Election of Remedies: The California Basis

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ELECTION OF REMEDIES: THE CALIFORNIA BASIS

Many justifications have been suggested for the doctrine of election of remedies. The Supreme Court has stated that it protects a defendant from vexatious litigation.\(^1\) In addition, prevention of plaintiff from pleading untrue facts has been stated as the "fundamental reason" for the doctrine.\(^2\) This justification is in fact nonexistent, since the plaintiff can now plead in the alternative and amend his complaint "in the belief that he is stating the facts just so far as they are clear to him."\(^3\) Prevention of double satisfaction has also been deemed the controlling reason for the election doctrine.\(^4\) Whenever the doctrine is applied, no matter what its justification, it denies the plaintiff any recovery in a second action.\(^5\)

This note will discuss whether the same purposes, prevention of vexatious litigation, untrue facts, and double satisfaction, can be accomplished by other legal theories. It has been suggested that either estoppel or res judicata can be applied to achieve the same results without resort to the election of remedies doctrine.\(^6\) If this is so, the use of such other doctrines would clarify the law and simplify the lawyer's task by abolishing election of remedies as an oft-invoked doctrine.

Definition of Election of Remedies

Election of remedies is an affirmative defense. To use the defense, the defendant must show that the plaintiff possesses two inconsistent and concurrent remedies to a single cause of action.\(^7\) If the plaintiff has chosen one of these remedies, he cannot bring a second action. The difficulty is in determining what remedies courts consider inconsistent and what constitutes a single cause of action. These requirements often seem "conclusions too nebulous and technical in themselves to serve as the foundation for the ultimate conclusion of rights and liabilities."\(^8\)

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1 United States v. Oregon Lumber Co., 260 U.S. 290 (1922). "The doctrine of election of remedies and that of res adjudicata are not the same, but they have this in common, that each has for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause." Id. at 301.
2 C. Clark, Code Pleading § 77 at 495 (2d ed. 1947).
3 Id. § 77 at 495-96.
5 The word "action" used in this note means a court action. Unless otherwise specified, the phrase "cause of action" means the Pomeroy definition of a cause of action which is discussed at a later point in the text.
6 5A C. CoRENB, Contracts §§ 1217, 1220 (1964).
7 E.g., Herdan v. Hanson, 182 Cal. 533, 541-42, 189 P. 440, 442 (1920); Deinard & Deinard, Election of Remedies (pt. 1), 6 Minn. L. Rev. 341 (1922).
8 Note, The Form and Reform of the Election Between Remedies Doctrine in Ohio, 8 W. Res. L. Rev. 92, 98 (1957).
Inconsistent Remedies

A plaintiff should be able to foresee the acts which a court will consider inconsistent. If a plaintiff has committed such acts, his second action on the same facts will be defeated. Some California dictum has concluded that rescission is effectual when the plaintiff merely gives notice of an intention to rescind the contract. By that authority the plaintiff is denied an action for damages because of an inconsistent act performed before litigation. Some recent decisions have refused to find that an act performed prior to litigation can be considered so inconsistent as to allow the defense of election of remedies. One district court of appeal case, Karapetian v. Carolan, involving fraud in a contract to sell land, confined the application of inconsistency to situations where there had been a previous court action. The plaintiff had sent notice of rescission, which had been ignored. He then brought an action seeking damages based on misrepresentation. In the latter action the defendant could not set up the defense of election of remedies. The court rejected language in earlier cases which could be used to support an argument that notice of rescission amounts to "effectual rescission." While agreeing that the plaintiff's acts were inconsistent, the Karapetian court pointed out that the defendant's refusal to acknowledge the notices left the plaintiff free to pursue an action for rescission or for damages based on fraud.

Despite the reluctance of Karapetian v. Carolan to use inconsistency, the plaintiff still cannot determine how another court will apply the requirement. A recent case, Paularena v. Superior Court, construed section 1692 of the California Civil Code, which provides that any relief awarded "shall not include duplicate or inconsistent items of recovery," as perpetuating the inconsistency requirement in election of remedies. More logically the statute denies the plaintiff double recovery, rather than denying his second action on the grounds of inconsistency. Cases which state that notice was sufficient to amount to an inconsistent act, the contrary view of Karapetian v. Carolan, and the discussion in the Paularena case illustrate the plaintiff's difficulty in determining whether he has committed inconsistent acts. Because of the uncertain application of the inconsistency requirement, it is submitted that the test is neither useful nor helpful.

