

ELECTION OF REMEDIES IN MISSOURI

I. INTRODUCTION

Legal problems growing out of unprecedented changes in the substantive law through modern legislation have relegated to the background important and equally troublesome problems in the field of procedure. Of these, the so-called doctrine of election of remedies stands as one of the most confusing and elusive in our legal system as is attested by the hundred or more digest paragraphs concerning it in the Missouri Digest alone.

The rule, as generally stated by the Missouri courts, is this: Where a party has the right to pursue one of two inconsistent remedies, and, with knowledge of all the facts, he makes his election and institutes his suit, in case the action thus begun is prosecuted to final judgment, or the plaintiff has received anything of value under a claim thus asserted, he cannot thereafter pursue another and inconsistent remedy.¹ The definition carries with it its own limitations. There must in fact be two remedies for the same wrong, otherwise no choice can exist.² The remedies must be inconsistent; that two remedies in fact exist is not determinative.³ The party against whom the rule is invoked must have had knowledge of all the material facts at the time he instituted the first action, otherwise there can be no election.⁴ Mere institution of an action in pursuit of one remedy is no bar to a subsequent action in pursuit of another, for the election is not final.⁵

The purpose of this article is to make a critical survey of the doctrine as applied by the Missouri courts—its establishment, development, and present effect.

1. Johnson-Brinkman Comm. Co. v. Mo. Pac. Ry. Co. (1895) 126 Mo. 344, 349, 28 S. W. 370, 47 Am. St. Rep. 675, 26 L. R. A. 340. For a collection of the varied statements of the rule see U. S. Fidelity & Guaranty Co. v. Fidelity Nat. Bank & Trust Co. (Mo. App. 1937) 109 S. W. (2d) 47, 48.

2. Mistaken belief in a remedy which does not exist is no bar to another remedy. Hartwig v. Security Mut. Life Ins. Co. (1912) 167 Mo. App. 128, 151 S. W. 477.

3. Steinbach v. Murphy (1910) 143 Mo. App. 537, 128 S. W. 207; Reynolds v. Union Station Bank of St. Louis (1918) 198 Mo. App. 323, 200 S. W. 711.

4. Horigan Realty Co. v. First Nat. Bank (1925) 221 Mo. App. 329, 273 S. W. 772; Horigan Realty Co. v. First Nat. Bank (1926) 221 Mo. App. 960, 289 S. W. 352.

5. Johnson-Brinkman Comm. Co. v. Central Bank of Kansas City (1893) 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615. The prior suit must have proceeded to judgment. Otto v. Young (1910) 227 Mo. 193, 127 S. W. 9. Or the plaintiff must have received something of value. Nanson v. Jacob (1887) 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.

II. CRITICISM

The doctrine of election of remedies has been a fruitful source of law review comment. That it is an anomalous doctrine, a product purely of the American courts, without any basis in the English common law decisions and without any reason based on principle behind it was shown in a brilliant article by Charles P. Hine in 1913.⁶ Statutory abolition of the entire doctrine has been advocated on at least two occasions.⁷

No adequate picture of the doctrine attempted to be applied by the courts can be conceived unless the doctrine is clearly distinguished from its relatives in law. It does not rest on the principle of estoppel *in pais*, which requires a change of position in reliance on some express or implied representation. The Missouri courts, however, have often confused it with this principle.⁸ Neither does it rest on waiver, which is a voluntary release of some right.⁹ Likewise it cannot be based on *res adjudicata*, for it has been held to operate in certain instances where the first suit has not proceeded to judgment and the parties to the two proceedings are not identical.¹⁰ When the rule is thus reduced to its naked essentials, the task of judging its utility as a legal doctrine is greatly simplified.¹¹

6. Election of Remedies, A Criticism (1913) 26 Harv. L. Rev. 707.

7. Rothschild, A Remedy For Election of Remedies: A Proposed Act to Abolish Election of Remedies (1929) 14 Cornell L. Q. 141; Davidson, A Proposal to Abolish the Doctrine of Election of Remedies (1934) 13 Ore. L. Rev. 298. See also dissent of Brandeis, J., in *United States v. Oregon Lumber Co.* (1922) 260 U. S. 290, 302, 43 S. Ct. 100, 67 L. ed. 261, especially his discussion of the leading case on this subject, *Robb v. Vos* (1894) 155 U. S. 13, 15 S. Ct. 4, 39 L. ed. 52.

8. So competent a judge as Judge Lamm has dismissed any scientific classification with the remark, "There are estoppels and estoppels." *Hector v. Mann* (1910) 225 Mo. 228, 245, 124 S. W. 1109; compare dissent of Valliant, J., in the same case at 252. Three elements are necessary to an estoppel: (1) representation by word or conduct; (2) reliance by the other party; (3) detriment to the other party. Perhaps a fourth requisite, intention, real or apparent, on the part of the actor, that such statement or conduct will be relied on, may be added. Bigelow, *Estoppel* (4th ed. 1886) 445. The Missouri courts have often said an election of remedies works an estoppel. See, e. g., *U. S. Fidelity & Guaranty Co. v. Fidelity Nat. Bank & Trust Co.* (Mo. App. 1937) 109 S. W. (2d) 47.

9. See for criticism of the accepted definition Ewart, *Waiver Distributed* (1917) 6.

10. To invoke the rule that once an issue has been tried it cannot thereafter be tried again, four elements must concur: A suit, final judgment, identity of parties, identity of subject matter. Von Moschzisker, *Stare Decisis, Res Judicata and Other Selected Essays* (1929) 32. The rule of election of remedies applies even in the absence of any such factors. *U. S. Fidelity & Guaranty Co. v. Fidelity Nat. Bank & Trust Co.* (Mo. App. 1937) 109 S. W. (2d) 47.

