Nothing more is necessary to understand the case of *Thomas v. Joslin*,[34] constantly cited as a leading case for the rule of election of remedies. Plaintiff in a former action had sued for specific performance of a land contract, but had been defeated on the merits. The issuable fact was the authority of the defendant's agent, who had contracted with the plaintiff. In form the contract was to convey the land free and clear; in fact, the court had found that to the plaintiff's knowledge, and necessarily therefore as part of the agreement, the contract was to be subject to a prior lease. Now, in an action to reform the contract (into a contract to convey free and clear) and to enforce it as reformed, defendant plead the former judgment as a bar. The court upheld the plea. The substance of the controversy was the extent of the authority of the defendant's agent. Since the first case was allowed to go to trial on the merits, the evidence disclosed that the agent's authority was inadequate to make the kind of contract that plaintiff needed to establish. Therefore the matter was

[33]McGarvey v. Independent Oil & Grease Co., (1914) 156 Wis. 580, 146 N. W. 895.

[34](1886) 36 Minn. 1, 29 N. W. 344, 1 A. S. R. 624 and N. 626.

res adjudicata. For the new issue, though different in form, was merely incidental to the identical right.

"Plaintiff elected to bring his action upon the contract in its imperfect form and proceeded to trial and judgment thereon. There was, however, in fact but one contract between the parties, and but one claim or right upon which to base a recovery, though it may not have been fully evidenced by the writing. This claim has once been litigated, and, as defendants contend, finally."

The court, however, intimated, though it did not expressly say, that the matter was also one for the rule of election of remedies. "We are unable to see, however, why the matter should not be held to be res adjudicata, and the plaintiff bound by his election." In a later case, counsel relied upon this intimation to contest an action to reform a policy of insurance and recover upon it as reformed,[85] on the ground that plaintiffs had previously commenced an action to recover upon the policy, though they had taken a dismissal without prejudice and before submission on the merits. The court in considering the plea stated:

"The doctrine of election as between inconsistent remedies is relied upon. . . If such were the case, the proper remedy having been misconceived merely by reason of the failure of the plaintiffs to correctly apprehend the legal construction of the written instrument . . . and that action having been dismissed without determination on the merits, the plaintiffs were not precluded from maintaining this action. In *Thomas v. Joslin* the former action had proceeded to a judgment for the defendant on the merits."

The court therefore denied the plea. There had been no determination of the issues in the previous action; the remedies were not inconsistent; there was no reason why the plaintiff should be concluded in his legal rights.

[85]Spurr v. Home Ins. Co., (1889) 40 Minn. 424, 42 N. W. 206. In Eder v. Fink, (1920) 147 Minn. 438, 180 N. W. 542, the court reviewed the two cases. It held that a judgment for defendant in an action to charge him as indorser barred further action for reformation of the indorsement. "He elected to pursue the former course. . . . He is bound by an election made under such circumstances."

A simple example of the application of the rule of res adjudicata, mis-cited as a case of election of remedies, is the case of Middlestadt v. City of Minneapolis, (1920) 147 Minn. 186, 179 N. W. 890. An attorney has a statutory lien for his services, and if the parties settle before trial, he may enforce his lien either by intervening in the original action, or by bringing an independent action against the defendant. Where an attorney so intervened, and on motion it was found that he had surrendered his lien, he could not thereafter resort to an independent action. For authority in a somewhat similar situation see Leigh v. Laughlin, (1906) 130 Ill. App. 530, where plaintiff was not allowed to resort to replevin of the fee bill after the question has been determined against him on

Summary. The six cases we have so far considered are regarded as the most authoritative statements of the rule of election of remedies in Minnesota. We have seen on analysis, however, that none of them involved a true election of any sort, and are easily disposable on accepted principles. We shall next consider another group of cases where an election actually operated, in order to determine whether in the light of our preliminary discussion such election is properly referable to the substantive or to the adjective law.

In *Kraus v. Thompson*,[95] plaintiffs had sold furniture, and recovered judgment by confession for the purchase price. Later, when they discovered that a fraud had been perpetrated on them, they rescinded the sale. In an action to recover the property, the trial judge excluded all evidence of rescission, charging the jury that rescission was impossible after judgment for the purchase price had been entered. The appeal presented the question of the correctness of the charge.

The case clearly involved an election between substantive rights. That the vendor had once elected to regard the sale as in force was admitted. The controversy was as to its conclusiveness. Judge Mitchell stated the issue as follows:

"Does the fact that a vendor of goods, in ignorance of fraud on the part of his vendee sufficient to authorize a rescission of the sale, has obtained judgment against his vendee for the purchase price of the goods, amount to an affirmance or ratification of the contract of sale, so as to preclude him from subsequently rescinding, upon discovery of the fraud?"

The court rightly held that it did not.

"Any act of ratification of the contract, after knowledge of the facts authorizing rescission, amounts to an affirmance and terminates the right to rescind; but, if done before such knowledge, it will have no such effect. And, in our opinion, the act of obtaining judgment against the vendee for the purchase price stands in that respect on the same footing as any other act recognizing the existence of the contract of sale and must be governed by the same rules."

The point of interest for us in the case is the last remark of the court, that the exercise of a remedial right here was of consequence only as the equivalent of any extra-judicial act of affirmance, and had no other elective operation. With the problem of

motion to retax costs. As to what matters are concluded by judgment see Southworth v. Rosendahl, (1916) 133 Minn. 447, 158 N. W. 717.

[95](1882) 30 Minn. 64, 14 N. W. 266.

election in ignorance of substantive rights, this inquiry is not concerned.

Raymond v. Kahn[97] was an action of replevin by a conditional vendor to recover machinery sold. It suffices to quote from the decision:

"It is thoroughly well settled in this state, that after retaking or recovering the property under a contract of this kind for a default of the buyer, the seller cannot thereafter maintain an action to recover a balance due on the purchase price, or on notes given therefor. The seller has the election (1) to reclaim the property; (2) to treat the sale as absolute and sue to recover the debt; (3) to bring an action to foreclose his lien. But the assertion of either right is the abandonment of the other."

