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Election of Remedies--Statutory Changes

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garded the claimant as the agent of the manufacturer.⁶³ The general rule still is that secondary boycotts are illegal and all such picketing will be enjoined.

III.

Section 876a of the Civil Practice Act has, however, been responsible for an abuse. This is illustrated by situations wherein one union has a closed shop agreement with the employer and another union pickets to obtain similar benefits for itself. The employer can not breach his contract with the first union nor can he accede to the demands of the second union. Injunctive relief is denied because of the statute holding such a situation to be a labor dispute. Meanwhile the employer's business diminishes because prospective customers may be deterred from passing the picket line, either by sympathy for labor in general, or by embarrassment or fear. The employer in such a case can do nothing but wait for the legislature to remedy the situation. Of course he can retire, as is usually the case, for legislators solicit the support of unions at campaign time.

In summation it may be generally said that

- (1) In all cases: Picketing accompanied by fraud, violence, or other illegality is not permissible;
- (2) In labor disputes: Peaceful picketing is permissible unless contrary to public policy or unless forfeited by *deliberate* excesses;
- (3) In "non-labor disputes" where:
 - (a) Labor is not involved: No settled rule at present but a tendency to regard peaceful picketing as part of the freedom of speech.
 - (b) Labor is involved: Peaceful picketing is not permissible.

ALFRED M. ASCIONE.

ELECTION OF REMEDIES—STATUTORY CHANGES.—When a litigant has the selection of one of two or more inconsistent remedies, which are available at the same time, a choice made of one, with full knowledge of all the facts which would enable him to resort to the other remedy if he so desired, will preclude him from pursuing the

⁶³ See the concurring opinion of Mr. Justice Rippey in *Goldfinger v. Feintuch*, 276 N. Y. 281, 291, 11 N. E. (2d) 910, 915 (1937).

second or inconsistent remedy.¹ This is the doctrine of election of remedies.

This doctrine has long been one for which statutory revision has been desired.² Among the many proposals for a statutory change was one by Professor Rothschild of Brooklyn Law School,³ which seems to have been generally desired by legal writers.⁴ His proposal is as follows: "The doctrine of election of remedies as heretofore known is abolished. A litigant, unless estopped by his conduct, or by a former adjudication, or by law otherwise prevented, shall not be foreclosed from a determination of the merits of his cause or defense. For the purposes of this statute, a former adjudication shall include any judgment on the merits, on the facts in controversy, irrespective of the form of the action or the relief obtainable."

It has also been pointed out⁵ that the doctrine of election is contrary to the Code provisions of many of the states,⁶ in that it does not tend to more simplified pleadings. Moreover, there is no public policy which requires such a doctrine.⁷ These proposals and the many articles written on the subject have greatly influenced the Legislature in seeking a revision of the law on election of remedies. Accordingly, the Law Revision Commission⁸ took over this task and recommended four additions⁹ to the New York Civil Practice Act, which have resulted in changing the doctrine in four specific instances. First, however, in order to facilitate the study of, and appreciate more thoroughly the significance of the changes, a discussion of the common law doctrine seems advisable.

I.

The remedies, in order for them to be affected by the doctrine, must be inconsistent¹⁰ and must proceed on "opposite and irrecon-

¹ *Henry v. Herrington*, 193 N. Y. 218, 86 N. E. 29 (1908); *Clark v. Kirby*, 243 N. Y. 295, 153 N. E. 79 (1926); CARMODY, *NEW YORK PRACTICE* (2d ed. 1931) § 903; 18 AM. JUR. (1938) p. 133, § 10, divides the definition into three elements: "1. The existence of two or more remedies; 2. the inconsistency between such remedies; and 3. a choice of one of them."

² Hines, *Election of Remedies, A Criticism* (1913) 26 HARV. L. REV. 707; Deinard and Deinard, *Election of Remedies* (1922) 6 MINN. L. REV. 341, 480; Rothschild, *A Remedy for Election of Remedies! A Proposed Act to Abolish Election of Remedies* (1929) 14 CORN. L. Q. 141.

³ Rothschild, *loc. cit. supra* note 2.