11. The rule of election between inconsistent remedies must be sharply

III. ESTABLISHMENT OF THE DOCTRINE IN MISSOURI— THE JOHNSON-BRINKMAN CASES

The leading cases on this subject in Missouri, *Johnson-Brinkman Commission Co. v. Central Bank of Kansas City*,¹² and *Johnson-Brinkman Commission Co. v. Missouri Pacific Railway Co.*,¹³ grew out of a complicated series of transactions and suits involving a sale of wheat. The plaintiff company contracted to sell this wheat to the Imboden Commission Co., terms cash on delivery. Plaintiff delivered the original bill of lading to the Imboden Company, receiving in return a check drawn on the Central Bank of Kansas City, the defendant in the first of these cases. The Imboden Company then exchanged the original bill of lading at the offices of the railroad company for a bill in its own name, consigning the grain to its order and marked, "Notify C. H. Albers & Co.," to whom the Imboden Company in turn had sold it. The new bill of lading, together with a draft drawn on Albers & Co., was deposited with the Central Bank for collection. In due course the draft was paid. The plaintiff in the meantime had deposited the check it had received from the Imboden Company in payment for the wheat, but on presentation to the defendant bank payment was refused. The same day the plaintiff sued out a writ of attachment against the Imboden Company, but the wheat was not seized under the writ, as it had already been shipped to Albers & Co. Three weeks later the attachment suit was dismissed, and an action for money had and received was brought against the defendant bank. The theory of this suit was that the defendant knew the wheat had been sold for cash and had not been paid for; that title had not passed to the Imboden Company; and that, therefore, the proceeds of the wheat belonged to the plaintiff. The defendant claimed that by virtue of bringing the attachment suit the plaintiff affirmed title to the wheat in the Imboden Company and could not now claim title to the wheat or to the proceeds thereof. The Supreme Court dismissed this contention, the language of the opinion clearly indicating that there is no separate doctrine of election of remedies recognized, but that ordinary principles of estoppel will be applied in an appropriate case.¹⁴

distinguished from the rule against changing the theory of a pleading at different stages of a single case. See Note (1937) 22 WASHINGTON U. LAW QUARTERLY 251.

12. (1893) 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615.

13. (1895) 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840.

14. *Johnson-Brinkman Comm. Co. v. Central Bank of Kansas City* (1893) 116 Mo. 558, 575, 22 S. W. 813, 38 Am. St. Rep. 615.

In the second case the same company brought suit against the railway company for the wrongful taking and detention of the wheat. The defense was raised that by bringing the attachment suit for the purchase price the plaintiff affirmed the sale and was barred from suing the railway company. The Kansas City Court of Appeals so held,¹⁵ expressly stating that damage need not be shown and admitting that it was not relying on estoppel.¹⁶ On certification to the Supreme Court, because of a conflict with the St. Louis Court of Appeals in two prior cases,¹⁷ the decision was reversed. The court refused to hold that the attachment suit improvidently brought should preclude other remedies in the absence of intervening rights of third parties. The court spoke of election of remedies; but it is clear that what it had in mind was estoppel.¹⁸ In effect the court announced no new principle, but subsequent decisions were to show with what ease the phrase "election of remedies" might be misconstrued.

What difficulties have ensued the case of *Welsh v. Carder*¹⁹ illustrates. One Warnick had sold plaintiff a cow, plaintiff depositing with Warnick as collateral a note made by a third party and secured by a chattel mortgage on certain personal property. Defendant subsequently became owner of the property. The Kansas City Court of Appeals held that recovery of an unsatisfied judgment against Warnick for conversion of the note by selling it to the original maker constituted an election to affirm the transaction, and barred replevin against the defendant. But the case showed that not only had the first suit proceeded to judgment but the plaintiff had been credited with the amount of the sale price of the cow. Clearly there was a recovery of something of value. The court relied for its ruling on the case of *Hargadine-McKittrick Dry Goods Co. v. Warden*,²⁰ which it declared bluntly to be in conflict with the *Johnson-Brinkman*

15. *Johnson-Brinkman Comm. Co. v. Mo. Pac. Ry. Co.* (1893) 52 Mo. App. 407. "He [plaintiff] cannot be *approbate* and *reprobate* at the same time." (l. c. 415).

16. *Id.* at 416.

17. *Anchor Milling Co. v. Walsh* (1885) 20 Mo. App. 107; *Lapp v. Ryan* (1886) 23 Mo. App. 436. The latter case held that where rights of third parties intervened, the election would be held to be final, but recognized that in the absence of such intervening rights the mere institution of an attachment suit would not prevent use of another inconsistent remedy. *Id.* at 438.

18. *Johnson-Brinkman Comm. Co. v. Mo. Pac. Ry. Co.* (1895) 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840. Compare the language of the court on p. 349 of the official report with that on p. 354.

19. (1902) 95 Mo. App. 41, 68 S. W. 580.

20. (1899) 151 Mo. 578, 52 S. W. 593.

cases. The *McKittrick* case held that a sale of replevied goods and *collection of the proceeds* constituted an election to disaffirm the original sale to the defendant barring a claim against the assignee for the benefit of creditors of the original purchaser of the goods. It would seem that plaintiff's having recovered something of value in the *McKittrick* case would be the true ground of distinction, but the opinion leaves much doubt.²¹

The exact status of the doctrine at present can be seen only from an examination of the limitations imposed by the courts and the results achieved in particular factual situations.

