Volume 38 | Issue 4 Article 6

June 1932

Actions--Election of Remedies

George W. McQuain
West Virginia University College of Law

West Virginia Law Quarterly
and THE BAR

Published by the Faculty of the College of Law of West Virginia University, and issued in December, February, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, $2.00 per year. To those who are members of the Association the price is $1.50 per year and is included in their annual dues. Single copies, 50 cents.

STUDENT NOTES

ACTIONS — ELECTION OF REMEDIES. — Because the interests of a second wife had intervened, the first wife failed in her equity suit to set aside a fraudulently obtained decree annulling her marriage. She then sued her former husband for damages. The first ground of demurrer set up was that by electing to sue in equity for a restoration of the marriage relation the plaintiff was estopped to bring an action for damages. The court said ". . . . a party is not estopped to maintain a second suit unless the two suits have substantially the same aim and scope and the remedy sought is substantially the same in each." *Cameron v. Cameron.*[1]

The defendant was evidently relying on the doctrine of election of remedies. The court, however, simply cited RULING CASE LAW[2] and laid down a rule which is really the test for *res judicata* and has practically nothing to do with election of remedies. This does not mean, of course, that the ultimate result was wrong. The

[1] 162 S. E. 173 (W. Va. 1932). For a complete statement of the facts in this case, see case comment, *infra* p. 371.

[2] 9 R. C. L. 964.

former suit had not purported to adjudicate the question of damages, and, as an attempt will now be made to show, the situation was not one for the application of the so-called doctrine of election of remedies.

Courts have employed election of remedies as a sort of general catch-all, which can be used at almost any time or place, to such an extent that it has lost all semblance of any specific meaning, if any it ever had. Everything from the starting of a suit to satisfaction of judgment has been held to constitute an election of remedies. Chancellor Kent said any decisive act was enough.[3] Judicial opinions are now filled with dicta and holdings as to what is and what is not a decisive act. It is pretty well established that the doctrine does not apply to consistent remedies.[4] Any number of those may usually be pursued even to judgment so long as no one of them is satisfied or some other rule of law does not interfere. But a different attitude has been evinced toward inconsistent remedies. Some courts have said that an injured party selects his remedy at his peril and is thereafter forever barred from asserting an inconsistent course even though the one first adopted proved useless.[5] By the better view, however, an attempt to follow a remedy which does not exist will not, ordinarily, bind one.[6]

Few cases in West Virginia have dealt with election of remedies. In *Bright v. Mollohan*[7] it is said that the prosecution of one remedial right to judgment, whether the judgment was for or against the party so prosecuting, was a decisive act which constituted an election, barring the subsequent prosecution of any inconsistent remedial right. The statement, however, was only

[3] Sanger v. Wood, 3 Johns. Ch. 416 (N. Y. 1818) "Any decisive act of the party, with knowledge of his rights and of the facts, determines his election in the case of conflicting and inconsistent remedies."

[4] Williams v. Brown, 70 W. Va. 472, 74 S. E. 409 (1912); Post v. Bailey & Co., 68 W. Va. 434, 69 S. E. 910 (1910); Sturdivant v. Reese, 86 Ark. 452, 111 S. W. 261 (1908); Jackson v. State Industrial Bd., 280 Ill. 526, 117 N. E. 705 (1917); Walden National Bank v. Birch, 130 N. Y. 221, 29 N. E. 127 (1891); Connihan v. Thompson, 111 Mass. 270 (1873).

[5] United States v. Oregon Lumber Co., 260 U. S. 290, 43 S. Ct. 100 (1922); Glezos v. Glezos, 346 Ill. 96, 178 N. E. 379 (1931); Baltimore American Ins. Co. v. Zimmerman, 127 Kan. 145, 274 Pac. 255 (1929); Blumb Bldg. Co. v. Ingersoll, 99 N. J. Eq. 563, 134 Atl. 176 (1926); Whalen v. Stewart, 194 N. Y. 495, 87 N. E. 819 (1909).

