

THE USE AND MISUSE OF EQUITABLE ELECTION

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I INTRODUCTION

The propriety and even existence of a doctrine of ‘equitable election’ is a long-standing, little-explored mystery. In Australia, as well as in England, it has been repeatedly pronounced by both courts and commentators that the notion of election comprises multiple doctrines and there is a fundamental divide between election at common law and election in equity, each eliciting a distinct doctrine operating to the exclusion of the other.¹ However, expository analyses of the notion of election, particularly of its theoretical foundation, have thus far been restricted to its manifestation at common law.² There is as yet no convincing rendition of the application of that notion in equity. Indeed, it is far from clear in what circumstances equitable election might be invoked and what its precise scope of operation is. In this respect it seems to be less established than common law election. Nevertheless, even still covered in mist, equitable election is equally infected with an abnormality that has haunted common law election since its birth, an abnormality which consists in Anglo-Australian law’s persistence in the position that an act of election should be regarded as invariably and innately irrevocable. At the heart of this abnormality lies an inexplicable lack of

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1 *Lissenden v CAV Bosch Ltd* [1940] AC 412, 418 (Viscount Maugham) (‘*Lissenden v Bosch*’); *Tiplady v Gold Coast Carlton Pty Ltd* (1984) 3 FCR 426, 454 (Fitzgerald J); *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] 1 Ch 12, 28 (Robert Walker LJ) (‘*Asworth v Ballard*’). See also John S Ewart, *Waiver Distributed among the Departments, Election, Estoppel, Contract and Release* (Harvard University Press 1917) 71; cf Rick Bigwood, ‘Fine-Tuning Affirmation of a Contract by Election: Pt 1’ [2010] *New Zealand Law Review* 37, 44, contra 40 n 11.

2 Bigwood, above n 1; Rick Bigwood, ‘Fine-Tuning Affirmation of a Contract by Election: Pt 2’ [2010] *New Zealand Law Review* 617; Aleka Mandraka Sheppard, ‘Demystifying the Right of Election in Contract Law’ [2007] *Journal of Business Law* 442; K R Handley, ‘Exploring Election’ (2006) 122 *Law Quarterly Review* 82; K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2006); Piers Feltham, Daniel Hochberg and Tom Leech (ed), *Spencer Bower: The Law Relating to Estoppel by Representation* (LexisNexis, 4th ed, 2004).

convincing explanations or justifications for the obligatory effect, or irrevocability, of an election.³

This article offers a re-assessment of the concept of equitable election by testing it against what I term as the 'normative conception of election' and by demonstrating its irrelevance in two major operational contexts. Part II of the article first explains that the normative conception of election positions it alongside estoppel and waiver and regards it as providing a distinct legal basis upon which a choice in law is held binding. It asserts that such conception is critical to the subsistence of the notion of election, whether at common law or in equity. However, although it has long achieved the status of orthodoxy, the conception is supported by neither legal principle nor actual precedents. This is amply demonstrated by the courts' use of equitable election in case law. Therefore, in Part III of the article, an attempt is made to substantiate the claim that the notion of equitable election ought not to be conceived of as the operative justificatory reason for irrevocability, by way of a critical analysis of two different contexts (respectively in relation to wills and legal proceedings) in which an act of election is considered likely to arise in equity. In Part IV of the article it will be concluded that, with the abandonment of the normative conception, equitable election should be distributed into better anchored principles that centre upon such concepts as estoppel and benefit retention.

II A GENERAL THEORY OF ELECTION

I have suggested elsewhere that the courts' orthodox understanding of the notion of election is capable of being articulated as a general theory built around the normative conception of election, whether that notion is applied at common law or in equity.⁴ It is essential to reiterate some of the key points made there. The law of election is traditionally conceived as covering segmented territories. Multiple doctrines are accommodated, supposedly operating to the exclusion of each other. In particular, there is said to be a fundamental divide between election at common law and election in equity. However, while individual doctrines of election may at times apply differently, it is often overlooked that there is much in common between these differing applications of the same notion of election. It is submitted that the individual doctrines can all be subjected to a general theory, a theory that binds all similar acts of choice into a conceptual unity. This general theory can be explained in two steps. The first step is to acknowledge that the existing Anglo-Australian law recognises four constituent elements essential to an act of election. First, an election is a unilateral act, being

3 See, eg, Bigwood, above n 1, 39; Francis Dawson and David W McLauchlan, *The Contractual Remedies Act 1979* (Sweet & Maxwell, 1981) 131; James E Redmond, 'The Logical Basis of the Doctrine of Election in Contract' (1963) 3 *Alberta Law Review* 77.

