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ELECTION OF REMEDIES IN TEXAS

*Leslie C. Merrem**

IT SHALL be our purpose, in writing this article, to discuss the essentials of the doctrine of election of remedies and its application by the courts of Texas and to present some of the problems raised in connection therewith; to determine, if possible, when a party by electing some one remedy precludes himself from pursuing another; and to attempt whenever possible to eliminate some of the confusion resulting from the application of the doctrine to various situations. It shall not be our purpose to cover the entire field, as that would be beyond the scope of an article of this nature; however, since the doctrine is so frequently invoked in the cases involving contracts induced by fraud, special attention will be given to that field.

The doctrine of election of remedies, which has been a problem child of the law for many years, may be stated simply as that doctrine of the law which holds that a party having more than one remedy growing out of the same right of action is bound by the remedy he elects to pursue.¹ Again, it has been said, "An election arises when one having two co-existent remedies chooses to exercise one, in which event he loses the right to thereafter exercise the other."²

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¹ *Moseley v. Fikes*, 126 S.W. 2d 589 (Tex. Civ. App. 1939).

² *Mosher Mfg. Co. v. Eastland W. F. & G. Ry. Co.*, 259 S.W. 253 (Tex. Civ. App. 1924) *er. ref.*

For the doctrine to apply, it is well settled that the party electing must have had, in fact, two or more remedies inconsistent with one another; that they were all available remedies and he, with full knowledge of the facts, selected one to the exclusion of the others. If one remedy was not, in fact, available, he is not bound. His supposition that he had a remedy and his effort to enforce it do not constitute an election unless the remedy does, in fact, exist.³ If, for example, the remedy is not available because it is barred for failure to act in time, an attempt to pursue it does not constitute a binding election.⁴

Clearly, if the remedies are concurrent rather than inconsistent, the pursuit of one will not preclude the other unless judgment is entered, or grounds for estoppel exist.⁵ If there is, in fact, an election, however, the fact that at the time the election was made, the party "reserved the right" to pursue another available remedy, is immaterial. The election is just as binding as if no such attempted reservation had been made.⁶

Further, in electing, in order to be bound, the party must know the facts. The rule is not inflexible. One definite qualification is that the party is not concluded in selecting a remedy unless he made it with knowledge, or means of knowledge of the facts. However, when one has selected a remedy in ignorance of the facts from which his rights arise, he will not be permitted thereafter to adopt a different remedy if by that procedure substantial injury will result to an innocent party.⁷

In a proper case third parties may take advantage of the election.⁸ This is particularly true when the act of election will injure the third party.

³ *Bandy v. Cates*, 97 S.W. 710 (Tex. Civ. App. 1906) *er. ref.*

⁴ *Poe v. Continental Oil and Cotton Co.*, 231 S.W. 717 (Tex. Comm. App. 1921).

⁵ *Rick v. Farrell*, 266 S.W. 522 (Tex. Civ. App. 1924).

⁶ *Mosher Mfg. Co. v. Eastland W. F. & G. Ry. Co.*, 259 S.W. 253 (Tex. Civ. App. 1924) *er. ref.*

⁷ *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W. 2d 377 (1945).

⁸ *Mosher Mfg. Co. v. Eastland, W. F. & G. Ry. Co.*, 259 S.W. 253 (Tex. Civ. App. 1924) *er. ref.*

The reasoning upon which the doctrine of election is based is simply that the courts will not permit one to affirm the existence of a certain fact situation entitling him to certain rights and relief and then change his position completely and assert an entirely contrary state of facts in order to set up a claim to an entirely different type of relief.

Nearly all of those who have written on the subject of election of remedies and the court decisions in that field state that much of the confusion existing is due to a failure to distinguish between election of rights and election of remedies. We have failed to find in any of the major texts, or in any of the decisions, a satisfactory discussion of the distinctions between the two. Few rules have been laid down to guide us. All tell us that the distinction must be made, but none tell us just how the distinction is to be made. One Texas Commission of Appeals case⁹ did say, however, that "[o]ne is a choice between inconsistent substantive rights while the other is a choice between forms of action or procedure." This is certainly as clear a statement as one can get from any of the authorities.

