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and consequently the principles upon which a trust may be executed *cy pres* have no application.

The Ohio courts have sometimes by-passed the principles of dedication and diversion in their zealous efforts to promote the public welfare, while incidentally augmenting the municipalities' sagging revenues. Particularly in the alienation cases, confusion has arisen where the courts have upheld legislative short-cuts taken in lieu of the applicable proceedings for appropriation. Even in those instances where dedicated land may be appropriated, the appropriation must be for another public use. Consequently a subsequent alienation would only convey the *fee* of the municipality, but the *use* can never be eradicated, and remains solely with the public. With the availability of such proceedings, short-cuts should be avoided, and consequently those few "guideposts," now obscured in a labyrinth of overly liberal opinions, will indicate possible avenues of approach to those courts and counsel now floundering in the "by-paths of confusion."

JAMES F. O'DAY

The Form and Reform of the Election Between Remedies Doctrine in Ohio

The doctrine of election between remedies works an estoppel: it bars a plaintiff from bringing against the same defendant consecutive causes of action for different remedies based on the identical fact situation. By this procedural rule a plaintiff's first choice of remedy may be his last. The courts have advanced two different lines of thinking for holding the plaintiff to his election:

1. *Estoppel by technical election*, whereby the plaintiff is estopped from making inconsistent demands for relief against the same defendant for the identical injury, or
2. *Equitable estoppel*, whereby the plaintiff is estopped from seeking a different remedy from the same defendant for the identical injury because a prior lawsuit resulted in some benefit to the plaintiff or detriment to the defendant.

At the common law, estoppel by technical election was strictly applied. The mere filing of one form of action was an election barring all other forms of action: "The plaintiff's choice is irrevocable."¹ In other words, the plaintiff was not allowed to contradict the remedial form into which he himself had cast his factual case. An imposed election between remedies prohibited such technical "inconsistency."

¹ MAITLAND, THE FORMS OF ACTION AT COMMON LAW 4 (1936 ed.)

The codes attempted to alleviate the harshness of the election principle. The Ohio code, by providing for voluntary dismissal of a cause without prejudice² and setting forth liberal rules for amending the petition,³ seemed to eliminate the original petition as *the* crucial part of a lawsuit. Nevertheless the Ohio courts have never referred to these enactments in the cases involving the issue of an election between remedies. Case law has developed and continues to shape the Ohio doctrine.

Until 1924 the courts persisted in binding the plaintiff to his original election on the ground of technical inconsistency despite the code. For instance, the mere filing of a specific performance action in equity was held to be an election to affirm the contract which precluded an "inconsistent" action at law for breach of contract.⁴ Under the code the plaintiff could have effected this change of action by amending his original petition.⁵ Yet the plaintiff was deprived of his remedial right because he had dismissed his original petition *without prejudice*, as provided by the code, and started anew.

In 1924 the supreme court finally abolished the common law estoppel by technical election in the leading case of *Frederickson v. Nye*.⁶ The facts were as follows: The defendant had obtained the plaintiff's land by fraud. Plaintiff first filed an action at law for deceit. He subsequently filed a second suit in equity to impress a constructive trust. The court recognized the logical inconsistency inherent in these two remedies:

The theory of the (first action) was that the title to the property was in the (defendant) and a money judgment was the relief sought. It amounted to an affirmation of the contract of conveyance of the properties in question. On the other hand the theory of the (second action), being the action in equity, was that of disaffirmance of the contract of conveyance of the property and assertion that while the legal title passed the equitable title was in the (plaintiff).⁷

It was held, however, that the plaintiff was not estopped from so contradicting himself in the second action by the mere filing of his original petition. Nor was he barred from seeking equity by having pleaded the adequacy of damages in the law action. Only equitable estoppel would restrict plaintiff to the first remedy elected.

² OHIO REV. CODE § 2323.05.

³ OHIO REV. CODE §§ 2309.55-58.

⁴ *Lee v. Thoma*, 1 Ohio App. 384 (1913), *aff'd*, 91 Ohio St. 444, 110 N.E. 1062 (1915); *Zutterling v. Drake*, 10 Ohio C.C.R. (n.s.) 167 (1907), *aff'd*, 82 Ohio St. 410, 92 N.E. 1113 (1910).

⁵ OHIO REV. CODE § 2309.55 permits practically unlimited amendment of a petition before the defendant answers.

