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gretted, because (a) in the interests of the public it is desirable that public service vehicles be more strictly regulated than private vehicles;[20] (b) under the general law applicable to all automobile drivers alike, it is possible for injured parties to be entirely unable to collect amounts awarded by any judgments for "first offenses" rendered against operators of for-hire vehicles;[21] (c) in view of the corporate surety's greater responsibility, and of the power of the creditor to sue such surety directly, the desireability of corporate over individual sureties is recognized in business and law.[22]

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Contracts Induced by Fraud—Election of Remedies in North Carolina.

A plaintiff who has been induced to enter a contract through fraud of the defendant is faced with the perplexing problem of making a choice of remedies. From the point of view of selection of rights he may affirm the contract or may rescind. If he chooses the former, his remedy is an action on the contract or an action for deceit. But if he chooses the latter, his remedy is to seek a restoration of the *status quo* by bringing a bill for rescission or suing at law on the basis of a complete rescission.[1] Thus, the plaintiff is faced with a choice between two inconsistent positions in regard to his substantive rights. In practical effect this usually means an election between the two remedies already mentioned. To this situation is applied the much discussed doctrine of election of remedies with the result that the choice of one among inconsistent remedies bars recourse to others.[2] It has been pointed out[3] that the historical evolution of this doctrine has proceeded in at least three stages: first, a period in which the doctrine was applied for the recognized purpose of preventing a double satisfaction; second, a period in which the doctrine was cast in terms of formal logic and its real purpose overlooked in the following of logical consistencies; and third, a period in which, it being recognized that logical consistency as an end in itself often led

[20] See: Eastern Ohio Transportation Corp. v. Village of Bridgeport, 44 Ohio App. 433, 185 N. E. 891 (1932); Notes 10 and 14 *supra.*

[21] Comment, (1931) 9 N. C. L. REV. 384; see note 4, *supra.*

[22] Lutz v. New Orleans, 235 Fed. 978 (E. D. La. 1916); NATIONAL BANKRUPTCY ACT, §50, Bonds of trustees and referees: 30 STAT. 558 (1898), 11 U. S. C. A. §78 (1927).

[1] Day v. Broyles, 222 Ala. 508, 133 So. 269 (1931); Fields v. Brown, 160 N. C. 295, 76 S. E. 8 (1912) (If rescission does not restore the *status quo,* damages may be a cumulative and not an inconsistent remedy).

[2] United States v. Oregon Lumber Co., 260 U. S. 290, 43 Sup. Ct. 100, 67 L. ed. 261 (1922); Gutterman v. Gally, 131 Cal. App. 647, 21 Pac. (2d) 1000 (1933); Deinard and Deinard, *Election of Remedies* (1922) 6 MINN. L. REV. 341; Hines, *Election of Remedies, A Criticism* (1913) 26 HARV. L. REV. 707.

[3] Note (1923) 36 HARV. L. REV. 593.

to exceedingly undesirable results,[4] the courts sought escape in exceptions and qualifications.[5]

The exact status of the doctrine in North Carolina is not entirely clear, but apparently it is still in the second stage of the development outlined above, still flourishing in all the strength of a strictly logical application. Perhaps the most striking example of this is the case of *Stewart v. Salisbury Realty Co.*[6] In that case the defrauded vendee of a land contract, upon discovering the fraud, attempted to rescind by tendering a deed, which was refused by the vendor. Subsequently the vendee brought an action for deceit. The court, per Brown, J., held that a mere tender of rescission bars a later action for deceit. In reaching this extreme result the court went even further than was absolutely necessary for logical consistency.[7] Other manifestations of the strict doctrine in North Carolina are: (1) the bringing of an action on the theory that title has passed will bar a subsequent action on a theory that title has not passed;[8] and (2) a plaintiff may not in one complaint join an action for rescission with an action for breach of contract.[9] Of course, even under a strict application of the doctrine, for the assertion of one remedy to constitute a bar to another remedy, the two remedies must be inconsistent.[10] Thus, a defrauded vendor's action for the purchase price does not bar his later action for deceit, as both proceed upon an affirmance of the contract.[11]

[4] A defrauded plaintiff, having prosecuted his bill for rescission to an unsucessful close, was thereafter denied the right to sue for deceit. The result is that the guilty party goes unscathed with the fruits of his fraud. United States v. Oregon Lumber Co., 260 U. S. 290, 43 Sup. Ct. 100, 67 L. ed. 261 (1922).

[5] Abbadessa v. Puglisi, 101 Conn. 1, 124 Atl. 838 (1924); Schenck v. State Line Telephone Co., 238 N. Y. 308, 144 N. E. 592 (1924) (mistaken pursuit of a non-existent remedy is not an irrevocable election).