It occurs to us that the following may be a possible method of distinguishing between the two: If the election is between ends to be attained, then it is an election of rights. If, however, the election is between two means or methods of attaining the same end, as where there is a choosing between the posting of notices under the power in a deed of trust foreclosure and a foreclosure of the deed of trust lien in court, this is but an election between remedies and usually will have to be pursued to a conclusion to be binding. But if it is an election between different types of redress, as where a debtor sets up a trust fund from which his creditors are to be paid proportionately, and a creditor elects to sue for his debt and run writ of garnishment against the fund instead, this is in the nature of an election of rights, and once hav-

⁹ *Seamans Oil Co. v. Guy*, 262 S. W. 473, 474 (Tex. Comm. App. 1924).

ing elected, he is bound. From one point of view, this may appear to be an election of remedies because the creditor is electing between two methods of collecting his debt. But actually there is a distinction in that in the one case he accepts the trust fund created for his benefit and in the other he rejects it.

Prior to *Rick v. Farrell*¹⁰ the right to affirm or disaffirm in cases where a contract was induced by fraud was often used as an illustration of a binding election of rights—that is, between the rights to declare the contract valid or to declare it invalid, and this certainly seems sound. But the cited case, in keeping with probably a majority of the decisions in the United States, held that, while an election to affirm by bringing suit was binding, a suit to disaffirm was not binding until pursued to judgment. It seems that they should both be classed as election of rights, but if they are, the above rule is well established now in any event. Likewise, one certainly would not say that in all elections between pure remedies the election is not binding unless pursued to a conclusion. The decisions do not make it that simple.

In discussing what constitutes an election, one must keep in mind certain fundamental principles hereinbefore mentioned, such as: that the elector must have had an actual choice of remedies that were in fact inconsistent, and that he must actually have selected one to the exclusion of the others. He must have made his choice with knowledge of the facts, and such remedies must have been in fact available to him.¹¹ In the event the remedy in fact does not exist, as for example, where in a workmen's compensation case action is brought under the Workmen's Compensation Law after limitation has run, this will not constitute an election because two remedies were not available. In holding that such was not binding, one of our courts said, "... [I]t is equally as illogical to hold that a man would waive a valid remedy for a non-

¹⁰ 266 S.W. 522 (Tex. Civ. App. 1924).

¹¹ *Bandy v. Cates*, 97 S. W. 710 (Tex. Civ. App. 1906) *er. ref.*

enforceable one as it would be to say that he elected an unenforceable remedy and waived a valid right."¹²

Probably the greatest confusion in the whole subject of election of remedies lies in determining what constitutes an election. Is a mere demand based on one remedy sufficient, or must suit be instituted, and still further, if suit is instituted, must it be pursued to judgment to be binding? We shall find the rules difficult to establish with clarity. In fact, while the rules are many times glibly stated, an examination of the cases will seem to show that it is almost impossible to lay down general rules. For example, mere filing of suit in affirmance of a contract will be binding, whereas suit to rescind under the identical state of facts is not binding until pursued to a conclusion,¹³ and again, there is always an attempt to distinguish between election of rights and election of remedies. The Texas Commission of Appeals¹⁴ has quoted, with approval, from *Ruling Case Law*, as follows: "... [I]f one having a right to pursue one of several inconsistent remedies makes his election, institutes suit and prosecutes it to final judgment or receives anything of value under the claim thus asserted, or if the other party has been affected adversely, such election constitutes an estoppel thereafter to pursue another and inconsistent remedy. And where the right in the subsequent suit is inconsistent with that set up in the former suit, as distinguished from a merely inconsistent remedy, the party is estopped though the former suit may not have proceeded to judgment. But where the inconsistency is in the remedies it is generally considered that there is no estoppel where the former suit was dismissed without trial or before judgment."¹⁵

While one may safely say that in Texas the general rule is that mere bringing of an action which has been dismissed before judg-

¹² *Poe v. Continental Oil & Cotton Co.*, 231 S.W. 717, 720 (Tex. Comm. App. 1921).

