Multiple Liability, Multiple Remedies, and the Federal Rules of Civil Procedure

In the following Article, Professor Bauman explores the effectiveness of the Federal Rules of Civil Procedure in coping with some of the perplexing procedural problems which arise in multi-party, multi-remedy litigation. His discussion is broken down into three separate areas. In the first situation, the liability of the defendant is alternative. In the second situation, the defendant's liability is joint and several; whereas in the third situation, the liability is cumulative. The author concludes that the Federal Rules have eliminated the problems presented by restrictive and technical rules of pleading and when measured against the standard of "the maximization of redress for the injured in the character of pursuers, with the minimization of hardship on the innocent in the character of defendants," are a "notable achievement."

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INTRODUCTION

One of the most fascinating chapters in the history of American law is the development of multiple remedies to redress a single wrong. The origin of this unique situation may be found in the evolutionary character of the common-law forms of action and in the establishment of an entirely distinct system of equitable relief. With the adoption of the code system of procedure, the forms of action and the separate bill in equity were abolished, to be replaced by the code "one form of action." An injured party thus had available in one action alternative remedies which formerly

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could only have been obtained in separate actions or courts, and which were based on theories historically inconsistent. In addition, if multiple defendants were liable to suit, and their liability in turn was alternative, joint, or cumulative, procedural complications were inevitable. These difficulties arose not only from restrictive and outmoded provisions governing joinder, but also from the application of an election doctrine requiring a litigant to make a binding choice of remedy or defendant while the facts were still undeveloped and uncertain.

The unsatisfactory result reached by cases involving these problems has been the subject of much criticism, and various remedial measures have been proposed and adopted. One such reform is the adoption of liberal pleading rules. This approach is exemplified by the Federal Rules of Civil Procedure. The effectiveness of these rules in solving procedural problems raised by multi-party, multi-remedy litigation is the subject matter of this Article. Three situations are considered. In the first, liability of the defendants is alternative, in the second, joint and several, and in the third, cumulative. The last two situations are further complicated by the availability of multiple remedies against each defendant.

I. ALTERNATIVE LIABILITY

A problem of alternative liability is presented when two or more persons are liable to another but judgment may be entered against only one of them. This occurs in cases involving an undislosed principal, where the plaintiff is compelled to elect whether to hold liable the principal or the agent. When an action is pursued to judgment against either party, the prevailing rule is that a subsequent action against the other is barred even though the first judgment remains unsatisfied. According to the English rule the subsequent action is barred even though there is no actual knowledge of the agency relationship at the time the first action is tried, since the problem is regarded as one of merger. Plaintiff has one cause of action and, having pursued it to judgment, the obligation is merged and no subsequent action can be had against the other party. The American rule is generally explained on an election basis, and hence knowledge of the agency becomes rele-

1. The classic article on election of remedies is Deinard & Deinard, Election of Remedies, 6 MINN. L. REV. 341, 480 (1922).
2. See RESTATEMENT, JUDGMENTS § 100 (1942).
vant. If the agency relationship is undisclosed, plaintiff may bring a subsequent action against the principal since no election can take place in the absence of knowledge. On the other hand, if the action is brought against either party after disclosure of the agency relationship, an election occurs (at least if the action is pursued to judgment) and a subsequent action will be barred.

What is needed to correct the injustice inherent in this situation is the adoption of a rule that an unsatisfied judgment against one party does not bar recovery from the other, but this requires a change in the substantive law of agency. In the absence of such a change, rules of procedure can aid a plaintiff only in situations where knowledge of the agency exists. This is true because under the American rule, a subsequent action is not barred if knowledge of the agency is lacking, hence plaintiff needs no help. Under the English rule, a subsequent action is barred even though the agency was undisclosed, hence no procedural rule can possibly help the plaintiff.

In situations where the plaintiff does have knowledge, procedural rules may hamper him in two ways. First, joinder of the two parties may be forbidden. In such cases, plaintiff must choose which defendant to pursue prior to the establishment of the agency. If the putative principal is chosen and the agency cannot be established, plaintiff must at best commence a new action against the agent. If the agent is sued first and a judgment is obtained against him, a subsequent action against the principal is barred by the doctrine of election.

The second and more usual problem facing the plaintiff is the application of an election doctrine prior to judgment. Regardless of whether or not joinder is permitted in the pleading, an election of defendants may be required at some point prior to or during the trial. The time for making an election is of crucial imp-

5. Id. § 158.
6. Ibid.
8. 7 ALI PROCEEDINGS 256 (1928–1929) (remarks of Professor Seavey); MECHEN, AGENCY § 159 (4th ed. 1952); Merrill, Election Between Agent and Undisclosed Principal: Shall We Follow the Restatement? 12 NEB. L. BULL. 100 (1933); Note, 39 CALIF. L. REV. 409 (1951); see N.Y. Civ. PRAC. ACT § 112–b.
9. Weil v. Raymond, 142 Mass. 206, 215 (1886); CLARK, CODE PLEADING § 60 (1947); 2 MECHEN, AGENCY § 1758 (2d ed. 1914); see 1939 N.Y. L. REV. COMM’N REP. 283 n.258. For the analogous rule that ‘a master and servant could not be joined, see Bailey v. Zlotnick, 133 F.2d 35 (D.C. Cir. 1942); Note, 26 MINN. L. REV. 730 (1942).
portance, but any rule requiring an election prior to an actual decision of the agency relationship is particularly hazardous for the plaintiff.

