Volume 39
Issue 1 *Dickinson Law Review - Volume 39, 1934-1935*

10-1-1934

Election of Remedies in Pennsylvania

James Rick III

guilty of murder at common law. This is so in the United States (except in Texas), by:

A. Murder caused through a guilty human agent, or

B. Murder caused through an innocent human agent, or

C. Murder caused by compulsion.

III. The attempt at suicide is a misdemeanor at common law.

A. This is so in the United States today where the common law is followed.

B. Where suicide is not considered a crime, the attempt at suicide is:

1. Made a crime by statute, or
2. Is not a crime.

IV. Conspiracy to commit suicide is a separate crime.

V. Solicitation to commit suicide is a separate crime.

VI. There is no legal duty to interfere to prevent the commission of suicide except in cases where one person sustains to another the legal relation of protector.

VII. Death of another person caused in the attempt to commit suicide is murder.

Richard Wolfrom.

ELECTION OF REMEDIES IN PENNSYLVANIA

This note is provoked because of the lack of adequate indexing on the subject of Election of Remedies in the Pennsylvania digests. An article in Corpus Juris has proven to be of invaluable aid in its preparation, and so it is only fitting that the definition therein contained should be iterated. "Election of remedies has been defined to be the right to choose, or the act of choosing between different actions or remedies, where plaintiff has suffered one species of wrong from the act complained of."[1]

No definition, unfortunately, can be all-inclusive; at best it can serve merely as a guide. Immediately we are forced to restrict the one above by saying that the term, election of remedies, has been generally limited to a choice by a party between inconsistent remedial rights. A quotation from *Patterson v. Swan*[2] states the proposition thus:

---

[1] 20 C. J., sec. 1. p. 2.

[2] 9 Serg. and R. 16 (1822).

> "It is well settled, that the doctrine of election holds only where the remedies are inconsistent with each other; and here they are not so. . . . . It is perfectly clear, therefore, that the plaintiff might pursue the principal or his surety; or both at the same time."

The defendant had entered bail to entitle himself to a stay of execution under the provisions of the Act of 21st. March, 1806, and the plaintiff, after the expiration of the cesset, issued a fieri facias and levied on defendant's real estate. On the return of this writ the plaintiff issued a scire facias against the bail upon his recognizance and it was held that the plaintiff could pursue either or both of these remedies, they being consistent, though he could receive but one satisfaction.

Thus we learn that the doctrine involved applies only where the alternative remedies are at odds, or inconsistent with each other; and not where they are concurrent. The question as to what remedies are consistent and what are inconsistent with each other will be discussed further on.

At once the query is propounded, why is an election ever required? Is there any fundamental reason behind the doctrine? The answer may best be given by an illustration from the case of *Ketcham v. Davis*.[3] A lease of personal property gave the plaintiff, the lessor, the right, in default of payment (which payment was to be made in two unequal instalments) to retake possession of the property or to recover the full price. The defendant (lessee) was in default on the first payment. The plaintiff pursued both alternatives. What was the result? When the plaintiff caused judgment to be entered for the unpaid balance, he considered the lease to be still in existence and acknowledged the title to be in the defendant. When later the plaintiff retook possession, he thereby rescinded the lease. In the first instance he affirmed the lease; in the second he disaffirmed it. The consequence of his procedure was a reliance on theories which cannot stand together. A party cannot affirm and disaffirm at the same time. The court said:

> "The established rule of law governing the enforcement of such contracts is that the so-called lessor, on default, can adopt either remedy, but they are not to be deemed cumulative; in other words, he could not take both unless it was plainly expressed in the contract or a necessary implication from its terms."

Another illustrative case is that of *Star Drilling Machine Co. v. Richards*[4] in which a contract provided that payments for merchandise delivered were to be made from time to time, the title thereto to remain in the seller until a certain amount had been paid. Sometime later the seller retook possession of the

---

[3] 31 Pa. Super. Ct. 583 (1906).
[4] 272 Pa. 383 (1922).

property and so his right to receive future payments at once ceased.[5] In *Piersol v. Neill*[6] the court said:

> "As a general rule, inconsistent remedies cannot exist at one and the same time, to redress a wrong, either in tort or on contract."