9 E.g., Ito v. Watanabe, 213 Cal. 487, 488, 2 P.2d 799, 800 (1931).
12 Id.
13 Id. at 355, 188 P.2d at 813. The opinion disapproved of Ito v. Watanabe, 213 Cal. 487, 2 P.2d 799 (1931), Prewitt v. Sunnymead Orchard Co., 189 Cal. 723, 209 P. 995 (1922), and Loaiza v. Superior Court, 85 Cal. 11, 24 P. 707 (1890).
14 83 Cal. App. 2d at 355, 188 P.2d at 815.
16 Note 9 supra.
Single Cause of Action

The additional requirement that the plaintiff must have a single cause of action before the defendant can plead election of remedies has been discussed less often than the inconsistency requirement. If there has been fraud in a contract to sell land, the vendee may ask for specific performance, damages, or rescission and restitution. Depending on the jurisdiction's definition of a cause of action, the plaintiff may have a single cause of action or multiple causes of action.

California applies the Pomeroy definition of a cause of action\(^9\) which states that a single cause of action amounts to an invasion of one "primary right" for which more than one remedy may be available.\(^20\) In a contract to sell land where there has been fraud, Professor Pomeroy expressly concludes that the plaintiff has only one cause of action,\(^21\) and three remedies—specific performance, damages, or rescission. Pomeroy also illustrates his definition of a cause of action when a vendor refuses to perform a contract to convey land, the vendee has a single cause of action with two remedial rights—compensation in damages or specific performance.\(^22\) Both examples, fraud in a land contract and refusal to perform a land contract, are common fact situations where the court is faced with an election of remedies problem.

Professor Clark defines a single cause of action as "an aggregate of operative facts . . . ."\(^23\) Under this definition, a single cause of action amounts to a collection of facts sufficient for a court to grant some recovery to the plaintiff. A "cause of action . . . [consists] of facts which should afford ground or occasion for the court to give judicial relief of some kind . . . ."\(^24\) This definition implies that in the situation of fraud in a contract to sell land as the example discussed above, the plaintiff would have one cause of action for specific performance, a cause of action in rescission, and a cause of action in damages for breach of contract. Professor Clark's theory thus reaches a different result as to what amounts to a cause of action from the Pomeroy definition discussed above.

Scope of the Election Doctrine

Both writers and courts attempt to distinguish between a plaintiff's substantive and remedial rights,\(^25\) since election of remedies applies only to remedial rights.\(^26\) This distinction to a large degree is

\(^9\) Panos v. Great Western Packing Co., 21 Cal. 2d 636, 638, 134 P.2d 242, 244 (1943); 2 B. Witkin, CALIFORNIA PROCEDURE Pleading § 11 (1954).

\(^20\) J. POMEROY, CODE REMEDIES § 347, at 528 (5th ed. 1929).

\(^21\) Id. at § 353, at 542.

\(^22\) Id. at § 348, at 530-31.

\(^23\) C. CLARK, CODE PLEADING § 19, at 127 (2d ed. 1947).

\(^24\) Id. § 19, at 137.

\(^25\) Schenck v. State Line Tel. Co., 238 N.Y. 308, 311, 144 N.E. 592, 593 (1924); Martin Music Co. v. Robb, 115 Cal. App. 414, 419, 1 P.2d 1000, 1002 (1931); RESTATEMENT OF CONTRACTS § 381, comment d at 713 (1932); Yerkes, Election of Remedies in Cases of Fraudulent Misrepresentation, 26 S. CAL. L. REV. 157 (1953).