¹³ *Rick v. Farrell*, 266 S.W. 522 (Tex. Civ. App. 1924).

¹⁴ *Seamans Oil Co. v. Guy*, 262 S.W. 473, 474 (Tex. Comm. App. 1924).

¹⁵ 10 R.C.L., *Estoppel*, pp. 703, 704.

ment in which no advantage has been gained or legal detriment occasioned is not an election,¹⁶ nevertheless there are other exceptions besides the one in which the mere institution of suit to affirm a contract induced by fraud will be held binding. As before noted, where a debtor sets up a fund in escrow for the benefit of his creditors and a creditor ignores the fund and institutes garnishment proceedings against the holder of the fund, institution of the garnishment proceedings, with knowledge of the facts, binds the party not to accept the benefits of the contract, though the garnishment proceeding is dismissed before judgment.¹⁷

And it has been held that where the injured employee files his suit for damages at common law, he makes an election and the fact that he subsequently presents a claim to the Industrial Accident Board does not estop him from prosecuting the suit based on his common law remedy.¹⁸

But it has also been held that where the vendor in a land purchase contract first sued for specific performance but dismissed before a hearing thereon, this would not constitute such an election of remedies as to preclude him from suing in a later action for the difference between the contract price and the sum realized from the sale of the property.¹⁹

It has also been held that where the vendor accepted the note of a third party in part payment for the conveyance of land, and the vendor then sued to set aside the sale on the ground of fraud and lost, this would not preclude such vendor from then bringing suit against such third party on the note.²⁰

And the Texas Supreme Court, in at least one case, held that the filing of suit asking for a decree of foreclosure is not such an election of remedies as precludes the plaintiff from amending his

¹⁶ *Adami v. Robinson*, 299 S.W. 659 (Tex. Civ. App. 1927).

¹⁷ *Commercial Loan & Trust Co. v. Reed Automobile Co.*, 75 S.W. 2d 144 (Tex. Civ. App. 1934) *er. disp.*

¹⁸ *Rice v. Garrett*, 194 S.W. 667 (Tex. Civ. App. 1917) *er. ref.*

¹⁹ *Brodkey v. Lesser*, 157 S.W. 457 (Tex. Civ. App. 1913).

²⁰ *Crutcher v. Eaves*, 259 S.W. 970 (Tex. Civ. App. 1924) *er. disp.*

petition and seeking recovery of the land.²¹ In deed of trust foreclosure cases where foreclosure may be had either under the power in the instrument or in court, while the commencement of foreclosure under one method will not preclude a withdrawal of that method and institution of proceedings under the other, nevertheless they cannot be pursued concurrently. Posting of notices cannot be started until the suit is withdrawn.²² In a Missouri decision it was held that even though the case is pursued to judgment, there is no election if the judgment is later set aside.²³

It might be noted here, however, that there is no question of election of remedies involved where the suit is filed and then dismissed and re-filed in another court. This is no more than a change in choice of courts.²⁴

In any event, a study of the cases discussed above will clearly show that it is impossible to form any clear rule as to when institution of suit constitutes a binding election and when it does not.

And of course, it must be remembered that several suits may grow out of the same transaction and may be pursued at the same time, if they are consistent with each other. The doctrine of election applies only when there is an election between inconsistent remedies.

Of course, while one of the most decisive acts in the matter of election is the institution of suit, it is possible for acts short of suit to constitute an election. Undoubtedly any positive act on the part of a defrauded person that he intends to affirm the contract and sue for damages will be binding.²⁵ There is authority indicating that the mere presentation of a claim to the Industrial Accident Board will preclude the claimant from later withdrawing

²¹ *Stone Cattle & Pasture Co. v. Boon*, 73 Tex. 548, 11 S.W. 544 (1889).