We have seen where the remedies are consistent, the doctrine of election does not apply. Thus it becomes incumbent upon us to discern what remedies the courts consider to be consistent remedies. The case of *Patterson v. Swan*, supra, is a good illustration. The language of *Floyd v. Browne*[7] is especially helpful in explaining the holding of the *Patterson* case:

> "Separate actions against a number who are severally liable for the same thing, or against the same defendant *on distinct securities for the same debt or duty*, are consistent, being concurrent remedies." (italics ours)

If a creditor accepts a promissory note for the debt, he can maintain, at the same time, an action both on the original debt and one on the note, "unless he (defendant) can show, upon trial, to the satisfaction of a jury, that the original debt was extinguished by the notes," *Alexander v. Righter*.[8] A slightly more difficult situation is presented in *Holt v. McWilliams*[9] in which the vendee brought an action at law to recover the purchase price paid for land. This he discontinued and then brought the present bill for specific performance. An objection was made that these are inconsistent remedies and so the plaintiff cannot maintain the second one, but the court dismissed the objection in this fashion:

> "The action at law was discontinued and the costs paid. It was in fact a suit based upon the very contract which is now the basis of the decree for specific performance. The suit was founded on an obligation of the defendant to perform his agreement to convey. The two proceedings are not inconsistent. It is true, pending both, the plaintiff might have been driven to elect between them. He, however, discontinued the first and relies now solely on his right to specific performance."[10]

No general rule can be deduced from these cases. A party must scrutinize each situation carefully and ask himself, if he discovers a choice of remedy, "Should I pursue both of them, would the underlying theory on which I rely

---

[5]See also Elliot to Use v. Douglass, 104 Pa. Super. Ct. 399 (1931); 37 A. L. R. 91; 58 A. L. R. 309n; Auto Security Co. v. Canelli, 80 Pa. Super. Ct. 43 (1922).

[6]63 Pa. 420 (1869).

[7]1 Rawle 120 (1829).

[8]21 Pa. Dist. 842 (1911). The same case was reversed on other grounds in 240 Pa. 22 (1913).

[9]21 Pa. Super. Ct. 137 (1902).

[10]Accord, Wasserman v. Steinman, 304 Pa. 150, 155 (1931); 26 A. L. R. 116n.

for my relief in each case be the same?" In other words, is each remedy predicated upon the contract I have made, or is each in disaffirmance of it; am I affirming in both, or disaffirming in both? Judge Gibson said that for remedies to be consistent they must be so, not only in *purpose* but in *kind*.[11] It may generally be said that where there is joint or several or joint and several liability, a plaintiff may sue all individually at the same time. The same holds true in principal and surety cases; or where one defendant has bound himself for the same thing in different ways.

The result of employing consistent remedies is this: the bringing of the actions and the pursuing of them to judgments are not bars, but *satisfaction* of one is a bar to the others and is a satisfaction of all.[12] The court in *Floyd v. Browne*, supra, thus tersely states the proposition:

> "Trespass is, in its nature, joint and several; and in separate actions against joint trespassers, being consistent with each other, *nothing but actual satisfaction by one will discharge the rest.*" (italics ours)

Schwartz v. Lawrence[13] was a case in which an attachment under the Act of 1869 issued, although an action for goods sold and delivered was pending at that time. It was held that the two remedies, although for the same cause, were not inconsistent "because they look to the accomplishment of the same purpose," and while two recoveries may be had, "there can be but one satisfaction."

We turn now to a discussion of what remedies are inconsistent. The most general rule that can be laid down is that a party cannot affirm and disaffirm at the same time,[14] whether it be a contract, or a deed, or any other type of obligation. All actions which proceed upon the theory that the title to property is in plaintiff are inconsistent with those which proceed upon the theory that title is in defendant. In conditional sale cases in which the vendor retakes the property first, he has elected, and cannot thereafter recover the price.[15] An interesting case is that of *Dick v. Gaskill*,[16] in which the court said:

> " . . . . . where there is a contract for the performance of certain things, and the party binds himself in a penalty for the perform-

---

[11]Potts' Appeal, 5 Pa. 500 (1847).

[12]Brennan et al. v. Huber, 112 Pa. Super. Ct. 299 (1934) is the latest and best utterance of our courts on this subject. In an action of trespass against a master to recover damages for personal injuries caused by a servant's negligence, the record established that the same plaintiff had recovered a judgment against the servant which had not been satisfied. It was held that the former action was not a bar. See also the cases cited therein.

[13]12 Phila. 181 (1877).

[14]Geiser Mfg. Co. v. Crissinger, 17 Pa. Co. Ct. 46 (1895); Share v. Anderson, 7 S. & R. (1821).

