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CHOICE OF REMEDIES

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In the practice of law the attorney is frequently confronted with two or more courses of procedure to obtain the desired result. In some cases the choice of the procedure involves an election of one remedy to the exclusion of the other; while in other cases he can pursue either or both to judgment, but have only one satisfaction of the claim.

This article is not intended to give a complete and full statement of the principles and rules governing the doctrine of election of remedies, but simply to point out in some specific cases the particular advantages of one remedy over the other; and of one course of procedure over another.

The doctrine of the election of remedies applies in a situation where two causes of action arise out of the same state of facts and the injured party has the right to pursue either; but the prosecution of the one is inconsistent with the prosecution of the other. The law says that a person cannot occupy two different and inconsistent positions and therefore the choice of one of the remedies bars the right to afterwards pursue the other.

Gall vs. Gall, 126 Wis. 390.
Rowell vs. Smith, 123 Wis. 510.

But in order to have an election, two causes of action must actually exist at the time and hence the rule does not apply where one of the alleged causes of action does not in fact exist. A party may pursue what he mistakenly thinks to be a cause of action to determination and then discover that the facts do not establish the cause of action which he believed them to. In such case he can immediately turn around and pursue the proper remedy, as no election of remedies is involved, the party having only one valid remedy.

Virtue vs. Creamery Package Co., 123 Minn. 17; 142 N. W. 930; L. R. A. 1915 B, 1179.
Rowell vs. Smith, 123 Wis. 510.

A good example of a case of a mistaken remedy is where an action at law is commenced on a written contract, and it subsequently appears that the writing is not in such form as to be enforceable, because of failure to comply with the statute of

frauds and was not made as intended by both parties. The action therefore fails. In such a situation resort may be had to equity invoking its jurisdiction to reform the writing so as to correspond with the intention of the parties and then enforce it as perfected. The positions taken in these two actions are not inconsistent.

The Wis. M. & F. Ins. Co. Bank vs. Mann et al, 100 Wis. 596; 76 N. W. 777.
Rowell vs. Smith, 123 Wis. 510.

We are most familiar with the application of this doctrine of election of remedies where the choice is between an action at law in tort and an action on contract as presented in cases where the particular contract was procured through fraud. A good illustration of such a case is found in *Jacobsen vs. Whitely,* 138 Wis. 434.

This action was for damages for deceit, caused by fraudulent representations as to the condition of a dry goods company, which induced the purchase of stock in said concern at par. In this action the defense was set up that the plaintiff by retaining his stock and continuing in the employ of the company, as contemplated at the time of the purchase, after he must have ascertained the falsity of the representations, has so ratified the contract or waived the right to complain of the fraud, that he cannot recover. The Court in answer to this contention makes this statement at page 441, "Under such circumstances the defrauded purchaser has at his election either of two rigths; he may rescind the whole contract and upon returning all he has received may recover back all that he has paid, so that the parties may stand in statu quo. To this right it is doubtless essential that he act with reasonable promptness and that enjoyment of rights under the contract will be deemed a waiver. He also has, however, the right to enjoy all the fruits of what he receives under the contract and to recover damages by reason of breach of warranty or deceit for whatever the property is in fact worth less than it would have been if as represented."

The two courses are different and inconsistent and the election of the one bars the right to pursue the other. In one he repudiates the contract and sues to recover the purchase price and in the other affirms it and sues for damages.

The advantages of the one remedy over the other depend on the facts in each particular case and the circumstances of the

parties. An action on contract gives merely a judgment for debt and if the judgment debtor possesses no property over and above that allowed as exempt from execution under the statutes, the judgment is uncollectable, as no person under our constitution can be imprisoned for debt. On the other hand, a judgment in an action for fraud is a tort judgment and under the statutes of most states the judgment creditor has the right of execution against the body of the judgment debtor, if no unexempt property can be found out of which to collect such judgment. However, if the judgment debtor is a party of financial means, either judgment is collectable and then the action on the contract is usually the better course, as less proof would ordinarily be required to establish a breach of contract than to show that the same was procured through fraud, with all the necessary elements required to establish fraud.