²² *Gandy v. Cameron State Bank*, 2 S.W. 2d 971 (Tex. Civ. App. 1927) *er. ref.*

²³ *Brayton v. Grumby*, 267 S.W. 450 (Mo. App. 1924).

²⁴ *Wiley v. Joiner*, 223 S.W. 2d 539 (Tex. Civ. App. 1949).

²⁵ *Pope v. Clendenen*, 257 S.W. 335 (Tex. Civ. App. 1923); 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1527.

it and suing at common law for damages.²⁶ But certainly it may be safely said that mere demand short of suit is not usually a binding election.²⁷

We now come to the problem presented by the contract fraud cases, the situation wherein the doctrine of election of remedies probably has its most frequent application. It is elemental that when a person is induced to enter into a contract by the fraudulent representations of the other party, he has his option to affirm the contract and sue in an action at law for damages suffered because of the fraudulent representations, or he may sue in equity to rescind the contract and demand the return of the consideration paid. Such contracts are not void. At most, they are voidable. It is in the discretion of the defrauded one to rescind the contract if he wishes, but he is not required to do so. If after discovering the fraud he elects to let the contract stand, that is his privilege. If he desires to set it aside, that too is his privilege, but since this is an equitable action, he must act with diligence after discovery of the fraud. If he elects to let the contract stand and sue for damages, since the action is one at law, he need only guard against the running of limitations. It is the defrauded one's option to choose either remedy, but it is obvious he cannot have both. He cannot both affirm the contract and repudiate it. As has been aptly said,²⁸ he has his "right to affirm the invalidity of the contract on account of fraud . . . or he . . . [has] the right to affirm its validity and receive the benefits thereunder. These rights . . . [are] wholly inconsistent." On the one hand plaintiff takes the position that there is a valid and existing contract between the parties and on the other that because of the fraud no binding contract was entered into and he is refusing to be bound by it.

In keeping with this idea, it has been held that one cannot bring a suit to rescind a contract of conveyance for fraud and at

²⁶ Rice v. Garrett, 194 S.W. 667 (Tex. Civ. App. 1917) *er. ref.*

²⁷ Clemenger v. Flesher, 185 S.W. 304 (Tex. Civ. App. 1916) *er. ref.*

²⁸ Seamans Oil Co. v. Guy, 262 S.W. 473, 474 (Tex. Comm. App. 1924).

the same time recover damages for wrongful sequestration of the premises in question.²⁹ By disaffirmance of the sale, he waived his right of possession and therefore cannot complain of the act of the other party in taking possession. He cannot yield the right of possession and at the same time recover damages for the loss of that possession.

As has been previously indicated, there is a question of whether election in cases such as these is in fact an election of rights as indicated by the *Guy* case,³⁰ since it may be argued that it is but an election of remedies because the fraud committed is a tort and plaintiff is primarily thinking of how he may redress his wrong.³¹ But the Texas courts seem to indicate it is an election of rights although the words "rights" and "remedies" are too often used interchangeably.³²

The rule that plaintiff must have two available inconsistent remedies when he makes his choice, of course, applies also in the contract fraud cases. Where for any reason the remedy elected to be pursued is not available, there simply is no election. For example, where one has been induced to part with his land because of the fraudulent representations of the vendee, and the vendee has reconveyed the land to an innocent purchaser, and the defrauded vendor then brings his suit to set aside the sale, he can, of course, amend and confirm the sale and ask for damages against the vendor because the action for rescission was not available to him.³³ His supposition that he had a remedy and his efforts to enforce it are simply immaterial.

There is a well-settled distinction, however, between suits to rescind and suits to affirm so far as election of remedies is concerned. Where the complaining party commences a suit for

²⁹ *Gustafson v. American Land Co.*, 234 S.W. 244 (Tex. Civ. App. 1921).

³⁰ *Seamans Oil Co. v. Guy*, cited *supra* note 28.

³¹ See Note, 36 Calif. L. Rev. 636 (1948).

³² See 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1528.