[15]Kelly Springfield Road Roller Co. v. Schlimme, 220 Pa. 413 (1908); Campbell Printing Press and Mfg. Co. v. Hickok, 140 Pa. 290 (1891).

[16]2 Whart. 183 (1837).

> ance, the party complaining of the breach of such contract has his election either to bring *debt* for the penalty, or *case* for the breach of contract; and in the latter case may recover even beyond the amount of the penalty in damages; and where the word penalty is specifically used, it is not in the nature of liquidated damages, but merely as a security."[17]

In *Jacob v. Groff*[18] there was a bailment lease of a piano, providing for a $50 quarterly rental until $350 was paid, when title should pass to the lessee. By the terms of the agreement, the lessee gave a note for $350 payable in three months, on which $50 was to be paid, the note surrendered, and a new one for $300 was to be given and so on until all was paid. The first note was discounted by a bank for the bailor before maturity, and at maturity it was not paid. Suit was brought by the bank and a compromise made by a payment of cash and notes to the bailor. The bailee then sold the piano to another person. The present suit was in replevin by the assignee of the bailor against the purchaser from the bailee, and it was held that the action of the bailor in having the note discounted, thereby putting it out of his power to comply with the terms of the lease, terminated the contract, and that his election had been made by allowing the suit on the note for the whole debt. The court said :

> "The bailor had the undoubted right to take the piano into his own possession, under the terms of the bailment, but, having allowed the holder of the note to bring suit for the whole amount and, therefore, hold the bailee as debtor therefor, he lost the right to take possession of the piano, which was not regained, unless by express agreement between the parties."

The plaintiff had a choice of trover, trespass or assumpsit in *Garrison v. Bryant.*[19] He chose the former and so was bound by all the incidents of and attaching to it. He elected his remedy and was bound by the said election.[20]

The most important incident attaching to the doctrine, where the remedies are inconsistent, is that it is the election itself which constitutes the bar to a different remedy, differing decidedly in this respect from those situations in which the remedies are concurrent. This is true although one remedy is at law and the other in equity.[21]

While there is no specific judicial utterance in Pennsylvania, it seems safe to say, by implication, that an election can exist only where there is a choice

---

[17]See also New Holland Turnpike Co. v. Lancaster County, 71 Pa. 442 (1872); Biery v. Steckel, 19 Pa. Super. Ct. 396 (1902).

[18]19 Pa. Super. Ct. 144 (1902).

[19]10 Phila. 474 (1873).

[20]It is of significance to note that because of the doctrine of the election of remedies, no rules of the substantive law have been altered. Merely because a plaintiff often has a choice of trespass or assumpsit for a given cause, does not mean that he always has an election. For a good discussion of this point see Brandmeier v. Pond Creek Co., 229 Pa. 280 (1910).

[21]Holt v. McWilliams, 21 Pa. Super. Ct. 137 (1902).

between two or more inconsistent remedies actually existing at the time the election is made. The case of *Fisher v. Lehigh, etc. R. Co.*[22] sustains this proposition. A widow brought suit for the wrongful death of her husband under the Pennsylvania Act. Later she also sued for the same thing in a federal court under the federal act. The defendant, in the latter case, petitioned the court, asking that the plaintiff be required to elect in which action she would proceed, and that she be required to discontinue the other one and pay the costs. It was held that the court had no power to grant the petition. Each statute came from a different soverign power, exclusive within its own domain. The two actions are separate. If decedent was killed while engaged in interstate commerce, the federal act and jurisdiction applied, contra if he was killed in intrastate commerce. The case of *Reap v. Scranton*[23] says that there has been no conclusive election where a party prosecutes an action based upon a remedial right which he erroneously supposes he has and is defeated because of such error. The facts are these: the plaintiff instituted proceedings to have damages assessed as if there had been a taking in the exercise of the right of eminent domain and the action fell by reason of the determination of the fact that there had not been such a taking as entitled him to have the damages assessed in that way. The court held that the remedy of trespass or ejectment survived. The case was affirmed per curiam, plaintiff having a verdict and judgment for $800 in trespass.

