#61 6/1/65

Memorandum 65-33

Subject: Study No. 61 - Election of Remedies in Cases Where Relief is Sought Against Different Defendants

Attached is a copy of our research consultant's report on this topic. The consultant, Professor Robert A. Girard of the School of Law, Stanford University, suggests that this project be terminated without preparing legislation. He believes there is no compelling necessity for legislative intervention.

Should this topic be dropped from out agenda?

Respectfully submitted,

John H. DeMoully
Executive Secretary

January 1, 1960

A STUDY TO DETERMINE WHETHER THE DOCTRINE OF ELECTION OF REMEDIES SHOULD BE ABOLISHED IN CASES WHERE RELIEF IS SOUGHT AGAINST DIFFERENT DEFENDANTS*

* This study was made at the direction of the California Law Revision Commission by Professor Robert A. Girard of the School of Law, Stanford University

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(#61) REPORT OF CONSULTANT 1/9/60

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California

Dear Mr. DeMoully:

As you know, I have been conducting a study for the California Law Revision Commission concerning the effect of the doctrine of "election of remedies" in cases where relief is sought against different defendants. The objective of this study, of course, is to ascertain the existing state of the law in California and to recommend such legislative action as may be warranted. Before I come to the principal point of this letter, perhaps some general observations about the doctrine of election of remedies would be helpful.

Frequently the law makes available different remedies or the same remedy on different theories for invasion of a legally protected interest. For example, where a party wrongfully appropriates another's property the aggrieved party may be able to recover on grounds of conversion, or trespass to chattels, or by an ancient fiction in general assumpsit for goods sold and delivered. Such multiplicity of remedies, or perhaps more accurately here theories of recovery, is attributable largely to history, to the common-law writ system and the overlapping of law and equity, and to a judicial desire to provide more complete protection of the aggrieved party's interests.

The much maligned doctrine of "election of remedies," as orthodoxly formulated, declares that where a party "knowingly elects" an "available

remedy" he is barred from resorting to an "inconsistent remedy" for an invasion of his interests. To illustrate, in connection with the example given in the preceding paragraph, courts have said that if the aggrieved party institutes an action for conversion he is barred by the doctrine of election of remedies from subsequently maintaining an action on the common counts for goods sold and delivered because the two actions are "inconsistent." The "inconsistency" is ascribed to the fact that in one case the plaintiff is proceeding on the theory that the taking is wrongful, in the other on the basis(albeit an obvious fiction designed to circumvent the limitations of a common-law writ) that a sale has been made.

Assuming, for the moment, that the doctrine of election of remedies is accepted at face value, there is actually not much independent scope in the law for its operation. Several other well established doctrines or principles cover much of the ground to which it is literally applicable. First are the principles of "res judicata," designed to curb undue and vexatious litigation, to the effect that a party is barred from litigating all issues which were raised or should have been raised in a previous action. Second, there is the concept of "estoppel," relevant here in preventing a party from changing remedies when that would unduly prejudice an opponent who has relief upon his original choice. Then there is the notion of one satisfaction, that a party can never recover more than once for the harm flowing from an invasion. And finally there is the doctrine of "election of substantive rights" as contrasted with "election of remedies." Often in the law a party has a choice between two different substantive positions and the election of one forecloses

the other. See Restatement, Restitution §144. For example, a party defrauded in a transaction may either avoid the transaction or affirm it, but is not permitted to do both. His choice may be manifested by legal proceedings or otherwise; however the mere fact that he has pursued a particular remedy is not necessarily conclusive in this regard. Among other things pursuit of a particular remedy or theory of recovery as a manifestation of choice is often conditioned on the pursuit being successful. See Schenck v. State Line Telephone Co, 238 N.Y. 308, 144 N.E. 542 (1924).

Thus the doctrine of "election of remedies" has independent significance, at most, only in a relatively few cases where subsequent pursuit of another remedy is not barred by the principles of res judicata, estoppel, satisfaction or the plaintiff's election of substantive rights. Perhaps the following would be a typical example. The defendant wrongfully consumes the plaintiff's property. The plaintiff files an action for conversion. Subsequently he voluntarily dismisses that proceeding and then brings an action on the common counts for goods sold and delivered. This new action probably would not be precluded by any of the concepts mentioned above, but might well be barred under the doctrine of election of remedies in many jurisdictions. To the extent the doctrine of election of remedies has significance apart from principles of estoppel, satisfaction, res judicata or choice between substantive positions, about the only jusitification ever offered is that a party should not be permitted to take logically

"inconsistent" positions before the courts. As many have observed, this somewhat esthetic concern with logical consistency by itself is hardly a persuasive basis for depriving persons of what would otherwise be their rights against wrongdoers. Among other things it contravenes the privelege to voluntarily dismiss an action without being barred from bringing a subsequent action, or to amend a complaint to seek recovery on a different theory or to obtain a different remedy. See Clark, Code Pleading, §76 (1928).