A somewhat different application of the same doctrines of substantive election was involved in *Bauer v. O'Brien Land Co.*[98] The defrauded party in an exchange of farms sued for rescission and restitution. He had upon discovering the fraud offered to rescind, and had tendered a reconveyance of the land deeded to him; but his offer had been spurned. The defense was predicated on the contention that the plaintiff had an adequate remedy at law for damages, and should be remitted to it. The court answered the contention in this way:

"It is true that, where a defrauded party has rescinded by his own act, he may sue at law and recover his damages to the value of what he parted with. But that does not mean that, where his offer of rescission had been spurned, he may not pursue his remedy in equity. His unaccepted tender of rescission did not destroy the equitable remedy."

Defiel v. Rosenberg[99] contains only a further discussion of the rights of substantive election of a person induced to enter into a contract by fraud, upon discovery of the fraud, where the contract has been fully executed, remains wholly executory, or has been only partially performed.

Hoidale v. Cooley[100] is a case of ratification. McGinnis, an insurance agent, delivered life insurance policies to the defendant. His instructions had been to deliver them only on receipt of the first premium in cash; but he disobeyed instructions and took two notes of defendant indorsed in blank. After maturity he transferred them to plaintiff. Plaintiff sued on the notes. The in-

[97](1914) 124 Minn. 426, 145 N. W. 164.
[98](1919) 144 Minn. 130, 174 N. W. 736.
[99](1919) 144 Minn. 166, 174 N. W. 838.
[100](1919) 143 Minn. 430, 174 N. W. 413.

surance company intervened, claiming the notes. The court indicated intervenor's rights in the situation as follows:

"When intervenor learned that McGinnis had disobeyed instructions, and had delivered the policies, and taken the notes, three courses were open to it: first, it might repudiate his act and demand a return of the policies. It did not do this. It chose to have the policies in force. Second, it might charge McGinnis with its proportion of the premiums, in which event the notes would belong to McGinnis. [The court found it did not do this.] . . Third, it might ratify McGinnis' unauthorized act in taking the notes and demand delivery of the notes to it. This, the court found, intervenor did do."

The election was of a course of action to determine its substantive rights.

In *Johnson v. Johnson*,[101] the defendant, a tenant at will, held over after notice of termination of the lease; the landlord then recovered possession by action under the forcible entry and detainer statute. Later he brought action to recover rent for the period of occupancy after notice of termination. His claim depended on the existence of the conventional relation of landlord and tenant. The court found that the plaintiff had elected to treat the defendant as a trespasser, and not as a tenant.

"We are of the opinion that, when a landlord has the right of election, and may treat the tenant as a trespasser or as a tenant holding over, the exercise of that right is conclusive against him, and that thereafter he cannot impose new terms upon the tenant without his consent."

The conduct of the plaintiff was thus correctly treated as an election between his substantive rights of continuation or termination of contractual relations. Since the tenancy was at will, the plaintiff had at any time the right to terminate it or allow it to continue; but once he had chosen the former course, there was only one remedy open to him—to have his tenant ejected. Therefore, it became impossible for him to sue for rent without proof of subsequent acceptance of a new tenancy on defendant's part. There is no confusion here of the rule of election of remedies.

Assuming for the sake of hypothesis that a situation does exist where the substantive rights of a litigant are determined, and several remedies are available to enforce the same right on the same state of facts, it has always been repeated that the rule of election of remedies can have no operation unless the available

[101] (1895) 62 Minn., 302, 64 N. W. 905.

remedies are mutually inconsistent. If the remedies are not inconsistent, but are alternative and complementary, or otherwise so reconcilable that the law will not regard the assumption of one "position" as a repudiation of the others, then the situation does not warrant invoking the rule. As may be noticed, there is implied here an illicit translation of the problem from terms of remedial rights, which might appear inherently inconsistent, into terms of "positions" assumed in order to maintain such rights. This is traceable to the doctrine of "theories and action" underlying the plaintiff's case, which the courts read into the general provisions of the code abolishing forms of action and providing for one civil suit. How far this doctrine has in fact perpetuated the old distinctions between actions at law and suits in equity, and between actions in tort and in contract will be discussed at a later point.

The first case in Minnesota which raised the question whether the remedies available were to be regarded as so inconsistent as to require application of the rule of election of remedies was that of *Barnes v. Hekla Fire Ins. Co.*[102] In that case a property owner sued insurance company "A" for the amount of a policy of fire insurance on a loss covered by it. For defense, company "A" alleged that, after the date of the policy, insurance company "B" had reinsured the property, and had agreed with plaintiff and company "A" that it would pay plaintiff any loss she might suffer under the policy; that thereafter, but before this suit, company "B" had become insolvent and assigned for creditors under the state Insolvent Law, and that plaintiff had filed and proved her claim in the insolvency proceeding against it for payment. Plaintiff demurred to the defense, and the trial court sustained the demurrer. On appeal the order was affirmed. The court held that, by proceeding against the estate of company "B," plaintiff did not relinquish her remedy against company "A" upon the policy in suit. In answer to defendant's assertion that "by electing to proceed against the estate of the German Insurance Co. (B) the plaintiff has effectually waived her remedy against the defendant," the court said:

"A creditor is put to an election only where his remedies are inconsistent, and not where they are consistent and concurrent. In the latter case, a party may prosecute as many as he has, as in the case of several debtors. And so, if, in this instance, the remedy against the insolvent company as respects the plaintiff, was merely

[102](1893) 56 Minn. 38, 57 N. W. 314.

cumulative, there is no reason why she may not pursue either or both."

Of course, the plaintiff could have but one satisfaction, and in case of concurrent actions, the court might interpose a stay if necessary to protect the defendants' rights.

Bell v. Mendenhall[102] is a similar case. A trust company assumed and covenanted to pay the debts of certain grantors of real estate in consideration of the grant. The creditors of the grantor brought suit on the covenant. The trust company defended on the ground that a prior judgment against the grantors had released it from its obligation. Execution on that judgment had been returned wholly unsatisfied. The court held that the trust company had become the principal debtor, and could be sued on its promise to pay the claims. The prior action against the grantors in no way prejudiced its rights.

"Its original and separate promise to pay the debt remained intact until the plaintiff obtains satisfaction of the debt. . . The plaintiff may maintain a separate action upon each promise at the same or different times, for such remedies are consistent and concurrent."