This doctrine of election is closely akin to estoppel and waiver, the latter being the closer counterpart. *Walter v. Graham*[24] is a case based upon an oral contract. Defendant agreed to wrap, pack and crate in an expert and proper manner certain household goods and furniture belonging to plaintiff, and load them in a proper manner in a railway freight car for shipment from Philadelphia to X. The goods were damaged and plaintiff had already recoverd $70 from the railroad company when she brought this action. Plaintiff secured a verdict and defendant moved for judgment n.o.v. In dismissing the motion the court said:

> "The argument for judgment n.o.v. is based on the contention that the plaintiff waived her claim against the defendant and estopped herself from asserting the same because she secured $70 from the railroad company on account of her damage. The obligations of the railroad and of the defendant in connection with the shipment of goods were separate and distinct, and the question of waiver or estoppel is not involved."

Thus where a person has distinct remedies against different persons whose obligations are separate and distinct, as distinguished from the master-servant, principal-agent and joint tortfeasor relationship, even satisfaction of one judgment will not bar a suit against the other.

---

[22] 20 Pa. Dist. 444 (1911).
[23] 7 Pa. Super. Ct. 32 (1898).
[24] 80 Pa. Super. Ct. 518 (1923).

The most important single element connected with this whole doctrine is how far one may proceed before he is bound by his election. The general rule in the United States is that the mere bringing of an action bars the use of any other inconsistent remedy. This, however, is not the Pennsylvania rule. In this state *the carrying of the action based upon one remedy through to judgment is the bar to a subsequent inconsistent remedy. Holt v. McWilliams,* supra, is most often cited as authority for this proposition. It will be remembered, however, that the court in the *Holt* case held that the two remedies therein which caused the controversy were consistent with each other. Thus it is submitted that the *Holt* case, technically, is of little value for which it is most frequently relied upon. *Wasserman v. Steinman,*[25] which follows the *Holt* case, however, clears up the situation by saying that if one remedy is discontinued, another one may be brought. The case of *Bookwalter v. Bookwalter*[26] must be confined to its own facts. The opinion indicates this, thus the case has no effect upon the rule propounded. The rule laid down therein is this: where a party had two remedies and, electing to follow one, in agreement with opposing counsel, requested the court to make a decree in conformance with such agreement, he cannot afterwards abandon such remedy and invoke another . . . . . "the question is not so much a matter of remedy as a matter of good faith to the court." *Portland Lumber Co. v. Kiehl*[27] clinches the situation. Briefly the facts are these: A had the sheriff, defendant, levy upon goods in the hands of B, which goods belonged to the plaintiff. At the sheriff's sale, the plaintiff notified the bidders, in the presence of the sheriff, that the goods were his. After the sale, the plaintiff proceeded against the sheriff for the wrongful sale, and it was held that he was not deemed, by his notice, to have elected his remedy against the purchasers. The case of *Floyd v. Browne,* supra, was referred to in the opinion, which case had the same facts except that the plaintiff therein had already obtained a judgment against the plaintiff in the execution and one other of the defendants before he brought assumpsit against the sheriff. It was held that he had made his election :

> "Although the judgment, perhaps, was worthless, having gone so far there certainly was an election of remedy, and having selected one source out of which to receive redress, and prosecuted it to judgment, he could not then select the other remedy."[28]

The *Portland Lumber Co.* case was reversed on other grounds in *Hyde v. Kiehl.*[29] In this latter case, *Floyd v. Browne* was again referred to and the following quotation contains the gist of the controversy :

---

[25]Supra, note 10.
[26]75 Pa. Super. Ct. 577 (1921).
[27]19 Pa. Co. Ct. 564 (1897).
[28]19 Pa. Co. Ct. 564, 566 (1897).
[29]183 Pa. 414 (1898).

> "But the basis in *Floyd v. Browne* is that by the judgment against the trespasser the title to the goods was divested out of the former owner, the plaintiff, and he could not subsequently maintain any action founded on that title. It was a debatable question in *Floyd v. Browne* whether the title was fully divested by a judgment without satisfaction, and in *Fox v. Northern Liberties, 3 W. & S. 103*, it was said that the authorities on the subject are conflicting. But in *Merrick's Estate, 5 W. & S. 9*, it was said that it was no longer an open question in this state: 'A judgment for the value of a chattel is placed on the same footing as an actual satisfaction, and consequently divests the plaintiff's title'."

Further on in the opinion of *Hyde v. Kiehl* the court says:

> "But while it is thus held that a judgment is per se a bar, no case has been found which holds that anything less than a judgment shall have that effect. The technical reason of divesting the title does not apply to a notice such as was given in the present case, and we should be taking a long doubtful step in advance of our previous decisions by holding that such notice should operate as an estoppel."