⁶ *Frederickson v. Nye*, 110 Ohio St. 459, 144 N.E. 299 (1924).

⁷ *Id.* at 467, 144 N.E. at 301.

The mere bringing of suit is not determinative of the right, but the party making the election must have received some benefit under his election, or have caused detriment or loss to the other party, or pursued his remedy to final judgment.⁸

Thus the issue in election cases became, "How far must an action be carried in order to amount to an election?"⁹

In the *Frederickson* case the issues had been drawn in the first proceedings by the defendant's answer. This was held not to constitute an election because mere pleading was neither a benefit to the plaintiff nor a detriment to the defendant. However, the plaintiff had obtained a preliminary injunction in the first action which had restrained defendant from conveying the land. The court held that this affirmative relief was of sufficient benefit to the plaintiff and detriment to the defendant to amount to an election based on equitable estoppel. The disposition of the case was that plaintiff was barred by his election between remedies from bringing any action other than his original cause in deceit for relief from the defendant's fraud.¹⁰

Election by the mere filing of suit has only rarely been the subject of litigation since the *Frederickson* decision settled the issue. Moreover, the courts have incorporated the reasoning of that case whenever the issue has been raised. An example is *Industrial Commission v. Francis*¹¹ in which the court of appeals held that the filing, then dismissal without prejudice, of a personal injury action did not constitute an election between remedies which would bar the statutory proceeding for workmen's compensation. The decision is noteworthy in that it is not based on the traditional estoppel by technical election test of inconsistent demands. Rather, the court wisely grounded its decision on the *Frederickson* rationale that the mere filing of the prior suit was neither a benefit nor a detriment to the parties.

The doctrine of election of remedies is the application of the underlying principles of estoppel and requires, before it can be invoked, a showing that one of the parties has caused the other party to change his

⁸ 110 Ohio St. 459, 144 N.E. 299 (1924) (syllabus by the court).

⁹ *Id.* at 471, 144 N.E. at 302.

¹⁰ Thus the plaintiff was held to have made an election between remedies but not because of any technical inconsistency between his original and new petitions. There has been considerable confusion concerning this familiar holding based on a new theory—equitable estoppel. SHEPARD'S OHIO CITATIONS lists *Frederickson v. Nye* as (1) "following" *Buell v. Cross*, 4 Ohio 327, 330 (1831), though that case had held that "a person having an option of law or equity, after selecting one tribunal, cannot resort to the other;" and as (2) "explaining" the *Lee v. Thoma* case, *supra* note 4. Both cases are cited with disapproval in *Frederickson v. Nye*. Similarly, DUFFEE AND DAWSON, II RESTITUTION, *Law and In Equity* at 172 states that *Frederickson v. Nye* holds "that the mere start of a deceit action is an (election) which precludes rescission and restitution by way of constructive trust."

¹¹ 19 Ohio L. Abs. 441 (Ohio App. 1935).

position to his own detriment, or that the remedy chosen has been pursued to final judgment.¹²

Election by the prosecution of one remedy pursued to a judgment has been a major subject of litigation since the *Frederickson* case. The rule appears clear that a judgment granting one remedy estops a plaintiff from seeking other relief from the same defendant for the identical injury.¹³ The established exception to the rule is that a judgment against one defendant does not bar suit against a second defendant who is severally liable.¹⁴ Here the election is not final until a judgment is satisfied. For some unexplained reason the courts have never adopted the *Frederickson* reasoning in these cases. Obviously no detriment results to a defendant by virtue of a prior suit against a different defendant. And the plaintiff derives no benefit until his judgment is satisfied. The courts are content, however, merely to hold that there has been no estoppel by technical election because "the remedy against one was not inconsistent with the remedy against the other."¹⁵

Most of the confusion concerning the election between remedies doctrine stems from the cases in which judgment has been entered against the plaintiff in the first suit and he then seeks another remedy in a second action. The general rule is that, absent *res judicata* or an estoppel by judgment,¹⁶ a losing cause is not such an election as to bar future actions.

Two cases prior to the *Frederickson* decision based this rule on lack of "inconsistency" in seeking dissimilar remedies. The first of these cases was *Bedinger v. Stevie*¹⁷ in which the defendant defaulted on payments for a car purchased from the plaintiff. Plaintiff lost his suit to replevy the property because the sales contract had passed title to the defendant. The court of appeals held that plaintiff was not barred from his remedy of specific performance of the contract by previously seeking this mistaken remedy. The supreme court applied this same rule in the subsequent case of *Conrad v. Youghioghery and Ohio Coal Co.*¹⁸ in which the failure

¹² *Id.* at 443.