From the definition of election it is also necessarily implied that two remedies must in fact coexist. Otherwise, choice is impossible. This necessity seems to be recognized in all the cases applying the rule of election of remedies. If by mistake of fact or law plaintiff pursues a remedy that is really not available to him, his rights cannot be concluded or prejudiced by such suit.[104] We shall now consider the cases decided upon that point. It will not be necessary to point out which are substantive elections and which elections of remedies, since this necessity must exist for elections generically.

The leading case in Minnesota is *In re Van Norman*.[105] Plaintiffs levied an attachment on the property of their debtors, the defendants. On the same day defendants executed an assignment of all their property under the state insolvent law for the benefit of creditors. Plaintiffs, contesting the validity of the assignment, refused to surrender the attached property to the assignee, but issued execution and sold the property to satisfy their judgment. The assignees then brought action for the value of the property,

[102](1898) 71 Minn. 331, 73 N. W. 1086.

[104]Fuller-Warren Co. v. Harter, (1901) 110 Wis. 80, 85 N. W. 698, 84 A. S. R. 867, 53 L. R. A. 603.

[105](1889) 41 Minn. 494, 43 N. W. 334.

and recovered judgment. Plaintiffs paid the judgment in full. Later plaintiffs presented their claim to assignee for allowance. The assignee disallowed the claim. It was held on appeal that plaintiffs were not debarred, but might present their claim for allowance and share in the benefits of the assignment. Judge Mitchell said:

"If appellants are debarred, it must be on the ground that they had elected to pursue an inconsistent remedy, or to claim an inconsistent right. . . But it seems to us that the doctrine of election between inconsistent rights or remedies has no application to the facts of this case. The appellants never in fact had any election of rights or remedies. Their action was a mere futile attempt to assert a right which they never possessed, in which they were defeated. "A mere attempt to pursue a remedy or claim a right to which a party is not entitled, and without obtaining any legal satisfaction therefrom, will not deprive him of the benefit of that which he had originally a right to resort to or claim; this proposition if sound, fully covers the case."

The cases following *In re Van Norman* will be found in the note.[106] The principle underlying them was well summarized in the latest of them. In *Kremer v. Lewis*,[107] plaintiff bought property on fraudulent inducements by defendant. The court said:

"These principles are well settled: One who has been induced to enter into a contract by the fraud of the other party, has the

[106]Marshall v. Gilman, (1892) 52 Minn. 88, 53 N. W. 811; Cumbey v. Ueland, (1898) 72 Minn. 453, 75 N. W. 727; Schrepfer v. Rockford Ins. Co., (1899) 77 Minn. 291, 79 N. W. 1005 (Under Minnesota standard policy of insurance against loss by fire, insured sued without entering into reference to arbitration, which was condition precedent to suit; was defeated; then offered to submit to reference, when Company in return refused; now insured sues again, *Held*, she might recover). See Christianson v. Norwich etc. Soc, (1901) 84 Minn. 526, 88 N. W. 16. Also Virtue v. Creamery Package Mfg. Co. (1913) 123 Minn. 17, 142 N. W. 930, 136 L. R. A 1915 B. 1179; Mohler v. Chamber of Commerce, (1915) 130 Minn. 288, 153 N. W. 617 (A sold and delivered wheat to B who resold to C. B could not pay; A sued C, but was defeated, since court found title had passed. Now A wishes to enforce his right to a lien for the debt on B's membership, according to the bylaws of the Chamber; lien allowed); Preston v. Cloquet Tie & Post Co., (1911) 114 Minn. 398, 131 N. W. 474, (conversion of timber) Freeman v. Fehr. (1916) 132 Minn. 384, 157 N. W. 587; Gunderson v. Halvorson, (1918) 140 Minn. 292, 168 N. W. 8 (unsuccessful suit for rescission by vendee under executory contract for sale of land. "The result is not a bar to a recovery for damages for the fraud if any was committed by the defendant. It will be within the discretion of the court below, after the cause has been remanded to grant an amendment of the complaint and to permit the action to proceed as one for damages for the alleged fraud." Also Piper v. Sawyer, (1899) 78 Minn. 221, 80 N. W. 970. Aho v. Republic Iron & Steel Co., (1908) 104 Minn. 322, 116 N. W. 590, could have been rested on even a simpler basis, for the plaintiff sues in the case before the court in a quite different capacity than in the prior suit, and clearly could not be barred qua administratrix by a prior mistaken action qua beneficiary.

[107](1917) 137 Minn. 368, 163 N. W. 732.

choice of two remedies: He may stand on the contract, sue for damages in an action for deceit, or he may rescind the contract and recover what he has parted with. He cannot do both. A choice of one remedy is an abandonment of the other. The commencement of an action for rescission which fails, is no election, for, to constitute an election, there must be a real choice, that is, two courses must be really open to him, and from the fact that he has in some manner lost the right of rescission, it does not follow that his right to damages does not exist. . . Defendants can hardly contend now that the complaint [prior action in deceit] did state a cause of action. With this state of facts, we think the commencement of an action for damages on a complaint which stated no cause of action could not destroy the right of action to recover the purchase price paid which had already accrued to plaintiff by reason of a fully consummated rescission, and we find no authority for any such rule of law."

Critique of the Rule

Summary. The foregoing cases exhaust the list of cases decided under or cited in support of the supposed rule of election of remedies. However, as we have seen most of them are cases in which the matter has been discussed only for the purpose of eliminating it as a point raised in argument, on grounds equally valid in election of any type, namely, ignorance or mistake of fact or of rights, want of jurisdiction of the previous suit, premature action in the previous suit, etc. And those cases, which really hold the suitor concluded by his prior action are apparently, in the light of our discussion, cases of election between substantive rights, where the remedies could be spoken of as inconsistent only in the loose sense that they involved an unequivocal assertion of inconsistent rights. In general, actions which proceed on the theory that title to property is in the plaintiff are inconsistent with those which consider title as in the defendant. Actions based on the theory of affirmance of a contract are inconsistent with actions based on the theory of disaffirmance or rescission. Actions based on the theory that plaintiff has ratified an unauthorized transaction are inconsistent with actions based on the theory that plaintiff had repudiated the same transaction. But beyond these cases, all disposable on settled principles of substantive law without the necessity of adversion to any rule of election of remedies, there is not even a mention of the two authentic cases where in other jurisdictions it has been held that an election of one remedy, after rights were determined, concluded the suitor. Granted that

a plaintiff may "waive" his tort and sue in assumpsit, there is not even a dictum that either suit would bar the other. How this curious situation could have arisen, namely, constant reference to the rule in cases where it would be wholly inapplicable, without any reference to the two authentic instances of its operation, can be understood only in the light of the history and growth of implied assumpsit as a remedy for conversion, and of the origin of the rule of election of remedies in reference to it.