⁴ Davidson, *A Proposal to Abolish the Doctrine of Election of Remedies* (1934) 13 ORE. L. REV. 298.

⁵ Davidson, *loc. cit. supra* note 4.

⁶ Section 8 of the N. Y. CIV. PRAC. ACT reads as follows: "Only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits have been abolished."

⁷ Davidson, *loc. cit. supra* note 4.

⁸ The Chairman of the New York Law Revision Commission is Charles K. Burdick. The Commission issued a pamphlet showing the results of their research in the field of election of remedies entitled *Acts, Recommendation and Study Relating to Election of Remedies*, LEG. DOC. NO. 65(F) (1939).

⁹ N. Y. CIV. PRAC. ACT §§ 112a-112d.

¹⁰ Deinard and Deinard, *loc. cit. supra* note 2.

cilable claims of right".¹¹ If the remedies are merely cumulative or consistent,¹² the doctrine does not apply,¹³ even though two or more remedies are available. A remedy is cumulative where further relief is merely sought, and where it does not proceed on an inconsistent ground.¹⁴ But an action to rescind a contract and an action for damages for fraud arising out of the contract are inconsistent, since the fraud action affirms the contract, while the rescission action disaffirms it.¹⁵ An action for replevin and an action for goods sold and delivered are also inconsistent, since to allow this would let a litigant say, "I sold, I never sold", in the same breath.¹⁶ Similarly, the contract and conversion remedies.¹⁷

The election once made is irrevocable.¹⁸ It is deemed to have taken place by the commencement of suit,¹⁹ and judgment need not

¹¹ Henry v. Herrington, 193 N. Y. 218, 86 N. E. 29 (1908); CARMODY, *op. cit. supra* note 1, at § 904.

¹² Titus v. Poole, 145 N. Y. 414, 40 N. E. 228 (1895) (breach of warranty and fraud are not inconsistent); Parker v. Knox, 60 Hun 550, 15 N. Y. Supp. 256 (1891) (action of deceit and implied warranty of agency are consistent); Balleisen v. Schiff, 121 App. Div. 285, 105 N. Y. Supp. 692 (2d Dept. 1907) (specific performance and an action for damages for breach of contract are not inconsistent); Hahn v. Schenck, 221 App. Div. 371, 223 N. Y. Supp. 418 (2d Dept. 1927) (a negligence action against one defendant and suit against the attending physician for malpractice are consistent); Kirchner v. State of New York, 223 App. Div. 543, 228 N. Y. Supp. 718 (3d Dept. 1928) (judgment against one tort-feasor is no bar to suit against another tort-feasor jointly and severally liable).

¹³ Ratchford v. Cayuga County Cold Storage and Warehouse Co., 217 N. Y. 565, 112 N. E. 447 (1916); 18 AM. JUR. (1938) p. 136, § 13; Deinard and Deinard, *supra* note 2, at 492: "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."

¹⁴ Tremarco v. Tremarco, 117 N. J. Eq. 50, 174 Atl. 898 (1934). For examples of consistent remedies see note 12, *supra*.

¹⁵ Merry Realty Co. v. Shamokin and Hollis Real Estate Co., 230 N. Y. 316, 130 N. E. 306 (1921); CARMODY, *loc. cit. supra* note 11; *cf.* Abramson v. Leo, 240 App. Div. 343, 269 N. Y. Supp. 814 (1st Dept. 1934); see Note (1939) 14 ST. JOHN'S L. REV. 124.

¹⁶ Henry v. Herrington, 193 N. Y. 218, 86 N. E. 29 (1908).

¹⁷ Terry v. Munger, 121 N. Y. 161, 24 N. E. 272 (1899); Hess v. Smith, 16 Misc. 55, 37 N. Y. Supp. 635 (1896); Emerald and Phoenix Brewing Co. v. Leonard, 22 Misc. 120, 48 N. Y. Supp. 706 (1897).

¹⁸ LEG. DOC. NO. 65(F) (1939) 31.