IV. LIMITATIONS ON THE DOCTRINE

Necessity of Choice. The law often affords to injured parties more than one remedy without necessity of a choice. When this is the case, the rule of election cannot properly be invoked, and the plaintiff is free to pursue any or all such remedies. So, a partner may sue for an accounting to recover his share of the profits without precluding himself from a future suit for profits thereafter accruing.²² And a suit by a principal against an agent, who, receiving money for the principal, converts it to his own use, will not bar a suit against a party, into whose hands the money has come, for money had and received.²³

Inconsistency. Closely allied with the problem of necessity of choice is the problem of consistency or inconsistency. The answer to the first question is usually determined by solution of the second. If the remedies are not inconsistent, the necessity of choice is removed. In the case noted above of the suit for money had and received against a third party, brought after a suit in conversion against the agent, the court's conclusion that the rule had no application where a party had the right to bring more than one suit was based on the theory that the remedies were not inconsistent. It indicated in *dictum* that this would be true though there had been partial satisfaction of the first judgment.²⁴ This would seem to throw doubt on one of the as-

21. *Hargadine-McKittrick Dry Goods Co. v. Warden* (1899) 151 Mo. 578, 52 S. W. 593. The determining distinction may have been any one of the following: presence or absence of knowledge of the facts; pendency of the first action at the time of the second; sale of the goods. Just how far this decision goes in limiting the *Johnson-Brinkman* cases is not clear.

22. *Steinbach v. Murphy* (1910) 143 Mo. App. 537, 128 S. W. 207.

23. *Reynolds v. Union Station Bank of St. Louis* (1918) 198 Mo. App. 323, 200 S. W. 711.

24. *Reynolds v. Union Station Bank of St. Louis* (1918) 198 Mo. App. 323, 333, 200 S. W. 711; accord *Strong v. Missouri-Lincoln Trust Co.* (Mo. App. 1924) 263 S. W. 1038; *Mann v. Bank of Greenfield* (1929) 323 Mo. 1000, 20 S. W. (2d) 502.

serted bases of the doctrine, namely, that there must be an end to litigation in the interest of the public. This case is not the only instance where the Missouri courts have avoided the harshness of the doctrine of election of remedies. If, throughout, a party bases his claim on the assertion of title in himself, he will be free to pursue a series of remedies to accomplish his ends.²⁵ And it is settled law that one may sue joint tort feorsors jointly or severally.²⁶ When results are made to depend upon whether one remedy is *theoretically* in accord with another, the very rule itself may justly be questioned.

Finality of Election. In the nature of things there must be a stage in the proceedings at which a court will say that action has gone so far as to cut off the aggrieved party from his alternative remedy. It is well settled in Missouri, as a result of the *Johnson-Brinkman* cases, that the conclusiveness of an election depends either (a) on the recovery of a final judgment or (b) the receipt of anything of value under the claim originally asserted.²⁷ Occasionally a Missouri court has violated this rule. In a recent case, *U. S. Fidelity & Guaranty Co. v. Fidelity Nat. Bank & Trust Co.*, it was held that a mere demand, without even the commencement of suit or the receipt of anything of value, constituted an election.²⁸

The technicalities connected with the whole doctrine of election of remedies are well illustrated in the case of *Brayton v. Gunby*.²⁹ A judgment against the plaintiff in her first action to rescind a contract had actually been obtained, but a motion for a new trial was sustained and no appeal taken. The court allowed a subsequent suit in deceit, holding that there was no final judgment at all, since the sustaining of the motion for a new trial left the case *as if* there had been no trial at all.³⁰ The reasoning

25. *Macklin v. Kinealy* (1897) 141 Mo. 113, 14 S. W. 893. See also *Adam Roth Grocery Co. v. Ashton* (1897) 69 Mo. App. 463.

26. *McElroy v. Swenson Const. Co.* (1923) 213 Mo. App. 160, 247 S. W. 209. See *Myer v. Kennedy* (1924) 306 Mo. 268, 267 S. W. 810, for effect of statutory remedy on necessity of choice.

27. *Johnson-Brinkman Comm. Co. v. Central Bank of Kansas City* (1893) 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Johnson-Brinkman Comm. Co. v. Mo. Pac. Ry. Co.* (1895) 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840; *Hargadine-McKittrick Dry Goods Co. v. Warden* (1899) 151 Mo. 578, 52 S. W. 593; *Otto v. Young* (1910) 227 Mo. 193, 127 S. W. 9; *Brown v. Howard* (1915) 264 Mo. 466, 175 S. W. 52; *Smith v. Becker* (1916) 192 Mo. App. 597, 184 S. W. 943; *Cowan v. Young* (1920) 282 Mo. 36, 220 S. W. 869; *Tracy v. Aldrich* (Mo. 1921) 236 S. W. 347; *Maiden v. Fisher* (Mo. App. 1929) 17 S. W. (2d) 562.

28. (Mo. App. 1937) 109 S. W. (2d) 47.

29. (Mo. App. 1924) 267 S. W. 450.

30. *Id.* at 452.

seems highly specious. The plaintiff had gone much further in the *Brayton* case than the plaintiff in the *Fidelity* case; she had had her day in court and ought not be allowed to "blow hot and cold."