\(^26\) RESTATEMENT OF CONTRACTS § 381, comment d at 713 (1932); Yerkes, Election of Remedies in Cases of Fraudulent Misrepresentation, 26 S. CAL. L. REV. 157, 157-58 (1953).
dependent on the definition of "a cause of action" adopted. Commentators on election of remedies, because they have applied the Clark definition of a cause of action, have concluded that a plaintiff's decision to rescind or ask for damages for breach of contract amounts to a substantive choice.\(^{27}\) Thus, impliedly a single cause of action under the Clark definition is equivalent to a substantive right. A remedial right is possible only in a few situations.\(^{28}\) Plaintiff's remedial rights arise only after he has made a substantive choice and finds that he has different remedies to effectuate that substantive right.\(^{29}\) As an example, according to the writers, if a plaintiff has decided to affirm his substantive right of ownership in certain property wrongfully occupied by another, he has two remedies available.\(^{30}\) He can sue on the common law assumpsit count to recover rents and profits, or he can bring an action in ejectment coupled with a prayer for damages. Both the action for rent and the ejectment action affirm the plaintiff's allegation of ownership in the land. Only in such a situation is there an election of remedies. Actions for rescission and for breach of contract under this definition amount to substantive choices.

California courts apply the election of remedies doctrine only to remedial rights.\(^{31}\) The courts, however, do not use the definition of remedial rights suggested by the writers on election of remedies. Instead, they distinguish remedial from substantive rights on the basis of the Pomeroy classification. This classification states that a choice to affirm or disaffirm ownership is a remedial right\(^{32}\) pursuant to a single cause of action. In an action for damages based on breach of contract or rescission, the plaintiff is choosing between remedies, not substantive rights. Thus, the election of remedies doctrine in California has a much broader impact than the writers in the field envisioned. The desirability of such an extension, as well as the alleged basis of the doctrine, will be considered in this note.

**Ratification as a Basis for the Election Doctrine**

*Bancroft v. Woodward\(^{33}\)* announced that the doctrine of election of remedies applies whenever a plaintiff has ratified a transaction. In an action for rents due on a lease, the defendant by way of cross-complaint asked for rescission. He further asked that if rescission were unavailable, he be granted damages due to fraudulent misrepresen...
sentations. The rescission plea failed due to laches and at that point the lessor alleged that an election of remedies had occurred. The court refused to find that an unsuccessful attempt to rescind the lease prevented the damage plea. It stated: "The right to damages exists unless and until the transaction is effectually disaffirmed." Since rescission had been denied, the transaction had not been disaffirmed. The court stated that if the plaintiff had first brought an action for damages, he would have lost any subsequent right to disaffirm because the election of remedies doctrine prevented a subsequent rescission. The remedies in that order are "wholly inconsistent." This dictum has been frequently discussed in later cases. Yet, the same result can be reached without any discussion of inconsistency or ratification. If the court in the first action had concluded that no contract existed between the parties, res judicata would prevent a plaintiff from seeking a subsequent determination of that same fact. A plaintiff would only be able to seek restitution of money had and received. Further, a plaintiff may be precluded from a subsequent rescission action if the defendant can show unreasonable delay, failure of timely notice, or any other equitable defense available in rescission actions. Such a defense would be likely, since a prior breach of contract action would cause delay and the plaintiff would be unlikely to give notice. Either alternative is preferable to a defense based on the theoretical inconsistency of the plaintiff's actions.

Authors agree that a plaintiff frequently affirms a transaction only to receive some recovery. It is often immaterial to him whether the court grants damages or allows rescission. Yet, if he should happen to bring the actions in the "wrong" order (breach of contract followed by rescission), he may find that he is denied any relief at all under the election doctrine. In this situation the concept of inconsistency works an injustice. In situations where a plaintiff should be denied relief in the second action, discussion of inconsistency may blur the fact that the defendant can show res judicata or an equitable defense.

Satisfaction as the Basis for the Election Doctrine

Unlike ratification, satisfaction disregards inconsistency in finding
an election of remedies. Theoretically, satisfaction considers only the
recovery obtained in the first action in deciding if the second action
will be precluded. California courts originally announced satisfac-
tion as a basis of the election doctrine in *House v. Piercy.* The
vendee had not brought two separate actions, but had submitted a
two-count complaint. The first count treated a contract to sell land
as rescinded by asking for money had and received. The second count
treated the contract as effective by asking for damages for breach.
The court concluded that this procedure was “not materially dif-
ferent from the situation that would have existed had he brought
two separate actions . . .” Before trial the defendant tendered
and the plaintiff accepted the sum asked for in the first count. The
court concluded that rescission was thereby effectuated. It refused
to hear the plea for damages. Under both counts the vendee had
asked for the same amount, so the court reasonably assumed that he
had been satisfied.