4 Qiao Liu, 'Rethinking Election: A General Theory' (2013) 35 *Sydney Law Review* 599. That article has its focus on the application of the notion of election at common law.

an expression of an intent to adopt one of the options available.⁵ An election is completed once the elector, the party making the election, makes its choice apparent to the ‘electee’, the non-electing party likely to be affected by that choice. An election comprises *only* a choice. It is a unilateral and self-accomplishing process. It does not depend on a consideration given by or reliance on the part of the electee,⁶ or indeed on any factor extrinsic to the elector’s unilateral manifestation of will. Nothing more than the making and communication of a choice is required in order to constitute an election. In fact, any additional requirement would undermine the very notion of election. Secondly, an election is not just any choice – it is an inevitable choice between alternative options.⁷ Alternative options are inconsistent with each other. They exist simultaneously, but cannot both be adopted or realised. Only one or the other can be adopted. The inconsistency between the options necessitates a choice. Hence, an election is always premised on the existence of inconsistent options. Without inconsistency there cannot be any need to elect. Thirdly, an election is also an informed, conscious or even deliberate choice.⁸ The elector is said to have to elect knowingly. The precise extent of knowledge required is still open for debate. It seems to vary according to the category into which an election falls. But there is general consensus that at least some degree of knowledge is required. The law thus insists that ignorance is fatal to an election. Fourthly, an election, once made, is in itself final, binding and irrevocable.⁹ This ‘assumed conclusiveness of choice’ is said to be ‘the only thread of identity that runs through’ all categories of election.¹⁰ In fact, all four elements, the third to a greater or lesser extent, are omnipresent wherever an instance of election is found, and no other further element is required by the courts. Thus, the four elements, and they alone, constitute the uniting knots for all choices labelled ‘election’.

The second step by which the general theory is explained concentrates on what I term as the ‘normative conception of election’. In short, the courts have consistently understood the notion of election in a normative sense, insisting that,

5 For example, in the context of equitable election, *Lissenden v Bosch* [1940] AC 412, 419 (Viscount Maugham). Cf *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55 (Kitto J; Taylor and Menzies JJ agreeing).

6 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The ‘Kanchenjunga’)* [1990] 1 Lloyd’s Rep 391, 398, 399 (Lord Goff of Chieveley); *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1994] 2 Qd R 390, 394 (Fitzgerald P).

7 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 641 (Stephen J).

8 *Insurance Corp of the Channel Islands, Royal Insurance (UK) Ltd v Royal Hotel Ltd* [1998] Lloyd’s Rep IR 151, 161 (Mance J); *Ashworth v Ballard* [2000] 1 Ch 12, 27 (Walker LJ); *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 642 (Stephen J).

9 *Scarf v Jardine* (1882) LR 7 App Cas 345, 360 (Lord Blackburn); *Matthews v Smallwood* [1910] 1 Ch 777, 786–7 (Parker J); *S Kaprow & Co Ltd v Maclelland & Co Ltd* [1948] 1 KB 618, 629 (Wrottesley LJ); *Ashworth v Ballard* [2000] Ch 12, 30 (Robert Walker LJ); *Commonwealth v Verwayen* (1990) 170 CLR 394, 421 (Brennan J).