Mistake. Perhaps the most important limitation on the rule of election of remedies is the principle of mistake. Mistake may take either of two forms: (1) Absence of knowledge of all the material facts at the time of the first action;³¹ (2) mistake as to the availability of the legal remedy first attempted.³² The first presupposes a judgment, or the recovery of something of value, otherwise the ordinary rule that mere commencement of an inconsistent remedy is not sufficient to bar later action could be invoked by the plaintiff.³³ The second concerns the lack of sufficient evidence to sustain the first action or the unavailability as a matter of law of the first remedy. It has no reference to a case where the plaintiff has alternative remedies against two or more parties and has misjudged the solvency of the party first sued.³⁴ An interesting extension of the principle of mistake was applied in *Central Savings Bank v. Danckmeyer*.³⁵ As surety for one Steffens, Danckmeyer had signed a note payable to the plaintiff bank, on maturity of which a renewal note was delivered to the bank purporting to be signed by Steffens and Danckmeyer. The old note was marked "paid" and surrendered to Steffens. In fact, Danckmeyer's signature on the renewal note was a forgery. The bank was informed but, being doubtful, sued Danckmeyer on the renewal note. A verdict was returned for Danckmeyer. The bank then sued Danckmeyer on the original note, and the defense raised was election of remedies. Despite the express finding that the bank had been informed of the forgery, the Kansas City Court of Appeals said there had been a mistake of fact.³⁶ The

31. *Central Savings Bank v. Danckmeyer* (1897) 70 Mo. App. 168; *Haughwout v. Royse* (1906) 122 Mo. App. 72, 98 S. W. 101; *Stephens v. Steckdaub* (1920) 202 Mo. App. 392, 217 S. W. 817; *Horigan Realty Co. v. First Nat. Bank* (1926) 221 Mo. App. 960, 289 S. W. 352.

32. *Hill v. Combs* (1902) 92 Mo. App. 242; *Hartwig v. Security Mut. Life Ins. Co.* (1912) 167 Mo. App. 128, 151 S. W. 477; *Fitzgerrell v. Fed. Trust Co.* (Mo. App. 1916) 187 S. W. 600; *Autocar Sales & Service Co. of Mo. v. Holscher* (Mo. App. 1928) 11 S. W. (2d) 1072.

33. See cases cited supra, notes 31 and 32.

34. *Welsh v. Carder* (1902) 95 Mo. App. 41, 68 S. W. 580.

35. (1897) 70 Mo. App. 168.

36. "We cannot see how the law as to election of remedies can find application to such facts. Plaintiff refused to believe that the second note was a forgery, brought suit thereon and was defeated. To hold that such mistake of fact would defeat an action on a separate and distinct instrument affecting another transaction would be a great injustice to say the least." *Id.* at 174.

same court adopted a liberal attitude in *Haughawout v. Royse*, in which the plaintiff acquired full knowledge of his rights during the pendency of the first action, and it was held that he need not dismiss the action but could press it to judgment and later prosecute an additional remedy.³⁷

In the main, the Missouri courts have applied the principle of mistake liberally to alleviate some of the harshness of the doctrine of election, keeping in mind that the doctrine normally operates in favor of the wrongdoer and against the party wronged.

V. APPLICATION OF THE DOCTRINE

The effect of the doctrine can best be observed from an enumeration of the varied classes of fact situations in which it has been invoked and by a comparison of the results achieved.

Election between continuation and termination of contractual relations. Writers have frequently asserted that a large measure of the misunderstanding of the doctrine of election of remedies has arisen through the failure of the courts to draw the distinction between election of rights and election of remedies.³⁸ Strictly speaking the doctrine itself pertains not to substantive but to adjective or procedural law. Thus, in the field of contractual relations, it is said that one remedy bars recourse to another, not because the remedies may be inconsistent, but because the bringing of the first action operates as evidence of the affirmation or disaffirmance of a certain transaction, thereby fixing the plaintiff's substantive rights and precluding remedies to enforce rights which he no longer possesses.³⁹ Ordinarily, however, this distinction is more illusory than real.

It is elementary that one who with full knowledge of the facts, has done an act which implies an intention to abide by a contract, cannot subsequently sue for a rescission; and if he does an act which implies an intention to disaffirm the contract, he cannot later sue for damages.⁴⁰ It has been stated that the bringing of

37. (1906) 122 Mo. App. 72, 98 S. W. 101 (recovery of goods *in specie* under writ of replevin, and action for damages for costs expended in prosecuting an unsuccessful suit against a party to whom defendant had transferred plaintiff's goods).

38. See Deinard and Deinard, *Election of Remedies* (1922) 6 Minn. L. Rev. 341, 347.

39. *Johnson-Brinkman Comm. Co. v. Central Bank of Kansas City* (1893) 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Johnson-Brinkman Comm. Co. v. Mo. Pac. Ry. Co.* (1895) 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840. If the distinction had been observed, it would seem that the sustaining of a motion for new trial after final judgment would not affect the election of the substantive right already made. But see *Brayton v. Gunby* (Mo. App. 1924) 267 S. W. 450, noted in text.

40. *Bush v. Norman* (Mo. App. 1917) 199 S. W. 721.

a suit is such a decisive act, even though the suit has not proceeded to judgment.⁴¹ This is, strictly, a matter of choice of rights, not remedies. So also in the field of substantive rights, according to strict logic, would lie the duty to elect whether or not to abide by a contract voidable for fraud.⁴² These cases constitute an exception to the principle laid down in the *Johnson-Brinkman* cases that mere institution of a suit will not be regarded as a conclusive election.⁴³ If, as is sometimes asserted, the true bases for election of remedies are the same that underlie *res adjudicata*—that no man shall be twice vexed for the same cause and that it is in the interest of the public that there shall be an end to litigation,—it is hard to reconcile such holdings with the view that when a contract is voidable for fraud, the defrauded party may commence a suit for damages for breach of contract⁴⁴ or for rescission⁴⁵ without barring the tort remedy of deceit, so long as the first action is not carried to judgment.⁴⁶ Furthermore one may sometimes, by using the legal device of waiver of tort, assert ownership of goods at one time and compel payment of the reasonable value of the goods (which in law now belong to the defendant) at another.⁴⁷ And the mere institution of a suit for specific performance will not bar another suit for damages.⁴⁸ Where, however, the aggrieved party recovers anything of value from the estate of the wrongdoer, he will be estopped from pursuing other remedies.⁴⁹

41. *City Light, Power etc. Co. v. St. Mary's Mach. Co.* (1913) 170 Mo. App. 224, 156 S. W. 83. Compare Restatement, *Contracts* (1932) sec. 381.