Now to come to the gist of this communication. At this point it seems to me that there are three directions the present study might take: (1) it might continue as now scheduled with the doctrine of election of remedies in actions involving different defendants; (2) it might be expanded to deal with the doctrine in all cases, both where the defendants are different and where the defendant is the same; (3) it might be abandoned entirely. On the basis of my research and reflection I believe the last alternative is best. I will endeavor to spell out the reasons that underlie this judgment.

There appears little justification for continuing the study as now conceived. In over one hundred years in California there have been only a handful of cases in the appellate courts involving the doctrine of election of remedies in actions against different defendants. So far as appears, the courts have not regarded these cases differently than if a single defendant had been involved in both actions. See Pacific Coast Cheese, Inc. v. Security First National Bank, 45 C.2d 75, 286 P.2d 353 (1955); Perkins v. Benguet Consolidated Mining Co., 55 C.A.2d 720, 132 P.2d 70 (1942). To the extent the doctrine of election of remedies has independent significance its rationale is precisely the

same in situations involving different defendants as the same defendant. The subsequent action is barred by the presumed logical "inconsistency" of the plaintiff's successive theories of recovery for an invasion of his interests. In short, the doctrine of election of remedies has not been treated differently in cases involving different defendants than in other cases, and there is no persuasive reason why it should be. I can see no justification for the Commission and the Legislature grappling with one application of the doctrine and its relatively trivial consequences. Either the Legislature should deal with the doctrine generally, if at all, or not bother and leave the matter in the hands of the courts.

Given a choice between expanding the study to consider the doctrine of "election of remedies" generally or terminating the project altogether, I would recommend the latter. There are several grounds for this recommendation.

First, as explained above, the doctrine of election of remedies at its utmost has little independent significance. Generally the principles of res judicata, estoppel, satisfaction or election of substantive rights would equally bar a second action if the doctrine of "election of remedies" had never been formulated. In other cases where the courts have resorted to the latter doctrine, it would seem the result could be explained readily in terms of the courts' power to deny amendment or to make voluntary dismissal with prejudice where a party is capriciously switching from one remedy to another.

Second , the doctrine of election of remedies is subject to numerous qualifications recognized by the California courts which further sharply curtail its significance. (1) The plaintiff is

not barred under the doctrine unless he actually has two or more "remedies" for the wrong. Even though the remedy sought in the first action is wholly "inconsistent" with the remedy sought in a second action or in an amended complaint, the plaintiff is not barred by the doctrine if in fact the remedy first sought was not availabbe for any reason. McGibbon v. Schmidt, 172 Cal. 70, 155 Pac. 460 (1915); Herdan v. Hanson, 182 Cal. 538, 189 Pac. 44 (1920); Waters v. Woods. 5 Cal. App 2d 631, 42 P.2d 1072 (1935); Papenfus v. Webb. Products, 48 Cal. App. 2d 631, 120 P. 2d 60 (1941). The courts have not carried the passion for consistency this far, and thus have removed one of the most objectionable features of the doctrine as it exists in some other jurisdictions. (2) Even if both remedies were available, the cases indicate that the plaintiff must have knowledge of the facts making the other available at the time he pursues one or he is not barred from pursuing the other. Gray v. Gray, 25 Cal. App.2d 484, 77 P.2d 908 (1938); Yates v. Kuhl, 130 Cal. App 2d 536, 279 P.2d 563 (1955).

(3) Furthermore the doctrine of election of remedies applies only where the remedies sought are "inconsistent;" so far as this doctrine is concerned the plaintiff can pursue different but "consistent" remedies at will. Longmaid v. Coulter, 123 Cal. 208, 55 Pac. 791 (1898); Mailhes v. Investors' Syndicate, 220 Cal. 735, 32 P.2d 610 (1934); Perkins v. Benguet Consolidated Mining Co., 55 C.A. 2d 720, 132 P.2d 70 (1942). Decision as to when remedies are "inconsistent" has been difficult for the courts and has yielded disagreement and uncertainty. It is sometimes said that remedies which proceed on the assumption that title is in the defendant are inconsistent with remedies based on the premise that the defendant has wrongfully taken or withheld

property, and that remedies based on an "affirmance" of a transaction are inconsistent with remedies based on "disaffirmance." These generalizations are shot through with uncertainty and are quite misleading when applied to the cases. For example, is an action for the price of goods sold on conditional sale grounded on the premise that title has passed to the buyer whereas an action for repossession is based on the seller's continued title as suggested in Parke and Lacy Co. v. White River Lumber Co., 101 Cal. 37 (1894). As an original proposition the answer would not necessarily seem to be yes; one might conclude that in each instance the seller was simply trying to obtain redress for the buyer's breach of the sale contract, and that neither remedy was any more inconsistent with title being in the buyer or the seller than the other. But several California decisions have held otherwise following the Parke and Lacy case. "The basis for that holding is not clearly expressed in the cases. Most frequently it is merely announced as a principle of law without any discussion of the reasoning upon which it rests." Ravizza v. Budd & Quinn, 19 C. 2d 289, 120 P.2d 865 (1942).

