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earlier decision.[14] Such failure to establish clearly the extant law results in improvident confusion.

Since the Court has held that recrimination is not an absolute bar to divorce but that final decision is dependent upon public policy, public welfare, and the exigencies of the case,[15] it is unfortunate that the present case sets out no clear statement as to precisely when the comparative rectitude doctrine is to be applied in Florida today.

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ELECTION OF REMEDIES: ACTION OF DECEIT AS A BAR TO SUBSEQUENT ACTION OF GENERAL ASSUMPSIT

Marks v. Fields, 36 So.2d 612 (Fla. 1948)

Plaintiffs leased a vacant lot from defendants to be utilized in the sale of used automobiles. Defendant lessors orally represented that the city zoning ordinances did not prohibit such use of the property. After acceptance of the lease, plaintiffs discovered the representation to be false and brought an action in deceit. At the trial, after introduction of their testimony, plaintiffs submitted to a non-suit and, over defendants' objection, were permitted to file instanter an amended declaration for money had and received. From a judgment for plaintiffs the defendants appealed, and the Court held that plaintiffs' declaration in deceit constituted an election between inconsistent remedies, precluding subsequent action in general assumpsit. Judgment reversed. On rehearing,[1] HELD, there was no election of remedies, for plaintiffs did not, in fact, have a remedy in deceit. Judgment affirmed, Chief Justice Thomas, Justice Sebring and Associate Justice White dissenting.

The doctrine of election of remedies provides that whenever a party, by electing a remedy, assumes the existence of a particular status he cannot afterward pursue another remedy involving assumption of an inconsistent position.[2] It is evident that deceit and general assumpsit

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[14]Hatfield v. Hatfield, 213 Mich. 368, 181 N. W. 968 (1921).

[15]Stewart v. Stewart, 158 Fla. 326, 29 So.2d 247 (1947).

[1]36 So.2d 614 (Fla. 1948).

[2]State v. Panama City, 126 Fla 776, 171 So. 760 (1937); Weeke v. Reeve, 65

are inconsistent remedies, since deceit involves an affirmance of a transaction voidable for fraud,[3] whereas general assumpsit is based upon a disaffirmance of the transaction.[4] In deceit the plaintiff elects to take his benefits under the contract, asking damages for the loss of bargain[5] occasioned by the fraud. On the other hand, in an action of general assumpsit the plaintiff relinquishes his benefits under the contract and asks restitution of his consideration.[6] The prosecution of an action in deceit, in addition to being a technical election of remedies, constitutes an election of substantive rights in that it is an affirmation of such rights predicated on ratification of the voidable contract.[7] In applying the doctrine, however, the courts have not maintained this distinction between the choice of alternative substantive rights and the doctrine of election of remedies as formulated in adjective law.

The original purpose of this doctrine was the prevention of double recovery for a single wrong.[8] From this modest beginning, dogmatic adherence to the rule has become more important than the purpose it sought to accomplish.[9] Many jurisdictions hold the mere commencement of an action in deceit to be a conclusive election, precluding subsequent action for restitution.[10] To avoid the harsh results in cases in which wrongdoers have escaped making amends through the application of the doctrine, the Florida Court has restricted its application. Thus it has been held that a futile attempt to enforce a remedy that the

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Fla. 374, 61 So. 749 (1913); McKinnon v. Johnson, 59 Fla. 332, 52 So. 288 (1910); American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942 (1908).

[3]Willis v. Fowler, 102 Fla. 35, 136 So. 358 (1931); Firstbrook v. Buzbee, 101 Fla. 876, 132 So. 673 (1931); Beers v. Atlas Assurance Co., 231 Wis. 361, 285 N. W. 794 (1939).

[4]Norris v. Eikenberry, 103 Fla. 104, 137 So. 128 (1931); Cox v. Grose, 97 Fla. 848, 122 So. 513 (1929).

[5]Williams v. McFadden, 23 Fla. 143, 1 So. 618 (1887). *But cf.* Tedder v. Riggin, 65 Fla. 153, 61 So. 244 (1913).