42. *Taylor v. Short* (1891) 107 Mo. 384, 17 S. W. 970; *Paquin v. Milliken* (1901) 163 Mo. 79, 73 S. W. 417. These two cases must be carefully distinguished. "This is not an effort to rescind by the discovery of another incident in the same fraud, but the prompt exercise of the right as soon as the fraud which would support a rescission was ascertained." *Paquin v. Milliken*, *supra*, at 102.

43. *Johnson-Brinkman Comm. Co. v. Central Bank of Kansas City* (1893) 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Johnson-Brinkman Comm. Co. v. Mo. Pac. Ry. Co.* (1895) 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840.

44. *Maiden v. Fisher* (Mo. App. 1929) 17 S. W. (2d) 563.

45. *Brayton v. Gunby* (Mo. App. 1924) 267 S. W. 450.

46. See Hine, *Election of Remedies, A Criticism* (1913) 26 Harv. L. Rev. 707, 711.

47. *Cowan v. Young* (1920) 282 Mo. 36, 220 S. W. 869; see also *Adam Roth Grocery Co. v. Ashton* (1897) 69 Mo. App. 463; *Corbin, Waiver of Tort and Suit in Assumpsit* (1910) 19 Yale L. J. 221, 223, 224.

48. *Otto v. Young* (1910) 227 Mo. 193, 127 S. W. 9; accord Restatement, *Contracts* (1932) sec. 382. This is true whether the suit for specific performance was brought prior to the suit for damages, or the suit for damages was the first action. *Tracy v. Aldrich* (Mo. 1921) 236 S. W. 347.

49. *Nanson v. Jacob* (1887) 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531. Election between the statutory remedy of recovering from bank officers

*Remedies against agent or trustee and recipient of converted funds.*⁵⁰ However stringent their application of the doctrine of election of remedies in other cases, the courts have refused to permit a party into whose hands converted funds have come to defend on the ground that a judgment has been obtained against the converter.⁵¹ It must be emphasized that while the court in such a situation will not permit double recovery, yet it permits action to proceed to final judgment. One opinion has gone so far in *dictum* as to say that even partial satisfaction of the first judgment will not preclude a suit against the third party for the

for acceptance of deposits at a time the bank is known to be insolvent and common law remedies is not required. *Eastin v. Bank of Harrisonville* (1922) 213 Mo. App. 130, 246 S. W. 991.

50. Another problem, not governed by the doctrine of election of remedies, but closely related thereto, is the necessity of election between the liability of an agent and his undisclosed principal. See Clayton, *Election Between the Liability of an Agent and his Undisclosed Principal* (1925) 3 Tex. L. Rev. 384. The law is clearly established that upon acquiring knowledge of a previously undisclosed agency, the third party must elect whether he will hold the agent or the principal. *Ames Packing & Prov. Co. v. Tucker* (1879) 8 Mo. App. 95; *Autocar Sales & Service Co. of Mo. v. Holscher* (Mo. App. 1928) 11 S. W. (2d) 1072. The theoretical basis for such a ruling has confused the commentators. Note (1929) 39 Harv. L. Rev. 265; 2 Mechem, *Agency* (1914) 1331, sec. 1750 et seq. The problem is similar to that presented in the true election of remedies cases, namely, what kind of action will amount to an election. Where the agency has been disclosed at the outset of the transaction, and the third party does not demand joint liability but contents himself with the security given by the agent and deals with the agent, we need not resort to any fiction of "election." It is simply a case where no liability ever existed on the part of the principal. *Ames Packing & Prov. Co. v. Tucker* (1879) 8 Mo. App. 95; *Schepflin v. Dessar* (1886) 20 Mo. App. 569. But where liability may be fixed either on the agent who failed to disclose the agency or on the subsequently discovered but hitherto undisclosed principal, the courts have required an election. *Sessions v. Block* (1890) 40 Mo. App. 569; *Negbaur v. Fogel Const. Co.* (Mo. App. 1933) 58 S. W. (2d) 346. Whether the mere institution of suit against one of the parties will amount to an election seems not to have been passed on directly. Certainly a mere demand on one of the parties does not constitute an election. *Banjo v. Wacker* (Mo. App. 1923) 251 S. W. 456. Nor does a mere bookkeeping change for a short time. *Weiselman v. Anderson* (Mo. App. 1931) 43 S. W. (2d) 905. At any rate the courts have kept this group of cases distinct from the general doctrine of election of remedies, and care must be taken not to carry their *ratio decidendi* into unrelated cases. See *Autocar Sales & Service Co. of Mo. v. Holscher* (Mo. App. 1928) 11 S. W. (2d) 1072, classifying this type of case as if within the general doctrine of election of remedies.