[6] Bierce v. Hutchins, 205 U. S. 340, 27 S. Ct. 524 (1906); Thomas v. Sugarman, 218 U. S. 129, 30 S. Ct. 650 (1909); Corbett v. Boston etc. R. R. Co., 219 Mass. 351, 107 N. E. 60 (1914); Hofman v. Hofman, 108 N. J. Eq. 161, 154 Atl. 518 (1931); Becker v. Kelsey, 157 Atl. 177 (N. J. 1931); Clark v. Kirby, 243 N. Y. 295, 153 N. E. 79 (1926); Strong v. Strong, 102 N. Y. 69, 5 N. E. 799 (1886); Whipple v. Stevens, 25 R. I. 563, 57 Atl. 375 (1904).

[7] 75 W. Va. 116, 83 S. E. 298 (1914).

a dictum, for the former suit in that instance had actually adjudicated the matter on its merits; so it was *res judicata* in the second suit. There is a dictum in *Stone v. Kaufman*[8] to the effect that an election between inconsistent remedies will bind one. In *Dudley v. Barrett*[9] the court had the right approach when it said, "Before an election of remedy can be ordered, it must appear that the party has more than one remedy." Language to the same effect is found in *Adams v. Power Co.*[10] While West Virginia seems to have no square holding on the point, authority is abundant in other jurisdictions to the effect that an attempt to pursue a futile remedy will not bar one from subsequently adopting an inconsistent right. The highest court of Oregon apparently had the proper conception of the situation when it said, "An election can exist only where there is a choice between two or more inconsistent remedies actually existing at the time the election is made. If a party attempts to make use of only a fancied remedy, then the barren attempt does not preclude him from afterward pursuing a remedy to which he is actually entitled."[11]

It would seem, therefore, that, ordinarily, there cannot be an election of remedies until an action has been prosecuted to final judgment. Before that time, there is no certain means of knowing whether the plaintiff is pursuing an actual or a fancied remedy. A judgment against him proves either that his remedy was inadequate or that it was improperly handled. In either event, there does not appear to be any very substantial reason for saying that the plaintiff is precluded from other remedies unless his acts have created an equitable estoppel or have necessarily terminated such other courses as might once have been available. If, in reliance upon the plaintiff's representations in the first suit, the defendant has, in good faith, so altered his position that he would

[8] 88 W. Va. 588, 590, 107 S. E. 295, 296 (1921).

[9] 66 W. Va. 363, 66 S. E. 507 (1909).

[10] 102 W. Va. 66, 135 S. E. 662 (1926). This case really deals with election between parties. It holds that accepting current benefits from the state compensation commission does not bar the injured workman from a later suit against his employer.

[11] Medford Nat. Bank v. Blanchard, 299 Pac. 301 (Ore. 1931). For language to the same effect, see Schotis v. North Coast Stevedoring Co., 1 Pac. (2d) 221 (Wash. 1931). See also the dissenting opinion of Mr. Justice Brandeis in United States v. Oregon Lumber Co., *supra* n. 5, in which he says, "If he deems it doubtful which one of several possible courses will lead to relief, he may (even where the courses are inconsistent) follow one to defeat, and still pursue thereafter another remedy until he ultimately finds one which will afford redress, provided always that the facts do not create an equitable estoppel."

be greatly prejudiced by the plaintiff's assuming a new and different role, the plaintiff should be estopped from asserting a remedy inconsistent with the one first employed.