The fact that the plaintiff in *House v. Piercy* received the entire
amount asked for has been overlooked when applying the satisfaction
test. It must be emphasized that satisfaction in *House v. Piercy*
amounted to the “effectual manner” in which rescission was declared.
*Reserve Oil and Gas Co. v. Metzenbaum* cited the following state-
ment from *House:* “[I]f the facts exist which justify rescission by
one party, and he exercises his right and declares a rescission in some
effectual manner, he terminates the contract . . .” Disregarding
the facts which prompted *House v. Piercy* to state the conclusion
quoted above, the court in *Reserve Oil and Gas Co.* used the state-
ment to support its conclusion that notice of default on a lease given
to the defendant can amount to an election. The same result could
have been reached by emphasizing the contract which stated that
notice of default with failure to remedy within 30 days amounted to
termination. If that had been done, the court would have avoided
reliance on the “effectual manner” test in a situation significantly
different from that where the test was first applied.

*Karapetian v. Carolan* refused to apply the “effectual manner”
test when the plaintiff had merely given notice of rescission. The
*Karapetian* court concluded that the plaintiff made no election until
he received satisfaction. This holding more closely parallels the fac-
tual situation in *House v. Piercy,* the case that first enunciated the
test. Thus, *Karapetian* reached seemingly contradictory conclusions
from *Reserve Oil and Gas Co.* by applying the same test. Since the
plaintiff cannot predict what will be considered an election of reme-
dies under satisfaction, the test enunciated in *House v. Piercy* is not
an adequate basis for the election doctrine.

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40 181 Cal. 247, 183 P. 307 (1919).
41 Id. at 252, 183 P. at 809.
42 Id.
43 E.g., Reserve Oil & Gas Co. v. Metzenbaum, 84 Cal. App. 2d 769, 191
P.2d 796 (1948).
44 181 Cal. at 252, 183 P. at 809.
46 Id. at 775, 191 P.2d at 800.
Election of Remedies

Equitable Estoppel as a Basis for the Election Doctrine

In California, equitable estoppel, not ratification or satisfaction, is the most commonly stated basis of election of remedies. Since cases discussing estoppel as the basis of the election doctrine are numerous, the following discussion is restricted to a selection of them. Cases where equitable estoppel clearly applies will be examined first. Subsequently, attention will be given to instances where equitable estoppel has perhaps been over-extended.

Detrimental Reliance: Applicable Cases

Before a plaintiff can be estopped in a second action, the defendant must show detrimental reliance—real injury. It is well established in California that a levy on a writ of attachment granted pursuant to plaintiff's first action prevents him from bringing a second action where attachment is not available. Courts consider attachment a sufficient act whereby the plaintiff gains advantage over the defendant. The defendant has clearly been restricted in the use of the property attached. If the plaintiff can assert actions based on tort or contract, he is deemed to have elected the contract remedy if he attaches the defendant's property. Since attachment is not available in tort actions, the plaintiff cannot have the security of the defendant's property and then later abandon the contract action for a possibly more remunerative tort recovery.

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52 Id.

53 See Acme Paper Co. v. Goffstein, 125 Cal. App. 2d 175, 179, 270 P.2d 505, 509 (1954): “So far as the judgment here makes an award in the tort measure of damages it must be held to be erroneous . . . .”
Rowley\textsuperscript{54} is most frequently cited for this conclusion.\textsuperscript{55} The plaintiff had been issued a writ of attachment against the defendant to secure his quasi-contract action for money had and received. While agreeing that a count for tort could be pleaded in the same complaint, the court denied recovery based on tort.\textsuperscript{56} The plaintiff had elected to stand on the implied contract when the court issued the writ of attachment. Thus, he could be estopped from proceeding on the tort count.