51. *Reynolds v. Union Station Bank of St. Louis* (1918) 198 Mo. App. 323, 200 S. W. 711; *Mass. Bonding & Ins. Co. v. Ripley County Bank* (1921) 208 Mo. App. 560, 237 S. W. 182; *Strong v. Missouri-Lincoln Trust Co.* (Mo. App. 1924) 263 S. W. 1038; see also *Trimble v. Wollman* (1897) 71 Mo. App. 467 (forged stock certificate; whether failure to act amounts to election); *Horigan Realty Co. v. First Nat. Bank* (1925) 221 Mo. App. 329, 273 S. W. 772.

balance.⁵² Why have the courts permitted the following of converted funds, even though the plaintiff has knowledge of all the facts at the time of instituting the first action? The answer is that no inconsistency *in theory* can be found.⁵³

So, too, the courts permit additional remedies after judgment against the bondsmen of a trustee wrongfully misappropriating trust funds.⁵⁴ *U. S. Fidelity & Guaranty Co. v. Fidelity Nat. Bank*⁵⁵ well illustrates the extreme to which the doctrine may be carried if not kept within proper bounds. Plaintiff surety company contracted to indemnify the Continental Construction Company against loss by reason of the dishonesty of its employees. One Chaney, a payroll clerk of the Continental, padded the payroll sheets with names of former employees, took them to the proper officer of the company for verification and signature of pay checks, and then abstracted the checks, forged indorsements, and cashed them at defendant bank. When the Continental learned of these peculations, it demanded return of the money from Chaney. Failing to get it, it made demand upon the plaintiff. Plaintiff reimbursed the Continental and took a release. Subsequently plaintiff received an assignment from Continental's successor of its claim against all parties including defendant. The Kansas City Court of Appeals assumed that the plaintiff was subrogated to the rights of the Continental by virtue of either the release or the subsequent assignment. The issue in the case, therefore, was whether, by making a technical demand on Chaney, the Continental (and consequently plaintiff, which stood in the shoes of Continental) had elected to hold Chaney and had cut itself off from its remedy against the bank for paying out Continental's money without legal authority.⁵⁶

52. *Reynolds v. Union Station Bank of St. Louis* (1918) 198 Mo. App. 323, 333, 200 S. W. 711.

53. "This suit is based upon the theory that defendant is liable to account to the plaintiff for all his money collected upon the checks payable to plaintiff, because the forged indorsements thereon of plaintiff's name did not pass title to Ferguson [the embezzler]. The suit against Ferguson is based upon the theory that he did not obtain title to plaintiff's checks and money by his embezzlements, and that he is liable to account therefor to plaintiff. Neither suit is based on the theory that title passed to Ferguson. *Both are based on the theory that title did not pass.*" (Italics supplied.) *Strong v. Missouri-Lincoln Trust Co.* (Mo. App. 1924) 263 S. W. 1038, 1044.

54. *Mann v. Bank of Greenfield* (Mo. 1929) 20 S. W. (2d) 502.

55. (Mo. App. 1937) 109 S. W. (2d) 47.

56. The printed form which Continental filed with the surety company stated that the sums "have not been paid over or satisfied in any way whatever to the said Employer, except as herein stated, have been fraudulently misappropriated by said Employee to his own use and benefit with the intent to deprive the said Employer of same, notwithstanding that due and legal demand has been made by the said Employer upon the said Employee for the same." *Id.* at 49.

The court held that there had been an election and that plaintiff was thus "estopped" from asserting its claim against the defendant. The court added insult to injury by concluding: "The result reached hereby is not only logical, but it is just and equitable; and the goal ever sought by the law is justice and equity, reached by logical reasoning."⁵⁷ The Continental's attempt to save the bank from loss, by demanding reimbursement from the real culprit, actually saved the bank from paying for its wrongful act! This is the "justice" to which the court referred. No Missouri case involving a similar fact situation was cited by the court to sustain its position.⁵⁸ In fact the very portion of one of the *Johnson-Brinkman* cases cited by the court as laying down the general rule of election of remedies would lead to the opposite conclusion.⁵⁹ In holding that the technical demand on Chaney, under the claim that he had embezzled Continental's money, constituted an election, the court flew in the face of all prior decisions holding that either a judgment must be obtained or something of value be realized. Furthermore it overlooked the analogous cases holding that where funds have been misappropriated, the owner may have his remedies against anyone into whose

57. *Ibid.*

58. The court cited *Tower v. Compton Hill Improvement Co.* (1905) 192 Mo. 379, 91 S. W. 104, and *Johnson-Brinkman Comm. Co. v. Mo. Pac. Ry. Co.* (1894) 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840, in support of the general doctrine of election of remedies. The court cited three cases from other jurisdictions involving the proposition at hand. In two of them a suit had been brought and had proceeded to final judgment. *Fowler v. Bowery Sav. Bank* (1889) 113 N. Y. 450, 21 N. E. 172, 10 Am. St. Rep. 479, 4 L. R. A. 145; *Jones v. First Nat. Bank of Lincoln* (1902) 3 Neb. (unof.) 73, 90 N. W. 912. The court in the third case, in the course of a long opinion, did indeed say that asking for, or accepting relief, against the forger would amount to an election. *Midland Savings & Loan Co. v. Tradesmen's Nat. Bank* (C. C. A. 8, 1932) 57 F. (2d) 686, 693, 697. It is interesting to note that one of the cases relied on in the *Midland* opinion was the *Jones* case, noted herein, where a final judgment had been rendered in the first action. See for discussion of the problem *Note* (1938) 38 Col. L. Rev. 293, 303.