The enactment of statutes has given new remedies to protect certain rights where there already existed an action at common law. In some such cases the statutory remedy supersedes the common law right and only one can be prosecuted to judgment. Before the passage of the Mechanics' Lien Laws, a principal contractor had merely an action on contract for the amount of the materials furnished and labor performed, the same as the seller of any merchandise. This statute left him this old right, and in addition gave him a lien against the building and real estate on which the materials had been furnished and the labor performed. To secure such right of lien the statutes ordinarily provide that certain requirements be complied with, such as giving of notices and filing of liens within a prescribed time. This statutory lien action involves the title to the real estate and is an equitable action, tried before the court without a jury. The common law action on contract gives the claimant the right of a jury trial and in both cases the main question litigated is the same; namely, is there anything due for materials furnished or labor performed?

In some cases, because of the peculiar nature of the dispute between the claimant and the owner of the property, it may be to his advantage to have the question determined by the jury rather than by the court, and he being the moving party, has the choice of either remedy. However, after the question has once been litigated in one or the other actions, it is res adjudicata and therefore bars any right to follow the other remedy.

As a matter of general practice, litigants usually elect to pursue their remedy under the Mechanics' Lien Law, as it has the

additional security of being a lien against the real estate, which is prior to all subsequent incumbrances and judgment creditors; and in many cases mechanics' lien claims are collected out of property the owner of which, since the commencement of the work, has gone into bankruptcy and paid his unsecured creditors but a small dividend on their claims.

As statutes of this nature are tried out, it sometimes develops that there are various defects, that rights given under them conflict with other rights and consequently amendments are made. We have such an example in the State of Wisconsin in the statute providing for the levying upon shares of a stockholder in a corporation. Prior to the enactment of the amendment to Section 2989 R. S. Wis. by Chap. 458 of the Laws of 1913, it provided that a levy could be made on the interest or shares of a stockholder in a Wisconsin corporation by the sheriff leaving a copy of the execution with the treasurer or other officer of the corporation having charge of its books and demanding from him a certificate of the number of shares such stockholder had in such corporation, and thereupon proceed to sell the same upon execution sale. The amendment is part of the Uniform Stock Transfer Act and provides that no levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate shall actually be seized by the officer making the levy or surrendered to the corporation which issued it or its transfer by the holder enjoined.

Prior to the amendment this statute was a very effective means of collecting judgments in many cases. But now with these new restrictions the teeth have been pulled and it is of very little benefit to a judgment creditor, because a stock certificate is often as hard to locate and as easy to conceal as cash money in a debtor's possession.

This change in the law makes it necessary for the judgment creditor to follow a different course and another remedy to obtain the same result as was secured under the old statute. Fortunately we have another statutory remedy, a substitute for the old common law Bill of Discovery, being the proceedings supplementary to execution, Chapter 131, R. S. Wis.

Upon the return of the execution unsatisfied, the judgment debtor can be cited to appear before a court commissioner and the order of citation usually contains an order restraining him from disposing of or transferring any of his property. Upon

examination, discovery can be had as to where the stock certificate is, whether he still holds title, and if so, an order be made by the court commissioner requiring him to deliver over the stock certificate to the judgment creditor to apply on the judgment, or else to the receiver, if one has been appointed.

This has the advantage of securing in one proceeding an injunction against the transfer of the stock, a discovery as to the exact holdings of stock and an immediate transfer thereof to the judgment debtor. If necessary, the secretary of the corporation can be made to produce the books, and be examined in these proceedings and in this manner all possible information can be secured concerning the judgment debtor's interest in the stock before any is actually seized.

This method has all the advantages of Section 2989 R. S. Wis. and in addition thereto is a safe and sure way of attaching the interests of a stockholder in a corporation without becoming involved in litigation with third parties who may have some interest in these shares of stock by way of transfer, pledge as security, or otherwise. The practical result of this statutory change will naturally be that the remedy given under Section 2989 as amended will be availed of only in cases where the judgment creditor has the stock certificates of his judgment debtor under his control or within his reach.