When attachment is not available in an alternative action, it is quite easy to see that the defendant has grounds for claiming an estoppel. However, there are situations when attachment is available in both actions. In these cases it is more difficult to determine why there has been injury to the defendant sufficient to amount to estoppel. In Crag Lumber Co. v. Crofoot,\textsuperscript{57} the plaintiff filed a complaint containing a count in rescission plus money had and received and a second count based on a written contract. On the same day the court issued a writ of attachment. The defendant sought to prevent recovery on breach of contract by alleging injury from an attachment levied pursuant to the count in rescission. The court concluded that the defendant could not assume that attachment was based on the rescission count.\textsuperscript{58} Since the amount in the affidavit for attachment paralleled that asked for in the breach of contract action, the court concluded that the attachment was based on that count.\textsuperscript{59} Even if the attachment had been based on the rescission count, it is difficult to see how the defendant could show any real injury when the plaintiff would have been allowed an attachment on both causes of action.

Estoppel has been applied in situations which do not involve attachments. An early case, De Laval Pacific Co. v. United Cleaners and Dyers Co.,\textsuperscript{60} also required the defendant to show detrimental reliance before he could interpose election of remedies as a defense. In a conditional sales contract action, the seller in pursuit of rescission had demanded that the buyer return the machines sold. The buyer returned the machine, but an essential part was missing. When the seller brought a subsequent action for the sale price, the buyer's defense of election of remedies was denied. The court found that the seller had gained no advantage and the buyer had suffered no loss by return of the machine.\textsuperscript{61}

Ferguson v. Fujardo\textsuperscript{62} is a recent case applying estoppel as the basis of the election doctrine. The vendee filed a complaint for damages based on breach of a contract to sell an apartment building. Two years later the court allowed an amendment asking for specific performance. In approving the amendment the court quoted Witkin: "[D]espite a clearly manifested intention to pursue one of

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  \item \textsuperscript{54} 35 Cal. 2d 713, 221 P.2d 9 (1950).
  \item \textsuperscript{55} E.g., Crag Lumber Co. v. Crofoot, 144 Cal. App. 2d 755, 759, 301 P.2d 952, 961 (1956).
  \item \textsuperscript{56} Steiner v. Rowley, 35 Cal. 2d 713, 720, 221 P.2d 9, 13 (1950).
  \item \textsuperscript{57} 144 Cal. App. 2d 755, 301 P.2d 952 (1956).
  \item \textsuperscript{58} Id. at 761, 301 P.2d at 962.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} 65 Cal. App. 584, 224 P. 766 (1924).
  \item \textsuperscript{61} Id. at 586, 224 P. at 767.
  \item \textsuperscript{62} 211 Cal. App. 2d 119, 27 Cal. Rptr. 72 (1962).
\end{itemize}
two inconsistent remedies, the plaintiff may thereafter seek the other remedy if the change will not work a substantial injury to the adverse party . . . . The vendor's $5,500 expenses for improvements did not prevent the vendee from bringing an action for specific performance, since the vendor retained all income from the property in the intervening 4 years. This court, like the De Laval court, refused to resort to election of remedies as a mechanical test. The facts of neither case could support an estoppel.

Since the detrimental reliance requirement of equitable estoppel must be shown in election of remedies cases, it is logical that the procedural requirements also should be present. Equitable estoppel is an affirmative defense which a defendant must raise for the first time in the trial court. If estoppel is not so raised, the defense is waived and cannot be urged for the first time on appeal. Two California courts of appeal differ as to whether the defendant needs to comply with these procedural requirements when he seeks to use estoppel as the basis of election of remedies. A 1954 case from the first district, Acme Paper Co. v. Goffstein, did not require the defendant to raise estoppel as a defense in the trial court. The court began with the general conclusion that election of remedies is based on estoppel. Instead of discussing the consequences of that statement (namely, that equitable estoppel cannot be first raised on appeal), it cited a 1930 case which had allowed the defendant to assert election of remedies on appeal. The confusing interrelation of estoppel and election of remedies in this case leaves a plaintiff in mystery as to what rules will be applied to his action. A more recent decision from the third district, Modoc Mineral and Oil Co. v. Cal-Vada Drilling & Exploration Co., refused to permit an estoppel defense urged for the first time on appeal. Since election is based on estoppel principles, that court concluded that the defense cannot be "dilatorily raised."