¹⁹ Conrow v. Little, 115 N. Y. 387, 393, 22 N. E. 346, 347 (1889) ("They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract"); Matter of Garver, 176 N. Y. 386, 68 N. E. 667 (1903); Haas v. Selig, 27 Misc. 504, 58 N. Y. Supp. 328 (1899).

However, one may be bound to a remedy other than by suit, *i.e.*, by waiver or estoppel. LEG. DOC. NO. 65(F) (1939) 35. While election is based largely on waiver and estoppel, there are grave distinctions between them. Election differs from estoppel in that a person invoking the election doctrine need not show that he will suffer from any injury if the other party is not estopped from going ahead with his action. Pederson v. Christofferson, 97 Minn. 491, 106 N. W. 958 (1906). It differs from waiver in that one who waives a right does it of

follow. In *Matter of Garver*,²⁰ the court said: "It is therefore the settled law of this court that an election of remedies is determined by the commencement of an action and not by the result of it." An exception to this principle lies where the action is one in rescission. In such a case, there is no election of remedies made by the mere commencement of suit, since the court's permission to sue for rescission must first be granted.²¹

In order for the doctrine to apply, the election must be made with full knowledge of all the facts relating thereto.²² Thus, mistake as to the facts, or ignorance of them, is not a bar to a later inconsistent action.²³ Similarly, mistake as to legal rights in selecting the remedy, such as electing a remedy in which the Statute of Limitations is a bar and a resulting failure in the first action, does not constitute an election of remedies.²⁴ "In such case it cannot be said that the party has made an election of remedies, there was in fact but one remedy, and the party has simply made a mistake as to what that remedy is."²⁵

II.

The main argument cited²⁶ in support of the doctrine of election is that "a litigant should not be permitted to vex another party or burden the courts by more than one action to redress one wrong or to enforce one right." The argument is answered by the Commission when it says that any number of *consistent* suits are allowed against the same defendant, and also, that discretionary apportionment of costs might be the answer.²⁷

As against these supporting arguments, there have been many criticisms submitted.²⁸ The most important of these are that the courts differ as to the principles on which the doctrine of election

his *own* volition or by his own act, while in the election doctrine, the *state* declares the second right to be non-usable when the election of the first remedy is made. Deinard and Deinard, *loc. cit. supra* note 2.

²⁰ 176 N. Y. 386, 68 N. E. 667 (1903).

²¹ *Abramson v. Leo*, 269 N. Y. Supp. 814, 240 App. Div. 343 (1st Dept. 1934); *Houston Mercantile Co. v. Powell*, 72 Misc. 358, 130 N. Y. Supp. 274 (1911); LEG. DOC. NO. 65(F) (1939) 45.

²² See note 1, *supra*.

²³ *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338 (1894); *Robson v. Bass*, 80 Misc. 132, 149 N. Y. Supp. 693 (1913) (plaintiff did not remember that he had been told of an undisclosed principal; nevertheless, he was awarded judgment, the defense of election being set aside); CARMODY, *op. cit. supra* note 1, § 907.

²⁴ *Schenck v. State Line Tel. Co.*, 238 N. Y. 308, 144 N. E. 542 (1924).

²⁵ *Ibid.*; *McNutt v. Hilkins*, 80 Hun 235, 29 N. Y. Supp. 1047 (1894); CARMODY, *op. cit. supra* note 1, at 1731.

²⁶ The argument is stated and refuted by the Law Revision Commission in their report of the Doctrine of Election of Remedies. LEG. DOC. NO. 65(F) (1939) 54.

²⁷ *Ibid.*

²⁸ *Hines*, *loc. cit. supra* note 2.

depends,²⁹ that, in most instances, the operation of the doctrine is very harsh,³⁰ and that the principle on which the law rests is inconsistent with other laws.³¹

III.