¹³ *Norwood v. McDonald*, 142 Ohio St. 299, 315, 52 N.E.2d 67, 75 (1943); RESTATEMENT, JUDGMENTS § 64. There may be an exception when the remedy granted cannot be satisfied.

¹⁴ *Land v. Berzin*, 26 Ohio L. Abs. 703 (Ohio App. 1938) (judgment against a servant is not an election of remedies barring suit against the master); *Heym v. Juhasz*, 45 Ohio L. Abs. 571 (Ohio App. 1943) (judgment against wife for medical services rendered is not an election between remedies barring suit against husband for services rendered on his behalf to wife). See *Firestone Tire and Rubber Co. v. Central National Bank*, 66 Ohio L. Abs. 45 (Ohio App. 1952).

¹⁵ *Land v. Berzin*, 26 Ohio L. Abs. 703 (Ohio App. 1938).

¹⁶ *Badgely v. Shue*, 1 Ohio L. Abs. 553 (Ohio App. 1923).

¹⁷ 37 Ohio C.C.R. 393 (Ohio App. 1916).

¹⁸ 107 Ohio St. 387, 140 N.E. 482 (1923).

of plaintiff to obtain workmen's compensation because his injury had not been incurred within the scope of employment did not bar his suit for personal injury. It should be noted that in both of these cases the first judgment involved findings of fact inconsistent with plaintiff's first remedy, yet entirely consistent with the second.

In later cases courts of appeals have applied the *Frederickson* reasoning in holding that a prior adverse judgment would not estop the plaintiff from seeking his true remedy if the judgment had been of no benefit to him or detriment to the defendant. This new rationale was first introduced by way of dictum in *Silber v Gale*.¹⁹ The plaintiff had sued on a lease for rent due as a result of defendant's occupancy of suite 7. Defendant's answer showed that he had actually occupied suite 8. Therefore plaintiff dismissed this action and thereafter filed for a reformation of the lease and recovery of the rent. The court indicated, in allowing this second suit, that even if plaintiff's first action had gone to judgment there would have been no detriment to the defendant which would justify an equitable estoppel.

The court of appeals decided *Wessel v Shank*²⁰ by this rule. In that case the defendant purchased land from the plaintiff who delivered defective deeds. The defendant refused to pay the agreed purchase price. Plaintiff thereupon sued in ejectment, treating the deeds as void. Judgment was for defendant. Plaintiff then asked for specific performance, treating the deeds as a contract to convey. In finding no election between remedies, the court did not even discuss the technical inconsistency of the treatment of the deeds in these two actions. Rather it held that the first suit had not been a detriment to the defendant.

Although the courts in these two cases stated the proper test under the *Frederickson* rationale, their application seems questionable. True the plaintiffs obtained no benefit from their first actions. But certainly the counsel fees and inconvenience of two law suits instead of one was a detriment to the defendants. Yet the courts attached no penalty despite the fact that this detriment was occasioned not only by the plaintiffs' mistaken belief as to remedy, but the plaintiffs' fault as well — fault in drafting an erroneous lease and fault in delivering a defective deed.

The cases since 1940 have unexplainedly ignored the equitable estoppel theory of the *Frederickson* case and reverted to the "inconsistency" reasoning. A court of appeals revived estoppel by technical election in *Taylor v Quinn*.²¹ A judgment against plaintiff on one cause of action because the statute of limitations had run was held not to bar a different cause because "the remedy or course pursued in the former case is not inconsistent with

¹⁹ 38 Ohio App. 248, 175 N.E. 886 (1930).

²⁰ 57 Ohio App. 35, 11 N.E.2d 275 (1937)

²¹ 68 Ohio App. 164, 39 N.E.2d 627 (1941)

the remedy here sought."²² Thus the detriment to the defendant of two lawsuits caused by the plaintiff's laches was tolerated.

Another court of appeals in *Roberts v. Lee*²³ adopted the view that there is no election between remedies when the remedies are consistent. Plaintiff's suit in *quantum meruit* was not estopped by his loss of an action on the contract. His failure to join both causes, as he could have,²⁴ and the resultant harassment of the defendant, were condoned.