The attachment cases, the De Laval case, and Ferguson v. Fajardo present examples of strict compliance with the substantive requirements of equitable estoppel in election of remedies. These courts carefully considered whether sufficient detrimental reliance existed before the defendant could invoke election of remedies as a defense. Modoc Mineral and Oil Co. v. Cal-Vada Drilling Co. concluded that the defendant must also comply with procedural requirements of estoppel so it refused to permit the defense to be first raised in the appellate court. Such cases illustrate that the existence of election of remedies as a doctrine separate from estoppel is

65 125 Cal. App. 2d 175, 270 P.2d 505.
68 Id. at 875, 46 Cal. Rptr. at 512.
69 Cases cited note 50 supra.
questionable. As election of remedies becomes more closely linked to estoppel, it ceases to be an independently viable doctrine.

Is Estoppel Always Applicable? Other Alternatives

If a plaintiff's first action has been dismissed or nonsuited, much California authority states that the defendant cannot use that prior suit to support a claim of equitable estoppel. Since the defendant can show no detrimental reliance by the first suit dismissed or nonsuited, the plaintiff's second action is thus allowed. The distinction of nonsuit from dismissal is subtle. It has been stated that nonsuit is a form of involuntary dismissal. A nonsuit is generally granted for insufficient evidence, whereas a lack of prosecution (unreasonable delay in prosecution of litigation) is the basis for most dismissals. Due to their similarity, it is reasonable that courts treat them alike in election of remedies problems.

Dismissal Cases

In Campanella v. Campanella, the plaintiff's first action based on rescission was dismissed before reaching trial on the merits. The court concluded that the plaintiff could bring a subsequent action based on breach of contract.

Under well-settled principles of the doctrine of estoppel, the disadvantage caused the other party must be a real injury, such as would, in the contemplation of the law, amount to an estoppel, and when it is of this character the doctrine of election of remedies will be applied by the courts.

Subsequent cases have followed this court and have applied equitable estoppel principles allowing a second action when the first action is dismissed. In Warfield v. Richey, for example, the lessee commenced an action based on fraud and sought damages for breach of contract. That action was dismissed due to inadequate pleadings. The plaintiff filed a second action a few days later. In allowing this second action, a suit for rescission, the court concluded in language similar to the equitable estoppel discussion in Campanella: "There was thus no decision on the merits, and we are unable to discern that defendant was in any way prejudiced or harmed thereby ...."
Equitable estoppel as a basis for election of remedies is not the only applicable theory when the prior action has been dismissed. Campanella v. Campanella did not rely solely on equitable estoppel. The court stated: "It is clear that the judgment is not res adjudicata and therefore not a bar to the present action nor an estoppel upon any issue therein ...." Reference there was to direct estoppel, a subclass of the more general term "res judicata" which also includes merger, bar, and collateral estoppel.

A substantial number of California cases have discussed res judicata, in lieu of equitable estoppel. Kramer v. Associated Almond Growers involved a contract to sell land in which the vendee's first action for rescission had been dismissed. In a subsequent action for breach of contract, the court approved of the Campanella holding that the defendant could show no "real injury" by dismissal sufficient to amount to equitable estoppel. Yet, in its holding for the plaintiff, the court rested its decision on the theory that "the judgment of dismissal could not operate as res judicata." Other cases have concluded that if the first case involved a dismissal on the merits or a determination of the issues, the defendant can successfully interpose res judicata to prevent the plaintiff's second action. As an example, in Morrison v. Willhoit the first action was brought to cancel two promissory notes due to fraud. The court sustained a demurrer to this action because the plaintiff had alleged insufficient facts to state a cause of action. Denying the plaintiff's second action, the court concluded that sustaining a demurrer when a defendant presents an absolute defense is a judgment on the merits. This defense was res judicata against any subsequent action. In reaching this conclusion the court cited the res judicata discussion in Campanella. In another example, Olwell v. Hopkins, the court dismissed the first action because the defendant was not qualified to do business in California, making the contract void. The plaintiff initiated a second action based on the contract with the defendant. The court held that the prior action barred the later one because the previous court had already determined that the contract was void.