(4) Finally there has been a progressive tendency in the California courts to require the elements of an estoppel before applying the election of remedies doctrine. See Hines v. Ward, 121 Cal. 115, 53 Pac. 427 (1897); Crittenden v. St. Hill, 34 Cal. App. 107, 166 Pac. 1016 (1917); Mansfield v. Pickwick Stages, 191 Cal. 129, 215 Pac. 389 (1923); Roullard v. Rosenberg Bros., 193 Cal. 360, 224 Pac. 449 (1924); Campanella v. Campanella, 204 Cal. 515, 269 Pac. 433 (1928); Waters v. Woods, 5 Cal.App.2d 483, 42 P.2d 1072; Perkins v. Benguet Consolidated Mining Co., 55 Cal.App.2d 720, 132 P.2d 70 (1942); Steiner v. Rowley 35 C.2d 713, 221 P.2d 9 (1950); Lenard v. Edmonds, 151 Cal. App.2d 764, 312 P.2d 308 (1957). Indeed the

very case which touched off the present study, Pacific Coast Cheese, Inc. v. Security First National Bank, 273 P.2d 547 (1954), was reversed by the California Supreme Court on the ground, inter alia, that the doctrine of election of remedies "is based on estoppel and, when applicable, operates only if the party asserting it has been injured" by the plaintiff's earlier attempt to rely on an "inconsistent" remedy. 45 C.2d 75, 80, 286 P.2d 353, 356 (1955). And just two years ago the District Court of Appeal in Garrick v. J.M.P., Inc., 150 Cal. App. 2d 232, 309 P.2d 869 (1957) declared, "The doctrine of election of remedies rests upon estoppel. And in the absence of prejudice to the opposing party no shifting of theories by one party can be precluded by application of the rule of election of remedies." There are a number of other cases, particularly in recent years, where the courts have spoken to the same effect.

To the extent the doctrine of election of remedies requires the elements of an estoppel it has lost independent significance, it is essentially meaningless. Cases would be decided the same under general notions of estoppel if the doctrine of election were completely ignored. See Buckmaster v. Bertram, 186 Cal. 673, 200 Pac. 610 (1924). Moreover equation of the doctrine with estoppel removes its objectionable feature of denying a party his rights, to the benefit of the wrongdoer, simply because the party has previously attempted to recover on an "inconsistent" remedy, a feature which has led to its uniform denunciation in law review and treatise. See, e.g., Hine, Election of Remedies, A Criticism, 26 Harv. L. Rev. 707 (1913); 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);

Corbin, Waiver of Tort and Suit in Assumpsit, 19 Yale L. J. 221, 239 (1910); Note, Election of Remedies: A Delusion?, 38 Colum. L. Rev. 292.

There are still other factors which tend to render the doctrine of election of remedies innocuous in California law. It seems fairly clear, for example, that a party can seek what are generally regarded as "inconsistent" remedies in alternative counts of the same complaint, and in some cases at least not be required to make any election in order to avoid excessive recovery until the jury has returned its verdict. See Pratt v. Clark, 12 Cal. 89 (1859); Bancroft v. Woodward, 183 Cal. 99, 190 P. 445 (1920); Wulfjen v. Dolton, 24 C. 2d 891, 151 P.2d 846 (1944); Williams v. Marshall, 37 C. 2d 445, 235 P.2d 372 (1951). Note, 9 So. Cal. L. Rev. 388 (1938). If true this eliminates the necessity of election between "inconsistent" remedies; in one action the plaintiff can seek any remedy to which he may be entitled.

The doctrine of election of remedies may also be frustrated by provisions in a contract. To illustrate, the rule developed in some earlier California cases that a conditional vendor who brought an action for the purchase price upon default by the vendee was barred by the doctrine from recovering possession of the goods in a subsequent action even though no judgment had been entered in the earlier proceedings or the judgment had proved uncollectible. Parke and Lacy Co. v. White River Lumber Co., 101 Cal, 37 (1894); Holt Manufacturing Co., v. Ewing, 109 Cal. 353 (1895). After the

courts had struggled to escape this rule in a number of later cases, see, e.g., Muncy v. Brain, 158 Cal. 300, 110 P. 945 (1910); Silverstein v. Kohler, 181 Cal. 53, 183 P. 451 (1919), the state Supreme Court in Ravizza v. Budd & Quinn, 19 C.2d 289, 120 P.2d 865 (1942), wiped out its effect for practical purposes by holding that where the conditional sales contract provides that title is to remain in the seller even though he sues for the purchase price and obtains a judgment for that amount the doctrine of election of remedies would not bar a subsequent action for repossession of the goods. By inserting such a provision in their form contracts conditional vendors can thus avoid the impact of the doctrine in this situation. Perhaps the same possibility exists in other contract situations. Cf. Dickinson v. Electric Corp., 10 Cal. App. 2d 207, 51 P.2nd 205 (1935) (lease). Many of the cases raising the doctrine of election have occurred in a contract context.