In *Joseph Denunzio Fruit Co. v. Crane*, the Federal Rules were interpreted by the district court to give the greatest possible advantage to the plaintiff. In that case, an action was brought seeking damages for the breach of a contract for the sale of grapes. Both the agent, Crane, and the partially disclosed principal, Kazanjian, were joined as defendants. At the close of the evidence, both defendants moved to compel an election between the agent and the principal. The motions were not passed upon by the court, but "were taken under submission." The court later ruled that this was a question of procedure governed by the Federal Rules, and that a proper interpretation of the joinder rules compelled a conclusion that the motions should be denied. Otherwise, said the court, "to compel a plaintiff to elect which party defendant it desires to hold liable is tantamount to compelling him to dismiss against the other defendant prior to the court's adjudication as to the liability of the parties." The court concluded that counsel for plaintiff "is hereby given permission to make an election, in writing, and prior to the entry of the judgment, as to which respondent he desires to hold liable in damages in this case." The choice was an easy one, since the court had previously ruled that Crane had acted without authority and that Kazanjian was therefore not liable for the unauthorized acts of the agent.

The case illustrates the extent to which good procedural rules can aid a litigant. Joinder of both agent and principal as defendants is permitted, and an election is postponed until entry of judgment. Further than this procedural rules cannot go. If the unjust election rule is to be completely obliterated, a change in the substantive law of agency must be made.

To be distinguished from such cases of alternative liability are situations in which a single injury has been sustained but plaintiff

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13. *Id.* at 140.
14. See also dicta in Ore S.S. Corp. v. D/S A/S Hassel, 137 F.2d 326, 330 (2d Cir. 1943).
is unable to determine which one of several persons is the culpable party. Since only a single cause of action against a single wrongdoer exists in these cases, no question of alternative liability arises. Instead, the problem is one of alternative joinder. Such joinder was forbidden at common law and by judicial interpretation of some of the codes. As a result, plaintiff was forced to sue each of the suspected wrongdoers separately, and unless a consolidation for trial was ordered, plaintiff was presented with the unpleasant prospect of meeting in each trial evidence tending to prove that parties not joined were the wrongdoers.

To forestall this possibility, many codes of procedure, including the Federal Rules, permit joinder in the alternative. The only limitation on this right is the proviso that the joined actions must involve a common question of law or fact arising out of the same transaction, a condition easily met in this type of case. To state a claim immune from demurrer-type attacks, plaintiff need only allege that there has been an invasion of some legally protected right and that it cannot be determined which of the named defendants is the culpable party.

Drafting a pleading meeting this rule is thus a simple task, but other substantial procedural problems remain. Plaintiff retains the burden of establishing a prima facie case against one or more of the defendants at the close of his case-in-chief. As stated by a federal court interpreting the New York alternative joinder provisions:

I take it that the burden still rests upon the plaintiff, at the close of the entire case, to produce something more than surmise to show which defendant is culpable, and that any defendant against whom there is nothing more than surmise is entitled to a directed verdict.

Thus in cases where the plaintiff joins defendants in the alternative, the sufficiency of his proof may be tested at the close of his case by a motion for a dismissal, directed verdict, or some

15. 1 CHITTY, PLEADING 86–87 (14th Am. ed. 1872); SHIPMAN, COMMON-LAW PLEADING §§ 227–28 (3d ed. 1923); CLARK, CODE PLEADING § 59, at 373–78 (1947).
other appropriate procedural device. The New York court has ruled that such a motion should be denied, stating that liability "need not be definitely fastened, at the end of plaintiff's case, on one precise defendant." Rather, said the court, "the defendants are called upon then to exhibit their conduct in the custody of the goods, and thus fix the liability as between themselves."

Ordinarily defendants will "exhibit their conduct" because of their uncertainty as to the sufficiency of the evidence against them. A refusal by defendant to accept the court's invitation, however, presents a question as to whether a suitable sanction exists to punish a defendant who is unwilling to proceed. In a number of cases, this difficulty is avoided because the plaintiff actually sustains his burden of proof through the use of a presumption. Thus in Julius Klugman's Sons, Inc. v. Oceanic Steam Nav. Co., in the absence of contrary evidence, a presumption fastened liability on the last custodian of the missing property. The doctrine of res ipsa loquitur may have a similar effect in tort cases. If there are no presumptions shifting the burden of coming forward with the evidence, the only available sanction against the recalcitrance of the defendants appears to be a shift in the burden of proof to them. There is no indication that any such change was contemplated by the rules, and cases in the federal courts involving alternative joinder have neither posed this question nor attempted to answer it. This may mean that the question is largely academic because the uncertainties of proof force a defendant to produce evidence exculpating himself from liability in the vast majority of cases. If defendants do refuse to produce evidence it seems highly unlikely that a federal court would shift the burden of proof to the defendants, and in the absence of evidence singling out any particular wrongdoer, a dismissal of plaintiff's case would seem to be required. The problems of proof cannot be solved by a liberal joinder rule.