³³ *Griffin v. Williams*, 142 S.W. 981 (Tex. Civ. App. 1912).

damages resulting from fraud, this is an affirmance of the contract, an election of a substantive right, and he cannot later sue to rescind.³⁴ He alone has been harmed by the fraud and he, without the concurrence of the other party, should have the right to say that the contract shall remain in force.³⁵ Once he brings his action to affirm, he is bound by it. It requires no concurring agreement by the other party. The mere act of bringing suit for damages is, of itself, a ratification of the contract between the parties. But this is not true in the case of rescission. It takes the concurrence of both to rescind, or it takes the final judgment of a court ordering rescission,³⁶ and the mere filing of suit to rescind is not a binding election and will not prevent a later withdrawal and suit for damages. Only when the action to rescind is pursued to final judgment is the action to rescind binding. The Dallas Court of Civil Appeals, in the case of *Rick v. Farrell*,³⁷ sets out the above rule very clearly. When suit to rescind is filed first, the remedies are not inconsistent, for it is only when the suit is filed affirming and suing for damages that the right to rescind is precluded by reason of affirmance of the contract. The rights of the parties in so far as affirmance of the contract is concerned remain the same on filing suit for rescission, the injured party being left free to abandon that action at any time before judgment and institute on the same state of facts his suit for damages suffered on account of the fraud. When pursued in this order, the remedies are not inconsistent, but alternative and concurrent, and the doctrine of election of remedies has no application.

Mr. Williston, in his renowned work on Contracts,³⁸ explains this as follows: "These courts generally treat the rescission action rather as an indication that the defrauded party has refrained from

³⁴ *Rick v. Farrell*, 266 S.W. 522 (Tex. Civ. App. 1924).

³⁵ See Note, 35 A.L.R. 1153 (1925).

³⁶ *Rick v. Farrell*, cited *supra* note 34; *Gorman-Head Motor Co. v. Barrett*, 78 Okla. 34, 188 Pac. 1083 (1920).

³⁷ Cited *supra* note 34.

³⁸ 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1528.

making a choice, preferring to submit to the court the determination of the right to disaffirm, and that there is, therefore, no conclusive election until judgment on the merits." Regardless of the reasoning back of the rule, it seems to be fairly well established.

It is conceded that the above rule is subject to criticism. There simply is little reasoning behind the rule that one is bound by an election to affirm, but not by an election to disaffirm.

It has been noted by Professor Williston³⁹ that there may be cases where a party may rescind the contract obtained through fraud, and still be the loser. The defrauding party may be insolvent. He often is. Plaintiff is faced with the dilemma of recovering the consideration that is still in the hands of his adversary, which may be a sure thing, and having to ignore his losses, sustained by his reliance on what appeared to be a fair and legal contract, or suing in tort for his damages and getting a judgment for the full amount thereof, only to find that it is not collectible. This learned author calls attention to the fact that in such cases the plaintiff may want to rescind the contract obtained through fraud and still desire to sue for damages and says that such relief "will generally be allowed." Doubtless such should be the law. English cases seem to support the idea,⁴⁰ and there are some Massachusetts cases that are inclined to allow it,⁴¹ but this will not likely be followed in those states which apply the doctrine strictly.

In one Texas case,⁴² wherein plaintiff was induced to part with his land through fraud and the court permitted him in a suit to cancel the sale not only to recover his land but to recover damages for the use of his land as well, the court said: "We overrule the further contention by counsel for Mooneyham that damages for fraud could not be awarded in the same suit for cancellation of the two deeds. We know of no reason why the general rule which

³⁹ WILLISTON, SALES (Rev. ed. 1948) § 648c.

⁴⁰ *Mondel v. Steel*, 8 M.&W. 585, 151 Eng. Rep. 1288 (Ex. 1841).

⁴¹ *Cook v. Castner*, 63 Mass. 266 (1852). See Note, 38 Col. L. Rev. 888 (1938).