59. "It is well settled law where a party has the right to pursue one of two inconsistent remedies, and he makes his election and institutes his suit, that in case the action thus begun is prosecuted to final judgment, or the plaintiff has received anything of value under a claim thus asserted, he cannot thereafter pursue another, and inconsistent remedy." *Johnson-Brinkman Comm. Co. v. Mo. Pac. Ry. Co.* (1894) 126 Mo. 344, 349, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840. The court in the *Fidelity* case itself inserted the italics! Again the court recognized that something more than mere demand is necessary to make an election conclusive, by saying: "Where one elects to pursue one of two or more inconsistent remedies * * * and receives full satisfaction therefrom * * *," he can no longer pursue the other remedy. *U. S. Fidelity & Guaranty Co. v. Fidelity Nat. Bank & Trust Co.* (Mo. App. 1937) 109 S. W. (2d) 47, 49.

hands they have come until he gets full satisfaction.⁶⁰ The answer to the contention made in those cases could well have been made here, namely, that the remedies were not inconsistent, that the action of Continental in demanding reimbursement from its agent was a clear disaffirmance of the agent's acts, and in the suit against the bank the plaintiff was still disaffirming the transaction.⁶¹ The case is clearly out of line, and it is doubtful whether the Supreme Court would sustain the holding.

Relationship of election of remedies to the law of security transactions. The doctrine of election of remedies extends its influence into the law of security transactions as in other fields. Of the problems involved, one of the most important practically is the necessity of election of remedies by a vendor of chattels sold under a conditional sale contract after default has occurred.⁶² The local decisions, however, have already been thoroughly reviewed,⁶³ and further comment is unnecessary.

The question whether a chattel mortgagee by attaching the goods waives his right to proceed by virtue of his mortgage lien has been answered affirmatively. In *Ottumwa Nat. Bank v. Totten*, the St. Louis Court of Appeals held that a mortgagee, by suing the debtor-mortgagor on the notes (which the mortgage secured) and attaching the goods, "waived" his claim to the mortgaged goods as against one to whom the mortgagor had sold the goods.⁶⁴

An interesting situation was presented in *Brown v. Essig*.⁶⁵ A mortgagee under a deed of trust released the deed of trust when the mortgaged property was conveyed to him, but agreed to resell to the mortgagor for practically the amount secured by the deed of trust. In the meantime a trust company had secured a judgment against the mortgagor, by virtue of which it had a lien on the land. Learning of this, the original mortgagee sued the mortgagor in attachment based on the contract of resale. In

60. *Reynolds v. Union Station Bank of St. Louis* (1918) 198 Mo. App. 323, 200 S. W. 711; *Mass. Bonding & Ins. Co. v. Ripley County Bank* (1921) 208 Mo. App. 560, 237 S. W. 182; *Strong v. Missouri-Lincoln Trust Co.* (Mo. App. 1924) 263 S. W. 1038.

61. See particularly *Strong v. Missouri-Lincoln Trust Co.* (Mo. App. 1924) 263 S. W. 1038.

62. See the leading Missouri case of *Twentieth Century Mach. Co. v. Excelsior Springs Bottling Co.* (Mo. App. 1914) 171 S. W. 940; Comment (1915) 7 Mo. L. Bull. 44.

63. Note (1932) 17 ST. LOUIS LAW REVIEW 143.

64. (1902) 94 Mo. App. 596, 68 S. W. 386, citing the leading case of *Evans v. Warren* (1887) 122 Mass. 303; see also 2 Jones, *Chattel Mortgages and Conditional Sales* (6th ed. 1933) 328, sec. 565.

65. (Mo. App. 1927) 1 S. W. (2d) 855.

a suit against the trust company for reinstatement of the deed of trust to establish priority over the judgment lien obtained by the trust company, it was contended that the attachment suit, which had proceeded to judgment, barred the suit for reinstatement of the deed of trust. The Kansas City Court of Appeals held that even though the attachment suit had proceeded to judgment, it was not an inconsistent remedy. While the court gave no reasons for its decision, the theory seems to have been that the plaintiff was *affirming* legal title in the mortgagor in both actions. Here again the fictitious and theoretical nature of the doctrine is apparent, since the result is made to depend not on whether anyone has changed his position in reliance on the first action or how far the first action had proceeded, but whether the remedies are in theory consistent.⁶⁶

Problems growing out of land transactions. Cases which might properly be classified here have been discussed incidentally in other portions of this article. A few, however, deserve special notice. In *Branner v. Klaber*⁶⁷ plaintiff sued to cancel a deed of land given defendant in exchange for some worthless stock, which defendant had fraudulently induced plaintiff to accept. Failing in this effort, plaintiff then asked the court to establish a vendor's lien on the land. The court said that the suit based on repudiation was inconsistent with affirmance of the transaction and establishment of the vendor's lien.⁶⁸ If this is the basis of decision, then the court entirely lost sight of the established rule that pursuit of a non-existent remedy is no bar to subsequent inconsistent action.⁶⁹

The case of *Macklin v. Kinealy*⁷⁰ is an illustration of the length to which a party may go if he asserts title in himself at all stages of the various remedies. The emphasis, of course, is still on the theoretical bases of the suits.⁷¹

An interesting application of the doctrine presents itself when

66. See for a sounder approach *Boogher v. Frazier* (1889) 99 Mo. 325, 12 S. W. 885 (estoppel *in pais*).

67. (1932) 330 Mo. 306, 49 S. W. (2d) 169.

68. *Id.* at 332.

69. See cases cited *supra*, notes 31 and 32.

70. (1897) 141 Mo. 113, 41 S. W. 893.