II. JOINT AND SEVERAL LIABILITY

Unlike the prior cases, plaintiff in this situation may obtain redress for his injury from more than one defendant. The example

21. Ibid.
22. 42 F.2d 461 (S.D.N.Y. 1930).
23. See the valuable discussion in McCoid, Negligence Actions Against Multiple Defendants, 7 STAN. L. REV. 480 (1955).
24. All of the cases cited note 17 supra involved pleading attacks.
25. See in accord McCoid, supra note 23, at 505.
chosen to illustrate this situation is the case of multiple conver-
sions. In such cases, plaintiff has a claim against all participants in
the wrong, each of whom is jointly and severally liable for the in-
jury. Not only does plaintiff have multiple causes of actions, he
also has available against each wrongdoer a number of alternative
remedies for righting the wrong done to him. Thus plaintiff may
sue in tort for compensatory damages, in quasi contract for re-
stitution of the value of the benefit derived from the conversion, in
replevin for recovery of the specific chattel itself, and in equity,
where the remedy at law is inadequate, to obtain a mandatory in-
junction compelling the defendant to return the chattel or to im-
pose a constructive trust on its proceeds. 26 The complications in-
herent in this situation are obvious and arise even in the simplest
cases. Suppose that plaintiff chooses to sue in tort for the value
of the converted chattel. It would obviously be desirable to join
all of the converters in one action, but this was impossible at com-
mon law unless the conversions were joint. 27 A like result was
reached by interpretation of some of the codes for the reason that
no one defendant is affected by the cause of action stated against
any of the other participants in the wrong. 28 If separate actions
are filed, either because joinder is forbidden or by choice, there
are problems as to the proper measure of damages in the case of
successive converters, some of whom may have acted in good
faith. 29

Fed. 712 (2d Cir. 1923); American Sugar Refining Co. v. Fancher, 145
N.Y. 552, 40 N.E. 206 (1895); Woodward, Quasi Contracts § 270 (1913);
Restatement, Restitution § 128, comment e (1937); cf. Restatement,
Judgments § 62, comment k (1942).

27. 1 Chitty, Pleading 86 (14th Am. ed. 1872); PomeroY, Code Rem-
edies § 210 (5th ed. 1929).

S.D. 282, 239 N.W. 242 (1931), noted in 30 Mich. L. Rev. 1344 (1932);
but see Geneva Gin & Storage Co. v. Rawls, 240 Ala. 320, 323, 199 So.
734, 736 (1940).

29. If the original conversion was in bad faith, the owner may re-
cover not only the value of the chattel at the time of the conversion, but
also the value of any improvement in the chattel made by the converter
subsequent to the conversion. Wooden-Ware Co. v. United States, 106
U.S. 432 (1882); Silsbury & Calkins v. McCoon & Sherman, 3 N.Y. 379
(1850); contra, Single v. Schneider, 30 Wis. 570 (1872). A subsequent
converter, even though acting in good faith, is liable for this enhanced
value at the time of his conversion, though he is entitled to the benefit of
any services he has performed subsequent to his purchase which further
enhances the value of the chattel. Tuttle v. White, 46 Mich. 485 (1881);
Nesbitt v. St. Paul Lumber Co., 21 Minn. 491 (1875). If the original
conversion was in good faith, however, the owner is limited to recovery of
the value of the chattel as it existed at the time of the conversion without
the benefit of any subsequent improvement. Wooden-Ware Co. v. United
Restrictive joinder of party rules presents only one of the obstacles confronting the plaintiff. It may also be necessary for him to pursue a single remedy to obtain redress for his injury. This is true because many codes in authorizing joinder of causes of action adopt a classification system based on the nature of the action. These provisions not only preclude the joinder of tort and contract and legal and equitable causes of action but also contain a specific prohibition against joinder of inconsistent claims.³⁰ If a narrow definition of cause of action is then adopted, the plaintiff finds himself faced with a problem of joinder of causes of action not within the authorized categories.³¹ He must therefore choose one of his remedies, and where a theory of pleading doctrine is also applied, the specific theory selected must be proved. The limitation to a particular theory and remedy is further strengthened by restrictive rules which prohibit amendments changing the cause of action.³² Even where joinder of alternative remedies is permitted in the pleading, an election might still be required prior to the submission of the case at trial.³³