⁴² *Mooneyham v. Cornick*, 294 S.W. 894, 899 (Tex. Civ. App. 1927).

favors a settlement of the entire controversy in the same suit under our blended system of law and equity should not apply in this case, and this conclusion applies also to the recovery of the rental value of the land during the time Mooneyham has held and enjoyed the possession of it.”

There are other exceptions of this nature, but undoubtedly as a general rule in Texas, one cannot both rescind the contract and sue for damages for its breach.⁴³

Sections 69 (c) and (d) of the Uniform Sales Act, though dealing primarily with breach of warranty, would indicate that the defrauded person must elect to affirm or disaffirm and cannot disaffirm and also sue for damages.

While probably not technically in the class of contract fraud cases, a situation close akin to it is that class of cases wherein an employee, against whom the employer has protected himself with a surety bond, issues checks to fictitious persons, endorses them with the fictitious names and collects the money himself. Some courts, and it is believed they represent the weight of opinion in the United States,⁴⁴ have indicated that in such situation the defrauded employer may either demand payment of the amount of the checks from the drawee bank on the theory that the bank paid the checks on a forged endorsement and therefore paid out its own money, or he may affirm the action of the bank in paying out on the forged endorsement and, on the ground that the employee embezzled the money belonging to the employer, collect on the employee's surety bond. The contention is that in the first situation the employer takes the position that his money is still in the bank and in the second that the employer's money came into the hands of the employee and he embezzled it, and that if the employer takes the position that the money has been embezzled and makes claim against the surety company, he or the surety company

⁴³ *Gustafson v. American Land Co.*, 234 S.W. 244 (Tex. Civ. App. 1921).

⁴⁴ *U. S. F. & G. v. First National Bank in Dallas*, 172 F. 2d 258 (5th Cir. 1949).

under subrogation cannot make claim against the bank, because if the money was embezzled by the employee, it cannot still be in the bank.

Prior to 1951 there were no Texas cases in point, but in that year the supreme court made it clear that where the employer makes claim against the surety company and also makes demand against the bank, there is no binding election of remedies, indicating that the employer's position is not that of the holder of a claim against two indemnitors, where payment of damages by the one would be off-set in a suit against the other, but a claim, first, against an insurer and, second, against the bank refusing to pay money in violation of its contract.⁴⁵ The remedies are, therefore, not in the same right. The insurance is not "in ease of the bank's mistake," and it would be taking an unusual position to say that an insurance contract could reach out to indemnify a stranger not a party to the insurance contract whose wrongful act caused the insurance company to pay the loss to the insured. Certainly the employer for whose benefit the insurance was taken might sue either the bank or the bonding company. Upon being indemnified, the employer certainly could assign his claim against the bank to the indemnity company. Those cases that deny the insurance company the right to pursue the insured's claim do so on the theory that the surety stands in the shoes of the employer and the employer having pursued his claim against the surety and collected it cannot now proceed against the bank because this would be permitting the insured a double recovery. But, of course, there is no double recovery if the suit is brought for the benefit of the insurance company instead of the insured. There is no estoppel as the bank has not been prejudiced in any way. The position of the employer in making claim against the surety company is that by virtue of the act of the employee the bank was induced to pay out its own money, but that the bank had wrongfully charged the

⁴⁵ *Liberty Mutual Ins. Co. v. First National Bank in Dallas*, 151 Tex. 12, 245 S.W. 2d 237 (1951).

checks against the employer's account. Until the bank restored this, the employer has suffered a loss. Such contention is wholly consistent with the position taken that the bank has paid out its own funds and not those of the employer. The positions being consistent, there is no election of remedies.