81 204 Cal. at 520, 269 P. at 435.
82 RESTATEMENT OF JUDGMENTS at 160 (1942).
85 Id. at 601, 295 P. at 875.
86 Id.
87 E.g., Olwell v. Hopkins, 28 Cal. 2d 147, 168 P.2d 972 (1946).
90 Id. at 835, 145 P.2d at 709.
91 Id. at 838-39, 145 P.2d at 711.
92 Id.
93 28 Cal. 2d 147, 168 P.2d 972 (1946).
94 Id. at 151, 168 P.2d at 975.
95 Id. at 149, 168 P.2d at 974.
would not prevent them from recovering in the present action is immaterial, for defendants do not rely on that doctrine but on that of res judicata. 996

Nonsuit Cases

A second action has consistently been allowed when the first action has been nonsuited. California case authority to that effect 97 preceded Justice Cardozo's famous statement in Schenck v. State Line Telephone Co. 98 that: "fruitless recourse to a remedy withheld does not bar recourse thereafter to the remedy allowed." 99 Four years before the Schenck case, Herdan v. Hanson 100 allowed a plaintiff to maintain a second suit for damages where the first action for rescission had been nonsuited due to the plaintiff's failure to tender back the deed. Herdan v. Hanson concluded: "the effect of the judgment of nonsuit in the prior action was merely to leave the plaintiff and defendant in the same relative position as before the action commenced" 101 so the plaintiff "is not stopped by his abortive election from subsequently resorting to and pursuing a remedy to which he was really entitled." 102 This language provides authority for discussing equitable estoppel as the basis of election of remedies in nonsuits.

If a prior action has been nonsuited, some later courts prefer to discuss res judicata. 103 In Steiner v. Thomas 104 the first action for rescission of a contract to convey property had been nonsuited on the merits. The court refused to hear the plaintiff's second action for breach of an agreement to devise property. The court discussed inconsistency and equitable estoppel as a basis of election of remedies, but concluded that the plaintiff was prevented from bringing the subsequent suit by res judicata. 105 Since nonsuit was granted after trial on the merits, the plaintiff could have asserted all the facts in the first action.

Both nonsuits and dismissals follow similar patterns. If a nonsuit or dismissal is granted without trial on the merits, courts consistently allow the plaintiff to bring another action. Courts sometimes state that no election of remedies has occurred. 106 Campanella v. Campanella reached that conclusion because the defendant suffered no "real injury." 107 Herdan v. Hanson found that the parties remained "in the same relative position as before the action commenced." 108 Other cases conclude that the defendant can show no

96 Id. at 152, 168 P.2d at 975.
97 Herdan v. Hanson, 182 Cal. 538, 189 P. 440 (1920).
98 238 N.Y. 308, 144 N.E. 572 (1924).
99 Id. at 311, 144 N.E. at 583.
100 182 Cal. 538, 189 P. 440 (1920).
101 Id. at 542, 189 P. at 442.
102 Id.
105 Id. at 659-60, 211 P.2d at 324.
106 Cases cited note 77 supra.
107 204 Cal. at 521, 269 P. at 435.
108 182 Cal. at 542, 189 P. at 442.
res judicata. Res judicata so applied usually means direct estoppel which precludes later litigation of matters previously determined between the parties on the same cause of action. Equitable estoppel should not be extended to include nonsuits and dismissals, since res judicata principles adequately cover the problems. This suggestion accords with section 53 of the Restatement of Judgments: "Where the plaintiff voluntarily submits to a nonsuit, or the court directs that he be nonsuited, or the action is dismissed without prejudice, the plaintiff is not barred from maintaining an action on the original cause of action."