In 1676,[108] it was first held that assumpsit would lie for the proceeds of a conversion. This remedy was added to the older writs of trover, trespass, and replevin, in order to facilitate redress.

"The fiction of a promise invoked in the cases . . . was originally adopted simply for the purpose of pleading; the action of assumpsit which is in form and originally always was in fact, based on a promise, being the only remedy open to the plaintiff seeking to enforce a quasi-contractual obligation, and that the real ground of liability is the fact that it would be unjust if the defendant were not compelled, at the option of the plaintiff, to pay for value received. If such is the case, then the use of the fiction should cease with the necessity which gave rise to it; and when used it should be recognized as a fiction, and treated as a fact only for the purpose for which it was invented."[109]

But the English judges did not regard it in this way. In *Lamine v. Dorrell*,[110] in which the right to waive a tort and sue upon promises was first distinctly recognized, Powell J. said:

"It is clear the plaintiff might have maintained detinue or trover for the indentures, but the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money that they were sold for as money received to his use."

In this way the nature of the transaction was recast by a fiction of law in order to conform to the conventional allegations of an assumpsit. The fact that the property was tortiously taken from the plaintiff and was irrevocably lost to him, that he was suing only for damages, and that the form of his declaration could not make what was before tortious cease to be so, were all overlooked in the fanciful idea that the transaction was really one of sale, and that the form of action could thereby unequivocally determine affirmance or disaffirmance and change the substantive

[108] Phillips v. Thompson, 3 Lev. 191.
[109] Keener, Quasi-Contracts 211.
[110] (1705) Ld. Raym. 1216.

rights of the parties.[111] The apparent distinction between rights and remedies was entirely forgotten.

"Had not this almost self-evident proposition been lost sight of, because of the fiction of a promise involved in the action of indebitatus assumpsit when brought to enforce a right of action not resting on contract, much of the confusion in and conflict of decisions now existing would have been avoided."[112]

For instance in *Longchamp v. Kennedy*,[113] an action in assumpsit for the value of a ticket which the defendant refused to deliver to the owner, Lord Mansfield said:

"If the defendant sold the ticket and received the value of it, it was for the plaintiff's use, because the ticket was his. Now, as the defendant has not produced the ticket ,it is a fair presumption that he has sold it."

How conscientiously the common law judges regarded this fiction of the sale can only be understood by considering the technique that grew up in cases of conversion in determining the right to waive a tort and sue for the proceeds.[114] Originally the right was confined to cases where the wrongdoer had resold the chattel.

"Nevertheless, the value of the goods *consumed* was never recoverable in indebitatus assumpsit. There was a certain plausibility in the fiction by which money acquired as the fruit of misconduct was treated as money received to the use of the party wronged. But the difference between a sale and a tort was too radical to permit the use of assumpsit for goods sold and delivered where the defendant had wrongfully *consumed* the plaintiff's chattels."[115]

And today we find such statements as these:

"The bringing of the suit is nothing more than a ratification of the sale made by the wrongdoer, and the converting of him into the agent of the actual owner,"[116] in the face of the settled prohibition in the law of principal and agent against ratification of an undisclosed agency, and in clear contradiction to the parties' intent. Later, in the United States, application of the right of waiver was extended to cases where the wrongdoer put the chattels to his own beneficial use. Some states extend the right to "waive" to every case of conversion.[117] In general, recovery is

[111] 3 Alb. L. J. 141-143 (Judge T. M. Cooley).
[112] Keener, Quasi-Contracts 160.
[113] (1779) 1 Doug. 137.
[114] 3 Alb. L. J. 141.
[115] Ames, Lectures Legal History 165.
[116] 23 Cent. L. J. 534.
[117] The conflicting authorities are collected in 19 Yale L. J. 221 (A. L. Corbin); 23 Cent. L. J. 532, 556; 7 Encyc. Pl. and Pr. 368 ff; Bliss, Code Pleading, 2nd Ed., sec. 13

limited to the amount of the defendant's enrichment, not the value of the chattel. If the defendant has sold the property for immoral or illegal purpose, the owner cannot "waive" and recover the price, on the absurd theory that he would thereby participate in the illegality. Generally, the remedies of trover, trespass and replevin proceed on the same theory of continued title in the injured party. Therefore the analysis of "waiver" of action in trover applies as well to an action in trespass for damages, or replevin for the property in specie or satisfaction in damages.

It should be understood that any criticism of the fictional ratification of a conversion does not apply to cases of ratification of acts purported to be done on behalf of the party ratifying. In such case the bar is a result of a substantive election.

The enforcement of the rule in the case of an unjust enrichment of one of two cotenants, which we considered, is even more strained for the reason that both the actions available are founded on wholly fictitious allegations. In *Munroe v. Luke,*[118] Shaw, C. J. said of the artificial dilemma created by law:

"We think it arises out of the artificial rules and technical principles, upon which actions of ejectment and real actions at law proceed. To prosecute an action on contract, for rents and profits, whilst the plaintiff has treated the defendant as a wrongdoer would, as said by Mr. Justice Ashhurst, in *Birch v. Wright,* 1 T. R. 379, 'be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser, and that of a lawful tenant, during the same period.' The difficulty, therefore is a technical one."

In the action in assumpsit the defendant, though treated as a bailiff, is not a bailiff in fact but is a converter; in the action in ejectment, by the consent rule, the defendant admits ouster and disseisin of the plaintiff by the causual ejector, though in fact the allegations are understood to be wholly fictitious. Nevertheless, after suit in ejectment the plaintiff cannot allege seisin to give him title to claim rents and profits on a supposed contract.