Where an adverse judgment is entered against the plaintiff under these circumstances, a question arises as to its effect in a subsequent action against the same defendant. If the judgment is entered on the merits of the claim, it is well established that any subsequent action seeking an alternative remedy against the same party will be barred by res judicata.³⁴ If the judgment is not on the merits, however, but is based on a finding that plaintiff had mistakenly chosen a remedy not available to him, there seems to be no reason why a subsequent action seeking the proper remedy should be barred, and courts have so ruled.³⁵ There are cases holding that even in this situation plaintiff is estopped from

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³⁰ See Harper & James, Torts § 2.35 at 188 (1956); Restatement, Torts § 927, comment f (1939). If the conversion is joint, obviously the same measure of damages applies to all, and if they are joined in one action, an identical judgment must be entered against each defendant. Hart v. Herzig, 131 Colo. 458, 283 P.2d 177 (1955).

³¹ See Note, 38 Colum. L. Rev. 292, 314 (1938).

³² Id. at 312–14.

³³ Id. at 315–17. See also Clark, Code Pleading § 68 (1947).

³⁴ Restatement, Judgments § 65, comment e (1942). For a discussion of the effect of such a judgment on a subsequent action against a different party, see text accompanying note 87 infra, and Restatement, Judgments § 96, comments b & h (1942).

³⁵ Clark v. Heath, 101 Me. 530, 64 Atl. 913 (1906); Independent Elec. Lighting Corp. v. M. Brodsky & Co., 118 Misc. 561, 194 N.Y. Supp. 1 (Sup. Ct. 1922); Restatement, Judgments § 65, comment g (1942).
bringing a second action by the application of the election of remedies doctrine. 36

A further question arises as to the effect to be given to a favorable judgment in the first action in subsequent actions brought against the other wrongdoers. Here the position taken is that not judgment alone, 37 but only judgment and satisfaction bars further actions. 38 Moreover, “no matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others. . . ." 39 The theory is that satisfaction of the judgment transfers title to the wrongdoers, such title relating back to the date of the conversion. 40

While res judicata thus poses no problem in actions brought against other converters, another procedural hazard is present. Plaintiff may find that in his first action, an irrevocable election of remedies has been made. Thus it has been held that where plaintiff has waived the tort and sued in assumpsit in the first action, a subsequent action in tort for conversion is barred against the other wrongdoers. 41 The theory supporting this estoppel is that plaintiff in his first action elected to treat the transaction as a sale and therefore cannot subsequently take the inconsistent position that there was an unlawful taking and conversion. Conversely, where the prior action is in tort for conversion, it has been held that the plaintiff is barred from asserting a claim to the property in a subsequent action. 42 An inconsistency has also been found be-


40. Hepburn v. Sewell, 5 Harr. & J. 211 (Md. 1821); see also Siegel v. Trav-Ler Karenola Radio & TV Corp., 333 Ill. App. 158, 76 N.E.2d 802 (1948) (abstract only); Ames, The Diseisin of Chattels, 3 Harv. L. Rev. 313, 327 (1890); Comment, Judgment or Satisfaction as Passing Title, 30 Yale L.J. 742 (1921).


between replevin and conversion, and thus a plaintiff who elects one of these remedies "thereby deprives himself of any right to resort to the other."\textsuperscript{3}

Briefly, these are some of the procedural problems a plaintiff may face in this type of litigation. Infinite variations can be found in various jurisdictions, and volumes of criticism could be noted, but that is another story. The question here considered is the effectiveness of the Federal Rules in overcoming the procedural pitfalls thus outlined.

Starting with the simplest problem, the formulation of an acceptable pleading, the Federal Rules have had an unqualified success. The joinder of parties problem is solved by express authorization of Rule 20 permitting joinder when a common question of law or fact is involved as is true in cases involving multiple conversions.\textsuperscript{44} Moreover, no difficulty is encountered in pleading the claim merely because alternative remedies are sought. Rule 8 (e)(2) and Rule 18 authorize plaintiff to plead two or more statements of his claim, alternatively or hypothetically, whether legal or equitable, and regardless of consistency. As a result, an attack on the pleading by motion because of misjoinder of claims or parties will fail. Specifically, no election will be compelled at this point in the proceedings.\textsuperscript{45}

The result reached in these cases seems inevitable because of the express language of the rules. This does not mean that plaintiff's problems are solved, however, because the liberality granted to the plaintiff by the pleading rules might very well be nullified by restrictive practices adopted at pre-trial and trial. Thus, in immunizing the pleadings from attack, the application of the election doctrine may merely have been postponed. The rules themselves are silent on this question, and in fact do not even mention the election doctrine. Hence a determination of whether that doctrine has really been "jettisoned" as one writer asserts,\textsuperscript{46} depends upon

\begin{thebibliography}{100}
\bibitem{44} Sudderth v. National Lead Co., 272 F.2d 259 (5th Cir. 1959).
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the decisions made by courts in cases where the election issue is raised.