[6] Stewart v. Salisbury Realty and Insurance Co., 159 N. C. 230, 74 S. E. 736 (1913).

[7] Rescission is bilateral; therefore, an attempted rescission by one party not accepted by the other is not inconsistent with continued existence of the contract and so should not bar a later action for deceit. But affirmance is unilateral; therefore, a prior action for deceit is a bar to a subsequent action for rescission. Cohoon v. Fisher, 146 Ind. 583, 45 N. E. 787 (1897); Gorman-Head Auto Co. v. Barrett, 78 Okla. 34, 188 Pac. 1083 (1920); Hines, *Election of Remedies, A Criticism* (1913) 26 HARV. L. REV. 707, 712. But some liberal courts hold a prior action for deceit a conditional affirmance only, contingent on a recovery of damages. Smith v. Bricker, 86 Iowa 285, 53 N. W. 250 (1892); Schenck v. State Line Telephone Co., 238 N. Y. 308, 144 N. E. 592 (1924).

[8] Davis v. Butters Lumber Co., 132 N. C. 233, 43 S. E. 650 (1903); Lanier v. Roper Lumber Co., 177 N. C. 200, 98 S. E. 593 (1919).

[9] Lykes v. Grove, 201 N. C. 254, 159 S. E. 360 (1931) (although no action for deceit involved here, the problem is the same since one action proceeds on an affirmance and the other on a disaffirmance of the contract). *Contra*: Glover v. Radford., 120 Mich. 528, 79 N. W. 803 (1899).

[10] Fleming v. Congleton, 177 N. C. 186, 98 S. E. 449 (1919); Irvin v. Harris, 182 N. C. 647, 109 S. E. 867 (1921).

[11] Standand Sewing Machine Co. v. Owings, 140 N. C. 503, 53 S. E. 345 (1906) (satisfaction of first judgment unsuccessful because of defendant's supervening bankruptcy); Bare v. Thacker, 190 N. C. 499, 130 S. E. 164 (1925).

On the other hand there are at least two North Carolina cases which differ radically from the result reached by a strict application of the doctrine. While it is true that in neither of these cases did the court expressly consider the doctrine, the problem was present on the facts and necessarily involved in the holding. In the case of *Pettijohn v. Williams*,[12] the court, per Pearson, J., allowed a bill for rescission even after judgment had been recovered in the action for deceit, double recovery being prevented by an injunction against further proceedings in the law action pending the proceedings for rescission. Also, in *Troxler v. Building Co.*[13] the court was little worried by the technical inconsistency of the plaintiff's double-barreled request in the same complaint for damages for deceit and for rescission, even sending appropriate issues on both counts to the jury, though, of course, a recovery would finally be permitted on but one.

It is a commentary on the value of a strict application of the doctrine that the ultimate results obtained by these last two cases, in which it was not applied, seem far preferable to the results of those cases in which it was strictly applied. Furthermore, the problem which the doctrine was originally invoked to meet, *i.e.*, prevention of a double satisfaction, was adequately met in these cases. Therefore, unless there has been a decision adverse to the plaintiff in the first action on the question of fraud, thus constituting *res adjudicata*,[14] or unless the bringing of the first action has led to such a material change of position on the part of the defendant as to constitute an estoppel,[15] it would seem the doctrine has little to recommend itself except mere compliance with formal logic.

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Evidence—Hearsay—Admissibility of Declarations of Present Bodily Feelings.

Plaintiff filed a claim before the North Carolina Industrial Commission for compensation, contending that the death of her husband resulted from an accident arising out of his employment by defendant

[12] Pettijohn v. Williams, 55 N. C. 302 (1855) (Although speaking of an "election of remedies," the court is here considering an election between legal and equitable remedies rather than an election between affirmance and disaffirmance of a voidable transaction).

[13] Troxler v. Building Co., 137 N. C. 51, 49 S. E. 58 (1904). This case seems to be contrary to the more recent case of Lykes v. Grove., 201 N. C. 254, 159 S. E. 360 (1931), cited note 9, *supra*.

[14] Gutheil v. Goodrich, 160 Ind. 92, 66 N. E. 446 (1903). In some jurisdictions a prior suit to rescind is a final election only when it is *res judicata* on the merits of the subsequent action in deceit. Kramer v. Association of Almond Growers, 111 Cal. App. 595, 295 Pac. 873 (1931); Dooley v. Crabtree, 134 Iowa 465, 109 N. W. 889 (1907).

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