Thus we have the situation as it exists in Pennsylvania. The *Holt* case, supra, does say that a discontinuance plus a payment of costs is the proper procedure when a change of remedy is desired, and it is submitted that this method is the safest. With two suits pending at the same time, the defendant may either demand an election or put in a plea in abatement to the second one.

ELECTION BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY

The mere commencement of an action at law or a suit in equity does not constitute a conclusive election so as to preclude resorting to the other tribunal to enforce the same cause of action after discontinuance.[80] On the other hand it is true, as shown in *Megahey v. Farmers' and Mechanics' Savings Fund and Loan Ass'n*:[81]

> "Jurisdiction will not be taken in equity to retry on the same facts a cause of action that has been decided in proceedings at law."

The same rule applies generally to courts of concurrent jurisdiction. *Smith v. McClure*[82] holds that where a party seeks relief in a court of equity and insists on its jurisdiction, he cannot thereafter complain because the court sustains his contention and disposes of the case upon its merits. The rule that in cases of concurrent jurisdiction the court that first acquired jurisdiction

---

[80]Cook v. Carpenter, 12 Pa. Dist. 483 (1903).
[81]215 Pa. 351 (1906).
[82]257 Pa. 168 (1917).

ousts the jurisdiction of the other has been applied where the first suit was not discontinued.[33]

There arises a point in this connection which has given some trouble to the courts but now appears to be definitely settled. It is this—where a suit on the identical cause is pending between the same parties at law, and the plaintiff subsequently commences another one in equity, what course is open to the defendant. Must he answer and then force plaintiff to elect which one he will pursue, or is a plea of lis pendens in abatment sufficient? J. Arnold in *Pa. Co. for Ins. etc. v. Phila. Nat'l Bank*[34] dealt with the problem by saying that the real question involved is:

> " . . . . whether a plea lis pendens is a good plea in abatement, or whether the defendant, who is sued first at law, must, when subsequently sued in equity, for the same cause, file answer upon the merits; and upon due reflection, I am of opinion, that the plea of lis pendens is good, and that the defendant is not bound to answer upon the merits before requiring the plaintiff to make an election which suit he will pursue."[35]

The complementary situation is also the same, the case of *Penn Bank v. Hopkins*[36] holding that the pendency of a suit in equity is a good plea in abatement to a subsequent action at law brought for the same cause of action.[37]

The older cases were the ones which brought doubt in the minds of judges who had the question of pleas in abatment before them. In *Pa. Co. for Ins. etc. v. Phila. Nat'l Bank*, supra, the court disposed of *Brooke v. Phillips*,[38] a proceeding in equity:

> "In *Brooke v. Phillips*, ... , on a motion to disallow a plea of this nature, Judge Strong, sitting at nisi prius, decided that 'it is only another suit pending *in equity* that is pleadable. Though the rule in former times was different, the course of practice has now been settled to be this. If a plaintiff sues a defendant at the same time and for the same cause, both at Common Law and in equity, the defendant, *after full answer put in*, may apply to the court for an order that the plaintiff make his election where he will proceed; but he cannot plead the pendency of the suit at Common Law in bar of the suit in equity.' For this

---

[33]Tiemann's Estate, 23 Pa. Dist. 607 (1914), holding that, where a party brings an action at law in the court of Common Pleas for damages for breach of contract, and subsequently petitions the Orphans' Court for specific performance assuming that the jurisdiction is concurrent, the court that first acquired jurisdiction ousts the jurisdiction of the other.

[34]3 Pa. Dist. 93 (1893), affirmed 195 Pa. 34.

[35]Accord, Glunz v. Kauffman, 7 Phila. 459 (1870).

[36]111 Pa. 328 (1886).

[37]This, of course, being before such pleas were abolished by the Practice Act of 1915. Today the pleading set up in the Practice Act must be followed.

[38]6 Phila. 392 (1867).

> he cites some of the authorities which I have referred to. Taking his own language as it is written, he was undoubtedly right in saying that a defendant cannot plead the *pendency* of a suit at Common Law in *bar* of the suit in equity. But subsequent cases in our state decide that he may plead *lis pendens* in *abatement* of another suit for the same cause, and he is not compelled to file an answer upon the merits of the case."

The treatment of the subject of election of remedies in this note has, of necessity, been general. The scattered cases leave great gaps in the law which time alone will fill.

James Rick, 3rd.