The federal courts have had to resolve the question of election in a number of cases. In understanding the results reached, a distinction must first be made between cases in which plaintiff is seeking a single remedy supported by several different legal theories and those cases in which alternative remedies are sought. If several rules or theories of substantive law support recovery of a single remedy, all of these theories may be alleged in the complaint and all theories supported by evidence may be submitted.\(^47\) An election among such theories will not be compelled, for, as the court states in *Senter v. B. F. Goodrich Co.*,\(^48\)

>a defendant cannot compel a plaintiff to choose at his peril the theory upon which he intends to rely and thereby possibly defeat a recovery where two consistent, concurrent or cumulative theories can be urged without prejudice to the defendant's ability to defend.

Where plaintiff actually seeks alternative remedies, as in cases of multiple conversions, some further distinctions must be made before the effect of the election doctrine can be stated. If the plaintiff either never had an alternative remedy, or has taken some action which results in an election of substantive rights depriving him of an alternative remedy, no election question is presented.\(^49\) Plaintiff has merely been mistaken in believing that alternative remedies existed. In other cases, plaintiff has proceeded to judgment on the merits of a particular theory and has lost. Again in any subsequent attempt to assert a different remedy, no question of election is involved, since a prior judgment on the merits bars further action on the claim.\(^50\)

The true issue of election is involved in cases where plaintiff


\(^50\) Sears, Roebuck & Co. v. Metropolitan Engravers, 245 F.2d 67 (9th Cir. 1956); Rasmus v. A. O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958); Schultz v. Manufacturers & Traders Trust Co., 40 F. Supp. 675 (W.D.N.Y. 1941); see Albert v. Kopplin Molding Corp., 247 F.2d 107, 110 (8th Cir. 1957); RESTATEMENT, JUDGMENTS § 65, comments d & e (1942).
has available alternative remedies and seeks those remedies in his
complaint. In considering the disposition to be made of the claim
in such cases, it must be noted at the outset that there is con-
siderable language in the federal cases, particularly prior to the
adoption of the Federal Rules, that certain remedies are inco-
sistent. Thus it has been stated at various times that tort and con-
tact,51 tort and quasi contract,52 or quasi contract and contract53
are inconsistent remedies, the implication being, of course, that
plaintiff may not seek both remedies for a single wrong.

Under the Federal Rules, as previously noted, all such rem-
edies can now be sought in a single pleading, and attacks on
that pleading will fail.54 Moreover, it has been held that filing
such a pleading “seeking two inconsistent remedies does not con-
stitute an election to pursue either of them.”55 Nevertheless,
there are several cases in which the court in rejecting an attack on
the pleading has indicated that an election would be required at
trial.56 On the other hand, there are cases in which the court has
permitted a plaintiff to submit both a contract and quasi contract
claim, ruling that plaintiff need only “be able to show that it
was proper to submit both counts to the jury; that is to say, failure
to support either would lead to reversal.”57 In other words, plain-
tiff is permitted to submit all counts supported by evidence. Fin-
ally, it has been held reversible error to require an election of al-
ternative remedies in a case where no prejudice could be shown
by the defendant. The court in so deciding stated flatly that “we

51. Nakdimen v. Baker, 111 F.2d 778 (8th Cir.), cert. denied, 311 U.S.
665, rehearing denied, 311 U.S. 726 (1940) (applying Arkansas law).
712, 725 (2d Cir. 1923) (also stating that replevin and conversion are in-
consistent).
53. Sylvania Industrial Corp. v. Lilienfeld’s Estate, 132 F.2d 887, 893
(4th Cir. 1943); Continental Grain Co. v. First Nat’l Bank of Memphis,
162 F. Supp. 814, 831 (W.D. Tenn. 1958); Sanders v. Meyerstein, 124 F.
54. See text accompanying note 44 supra.
(D. Utah 1957).
1956); Neumann v. Bastian-Blessing Co., 71 F. Supp. 803 (N.D. Ill. 1946);
Venn-Severin Machine Co. v. John Kiss Sons Textile Mills, 2 F.R.D. 4, 3
(D.N.J. 1941).
57. North American Graphite Corp. v. Allan, 184 F.2d 387, 389 (D.C.
Cir. 1950). See also Western Machinery Co. v. Consolidated Uranium
Mines, 247 F.2d 685 (10th Cir. 1957); Automobile Ins. Co. of Hartford,
Conn. v. Barnes-Manley Wet Wash Laundry Co., 168 F.2d 381 (10th Cir.
1948).
are certain that there is no room for its [the election of remedies doctrine] application under applicable rules of procedure."

Thus, with the exception of dicta in some cases, the federal courts have seemingly adopted a rule which permits the plaintiff to plead and submit alternative remedies if supported by the evidence. There may only be one recovery, of course, since these remedies are alternative not cumulative, but judgment may be entered for the maximum amount allowable by the evidence. It should follow that in situations of multiple conversions, plaintiff could submit both his tort and restitutionary remedies, and uphold the judgment on either theory. If plaintiff also asserted a claim for the chattel itself, that claim, if supported by the evidence, should also be submitted. If all of the claims submitted are proved, an election at that time must be made, since plaintiff cannot have judgment both for the chattel and its value.