The trend in New York, prior to the passage of the new legislation,³² was toward liberality in the application of this doctrine, as shown by the cases of *Schenck v. State Line Telephone Co.*³³ and *Clark v. Kirby*.³⁴ These cases laid down the rule that if an action for deceit is discontinued because of the defense of the Statute of Limitations, a subsequent rescission action is not barred. Furthermore, in the *Clark* case it was said that an action seeking the return of a consideration and "reliance damages"³⁵ is not as a matter of law inconsistent with rescission.³⁶ Therein Judge Crane said,³⁷ " * * * In this state we say that where a party, knowing all the facts, elects to sue in rescission instead of for damages, he must pursue the course he has taken. Even then, if the remedy chosen be insufficient or inadequate or useless, the rule has not barred the plaintiff from taking other timely methods to obtain his rights. All procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose which it seeks to accomplish. Unless some necessary requirement has been omitted the courts ought not to furnish protection for a wrongful act." The language used here seems broad

²⁹ Some courts hold that an estoppel, too, is needed for the doctrine to apply. *Gibbs v. Jones*, 46 Ill. 319 (1868); *Hines*, *supra* note 2, at 711; see note 47, *infra*.

³⁰ *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272 (1899); *Stewart v. Salisbury Realty and Insurance Co.*, 159 N. C. 230, 74 S. E. 736 (1912).

³¹ *Hines*, *supra* note 2, at 711.

³² N. Y. Laws 1939, cc. 126, 127, 128, 147.

³³ 238 N. Y. 308, 144 N. E. 542 (1924). In that case plaintiff commenced an action to recover damages for fraud. He then discontinued this action after it was placed on the calendar because of a defense of the Statute of Limitations interposed by the answer of the defendant and he now brings suit for rescission. *Held*, doctrine of election does not apply. There was but one remedy, and if recourse is had to a second remedy after the first is found to be unavailable, there is no election of remedies made.

³⁴ 243 N. Y. 295, 153 N. E. 79 (1926). Therein plaintiff started a rescission action in New York and later sued in fraud in Missouri against the same defendants. The defendants in the New York action plead election of remedies as a defense. *Held*, the defense was not valid since the election was made by the prior action for rescission in New York and not by the subsequent Missouri action.

³⁵ 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1464. Reliance damages are those which would place the plaintiff in the same position he would have been in, had he not entered the contract; *i.e.*, restore to him any expenses incurred in reliance on the contract.

³⁶ LEG. DOC. NO. 65(F) (1939) 49.

³⁷ *Clark v. Kirby*, 243 N. Y. 295, 303, 153 N. E. 79, 82 (1926).

enough to include cases where a judgment has been entered, but not satisfied.

Although these cases liberalize generally, they do not uproot the doctrine or settle the law of election of remedies. To use the Law Revision Committee's³⁸ own words, "The effect of the foregoing decisions must be to discourage and, in new and doubtful cases to restrict, the application of the doctrine of election of remedies. This being so, the commission does not recommend any general legislation. It confined its proposals to special cases where lines of decision have caused injustice or confusion and where those lines have existed so long that it seems probable—even in the light of the *Schenck* and *Clark* cases that only legislation can bring relief."

IV.

The Law Revision Commission recommended that statutory changes be made to correct four special instances of the doctrine of election, with the result that four bills³⁹ were approved by the Senate and Assembly, signed by the Governor, and incorporated into the Civil Practice Act as Section 112, subdivisions a to d.

Section 112(a) reads as follows :

"Rights of action against several persons; no election of remedies. Where rights of action exist against several persons, the institution or maintenance of an action against one, or the recovery against one of a judgment which is unsatisfied, shall not be deemed an election of remedies which bars an action against the others."

The instance here corrected is best exemplified by the case of *Fowler v. Bowery Savings Bank*.⁴⁰ Therein *A* deposited money with *D*, in trust for *W*. *A* and *W* died, and *W*'s executor served notice on *D* that they claimed the trust fund. *D*, however, surrendered it to *A*'s executor. *W*'s executor brought an action against *D*. *D* defended by claiming an irrevocable election of remedies had been made when *W*'s executor sued *A*'s executor for money had and received, which resulted in an unsatisfied judgment. The court held, that an election was made and that both defendants could not be sued, because suit against the executor affirmed the action of the bank in turning over the moneys to him.⁴¹ Under the present statute, how-

³⁸ LEG. Doc. No. 65(F) (1939) 9.

³⁹ N. Y. Laws 1939, cc. 126, 127, 128, 147.