The question sometimes arises as to whether exemplary damages may be collected in contract fraud cases where there is a suit for rescission. It is certainly the general rule that an action for exemplary damages cannot be based on a mere breach of contract. But this rule obviously should apply only to cases where actual binding contracts are involved and not fraudulent fictions. Where one is allowed to waive a tort and sue in *assumpsit*, in cases such as theft, the obligation is really not contractual.⁴⁶ But even in the case of express contracts, exemplary damages may be recovered when the wrong complained of constitutes both a breach of contract and a tort accompanied by fraud, malice or oppression.⁴⁷ By analogy exemplary damages should also be allowed when the act giving rise to a fictitious contract amounts to a willful tort. It was early pointed out by the Texas Supreme Court that a plaintiff does not waive his right to exemplary damages by suing for the return of the consideration he had parted with because of fraud or duress.⁴⁸ Though the main purpose of the suit may be to cancel the contract and recover the consideration, still since fraud is shown as the basis for the cancellation, exemplary damages may be recovered.⁴⁹

And one may add that it is obvious that where the defrauded party, with full knowledge of the facts, enters into a new agreement adjusting his differences with the defrauder, any cause of action against the defrauding one is waived.⁵⁰

⁴⁶ See Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 Yale L. J. 221 (1910).

⁴⁷ *G. C. & S. F. v. Levy*, 59 Tex. 542 (1883).

⁴⁸ *Oliver v. Chapman*, 15 Tex. 400 (1855).

⁴⁹ *Briggs v. Rodriguez*, 236 S.W. 2d 510 (Tex. Civ. App. 1951) *er. ref. n. r. e.*

⁵⁰ *Risley v. McAdams*, 108 S.W. 2d 443 (Tex. Civ. App. 1937).

The defense of election of remedies should be specially pleaded and proved. It must be brought to the attention of the trial court at the proper time, for without pleading and proof, the defense will not prevail.⁵¹

Rule 94 of the Texas Rules of Civil Procedure, after stating that a party shall set forth affirmatively fraud, release, *res judicata* and several other defenses, adds, "and any other matter constituting an avoidance or affirmative defense." In the absence of any cases on the subject, this would be sufficient to require that this defense be affirmatively set out, but there are numerous cases on the subject. The plea should allege all of the essentials of an election, namely, that there were two or more valid, inconsistent remedies and that plaintiff did elect one of them under such circumstances as to preclude his right to pursue the others. It cannot be asserted for the first time on appeal.⁵²

But when the defendant properly pleads plaintiff's election of remedies in a prior suit, he still must sustain the burden of proof on the issue. He will have to introduce in evidence at the hearing on the plea, the pleadings, evidence, rulings and record generally in the first suit. Should this evidence fail to show an election, his plea will, of course, be overruled.⁵³

Should the defendant depend on some act short of filing suit as the election, then he must allege the act and facts sufficient to show that the same was an election. It must, of course, be remembered that all of this is still subject to the general rules that plaintiff must have had a choice between two available remedies with full knowledge of the facts, and it must also be remembered that where the issue is tried without pleadings on the subject, under Rule 67 of the Texas Rules of Civil Procedure, the court may hold that the issue was tried by implied consent.

⁵¹ *Moseley v. Fikes*, 126 S.W. 2d 589 (Tex. Civ. App. 1939); *Betty v. Tuer*, 292 S.W. 271 (Tex. Civ. App. 1927).

⁵² *Holland Texas Hypotheek Bank v. Brooks*, 266 S.W. 183 (Tex. Civ. App. 1924) *er. ref.*

⁵³ See 18 AM. JUR., *Election of Remedies*, § 53.

The law covering the subject of election of remedies is definitely uncertain. In fact, there are few phases of the law more unsettled. It has been referred to by leading jurists and authors as follows: "The authorities are by no means harmonious as to what acts constitute a conclusive election;"⁵⁴ "Just what acts . . . amount to an election of a remedy is not always clear;"⁵⁵ "no decisive rule seems to exist by which all cases in which the question arises can be tested;"⁵⁶ "The doctrine of estoppel by election of inconsistent rights or remedies does not seem to have been extensively discussed by the courts of this state, and there is some confusion in the decisions."⁵⁷