In *Norwood v. McDonald*²⁵ the supreme court followed the trend in the lower courts while citing the *Frederickson* decision for the proposition that:

The doctrine of election of remedies is applicable only where, at the time of election, there are available to the litigant for the assertion of a single right, two or more coexisting remedies which are repugnant to and inconsistent with each other.²⁶

The rule is quite logical. A fancied remedy can not be inconsistent with merited relief. When there is no election in fact there can be no election in law.

The plaintiff in the *Norwood* case had brought an action against the deceased's estate claiming a resulting trust on certain of her property. The equity court denied him relief on the ground of insufficient evidence. This was held not to bar the plaintiff's ejectment action based on his claim to be the deceased's common law husband and as such her sole heir. "Where a judgment is for the defendant in a suit based upon one of two mutually exclusive remedies, *the plaintiff is not precluded* from thereafter maintaining an action for the other remedy."²⁷ A dissent would have restricted the plaintiff to his election between remedies because the trust action had been merely an attempt to avoid inheritance taxes.

The *Norwood* decision seems inconsistent with the prior supreme court case of *Bolles v. Toledo Trust Co.*²⁸ There a judgment against the plaintiff's claim that certain property in her husband's estate had been a gift was held to be *res judicata* as to her suit for an express trust.²⁹ The court held that she had but one cause of action for the property against her husband's estate.

²² *Id.* at 169, 39 N.E.2d at 629.

²³ 72 Ohio App. 235, 51 N.E.2d 108 (1942).

²⁴ *Smith v. Horvath*, 32 Ohio L. Abs. 170 (Ohio App. 1939).

²⁵ 142 Ohio St. 299, 52 N.E.2d 67 (1943).

²⁶ *Id.* at 315, 52 N.E.2d at 75.

²⁷ *Ibid.*

²⁸ 136 Ohio St. 517, 27 N.E.2d 145 (1940)

²⁹ Fortunately for the plaintiff this election between remedies was held not to bar her statutory action, upon waiving the will for a 1/3 enforced interest in the whole estate. *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944). This holding is consistent with *Norwood v. McDonald*.

And yet in the *Norwood* case the plaintiff was said to have two causes of action against his wife's estate by virtue of the consistency of the remedies sought.

The inconsistency in these two cases is inevitable under the reasoning used. Whether one remedy is consistent or inconsistent with another, whether the plaintiff has one or two causes of action—these are but conclusions too nebulous and technical in themselves to serve as the foundation for the ultimate conclusion of rights and liabilities.

The benefit-detriment test laid down in the *Frederickson* case is simpler of application and sounder in theory. The courts should recognize equitable estoppel as the only rationale for the election doctrine.

Furthermore, the courts should recognize that two lawsuits are a detriment to the defendant—particularly where the plaintiff's own fault or failure to join his causes of action put the defendant to his defense twice instead of once.

Finally, and most important, the drastic effect of the election doctrine should be alleviated. Modern courts should not persist in mimicking their common law counterparts: "With me, it's all or nothing." The plaintiff should not be irrevocably estopped by an election between remedies merely because he realized some benefit (which did not satisfy his claim) or because he caused some detriment (which did not fulfill the defendant's obligation). Justice might better be done if a plaintiff were only estopped from his second remedy until he returned any benefit he had obtained in his first action and until he reimbursed the defendant for any detriment he had proximately caused.⁸⁰ Thus, in the *Norwood* case the court should not have been so reluctant to find an election between remedies. The equitable estoppel should have only imposed a condition precedent to the second action: reimbursement of the defendant for his expenses in the first lawsuit. The fairness of this proposition seems irrefutable. The plaintiff rather than the defendant would have taken the risk of the plaintiff's gamble to avoid taxes. Similarly, in the *Frederickson* situation the negligible benefit to the plaintiff and measureable detriment to the defendant of the preliminary injunction should not have had the decisive effect of fixing (or possibly terminating) the rights and liabilities of the parties. Mere dam-

⁸⁰ Dictum in *State v. Broskey*, 128 Ohio St. 372, 191 N.E. 456 (1934), would seem to go farther than this suggestion. There plaintiff brought a personal injury action which the defendant settled for \$6,500. Plaintiff then sought workmen's compensation from the defendant claiming that the first action had been brought under the mistaken belief that plaintiff was not entitled to workmen's compensation. In denying this second remedy the supreme court indicated that had plaintiff returned the \$6,500 benefit he had obtained in the first suit, his second action would not be barred.