⁴⁰ 113 N. Y. 450, 21 N. E. 172 (1889).

⁴¹ Accord: *In re Jama Realty Corp.*, 92 F. (2d) 3 (C. C. A. 2d, 1937); *Seeman v. Bandler*, 26 Misc. 372, 56 N. Y. Supp. 210 (1899) (vendor was held precluded from maintaining action against purchaser for value of goods sold, by suing purchaser's transferee in replevin on the ground of the purchaser's fraud); *Hochberger v. Ludvigh*, 63 Misc. 313, 116 N. Y. Supp. 696 (1909).

ever, the action can be brought against the third party without a defense of inconsistent remedies being raised.

Section 112(b) reads:

"Rights of action against agent and undisclosed principal; no election of remedies. Where rights of action exist against an agent and his undisclosed principal, the institution or maintenance, after disclosure of the principal, of an action against either, or the recovery of a judgment against either which is unsatisfied, shall not be deemed an election of remedies which bars an action against the other."

This subdivision remedies the situation which was presented by *Georgi v. Texas Company*.⁴² In that case suit was brought against the agent of an undisclosed principal and judgment was recovered.⁴³ Since the plaintiff proceeded to judgment⁴⁴ against the agent with a full knowledge of all the facts regarding the agency, it was held that he was precluded from suing the principal because of an election of inconsistent remedies. Under the present statute, *both* the agent and the undisclosed principal may be pursued to judgment without any election being required, even after knowledge of the facts of the agency, as long as the first judgment remains unsatisfied.

Section 112(c) follows:

"Actions in conversion and on contract; no election of remedies. Where rights of action exist against several persons for the conversion of property and upon an express or implied contract, the institution or maintenance of an action against one of these persons, or the recovery against one of them of a judgment which is unsatisfied, for the conversion or upon the contract, shall not be deemed an election of remedies which bars a subsequent action against the others either for conversion or upon the contract."

In *Terry v. Munger*,⁴⁵ judgment was obtained by the plaintiff on the theory of implied contract against two of three persons, who wrongfully detached and carried away machinery belonging to the plaintiff. This action was brought against the third person and was in conversion. It was held⁴⁶ that the action could not be brought

⁴² 225 N. Y. 410, 122 N. E. 238 (1919).

⁴³ Accord: *Knapp v. Simon*, 96 N. Y. 284 (1884) (agent was sued first, and after judgment was recovered against him, he went into bankruptcy; suit is now brought against the principal. *Held*, action must fail since knowledge of all the facts of the agency were had at the inception of the suit against the agent); *DeRemer v. Brown*, 165 N. Y. 410, 59 N. E. 129 (1901).

⁴⁴ In principal-agent actions, the suit must proceed to judgment in order for there to be an election. *Cobb v. Knapp*, 71 N. Y. 348 (1877).

⁴⁵ 121 N. Y. 161, 24 N. E. 272 (1899).

⁴⁶ Accord: *Hess v. Smith*, 16 Misc. 55, 37 N. Y. Supp. 635 (1896).

because the first action treated the entire transaction as a sale and was an irrevocable election which was binding on the plaintiff, since he had full knowledge of all the facts at the inception of the first action. The statute remedies this instance in that one of several defendants may be sued in conversion and the others in contract, and the actions are no longer to be deemed inconsistent, as long as the judgment remains unsatisfied. It is to be noted, however, that the statute does not sanction both a conversion and contract action against the *same* defendant.

Section 112(d) states:

“Action on contract no bar to action to reform. A judgment denying recovery in an action upon an agreement in writing shall not be deemed to bar an action to reform such agreement and to enforce it as reformed.”