We are not inclined to agree with that portion of the last statement to the effect that the matter has not been extensively discussed by the courts of this state, but we do agree with that portion to the effect that there is some confusion in the decisions. In fact, we think there is a great deal of confusion. The author of this article had hoped to be able to reconcile a lot of discrepancies, but we realize we have fallen short of our goal. It is simply impossible to reconcile all of the cases. Whether this is due to using the terms "election of remedies" and "election of rights" interchangeably,⁵⁸ or for other reasons, we cannot say. We do know that the law is in a state of confusion and has been for a long time, and it is likely to remain so as long as the doctrine is recognized. Almost without exception those who have written on the subject have recommended that the rule be abolished. Mr. J. Leo Rothschild, commenting on a statement made that the doctrine of election of remedies was like a weed recently sprung up in the garden of the common law,⁵⁹ says: "The difficulty was and is, however, that judicial gardeners do not weed the field of the law. Such is not

⁵⁴ 28 C. J. S., *Election of Remedies*, p. 1077.

⁵⁵ 18 AM. JUR., *Election of Remedies*, p. 140.

⁵⁶ *Hartford Life Ins. Co. v. Patterson*, 231 S.W. 814, 817 (Tex. Civ. App. 1921) *er. ref.*

⁵⁷ *Seamans Oil Co. v. Guy*, 262 S. W. 473, 474 (Tex. Comm. App. 1924).

⁵⁸ *Id.*

⁵⁹ See Hine, *Election of Remedies, A Criticism*, 26 Harv. L. Rev. 707 (1913).

their function. They sow the seeds of legal doctrine—both those that flower and those which sour. Once planted, however, all receive similar treatment. Nothing, except in rare instances, is ever rooted out. Few, indeed, and rare, are the cases expressly overruling prior erroneous decision.”⁶⁰ The writer then goes on to recommend a legislative enactment to abolish the doctrine.

It is unfortunate that in its application the doctrine sometimes has had harsh results. Technicalities should not hamper justice. Judge Crane in *Clark v. Kirby*⁶¹ said: “All procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose which it seeks to accomplish. Unless some necessary requirement has been omitted, a wrong move or mistake in the method of seeking relief from the courts ought not to furnish protection for a wrongful act.”

Certainly some relief from the confusion and injustices that sometimes come from application of the doctrine of election is needed. If this relief cannot come from the courts, and the application of the doctrine will probably not be entirely eliminated by them for some time to come, then we agree with Mr. Rothschild that it should come by legislative enactment. The right should always be more important than the means by which it is obtained. The important thing should never be whether the party has filed a previous suit and withdrawn it or made a previous demand and then changed his mind, but whether by such action he gained some advantage or caused his adversary to suffer some detriment. If by the filing of suit or making demand the plaintiff has gained no advantage and defendant has suffered no harm, why should not the plaintiff be allowed to change his mind and proceed in a different manner? If plaintiff has gained such advantage or caused defendant to suffer a disadvantage, then estoppel applies and there

⁶⁰ *A Remedy for Election of Remedies: A Proposed Act to Abolish Election of Remedies*, 14 Cornell L. Rev. 707 (1913).

⁶¹ 243 N. Y. 295, 153 N.E. 79, 82 (1926).

is again no need for the rule. Ratification will probably take care of any other situation. In the absence of *res adjudicata*, ratification or estoppel, why should plaintiff be bound? It is the wronged party who brings the suit, and why should he be precluded from changing his mind when the other party has been put to no disadvantage? The Texas Supreme Court in *Slay v. Burnett Trust*⁶² said, "The doctrine of election of remedies is not a favorite of equity. It has been said that it 'is a harsh and now largely obsolete rule, the scope of which should not be extended.' . . . The rule is an application of the doctrine of the law of estoppel, and it is used to prevent a double redress for a single wrong." The rule is indeed a harsh one and if applied only in cases where the plaintiff is seeking to take advantage of a technicality, it might be tolerated, but the rule recognizes no such limited application. A study of the cases shows that the doctrine often requires the court to decide in one law suit whether plaintiff might have recovered in another. We agree with those authors who recommend abandoning the rule and would like to see the legislature, or the courts, in the not too distant future abolish it completely.

⁶² 143 Tex. 621, 649, 650, 187 S.W. 2d 377, 393 (1945).