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Restitution - Election of Remedies - Action in Quasi-Contract Against Joint Tortfeasor as Barring Fraud Action Against Other Joint Tortfeasors

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RESTITUTION—ELECTION OF REMEDIES—ACTION IN QUASI-CONTRACT AGAINST JOINT TORTFEASOR AS BARRING FRAUD ACTION AGAINST OTHER JOINT TORTFEASORS—Plaintiff sued for fraud, alleging that defendant engraving companies secretly agreed with an agent of the plaintiff to give the agent a commission in return for which the agent was to contract for engraving work to be done by the defendants for plaintiff at a rate in excess of the fair market price for such work. Upon discovery of the fraud and prior to the commencement of this action, plaintiff had instituted an action in a state court against its agent for money had and received, and had obtained an attachment. Upon defendants' motion to dismiss the fraud action, *held,* motion granted. The prior election of the plaintiff to sue its agent in the state court *ex contractu* and the securing of an attachment against him affirmed the acts of that agent in dealing with the defendants, and plaintiff is now estopped to bring this suit against them. *Sears, Roebuck & Co. v. Blade,* (D. C. Calif. 1954) 123 F. Supp. 131.

The principal case indicates that the doctrine of election of remedies,[1] despite constant criticism,[2] still presents a major hazard to plaintiffs. Many of the cases purporting to bar a plaintiff from relief because he has made an election of remedies could be better explained in other terms, such as estoppel or election of substantive rights (affirmance or disaffirmance) in a voidable transaction.[3] There remains a group of cases, however, in which such distinct

[1] For a concise statement of the doctrine, see Hine, "Election of Remedies, A Criticism," 26 HARV. L. REV. 707 at 707 (1913).

[2] Ibid.; Deinard and Deinard, "Election of Remedies," 6 MINN. L. REV. 341 (1922); Rothschild, "A Remedy for Election of Remedies: A Proposed Act to Abolish Election of Remedies," 14 CORN. L.Q. 141 (1929).

[3] See, e.g., Gloeser v. Moore, 284 Mich. 106, 278 N.W. 781 (1938), where plaintiff was denied rescission because of previous acts constituting an election to affirm the transaction. This does not depend on any election of remedies as such, although the headnote describes it as such a case. See also 38 COL. L. REV. 292 (1938).

elements are not present. The problem is then to determine whether the litigant's causes of action include an element of inconsistency, since it is on inconsistency that the doctrine of election depends.[4] The court in the principal case finds this inconsistency in the fact that the action brought in the state court was *ex contractu* while the action in the principal case is *ex delicto*.[5] But this fails to give recognition to the real nature of the prior assumpsit action. Such an action is inconsistent with the subsequent deceit action only if one takes seriously the fiction of an implied contract,[6] since both actions are in truth based on the fraud of the plaintiff's agent and of the defendants. Nor does the doctrine serve any useful purpose in cases like the principal case. Although the prevailing view appears to be that the fact that the second action is against a person not a party to the first suit will not, in itself, prevent application of the doctrine,[7] this is difficult to justify. It does not appear that the defendants were in any way prejudiced by commencement of the previous action in the state court, since they were not parties to that suit.[8] Nor does the public interest in the prompt dispatch of litigation justify the doctrine. The courts universally allow separate actions against joint tortfeasors[9] and the fact that those actions may be inconsistent does not add in the least to the time consumed by them. The result reached, then, must be justified by the inconsistency and not the multiplicity of the actions. But where that inconsistency results merely from a fiction used only for pleading purposes and does not represent an actual ratification of the agent's actions,[10] the better rule, absent prejudice to the defendant or to the public interest, would be to allow the plaintiff all appropriate remedies, without imposing upon him the necessity of choosing one particular theory upon which he will seek recovery.[11]

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[4] Principal case at 135; CLARK, CODE PLEADING 493 (1947).

[5] Principal case at 136.

[6] KEENER, QUASI-CONTRACTS 211 (1893). For cases holding action of assumpsit consistent with deceit action, see Mintz v. Jacob, 163 Mich. 280, 128 N.W. 211 (1910); Bolinger v. Giles, 125 Kan. 53, 262 P. 1022 (1928).

[7] Lindburg v. Engster, 220 Iowa 1073, 264 N.W. 31 (1935); Weaver v. Detroit Bank, 330 Mich. 366, 47 N.W. (2d) 650 (1951). *Contra:* Huffman v. Hughlett & Pyatt, 11 Lea (79 Tenn.) 549 (1883); Kuechle v. Springer, 145 Ill. App. 127 (1908). See 116 A.L.R. 601 (1938).

[8] It has been said that the doctrine of election of remedies, like res judicata, is based on "the maxim which forbids that one shall be twice-vexed for . . . the same cause." United States v. Oregon Lumber Co., 260 U.S. 290 at 301, 43 S.Ct. 100 (1922). If this is true the doctrine should not apply in any case where the defendant was not a party to the prior suit.

[9] 116 A.L.R. 601 at 609 (1938), citing cases.

[10] In Schenck v. State Line Telegraph Co., 238 N.Y. 308 at 312, 144 N.E. 592 (1924), Cardozo, J., pointed out that, "The distinction [between election of remedies and election of substantive rights] is one not infrequently obscured, and yet important to be heeded. Often what is spoken of in opinions as a choice between remedies is in reality a choice of 'an alternative substantive right'. . . . Ratification, however, is not in itself the choice of a remedy, though the choice of a remedy may be evidence of ratification."

[11] See Rothschild, "A Remedy for Election of Remedies: A Proposed Act to Abolish Election of Remedies," 14 CORN. L.Q. 141 (1929).