In *Steinbach v. Relief Fire Insurance Co.*,⁴⁷ the plaintiff sued the insurance company to recover on a policy for damages caused by fire. The policy had a clause avoiding it if hazardous goods were kept on the premises. Fireworks, however, were permitted to be kept for sale, but no clause was inserted relating thereto. The fire was caused by fireworks and plaintiff brought an action to recover on the policy. The recovery on the policy was refused, and subsequently this action was brought to reform the contract on the ground that the clause was omitted by mistake from the policy. *Held*,⁴⁸ recovery and reformation denied, since the plaintiff elected to sue on the contract and, once defeated, was bound by his election. This case has been remedied by Section 112(d), which allows the reformation action to proceed immediately after defeat in the first contract action. This section expressly corrects the situation involved in the *Steinbach* case, but it is submitted that it allows a single defendant to be doubly vexed on the same set of facts. Therefore, this statute, which is de-

⁴⁷ 77 N. Y. 498 (1879).

⁴⁸ In the case of *Allen v. U. S. Fire Insurance Co.*, 245 App. Div. 31, 282 N. Y. Supp. 420 (1st Dept. 1935), *aff'd without opinion*, 270 N. Y. 597, 1 N. E. (2d) 348 (1935), a fire insurance policy provided that all cases were to be submitted to the Cuban courts. The Cuban court held that the loss was not covered by the policy; the plaintiff then started an action for reformation here. The court said in their opinion, “On principle, there would seem to be substantial doubt whether the plaintiff should not be permitted to maintain this action on the theory of mistake. The purpose of this action is to secure the reformation of the written policy so that it shall correctly express the alleged intentions of the parties by including the loss. The previous action merely held that the loss was not covered by the terms of the policy as they had been reduced to writing. It may, therefore, not unreasonably be contended that the issues are not identical and that the previous action is not *res adjudicata* here. We are, however, constrained to affirm the judgment and order, with costs, on the authority of *Steinbach v. Relief Fire Insurance Co.*”

For the unsettled state of the law see *Baird v. Erie R. R.*, 210 N. Y. 225, 104 N. E. 614 (1914) (where reformation was allowed for mistake after defeat on the contract).

signed to correct a specific evil, may do more harm than good. However, since the Commission and the Legislature have adopted Section 112(d) allowing suit against the same defendant on the contract, and then, upon defeat, to sue for reformation, why in Section 112(c) of the Act were they inconsistent, in not allowing both a contract and conversion action against the *same* defendant?

These statutory changes in the common law rule, effective September 1, 1939, are among the first statutes passed which tend to abolish the doctrine.⁴⁹ The law elsewhere in the United States and England still follows the common law doctrine of election of remedies.⁵⁰

The Law Revision Commission in its report said that it desired to correct the four above-mentioned specific instances only, and that they did not recommend any general legislation to do away with the doctrine.⁵¹ They felt that any cases not covered by these sections of the Statute would be covered by the liberality of the courts as shown in the *Schenck* and *Clark* cases. However, instead of drawing statutes doing away with parts of the doctrine and leaving the rest to courts whose diversity has been one of the difficulties in its application,⁵² why not adopt Professor Rothschild's proposal⁵³ and say, "The doctrine of election of remedies as heretofore known, is abolished."

SEYMOUR C. SIMON.

THE FEDERAL JUVENILE DELINQUENCY ACT.—A truly remarkable example of the manner in which the law is attempting to keep pace with social realities is the development of the modern concept of juvenile delinquency.¹ At common law the status of an infant ac-

⁴⁹ Section 80(d) of the N. Y. PERS. PROP. LAW denies application of the doctrine of election of remedies expressly. That section reads as follows: "After retaking of possession * * * the buyer shall be liable for the price only after a resale * * *. Neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgment in such action, nor the collection of a portion of the price, shall be deemed inconsistent with a later retaking of the goods * * *. But such right of retaking shall not be exercised by the seller after he has collected the entire price, or after he has claimed a lien upon the goods, or attached them, or levied upon them as the goods of the buyer."

See the Draft of an International Law of Sale of Goods [League of Nations (1935) Unification of Private Law No. 1] L. O. N. 1935, U. P. L. Draft 1, which allows rescission and damages for breach of contract as consistent actions.

⁵⁰ LEG. DOC. NO. 65(F) (1939) 39.

⁵¹ *Id.* at 9.

⁵² See notes 15, 29 and 47, *supra*.

⁵³ See note 2, *supra*.

¹ See U. S. Children's Bureau Pub. No. 193 (1933) 1, 2.