That the new remedy of assumpsit was founded on a fictional transaction could not be objectionable as long as its only effect was to give an additional remedy said to be founded on a "waiver." There was no necessity for predicating the existence of the contract between the plaintiff and defendant any farther than was necessary to allow the writ to be framed in the language of assumpsit. That the existence of the contract would persevere

[118](1840) 1 Met. 459.

to defeat the plaintiff in a later action of tort is a further development. Until the suit in assumpsit was held to involve a position so inconsistent that its assertion negatived or repudiated the existence of the tortious act on which alone the plaintiff's right of recovery rested, the so-called rule of election of remedies was unknown.

The history of the rule is a matter for speculation. It has always been assumed to be of very ancient origin. Even at the earliest common law there were concurrent remedies and the litigant might take his choice. Says Coke: "If a man has several remedies for the same thing, he has an election to use which he pleases."[119] In *Folsom v. Carli*,[120] Judge Flandrau said:

"While the forms of action were in existence a party had what was called the right of election of actions. This right in the hands of a skilful pleader could be used to great advantage. There were many cases in which a plaintiff could declare in trespass, trover, or case according to the facts, or he might elect to waive the tort and declare in assumpsit. So in general a plaintiff could elect to declare either in assumpsit or debt. One of the most usual reasons in practice for adopting a form of action ex delicto, instead of declaring in assumpsit, was to cut off an apprehended off-set, which could be interposed to the latter but not to the former."

In a later case,[121] where plaintiff brought a common law action for damages from injuries sustained in the hold of the vessel, the court enumerated the remedies as follows:

"By virtue of the saving clause [in the Judicial Act of 1789] a party so aggrieved may (1) proceed in rem in admiralty if a maritime lien arises; (2) bring suit in personam in an admiralty jurisdiction; (3) resort to his remedy at law in a state court, or (4) in the United States court at law, if there are parties proper to give such jurisdiction."

Election of forum is often quite as important as election of form of action. But no statement of the finality of such an election can be found until most recent times. The first outspoken case in England was *Smith v. Baker*,[122] decided in 1873, in which it was said:

"But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort; and

[119] Co. Lit. 145a, cited in 3 Comyns' Dig., Title *Election*.
[120] (1861) 6 Minn. 420 (426).
[121] Lindstrom v. Mutual S. S. Co, (1916) 132 Minn. 328, 156 N. W. 669.
[122] (1873) L. R. 8 C. P. 350.

so the commencement of an action of trespass or trover is a conclusive election of the other way."

Mr. Hine has shown that all the dicta in the earlier cases refer to a choice between real and personal actions, and that the early authors found no inconsistency in actions "merely personal."[123] Thus in an early case[124] it was said that,

"Cases have been cited to show that where there are two different kinds of remedies, real and personal, or otherwise specifically distinguished, a man's election of one prevents him from using the other. He may distrain or bring assise; but not both, Litt. S. 588. May bring writ of annuity or distrein, S.219, and his election is determined even though he should not recover after he hath counted thereon. Co. Litt. 145, but where both remedies are merely real or merely personal then the election is not determined until the judgment on the merits."

This curious distinction between specific writs is well illustrated by the history of trespass and replevin. They were, Dean Ames says,

"Fundamentally distinct and usually exclusive actions. The one was brought against a disseisor; the other against the custodian. The former was a personal action, the latter a real action. Trespass presupposed the property in the defendant, whereas replevin assumed the property in the plaintiff, at the time of action brought."

To which Dean Ames adds in a note:

"Accordingly, even after replevin became concurrent with trespass, if a plaintiff had both writs pending at once for the same goods, the second writ was abated for the 'contrairiositie' of the supposal of the writs."[125]

The Minnesota court, assuming that the rule of election of remedies was fully accepted in its decisions, recognized its anomalous character. The court has been at pains to point out that the rule must be one sui generis, and cannot be assimilated to the accepted doctrines of equitable jurisprudence. Thus in *Pederson v. Christofferson*[126] the court said:

"The doctrine of election of remedies differs from that of estop-

[123]26 H. L. R. 716.

[124]Hitchin v. Campbell, (1771) 2 W. Bl. 827. Acc., "But where an Election is of several Remedies, if he chooses one, he may afterwards have the other in personal Cases; as, where he has Election of several Actions." 3 Comyns' Dig., Title *Election,* Co. Lit. 145a. And Chitty says: "The circumstances of a party having elected one of several remedies by action will not in general preclude him from abandoning such suit and after duly discontinuing it, he may adopt any other remedy" (Pleading 234).

[125]Ames, Disseisin of Chattels, 3 H. L. R. 23 (31). Lectures Legal History 172 (182).

[126](1906) 97 Minn. 491, 106 N. W. 958.

pel in its broadest sense in that the party invoking it need not show that he will suffer some material disadvantage unless his adversary be required to abide by his election."

Other courts and writers have been less keen in scenting the real basis of the rule. It is often mistaken for a special application of the principle of estoppel in pais on the ground that by the misrepresentation of the party electing the other suitor has been misled to his damage.[127] In this way the whole distinctiveness and vitality of the rule is entirely disregarded and lost. If really only a branch of estoppel, the cases decided upon it are unsupportable. If fully recognized, on the contrary, the rule goes far beyond estoppel, including cases where there has been no misrepresentation, where the other party has been in no way misled—in other words, where the familiar requisites of an estoppel in pais are most prominently absent.

Nor is election a matter of waiver, as is often assumed. "Waiver," as the term is commonly used by the courts involves a voluntary act of relinquishment of a right or privilege.[128] Now if A steals B's horse, B finds that he has a right of action for the wrong committed enforceable in two different ways. He may bring action in trover for the conversion, or in indebitatus assumpsit for the value. B does not as a matter of fact voluntarily relinquish the right to sue in one action by adopting the other. What really happens is that the law beforehand determines for B that he may have his choice between them, but that he cannot in any case exhaust one and then take up the other. "When to elect there is but one, 'tis Hobson's choice; take that or none." This is the simplest statement of the rule. It does not involve either a voluntary act or a real relinquishment: it is the inference of the law from the exercise of the right. "B had a right of election between two positions, and he chose one. He did not 'waive' or

[127] 19 Yale L. J. 221 (239); Bolton Mines Co. v. Stokes, (1895) 82 Md. 50, 33 Atl. 491, 31 L. R. A. 789.