[6]See CRANDALL, FLORIDA COMMON LAW PRACTICE 210, 211 (1928).

[7]See RESTATEMENT, CONTRACTS §484.

[8]First Nat. Bank v. Flynn, 190 Minn. 102, 250 N. W. 806 (1933); Note, 36 HARV. L. REV. 593 (1923).

[9]Deinard and Deinard, *Election of Remedies,* 6 MINN. L. REV. 341, 480 (1922).

[10]Wheeler v. Dunn, 13 Colo. 428, 22 Pac. 827 (1889); Donovan v. Curts, 245 Mich. 348, 222 N. W. 743 (1929); Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119 (1906); see Note, 123 A. L. R. 386. *But see* Smith v. Bricker, 86 Iowa 285, 53 N. W. 250 (1892); Loomis v. Pease, 234 Mass. 101, 125 N. E. 177 (1919); First Nat. Bank v. Flynn, 190 Minn. 102, 250 N. W. 806 (1933).

plaintiff never possessed will not bar a later assertion of an inconsistent remedy that does exist.[11] This limitation upon the doctrine is reasonable, since obviously more than one remedy must actually exist as a prerequisite to any possibility of election.[12] The burden of proving the availability of the remedy first sought is upon the party asserting the bar of previous action.[13]

The holding in the principal case falls clearly within the foregoing limitation upon the doctrine. In truth the plaintiffs did not have a remedy in deceit, because the fraud alleged was a misrepresentation of law, not of fact—for whatever this illogical but ancient distinction may be worth.[14] The misconceived action in deceit was not prosecuted to judgment; therefore it was not a bar to the inconsistent remedy for money had and received, based upon the alleged failure of consideration. The question of ratification as an election of substantive right was dealt with only indirectly in relation to the inconsistency of the remedies. Had it been raised directly, the same result might have been reached by the reasoning of Justice Cardozo in the *Schenck* case,[15] holding that before judgment the mere prosecution of an action in deceit is by itself ineffective to establish a final election between remedies or a conclusive ratification of the voidable transaction, since the plaintiff in deceit has impliedly conditioned his affirmance upon recovery of damages.

Considerable difference of opinion exists as to whether the bar presented by the doctrine is based upon estoppel or upon waiver of right.[16] It has been proposed that an estoppel in pais be required to establish a conclusive election.[17] The legal writers almost unanimously disapprove the doctrine,[18] while the courts continue to observe it,

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[11]Williams v. Robineau, 124 Fla. 422, 168 So. 644 (1936); Seaboard A. L. Ry. v. Hartline, 84 Fla. 133, 92 So. 813 (1922); Capitol City Bank v. Hilson, 64 Fla. 206, 60 So. 189 (1912); Hays v. Weeks, 57 Fla. 73, 48 So. 997 (1909).

[12]Malsby v. Gamble, 63 Fla. 508, 57 So. 687 (1912).

[13]*Cf.* Brodkey v. Lesser, 157 S. W. 457 (Tex. 1913).

[14]Metzger v. Baker, 93 Colo. 165, 24 P.2d 748 (1933); PROSSER, HANDBOOK ON TORTS §89 (1941); Note, 32 COL. L. REV. 1018 (1932).

[15]Schenck v. State Line Tel. Co., 238 N. Y. 308, 144 N. E. 592 (1924); see Mr. Justice Brandeis, dissenting in United States v. Oregon Lumber Co., 260 U. S. 290 (1922); RESTATEMENT, RESTITUTION §§68, 145, 146 (1937).

[16]*Cf.* Flynn-Harris-Bullard Co. v. Hampton, 70 Fla. 231, 70 So. 385 (1915); First Nat. Bank v. Flynn, 190 Minn. 102, 250 N. W. 806 (1933); BIGELOW ON ESTOPPEL 673 (5th ed. 1890).

[17]Comment, 34 YALE L. J. 665 (1925).

[18]Davidson, *Proposal to Abolish the Doctrine of Election of Remedies*, 13 ORE.