The rejection of the election of remedies doctrine in the federal courts is not as clearly established in one other important area. There are statements indicating that the doctrine may be applied in the classic situation represented by Terry v. Munger where the judgment in a prior action was held to be a conclusive election estopping plaintiff from seeking a different remedy in a subsequent action against the other converters. Thus in Korns v. Thomson & McKinnon, the court stated that while a plaintiff may sue in tort for conversion or waive the tort and sue in assumpsit, "he cannot maintain an action upon an implied contract as against some of the wrongdoers, and then an action in tort against other wrongdoers." In United States v. Fleming, the court accepted and stated the traditional rationalization for this rule. That case involved the conversion of mortgaged property and its proceeds. The United States brought an action against the assignor of the mortgage for the proceeds received from the wrongful sale of the mortgaged property. This action was held to bar a subsequent action in conversion for damages against the purchaser of the property since the result of the first action was said

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60. Cf. 5 CORBIN, CONTRACTS § 1221 (1951). The result would be different, of course, if the remedies were cumulative. See Bankers Trust Co. v. Pacific Employers Ins. Co., 282 F.2d 106 (9th Cir. 1960); RESTATEMENT, JUDGMENTS § 64, comment f (1942).
61. 121 N.Y. 161 (1899) cited note 41 supra.
63. Id. at 450.
64. 69 F. Supp. 252 (N.D. Iowa 1946).
to ratify the sale and the purchase was therefore no longer wrongful.

It is difficult to accept this line of reasoning since it is now recognized by everyone that the first action is treated as one in contract merely to satisfy the historical requirements of assumpsit. The dangers of such a holding may be seen in *Sears, Roebuck & Co. v. Blade,* a case involving fraud rather than conversion. In that case plaintiff discovered that for many years its advertising manager had entered into contracts with the defendant engraving company because of the payment to him of illegal rebates or commissions. The first action filed by the plaintiff was for money had and received against its advertising manager in the state court to recover the amount of these rebates. This action was successful and a judgment was entered for the plaintiff for this amount of money. Plaintiff then brought an action in the federal court charging the engraver and the manager with conspiracy to defraud. The district court held that the state court judgment barred further action against the manager and dismissed the complaint against the engraver. The reason given for this ruling was that plaintiff in the state court action had affirmed the acts of the defendants and was therefore estopped from bringing an action based on fraud. By waiving the tort and suing the manager in assumpsit, plaintiff had made an irrevocable election of inconsistent remedies. On appeal to the circuit court, the judgment of dismissal against the engraver was reversed. The court ruled that the causes of action in the two cases were not identical since each defendant was charged with a distinct wrong. Thus two different causes of action arose, and the plaintiff therefore had a right to recover for the fraudulent overcharges from the engraver in excess of the amount of rebates recovered in the action against the manager. The election of remedies question was thus avoided in the court of appeals, but the opinion nevertheless stated that the doctrine should not be applied in the absence of double vexation, a factor missing in the present case since the engraver was only sued once.

The decision by the court of appeals in the *Blade* case is a hopeful sign that eventually the federal courts will successfully resolve the election of remedies problem. Once it is recognized that the

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65. The best statement of this criticism may be found in United Australia, Ltd. v. Barclays Bank, Ltd., [1941] A.C. 1 (H.L. 1940).
67. Sears, Roebuck & Co. v. Metropolitan Engravers, 245 F.2d 67 (9th Cir. 1956).
law has given the plaintiff alternative remedies for one wrong, and that fictitious allegations of contract are made merely to satisfy the historical vagaries in the development of assumpsit, there should be no difficulty in arriving at a correct solution. While this problem is not specifically governed by the rules, it has been considered procedural for purposes of *Erie*, and therefore the considerable body of state law accepting an election of remedies doctrine is no obstacle to adopting a better rule in the federal courts.

## III. CUMULATIVE LIABILITY

In the multiple conversion cases just considered, a single injury, the conversion, was done to the plaintiff, but that same injury was accomplished by a number of persons, each of whom is jointly and severally liable. If a contract is repudiated by one party as a result of the wrongful inducement of another, there results not one but two distinct injuries. For the breach of contract, the injured party may seek either compensatory damages for loss of the benefit of his bargain, restitution of the benefit obtained by defendant from plaintiff's partial performance of the contract, or specific relief in equity in cases where the remedy at law is inadequate. The wrongful inducement to breach the contract gives rise to a tort action against the wrongdoer, and again multiple remedies are available. Plaintiff may seek either compensatory damages for the loss occasioned by the wrong, restitution of any benefit obtained by the wrongdoer as a result of his misconduct, or equitable relief either by way of an injunction against the wrongful conduct or by the imposition of a constructive trust on the benefits received from the wrongdoing. Thus having sustained two injuries, plaintiff has two causes of action and in each cause of action alternative remedies are available.