[128] "Does anybody know what waiver is? I do not Some years ago I commenced a book upon waiver, wrote several hundred pages, and then observed that what I had done was to put all the waiver cases I had come across into four other departments of the law. I resolved to go no further with my book on waiver until I had found a specimen of the supposed genus. I have never yet seen one, and cannot imagine what it will be like if it ever be discovered. . . . If it has a religious aspect, I bow respectfully and cease my demands for definition; but if it be really bilateral, I believe that every supposed sample can be put in one of four well known and perfectly respectable categories: Release, Contract, Estoppel or Election." 12 Col. L. R. 619 (Ewart). See Dawson v. Shillock, (1882) 29 Minn. 189, 12 N. W. 526.

relinquish the other. He never had it. He had a choice, and he did not waive that. He exercised it."[129]

This discussion points out the penal operation of the rule. It is not invoked for the protection of the defendant against an unjustifiable injury as an estoppel is. It is not the result of an intentional abandonment, like a waiver. On the contrary, it imposes a special limitation on the plaintiff by restricting his means of redress for an admitted wrong, and allows the defendant a gratuitous advantage in case of its infraction. It inferentially operates in terrorem by imposing a duty on the plaintiff to choose his remedy well through requiring him to choose it irrevocably.

Its real basis is the notion of inconsistency between certain writs. B "waives" the tort by declaring in assumpsit only in this loose sense: that he has alternative actions and therefore by accepting one he discards the others.

"It is customary to say, that where goods are tortiously taken and sold the owner may 'waive' the tort and sustain an action in assumpsit for money had and received; but nobody would think of saying that the owner might 'waive' his action in assumpsit and bring an action in trespass.[130] The owner has a right to elect; he makes his election; he gives up—he 'waives' nothing."[131]

Thus the rule that the elector's choice must be irrevocable does not follow so simply as has been supposed: it results from the additional fact that the law says that the interpretation of the facts in each case is on an inconsistent theory. For in form by suing in assumpsit plaintiff asserts that property is no longer in himself but has passed to the defendant by a sale, and that he is suing for the purchase price. And the fiction of a sale is expanded into a reality of substance, so that the case appears to be one for the application of the general principle of election. In other words, the law stamps the remedial alternatives with the consequences of an affirmance or disaffirmance of a sale. Therefore, after suing in assumpsit and failing to recover, the plaintiff cannot resort to an action in trover according to this mysterious dogma of "inconsistency"—a description of the prohibition the law has laid upon him against being able to try his hand at various plays.[132]

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[129]Ewart, Waiver 138.

[130]But the court said just this in Smith v. Baker, (1873) L. R. 8 C. P. 350.

[131]Ewart, Waiver 7-8.

[132]Peters v. Bain, (1890) 133 U. S. 670, 10 S. C. R. 364, 33 L. Ed. 696.

In the most recent case before the Court of Appeal in England,[133] the statements of the judges as to the basis of the doctrine were hardly more critical. Although the case was really one of ratification, it was treated by Scrutton L. J. as an election of remedies. He said apologetically:

"It is not easy to see why this act of the owners should enure to benefit of the agents, who were not parties to the action for goods sold and delivered, and who have in noway altered their position in consequence of any election involved in bringing that action, but the principle is well established."

To support the profundity of the rule he referred to the well-known couplet:

"Thoughts too deep for tears subdue the court
When I assumpsit bring, and god-like waive a tort."[134]

Bankes introduced his argument by saying: "This is an attempt to blow hot and cold as Lord Esher used to say, or to approbate and reprobate in the language of others."

Now it must be plain that the plaintiff in "waiving" a conversion never in fact regards the transaction as a sale. It is true that after judgment in trover, by the early law,[135] and after judgment and satisfaction at the present time,[136] property in chattels passes to the defendant. But this is merely by operation of law. For one need only consider the possibility of the wrongdoer suing for breach of warranty of the chattels after suit against him in assumpsit and dismissal thereof, to appreciate that the sale is entirely fictitious. Concrete support for this belief may be found in the decision that a sheriff cannot have assumpsit, though he may have trover for conversion of goods in his custody.[137]

Thus we are returned ultimately to the original thesis of the substantive law that one cannot affirm and disaffirm the same transaction, and the doctrine of equity that one cannot claim inconsistent titles, and marvel at its translation into the field of adjective law. This is a classical statement of its significance:

"Allegans contraria non est audiendus. In translation of this maxim of the law Lord Kenyon said that a man shall not be per-

[133] Verschures Creameries Ld., v. Hull & Netherlands S. S. Co. Ld. [1921] 2 K. B. 608.

[134] The Circuiteers, an Eclogue, by J. L. Adolphus, 1 Law Quar. Rev. 232.

[135] Buckland v. Johnson, (1854) 15 C. B. 145.

[136] 28 Am. & Eng. Encyc. of Law 738; Elliott v. Hayden, (1870) 104 Mass. 180; Lovejoy v. Murray, (1865) 3 Wall. (U.S.) 1.

[137] Westervelt v. Jacquelin, (1835) Anth. (N.Y.) 2nd Ed., 320. See Moffat v. Wood, Seld. Notes (N.Y.) 186, that consignor cannot waive tort in case of conversion of chattels by consignee, who is factor for consignor.

mitted to blow hot and cold with reference to the same transaction, or insist at different times on the truth of each of two conflicting allegations, according to the prompting of his private interests. Broom, Leg. Max. 168."[138]

Assuming the validity of the prohibition, the application at common law when the forms of action were carefully distinguished, and special pleading was an art, was clear. There was little possibility of mistaking an action in contract for one in tort. But with the institution of code pleading,[139] and the introduction of one civil action in place of all the common law forms of action, it might have been expected that, along with the general merger of the separate actions the rule would be lost.