Sometimes following one remedy necessarily terminates others. It is not much disputed that when one elects to affirm a voidable contract and sue for damages because of some fraud connected with it, he cannot thereafter sue for rescission, for when once the contract is affirmed, the right to rescind is lost.[12] A similar situation arises when there has been an unauthorized sale of property. An action for the proceeds of such unauthorized sale affirms the sale and prevents the plaintiff from later maintaining an action for the tort.[13] But the converse of these propositions is not always true.[14] It one fails in his attempt to rescind, he has not necessarily done anything to bar an action for damages.[15] The distinction is that affirming a voidable transaction is a one-party act, but one party may not be able by his own act alone to rescind or terminate a contract. Courts have, however, frequently failed to note this distinction.[16]

In situations where the doctrine of election of remedies is usually applied, the results obtained seem to be justified in only three cases: (1) where bringing the former suit resulted in an equitable estoppel; (2) where bringing the former suit affirmed an otherwise voidable transaction; and (3) where there has been a judgment favorable to the plaintiff in the former suit. In the first instance, the estoppel will work a proper result without any assistance from the doctrine of election of remedies. In the second situation, election of remedies really has no application, for the second remedy no longer exists, it having been lost when the voidable transaction was affirmed.[17] In the third situation, the

[12] Weeke v. Reeve, 65 Fla. 374, 61 So. 749 (1913); Thompson v. Howard, 31 Mich. 309 (1875).

[13] Keene Five-Cents Savings Bank v. Archer, 109 Iowa 419, 80 N. W. 505 (1899); Butler v. Hildredth, 5 Metc. 49 (Mass. 1842); Welsh v. Carder, 95 Mo. App. 41, 68 S. W. 580 (1902); Demars v. Hudon, 33 Mont. 170, 82 Pac. 952 (1905).

[14] Tanner v. Johnson, 119 Ark. 506, 178 S. W. 376 (1915); Tracy v. Aldrich, 236 S. W. 347 (Mo. 1921).

[15] Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8 (1918); Strong v. Strong, *supra* n. 6.

[16] Cases cited *supra* n. 5.

[17] It seems that as to affirmance of voidable transactions, the court might very well say that the affirmance is for the purpose of that particular suit only and is not binding for any other purpose, but no court seems to have taken this view. Courts apparently make no distinction between affirming express contracts and contracts implied from a wrongful dealing with the plaintiff's goods. Since the implied contract in such instances is purely a

party would be estopped by the record to maintain a second suit; so election of remedies would be mere surplusage there. When thus limited and qualified, election of remedies is a neutral doctrine. It is harmless and practically useless; but it is hard to justify any extension of the limitation. Modern ideas of justice are not readily reconcilable to the proposition that a plaintiff must lose a valuable right of action merely because his ignorant or careless attorney has attempted to pursue a remedy that was not available to him or has bungled what should have been a sufficient remedy. So long as the plaintiff is acting in good faith, the law should not place arbitrary and unwarranted restrictions upon his honest efforts to get what is justly due him. If the defendant actually owes something, there is small justification for allowing him to escape payment through some artificial doctrine. On the other hand, if he does not owe anything, he will usually not be prejudiced by having the case tried on its merits.

As already indicated, it seems that West Virginia has not yet saddled herself with this so-called doctrine of election of remedies. Limited to its proper scope, it would not have changed the result in *Cameron v. Cameron;* for, in bringing the annulment suit, the plaintiff was merely attempting to assert a remedy she did not have. The case, however, afforded an excellent opportunity for the court to take a definite stand as to the application and scope of election of remedies in West Virginia, which was not exploited.

—GEORGE W. MCQUAIN.

BANKRUPTCY — TRUSTEES — ATTACK BY COURTS ON CREDIT ASSOCIATIONS. — The Report of the New York Bankruptcy Investigation, usually referred to as the Donovan Report,[1] wrote an important chapter into the story of bankruptcy administration in the United States. Boldly formulated under the auspices of the bench and bar to meet the serious challenges issuing from pre-

fictional device to enable the plaintiff to maintain assumpsit, it seems to be going pretty far to say that he has affirmed and is bound by a contract which every one knows never existed. If this idea of tentative affirmance were adopted, it would seem that a plaintiff who has procured a judgment for damages should not be barred from other remedies, unless his judgment has been satisfied or is capable of being satisfied.

[1] Issued in March, 1930, by Col. William J. Donovan (formerly Assistant to the Attorney General), acting as counsel for the Association of the Bar of the City of New York, the New York County Lawyers' Association, and