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68. See the thorough analysis in Note, 38 COLUM. L. REV. 292 (1938).
70. Philpott v. Superior Court, 1 Cal. 2d 512, 36 P.2d 635 (1934); Anderson v. Bell, 70 Wyo. 471, 251 P.2d 572 (1952); 5 CORBIN, CONTRACTS § 1105 (1951); WOODWARD, QUASI CONTRACTS § 260 (1913).
Whether the liability of the promisor and the tort-feasor is cumulative in this situation presents an interesting question. Clearly two causes of action arise in these cases,74 and an action against the tort-feasor cannot be defeated merely by asserting that no loss has been suffered because an action for breach of contract is available.75 If the plaintiff pursues either action to judgment and recovers, it is also clear that the other remedies against that particular defendant are barred, since such remedies are admittedly alternative, not cumulative.76 The pertinent question is whether that judgment will also bar further action against the other party. Assume first that a judgment has been entered against the promisor, and subsequently the injured party seeks further relief from the tort-feasor. Should that action be barred by the prior judgment in the contract action? On principle, the answer would seem to be no, though Lord Mansfield doubted "extremely" that an action would lie against the tort-feasor after a judgment in the contract action.77 Since plaintiff has two causes of action, it is difficult to see why judgment without satisfaction should bar plaintiff from seeking further relief for his injuries. In Angle v. Chicago, St. Paul, M. & O. Ry.,78 the United States Supreme Court adopted this view. Although a prior judgment had been entered in an action against the promisor, a constructive trust was imposed on the benefits the tort-feasor had obtained as a result of the breach of contract. The fact that a nulla bona return had been filed in the contract action no doubt influenced the court to take this position.

If the judgment against the promisor has been satisfied, however, a very practical obstacle faces the plaintiff in subsequent litigation against the tort-feasor. Proof of damages is an essential element in the tort action, and if satisfaction has been obtained from the promisor, plaintiff may have difficulty in sustaining his burden of proof.79 As Lord Mansfield stated: "Here is no injury at all done to the master: for, he has recovered and received a

76. See Sears, Roebuck & Co. v. Metropolitan Engravers, 245 F.2d 67, 69–70 (9th Cir. 1956); RESTATEMENT, JUDGMENTS § 64, comments c, d & e (1942).
78. 151 U.S. 1 (1893).
79. 1 HARPER & JAMES, TORTS § 6.5, at 490 (1956).
complete satisfaction and more. Therefore all the injury is done away... The same argument of lack of injury has been applied to bar an action against the tort-feasor in cases where the plaintiff released the promisor from liability.

This reasoning is valid only if the identical measure of damages is applied in the tort and contract action. If a contract measure of damages is applied in the tort action, it is undoubtedly true that a prior satisfied judgment against the promisor precludes further relief in tort since no damages could be proved in the latter action. The situation is analogous to multiple conversion actions involving a single injury. Yet there are cases that recognize the tort as a distinctive injury and apply a tort measure of damages to compensate for that wrong. In these cases, recovery is allowed for injuries not compensated for in the prior contract claim. Since plaintiff has two causes of action, and since the only policy involved is that against a double satisfaction for one injury, it follows that a prior judgment in the contract action, even though satisfied, should not prevent recovery of these additional items of damages. This same reasoning applies to cases where plaintiff first obtained a judgment against the promisor for the alternative remedies of restitution or specific relief in equity.

In the converse situation where plaintiff first sues the tort-feasor, the same principle applies. If the judgment in the tort action is for damages, its satisfaction should preclude any further action against the promisor on the contract. This follows from the fact that even the least favorable measure of damages, the contract rule, gives plaintiff complete satisfaction, and double recovery for one injury is not allowed. The significance of two causes of action appears only when plaintiff fails to get complete satisfaction in the first action. Thus if plaintiff sought and was awarded an injunction against the tort-feasor's misconduct, there would appear to be no reason why a subsequent action against the promisor for damages should be defeated even though such damages could have been recovered in the equitable proceeding against the tort-feasor. Since the cause of action against the promisor is distinct, no problem of splitting arises.