71. "Defendant's main contention is that the circuit court erred in holding that the plaintiff was not estopped from maintaining this suit by reason of her action in prosecuting the suit for the recovery of the possession of the premises and her subsequent compromise thereof as found by the court. We do not think the authorities cited support this contention. Her action in this behalf certainly cannot be considered a ratification of the defendants' act in conveying the property, which conveyance she was continually attacking and asserting title against." *Id.* at 120.

a public utility wrongfully enters premises, appropriating land for its right of way. That there may be a suit for damages or ejectment, but not both, was the conclusion of the Missouri Supreme Court in *Tooker v. Missouri Power & Light Co.*⁷² Practical exigencies and the interest of the public, rather than any theoretical inconsistencies in the remedies, seem to require this result. The court relied on another supreme court case reaching the same result, though the facts and basis for the decision were not alike.⁷³ There, land was sold with certain mutual covenants. The grantee breached his covenant, whereupon the grantor proceeded to violate his covenant. It was held that, having done this, the grantor could no longer bring ejectment.⁷⁴ In that case the rights and remedies arose out of consensual relations. Moreover the right-remedy approach becomes useful. The grantor had a *right* to be relieved of the obligations binding on him. He elected this right in preference to the *right* to regard the covenant as broken and could no longer assert the *right* to regard the covenant as broken by the *remedy* of ejectment. The decisions in both cases may be justified, but it is important to distinguish them.

VI. CONCLUSION

No attempt has been made to delve into all the ramifications of this complicated doctrine, even in a single jurisdiction.⁷⁵

72. (1935) 336 Mo. 592, 80 S. W. (2d) 691, 101 A. L. R. 365.

73. *Tower v. Compton Hill Imp. Co.* (1905) 192 Mo. 379, 393, 91 S. W. 104.

74. The plaintiff-grantor had successfully defended an action by the defendant-grantee to enjoin him from violating his covenant. The action was dismissed for want of equity in the grantee. *Compton Hill Imp. Co. v. Tower's Ex'rs* (1900) 158 Mo. 282, 59 S. W. 239. It is clear that it was action prior to the defense of the suit that worked the election, and not the defense of the suit itself. *Tower v. Compton Hill Imp. Co.* (1905) 192 Mo. 379, 393, 91 S. W. 104. See *Bell v. Butte Inv. Co.* (Mo. 1923) 250 S. W. 381, where defense of a suit in ejectment was held a bar to a suit, by the winning defendant in the first suit, for damages for fraud in obtaining title. True estoppel was apparent in that case.

75. In the following cases, listed by date, the court discussed election of remedies, although many involved statutory interpretation, *res adjudicata*, ratification, and other grounds for decision. *Union R. R. & Transp. Co. v. Traube* (1875) 59 Mo. 355 (*res adjudicata*); *MacMurray-Judge Architectural Iron Co. v. City of St. Louis* (1897) 138 Mo. 608, 39 S. W. 467 (injunction against changing grade of street bars suit for damages); *Lilly v. Menke* (1898) 143 Mo. 137, 44 S. W. 730 (*estoppel*); *Smoot v. Judd* (1904) 184 Mo. 508, 83 S. W. 481 (suit on sheriff's bond for false return bars suit to quash execution and set aside sale of property); *State ex rel. Kimbrell v. Peoples Ice, etc. Co.* (1912) 246 Mo. 168, 200, 151 S. W. 101 (inconsistency of *quo warranto* and injunction); *Deer v. Deer's Estate* (Mo. App. 1915) 180 S. W. 572 (election between common law and statutory remedies); *Mo. Pac. Ry. Co. v. Kansas City & I. Air Line Co.* (1915) 189 Mo. 538, 88 S. W. 3 (change in theory of pleading); *Hunnell v. Zinn* (Mo.

Rather the purpose has been to show (1) the extent to which the doctrine cuts across the whole field of law; (2) its fictitious and theoretical nature; (3) the departures made by the Missouri cases from the holdings in the *Johnson-Brinkman* cases. *A priori* it would seem that the injured party should be allowed to pursue the remedies afforded by law until made whole for his losses, unless barred by independent operation of an estoppel *in pais* or *res adjudicata*. The greatest hardship is presented when the aggrieved party may seek relief from either of two parties, but must judge ahead the solvency of the respective parties at his peril. The clear holdings of the Missouri courts, however, are to the effect that when, in legal theory, the remedies are inconsistent, pursuit of one remedy to judgment or the receipt of something of value will bar further relief.⁷⁶ The difficulty has been that the courts have sometimes failed to observe these limitations and have labelled the abortive attempt to secure relief an election of remedies. The few limitations on the doctrine should be carefully guarded lest the law favor the wrongdoer at the expense of the wronged.

SIGMUND BARACK.

1916) 184 S. W. 1154 (resulting trust and advancement); *Highfield v. United Magazine Press* (Mo. App. 1916) 190 S. W. 926 (election between statutory and common law remedies); *Smith v. Berryman* (1917) 272 Mo. 365, 199 S. W. 165, 1 A. L. R. 1692 (mandamus and suit for damages for false return to the alternative writ); *Headlee v. Cain* (Mo. App. 1923) 250 S. W. 611 (judgment against escrow holder of note for wrongful delivery bars defense against holder of note); *Doebbling v. Quimby* (1927) 221 Mo. App. 1178, 299 S. W. 629 (ejectment bars replevin for unsevered crops); *Langford v. Fanning* (Mo. App. 1928) 7 S. W. (2d) 726 (election between statutory and common law remedies for wrongful levy); *Berryman v. People's Motorbus Co. of St. Louis* (1932) 228 Mo. App. 1032, 54 S. W. (2d) 747, cert. quashed State ex rel. St. Louis Pub. Serv. Co. v. Becker (1933) 334 Mo. 115, 66 S. W. (2d) 141 (election between common law and statutory remedies).

76. *Johnson-Brinkman Comm. Co. v. Central Bank of Kansas City* (1893) 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Johnson-Brinkman Comm. Co. v. Mo. Pac. Ry. Co.* (1895) 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840.