It seems to me that a lawyer has abundant authority to repel the defense of election of remedies in any particular case in the California courts, and that if he does a competent job his chances of success are high, at least on the appellate level. There have been only three or four decisions applying the doctrine of election of remedies to defeat recovery in these courts in the last forty years, where no estoppel or other independent ground for barring relief was present. On the other hand there are at least twenty decisions rejecting this defense on one or another of the numerous grounds mentioned previously. Perhaps a deficiency of my research is that I have no reliable knowledge of the virulence of the doctrine in the trial courts and the offices of lawyers. I have no reason to believe that it is greater in these vital quarters than in the appellate courts; the same objections of policy and common

sense remain opposed to the doctrine to the extent it has independent significance. It may be that members of the Commission have more knowlege about this matter which might be helpful.

Studying the appellate reports of a century one comes away with the overall impression that the courts have used the doctrine of election of remedies rather infrequently on largely an ad hoc basis to reach a result they felt just in the particular case which apparently could not be reached otherwise. They have been the masters of the doctrine not its servants. For example, the doctrine has probably been relied upon most often to prevent a conditional vendor from repossessing property once he has obtained a judgment for the purchase price. As the California Supreme Court recently observed, "It may well be that the doctrine has been resorted to [in this situation] as a means of protection to purchasers under conditional sales contracts from instances of harsh and unjust results arising out of transactions for the purchase of property under such contracts." Ravizza v. Budd & Quinn, Inc., 19 C.2d 289, 120 P.2d 865 (1942). In another group of cases the doctrine has been used to protect homesteads purchased with funds wrongfully withheld except to the extent that a general judgment creditor could invade the homestead to execute a judgment. Hanley v. Kelly, 62 Cal. 155 (1882); Hilborn v. Bonney, 28 Cal. App. 789, 134 Pac. 26 (1915); Gray v. Gray, 25 Cal. App. 2d 484, 77 P.2d 908 (1938).

To single out a further illustration, Hensley-Johnson Motors v. Citizens National Bank, 122 Cal. App. 2d 22, 264 P.2d 973 (1953), is heavily relied upon in the preliminary report recommending the present study. In that case one of plaintiff's employees forged its name to a

number of checks and presented them to defendant bank. The defendant paid the checks and deducted the amount from plaintiff's account. The plaintiff held a fidelity bond issued by an indemnity company which protected against employee defalcations. After the theft was discovered, the indemnity company agreed to reimburse the plaintiff for its losses to the extent it could not recover from the defendant. The plaintiff then sued the defendant for conversion. The district court of appeals held that the plaintiff could not recover from the defendant any of the loss covered by the agreement between the plaintiff and the indemnity company. The court observed, "The effect of the agreement between plaintiff and the surety is that plaintiff has been reimbursed in full by the surety for the losses sustained...." Obviously the arrangement between the plaintiff and the surety represented an attempt to exculpate the surety at the expense of the defendant bank but the court blocked this on the ground that a "surety who has reimbursed employer for thefts by employee caused by forging checks cannot recover from the drawee bank since the surety has no equities superior to those of the bank." The result seems proper for that reason, but seemingly to bolster its conclusion the Court went on to talk of election of remedies. Since plaintiff had instituted no previous legal proceeding the orthodox doctrine of election of remedies would seem inapplicable, but even if it were it would be surplusage.

In summary the doctrine of election of remedies has quite properly never had much independent significance in California law. To the extent that it has it appears to be dying, and the necessary coup de grace has been given wide currency in recent cases. Although the courts have written a great deal about the doctrine, and although it has caused some confusion and undoubtedly produced an occasional bad result, it appears few

values have been improperly sacrificed in its name by the courts over the past century. In my judgment there quite clearly is no compelling necessity for legislative intervention. Therefore I would recommend that the project be terminated without further action. Needless to say I am completely willing to abide by the Commission's decision if it decides to continue the project either as now conceived or in a different framework. If I can be of further assistance in connection with the proposals made in this communication, please let me know.

Sincerely yours,
/s Robert A. Girard
Robert A. Girard
Professor of Law