83. Cf. Sears, Roebuck & Co. v. Metropolitan Engravers, 245 F.2d 67, 72 (9th Cir. 1956).
85. Cf. RESTATEMENT, JUDGMENTS § 64, comment f (1942).
If the plaintiff suffers an adverse judgment on the merits in the first action, whether tort or contract, that judgment will bar further action against that particular defendant for an alternative remedy.\textsuperscript{86} Whether such a judgment also bars further action against the other defendant depends upon the rule of res judicata adopted. By the accepted formulation of the mutuality rule, a judgment in the first action does not bar a second action against the other defendant because that defendant is not bound by a prior judgment favorable to the plaintiff. Application of such a rule here means that a second action against the other wrongdoer is not barred by the prior unfavorable judgment. The policy reasons of equality and fairness supporting this result are not always persuasive, and exceptions have been made where no unfairness results to the injured party. It has been held that the present situation is exceptional, since the plaintiff has had his day in court on the merits of the claim, and there is no good reason why he should be given a second opportunity to relitigate those same issues.\textsuperscript{87} On the other hand, if the first judgment merely decides that the relief sought is inappropriate, it will bar neither a further action against the original defendant for an alternative remedy that is available nor a subsequent action against the other defendant.\textsuperscript{88}

The answer to the original question as to the existence of cumulative liability in this situation thus depends upon the relief sought and the measure of damages applied in these cases. The proper standard of damages is a matter of substantive law beyond the reach of procedural rules. Thus in diversity cases in the federal court, state law governs. If that law recognizes different measures of damages in the two actions, a federal court will permit the subsequent action.\textsuperscript{89}

Although the important question of cumulative liability is beyond the control of the procedural law, rules of procedure do have an important effect on the joinder problems arising in such litigation. It should be clear from what was previously stated that joinder of the promisor and the tort-feasor presents serious questions under the code.\textsuperscript{90} The Federal Rules do permit such join-
der,91 and typically this is the course of action pursued by the plaint-
iff.92 Substantial advantages obviously result to plaintiff from
such a joinder, but these advantages can be defeated, at least in
part, by permitting a severance for trial as has been allowed in
New York.93

The Federal Rules also authorize the plaintiff to seek alternative
remedies in a single action, and as previously noted, the problem
of an election of remedies then presents itself.94 While there is
authority requiring plaintiff to elect at trial whether to seek dam-
ages or rescission,95 other and better authority permit plaintiff
to submit all remedies supported by proof.96 In one respect, the
election of remedies doctrine is less troublesome here than in the
multiple conversion cases previously discussed. Since plaintiff has
two causes of action, his choice of remedy in the contract action
cannot affect the remedies available in the tort action.97 Thus
the problem presented in multiple conversion cases such as Terry
v. Munger98 is completely avoided here.

CONCLUSION

When Jeremy Bentham, over a century ago, directed his con-
siderable talents toward an examination of the law, one of his
principal concerns was the apparent indifference of judges to the
purposes of the procedural law. Because all rules of law are in
form conditional imperatives, the rules tended to become ends unto
themselves, rather than means to an end. For Bentham the only
defensible object of procedure was "the maximization of the execu-
tion and effect given to the substantive branch of the law."99
While the law as a whole had as its objective "the greatest hap-

(N.D. Iowa 1960); Allison v. American Airlines, 112 F. Supp. 37 (N.D.
Okla. 1953); Carl Gutmann & Co. v. Rohrer Knitting Mills, 86 F. Supp.
506 (E.D. Pa. 1949); Canales v. Stuyvesant Ins. Co., 10 Misc. 2d 583, 172
S.2d 1 (1956).
94. See text accompanying notes 33, 51–60 supra.
95. Neumann v. Bastian-Blessing Co., 71 F. Supp. 803 (N.D. Ill. 1946);
N.J. 1941); RESTATEMENT, CONTRACTS § 384, comment b (1932).
F.2d 381 (10th Cir. 1948); see 5 CORBIN, CONTRACTS §§ 1221–24 (1951).
97. Cf. Sears, Roebuck & Co. v. Metropolitan Engravers, 245 F.2d 67,
72 (9th Cir. 1956).
98. 121 N.Y. 161 (1899). See text accompanying note 41 supra.
99. Bentham, Principles of Judicial Procedure with the Outlines of a
Procedure Code, in 2 JEREMY BEN'THAM’S WORKS 6 (Bowring ed. 1843).
piness of the greatest number,” the adjective law had two specific ends, “the one positive, maximizing the execution and effect given to the substantive branch; the other negative, minimizing the evil, the hardship, in various shapes necessary to the accomplishment of the main specified end.” Thus the problem for Bentham was “how to unite the maximization of redress for the injured in the character of pursuers, with the minimization of hardship on the innocent in the character of defendants.”

When measured against this standard in the three areas examined herein, the Federal Rules are a notable achievement. Perplexing problems presented by former restrictive and technical rules governing pleading and joinder have been completely eliminated. Except for a few decisions and some language honoring the ancient dogma in election of remedies cases, the substantive law, in Bentham’s language, has been “maximized.” Such problems as still plague litigants in these cases are found to be problems of substantive law. Whether justice is achieved and “the greatest happiness of the greatest number” promoted by the election rule in cases involving undisclosed principals or by a measure of damages which may preclude recovery from a wrongdoer inducing a breach of contract depends upon one’s view of the proper economic and social policies involved. Such a determination involves considerations quite distinct from an evaluation of the procedural law. On the basis of these considerations, a change may be thought desirable. If so, the change will not be in the rules of procedure, but in the substantive law itself.

100. Id. at 8.
101. Id. at 9.