"In the case supposed, however, the implied promise is a fiction, and yet to allow it is well enough in a system abounding in fictions. It is not, however, in harmony with one from which fictitious averments are supposed to be excluded. Yet I do not find that the attention of the courts, in the states that have adopted the new system, has been called to the seeming inconsistency. The common law doctrine is still realized; the old phraseology, in the old sense, is still used by the courts; and I shall be compelled to treat the subject, in this regard, according to the view taken under the common law procedure."[140]

From the earlier cases, there has been insinuated into the science of code pleading the notion that the plaintiff must adopt a particular theory of his case, corresponding at least to the general common law distinction between delictual and contractual actions, and between actions at law and suits in equity, and must recover on the theory of action adopted.

How far the courts have thus defeated the purpose of the code makers to abolish the forms of action may be illustrated by a recent case in Minnesota.[141] A sold an ironer, on a contract of conditional sale reserving title, to B who conducted a restaurant. Before final payment A wrongfully removed the ironer for alleged default. B sued to recover damages for the wrongful taking. The trial court directed a verdict for A; B appealed. The court affirmed the direction. It was conceded that trover would

[138]Kaehler v. Dobberpuhl, (1884) 60 Wis. 256 (261), 18 N. W. 841.

[139]In 1851 in Minnesota. See 6 Minn. 425.

[140]Bliss, Code Pleading 2nd Ed. sec. 12. But see Downs v. Finnegan, (1894) 58 Minn. 112, 59 N. W. 981: "The right to waive the tort and to recover as on implied assumpsit is an exception to the principles of code pleading, and there must be no extension beyond what is allowed at common law."

[141]Reinkey v. Findley Electric Co., (1920) 147 Minn., 161, 180 N. W. 236. See, however, Tuder v. Short Line, etc, Co., (1915) 131 Minn. 317, 155 N. W. 209.

lie for the wrongful retaking of the property, and that in such action full money compensation could be recovered for actual damages, including humiliation. But in this case the complaint did not allege damages for a conversion. Therefore the action was to be regarded as one for breach of contract. And in such action no recovery for injured feelings may be had in Minnesota. The net result was that the action was taken as sounding in contract, because the prayer for relief seemed to indicate that plaintiff had adopted such a theory, and therefore an allegation of damages sufficient in any action for a conversion, was rendered wholly nugatory. Two judges dissented; they were willing to break through this vicious circle by simply finding that since there were facts sufficient for a conversion, and facts sufficient to show substantial damages, the mere form of the prayer for relief could not destroy the sufficiency of the complaint.

In a similar case, *Ash v. Childs Dining Hall*,[142] the Massachusetts court reversed a judgment for personal injury suffered from swallowing a tack in a piece of pie served by defendant. The sole ground of reversal was that the complaint after setting out the facts in full, contained a further allegation that "unmindful of its duty the defendant, by its servants and agents, carelessly and negligently permitted said nail to get into such pie." On the trial no evidence of negligence had been offered. Therefore, the court said, this allegation, superfluous to the plaintiff's rights, transformed a perfect contract action for breach of implied warranty into a tort action unsupportable for failure of proof.[143]

And so, although the whole genius of code pleading would seem to oppose the retention of a rule founded in outworn formulae, and granting unearned advantage, rather than a merited protection, we find the curious rule perpetuated in many decisions under the various codes.

In the famous case of *Terry v. Munger*[144] it was held that a judgment obtained in assumpsit against one of two joint tort-feasors, though unsatisfied, would bar suit in trover against the other tort-feasor for a wrongful conversion of the property. In a criticism of the case Professor Keener wrote:

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[142](1918) 231 Mass. 86, 120 N. E. 396.

[143]For criticism see 33 H. L. R. 240, (Scott A. W., Progress of Law, Civil Procedure).

[144](1890) 121 N. Y. 161, 24 N. E. 272, 18 A. S. R. 803, 8 L. R. A. 216.

"Now everyone knows that where one man tortiously takes the goods of another, there is no sale between those parties; and yet the highest court in the state of New York gravely asserts that there was. In other words a fiction to which it is no longer necessary in New York in order to give a remedy is there resorted to to deny a right: and the court says that there is no tort where but for the proof of a tort there could have been no recovery against anyone. The decision will probably never be cited as illustrating the maxim, in fictione juris subsistit equitas."[145]

The supreme court of Tennessee in a similiar case refused to adopt the reasoning accepted in *Terry v. Munger*, and held that the action in contract could not waive the tort, since the tort was the very foundation of the action.[146]

The courts have rather diffidently connected the rule with considerations of public policy. Most attractively stated, its justification thins down to the disciplinary policy that litigants shall not experiment with the remedies afforded by the law, bolstered up by the related argument that relaxation of the rule would impose a great and useless burden on the courts by the recklessness of suitors.[147]

Its real motive may more probably be found in the regrettable conception of the early common-law lawyers that a litigation is a sporting game between the parties, and that the favors should go to the most skillful player even though sometimes he may have the less deserving case.[148]

As to the alleged public policy underlying the rule, a critic of the rule, which he thinks is spurious, says:[149]

"If the policy to prevent trifling with justice, forbids a suitor who has two remedies to dismiss a suit for one and resort to the

[145]Keener Quasi-Contracts 212.

[146]Huffman v. Hughlett, (1883) 11 Lea (Tenn.) 549; Kirkman v. Phillips Heirs, (1871) 7 Heisk. (Tenn.) 222. Acc., Cohen v. Goldman, (1878) 43 N. Y. Super. Ct. 436. Cf. Edwards, Trustee v. Schillinger Bros. Co., (1910) 153 Ill. App. 219, (223).

[147]Peters v. Bain, (1890) 133 U. S. 670, 10 S. C. R. 354, 33 L. Ed. 696.

[148]"What Dean Wigmore has called the sporting theory of justice, the idea that judicial administration of justice is a game to be played to the bitter end, no doubt has its roots in Anglo-American character and is closely connected with the individualism of the common law. Yet it was fostered by the frontier attitude towards litigation and it has flourished chiefly in recent times in tribunals such as the Texas Court of Criminal Appeals, where the memory of the frontier is still green." Pound, The Spirit of the Common Law, 127. "Something of this spirit, which is the spirit of the strict law, may be recognized today in such doctrines as contributory negligence and assumption of risk and the exaggerations of contentious procedure which treats litigation as a game." Ibid, 146.