Weight as a Basis of Election of Remedies

Some case authority considers waiver as the basis of election of remedies. Waiver has been defined as "the intentional relinquishment of a known right." Election of remedies can scarcely be called a voluntary act of the plaintiff, so case law applying waiver in election of remedies in effect disregards the definition of express waiver. If waiver is applicable in election of remedies situations, the act of the plaintiff, not any act or conduct affecting the defendant, is alone sufficient to apply election. For example, the California District Court of Appeal in Martin Music Co. v. Robb stated: "A waiver can be inferred whenever the conduct of the seller [plaintiff] is inconsistent with the idea that he still intends to enforce return of the goods..." This is perhaps the clearest case applying waiver as a basis of election of remedies. The defendant-buyer had breached a conditional sales contract. The court concluded that commencement of a proceeding to enforce the contract amounted to waiver. "Any act on the part of the seller clearly manifesting an intention to treat and rely upon the unpaid purchase price as an absolute debt from the purchaser will be deemed an election to waive the conditions of the sale, resulting in title passing to the purchaser, and precluding the seller from thereafter retaking the property." This case illustrates that an election based on waiver looks to acts of the plaintiff without considering the effect of those acts on the defendant.

Whenever waiver is mentioned as a possible basis of the election doctrine, other theories are also often mentioned. In concluding that the basis for the election doctrine is unclear, one case stated that the doctrine may be based on estoppel, waiver, or inconsistency.
Waiver, like estoppel, must be raised in the trial court. Unlike estoppel, waiver is a unilateral act which operates without detriment being shown. This was shown in Martin Music Co. v. Robb. If applied as the basis of election of remedies, it could thus operate more often than estoppel. Since election of remedies has already been criticized as too broadly applied, inclusion of waiver as the basis of the doctrine would hardly seem desirable.

**Conclusion**

Definitional requirements of the election doctrine are rarely discussed in modern law. However, the inconsistency requirement is still applied in cases where a plaintiff has brought an original action for damages followed by a subsequent action for rescission. The order of these actions is deemed inconsistent. Since California clearly follows the Pomeroy definition of a single cause of action, that requirement of election of remedies has merited even less discussion than the inconsistency requirement.

Satisfaction as a basis for election of remedies, in lieu of the definitional requirements, can be unfair if courts fail to consider the exact amount of recovery that the plaintiff gained in the first action. There has been some confusion on this point in California. For that reason it may be wise to avoid satisfaction as a basis for election of remedies. Waiver as a basis has little value, since it looks only to the plaintiff's acts, thereby disregarding the consequences of such acts upon the defendant.

Equitable estoppel is left as the most frequently stated basis for the election doctrine. It does not prejudice the plaintiff's rights, if the courts insist that the defendant show detrimental reliance. Recent cases emphasize that detrimental reliance must be shown. If the plaintiff's first action has been dismissed or nonsuited, some courts conclude that the defendant can show no change in position. Equitable estoppel thus does not prevent the second action. In similar nonsuit and dismissal cases, there is authority that res judicata applies instead of equitable estoppel, and it has been suggested in this note that res judicata is in fact more applicable to these procedural problems.

It is submitted that election of remedies has no independent viability. Estoppel and res judicata can be employed without re-

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120 115 Cal. App. at 419, 1 P.2d at 1002.
121 Note 30 supra.
124 See discussion in text accompanying notes 40-45 supra.
125 Id.
127 Cases cited note 75 supra.
128 Cases cited notes 81 and 101 supra.
129 Deinard & Deinard, Election of Remedies, 6 Minn. L. Rev. 480, 501 (1923): "It [election of remedies] is often mistaken for a special application
sort to the election doctrine. These theories, in lieu of election of remedies, enable a plaintiff to predict the consequences of his actions and prevent the defendant from raising this technical and often non-meritorious defense.

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of the principle of estoppel in pais . . . . In this way the whole distinctiveness and vitality of the rule is entirely disregarded and lost." Hine, Election of Remedies, A Criticism, 26 Harv. L. Rev. 707, 719 (1913): "The result of this review of the operation and history of the doctrine may be summed up in this way: The modern rule of election of remedies is a weed which has recently sprung up in the garden of the common law, its roots stretching along the surface of obiter dicta but not reaching the subsoil of principle. The judicial gardeners through whose carelessness it has crept in should be able to eliminate it, or at least prevent its further growth." Note, Election of Remedies: A Delusion?, 38 Colum. L. Rev. 292, 293 (1938); Note, Election of Remedies: A Judicial Weed?, 16 Okla. L. Rev. 193, 198 (1963): "The interpretation . . . that the doctrine is but an extension of the principles of estoppel, robs the doctrine of election of remedies of all excuses for its existence as a separate and distinct doctrine of law."

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