Another and somewhat similar situation is where a party has a choice between two courses of procedure. I have in mind a situation where personal property is pledged as security for a loan, evidenced by a note. In case of default in the payment of the note he can foreclose the pledge, but in order to properly and in due conformity with the law do this, an equitable foreclosure action would be necessary, which becomes a very cumbersome proceeding to settle a matter of this nature. In making this statement, I appreciate that many pledge contracts provide that the pledgor forfeits title to the property pledged upon failing to redeem the same at the time stipulated. But a title so obtained, I do not consider very secure. A perfectly safe, simple and easy method of collecting on this pledge is as follows: A suit on the note to judgment; and in the case of a judgment note, the entering of a cognovit. Thereupon the immediate issuing of an execution and levy upon the article pledged. The property being in the possession of the claimant, there is no difficulty in making the levy and the pledged agreement has in the meanwhile kept

the property where it could be reached at any time. Upon execution sale, the claimant or pledgee can either secure the full payment of the money loaned and all costs of the proceedings or else by bidding it in at the sale himself for the amount of his claim, secure an absolute title thereto. In this proceeding the party abandons all rights of foreclosure under the pledge agreement, but nevertheless the pledge has served its purpose in furnishing security for the debt, and has been the means of securing its collection. The party thus has as full and better relief than will be afforded him by enforcing the pledge agreement.

In the case where a debt is secured by a chattel mortgage on personal property, the mortgagee has a similar choice of remedies. Under the usual statutes governing the foreclosure of chattel mortgages and their requirements as to public sale and the notices to be given, it becomes somewhat of a technical and burdensome procedure, and these foreclosures are usually scrutinized rather closely by the courts in case of a question of title arising out of the same, and the mortgagor given the benefit of the doubt. Because of this situation, a chattel mortgagee often finds it to his advantage not to avail himself of the valuable rights given him under his chattel mortgage, but to sue on the debt and prosecute the same to judgment. An execution is then issued and the property subject to the chattel mortgage levied upon and sold at sheriff's sale. As in the case of the pledge, this is a quick and easy way of securing the collection of the debt. This procedure is the same as in the case of the pledge, the only difference being that with the pledge the claimant holds possession of the property which is the security, while with the chattel mortgage the mortgagor retains possession.

In situations of this kind it becomes necessary at times to rely upon the security contract and pursue the remedy given under it, and even abandon the proceedings by way of execution, levy and sale where they have been commenced and almost carried to completion. This is what the plaintiff was required to do in the case of *J. I. Case Threshing Machine Co. vs. Johnson,* 152 Wis. 8. After the levy and while the property was being advertised for sale, the debtor and chattel mortgagor was adjudged a bankrupt and immediately the plaintiff was in the same position as any other creditor of the bankrupt in so far as his execution and levy were concerned, as they did not give him a preference above other creditors. His chattel mortgage, however, did, and he

therefore promptly released the levy and demanded possession of the property under the chattel mortgage, and upon refusal commenced an action to recover possession. In behalf of the creditors the trustee in bankruptcy contested his right and claimed that the proceedings on the debt followed by judgment, execution and levy constituted a waiver of his rights under the chattel mortgage. The Supreme Court held there was no waiver and that the rule of election of remedies did not apply; as the two proceedings were not inconsistent and as long as the levy was released before sale, the rights under the chattel mortgage were not lost.

This case very well illustrates the fact that while one remedy may be a quicker and easier way of securing the relief desired, the rights given under the security agreement, whether it be chattel mortgage, pledge or conditional contract of sale, must in some cases be relied upon to obtain a complete satisfaction of one's claim.

The foregoing examples are demonstrative of the fact, that before the commencement of any proceeding, careful consideration should be given: as to whether the choice of one remedy will constitute an election of remedies and bar the right to pursue the other; and, secondly, which course of procedure will give ample relief in the speediest, easiest and safest way.

VOTING TRUSTS

By Max W. Heck, of the Racine Bar.

The discussion of this subject is not intended to be a brief on the subject, but rather a discussion of a subject, which must, in the near future, be disposed of with the development of corporations and corporate interests, so that stockholders in such corporations may know their respective rights and responsibilities. A close examination of this subject, as passed upon by the various courts in this country, is apt to mislead attorneys as well as investors in stock, as to the real trend of discussion on the subject in America.

"Voting trusts are defined to be a term applied to the accumulation in a single hand or in the hands of a few, known as trustees, of the shares of corporate stock belonging to several owners, in order to control the business of the corporation." It may be