[149]Hine, Election of Remedies, a Criticism, 26 H. L. R. 707 (711).

other, notwithstanding the fact that no action has been taken by other persons in reliance on the suit first commenced, the same public policy should require a suitor who has one remedy, and who commences an action therefor, to prosecute that action to a conclusion or be forever barred; yet the law permits one to dismiss an action without prejudice and recommence a similar action.

"Furthermore the rule as to election of remedies does not apply unless the plaintiff actually has two inconsistent remedies;[150] but if we assume the principle underlying the rule to be that the time of the courts shall not be taken up with different suits against the same defendant based on the same state of facts, the plaintiff should be required in all cases to elect at his peril between inconsistent theories. It cannot be denied that a defendant suffers more by being compelled to defend successive suits prosecuted to final judgment by a plaintiff who in fact has but one available remedy, than he does by being sued twice by a plaintiff who had two available remedies but who abandoned one suit immediately after its commencement. More time of the courts, also, is wasted by the first suitor than by the second."

Conclusion. We have found that the rule of election of remedies has always been confined to two infrequent instances, and that fortunately the Minnesota supreme court is not committed by express decision to its acceptance. It is true that the court has often said, in the identical language of Coke,[151] that a person who has a choice of remedies may elect his remedy. This, however, goes no further than to allow a litigant, whose cause of action is enforceable through several remedies, whether cumulative or alternative, whether given by the common law or by statute, or by both, to adopt whichever remedy he wishes.[152] It in no way implies that after choice of one, the others are not also available Such an implication depends always on the deeper assumption that they proceed "from opposite and irreconcilable claims of right,' which we have seen applies properly only to the substantive law.

[150]Clark v. Heath, (1906) 101 Me. 530, 64 Atl. 913; Barnsdal v. Waltemeyer, (1905) 142 Fed. 415.

[151]Co. Lit. 145a, cited in 3 Comyns' Digest, Title Election.

[152]Bitzer v. Bobo, (1888) 39 Minn. 18, 38 N. W. 609. That the court cannot elect for the plaintiff against his wishes, see Cisewski v. Cisewski, (1915) 129 Minn. 284, 152 N. W. 642. Plaintiff sued to recover the trust res in its substituted form, but the trial court denied such relief and gave only a money judgment secured by lien. On appeal reversed. "It would seem fairly clear that plaintiff had the absolute right to choose his own remedy and that having elected to claim the property in its substituted form, the court was without power to deny him his relief and compel him to take a remedy that he did not elect. We know of no authority or principle that gives the court the right of election between remedies that belongs to a party especially when there has been a plain election by the party."

The court is not bound to such an assumption. The court in *Gregory v. Cale*,[153] was merely repeating the unimpeachable language of Coke. Defendant appealed from an order of execution authorizing levy for plaintiff on specified real estate, which had been exempt from bankruptcy proceedings under the state Homestead Law, but was still liable for debts contracted prior to the passage of the Homestead Law. The court said:

"The creditor has an election of remedies in situations like that here presented—that is, where property [which] is exempt from general debts, but liable for particular obligations, for instance, the purchase price, work, labor, and material furnished in its construction and repair; and he may proceed (1) in equity, setting forth in his complaint all the facts, and demand a lien upon the particular property; (2) he may proceed by attachment; or (3) by an ordinary action for the recovery of money. The same result follows either remedy, namely, the appropriation of the property charged with the payment of the debt. And it would seem in this state, where all forms and distinctions between law and equity are abolished, to be immaterial which method is pursued."

This right of choice was expressly recognized in case of conversion. In *Downs v. Finnegan*,[154] the defendant was allowed to "waive the tort" and present a claim in contract, in order to come within the counterclaim statute. Plaintiff had removed stone quarried on defendant's land, and had sold or used it beneficially. The court said:

"That in cases where property has been severed from real estate by a wrongdoer, carried from the freehold, and converted to his own use, the rightful owner may sue and recover its value as on implied contract, is thoroughly established, although it may not be in harmony with the principles of the reformed system of pleading. . . . It being established that an injured party may [so] elect between the two forms of remedial proceedings—may sue in tort for the wrong done him, or in assumpsit as upon an implied contract,—it follows that by waiving the tort the demand may be counterclaimed against the plaintiff's cause of action arising on another contract. . . ."

There is not even a dictum as to the rule of election. Of course, there are numerous dicta in other cases as to its conclusive effect. But the foregoing case is the only one in the reported decisions that even raised a genuine problem of so-called "inconsistent remedies" for the application of the rule. In fact,

[153] (1911) 115 Minn. 508, 133 N. W. 75.
[154] (1894) 58 Minn. 112, 59 N. W. 981.

by their inapplicability to the situations at hand, these dicta disclose that the most lamentable influence of the rule lies not in the failure of relief in the few genuine cases of election of remedies, but in the general confusion of the problem of substantive election. Instead of finding the solution for problems of affirmance and disaffirmance of contracts, ratification and repudiation, etc., in sound, basic principles of law, the courts have been far too ready to snatch at ill considered maxims, hallowed only by the obscurity of their origin, and spin the most profound implications out of them. Judges are few, who in ascertaining the rights of defrauded parties in transactions do not gravely begin with a sounding statement of the rule of election of remedies, and attempt to use it as the basis for judgment. The glory of destroying the rule would reside not in the fact that the infrequent suitor who pursues his cotenant for taking an excessive share of the profits might have more perfect justice, but in the fact that the law would be purged by the exorcism of the mediaeval spirit of formalism from which the rule of election of remedies springs. A clean analysis and differentiation of the types of election would allow an independent and rational decision as to the necessity and consequences of each. It would dissipate the naive assumption that "The same effect that follows the adoption of one of several remedies, to wit, exclusion from resort to the other, follows the adoption of an alternative provision in a contract, or the acceptance of a benefit under a will or other instrument of donation."[155] It would confine to its proper and just sphere the now all too ubiquitous dogma that:

"The decision made
Can never be recalled. The gods implore not,
Plead not, solicit not; they only offer
Choice and occasion, which once being passed
Return no more."[156]

[155] 7 Encyc. Pl. & Pr. 361.

[156] Longfellow, Masque of Pandora, Tower of Prometheus on Mount Caucasus.