10 Amos S Deinard and Benedict S Deinard, ‘Election of Remedies’ (1922) 6 *Minnesota Law Review* 341, 342.

like other cognate concepts (particularly waiver and estoppel), that notion furnishes a distinct rationale for the loss or suspension of a legal right or benefit. Consequently, the general theory comprising four essential elements of election is not only referable exclusively to certain irrevocable choices, but is also intended to furnish in itself a justification or explanation for the irrevocability of those choices. As such the general theory appears to embody an internally rationalised system. An act of election is irrevocable precisely because it is a unilateral informed choice between inconsistent options. It is to be emphasised that the only 'normativity' to be dealt with in this article relates to the fourth element enunciated above, namely, the internally justified irrevocability of an act of election, and no attempt will be made to explore any other sense of that word. Thus, should the irrevocability of an 'election' be attributable to any reason not derivable from the four element system, the term 'election' would cease to be a justification or explanation for such irrevocability and its continuous use in that specific 'normative' sense would disguise the true legal basis of the binding choice which it purports to explain. It then follows from this that 'election' ought not to be regarded as a 'normative' concept in that sense. Whether this is indeed the case as far as equitable election is concerned is a point to be tested in the ensuing passages. This article is not concerned with binding choices not explained or explicable by the notion of election, such as a declaration of trust. It is a critique of the widespread assumption that the notion of election should be conceived in the same normative sense as estoppel and/or waiver. Where that normative conception is accepted, as it is now, a unilateral act of election will in itself elicit a legally binding force and its irrevocability can accordingly be said to be self-conferred. Therefore, following this Part, the main body of the article (Part III) endeavours to demonstrate why it is impossible to rest the irrevocability, if any, of choices labelled 'equitable election' upon such a notion.

III TWO CATEGORIES OF EQUITABLE ELECTION

Proper reflection on the normative conception of election calls for a critical assessment of how the notion of election is actually applied in cases. This article is focussed on equitable election. The existing Anglo-Australian case law shows that the notion of equitable election operates mainly in two categories of cases. The first category consists of cases in which the courts exercise their equitable jurisdiction over the irrevocability of an election. In such cases an equitable election is an informed choice between inconsistent options, which is complete upon the communication of the choice but becomes binding only by virtue of the court's exercise of its equitable jurisdiction. An inquiry into the sustainability of this genuine category of equitable election is central to our probe. Section A surveys an election made in legal proceedings, where resort has been had by counsels to the notion of equitable election in the sense described above. The second category consists of cases in which the courts exercise their equitable jurisdiction over other aspects, such as the remedial consequences, of an election. A good illustration is an election between distinct properties conferred in a will,

which is discussed in Section B. Although the election made in this context may not necessarily be an equitable election as defined above, a new look at the justifications for its inception may shed important light on the discourse on the normative conception of election.

A Election in Legal Proceedings

A person seeking relief against another person may have at its disposal alternative courses of action and it is inevitable that, at some stage, he or she has to make a choice. This type of election is customarily known as an election between remedies, but it is best seen as an election between inconsistent conduct in legal proceedings.¹¹ The former term is both too narrow and too wide. It is too narrow because it is artificial to draw a line between remedial and non-remedial options available to the aggrieved party. A litigant faced with incompatible non-remedial options has to ‘elect’ as much as he has to between inconsistent remedies. There is no reason to restrict the scope of election to remedial options. The term is too wide because remedies not sought in legal proceedings, such as rescission or termination of contract and other ‘self-help’ remedies, cannot be cleanly disentangled from their foundational substantive rights and must for that reason be regarded as falling under the ambit of election at common law, an election between alternative substantive rights. The distinction between common law election and equitable election is well recognised.¹² It does not lie so much in whether the rights in issue have a procedural or substantive nature, as in such policy considerations unique to the conduct of legal proceedings. Legal proceedings must be conducted in a way that espouses not only the interests of the participating parties, but also the public interest. Double recovery must be avoided.¹³ So must other ‘unjust advantage’¹⁴ or undue hardship¹⁵ to one of the parties. Public policies in favour of the finality of judgment¹⁶ and judicial economy,¹⁷ and those against trifling with justice and imposing an undue burden on the courts¹⁸ must be implemented. It is these unique considerations that have shaped the legal nature of an election in legal proceedings. Different views have been uttered on this matter and, apart from being perceived as arising in common

11 *Union Music Ltd v Watson Blacknight Ltd* [2002] EWCA Civ 680, [26] (Walker LJ) (‘*Union Music v Watson*’); *McLaughlin v Newall* [2009] EWHC 1925 (QB) [30] (Judge Moloney). Cf *Handley, Estoppel by Conduct*, above n 2, 229 [14-001]; M J Tilbury, *Civil Remedies: Principles of Civil Remedies* (Butterworths, 1990) vol 1, 20 [2005] ff.

12 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 30 (Lord Atkin) (‘*United Australia v Barclays*’). See also *Ciavarella v Balmer* (1983) 153 CLR 438, 449; *Deinard and Deinard*, above n 10, 347–8, 358.

13 *Ashworth v Ballard* [2000] 1 Ch 12, 28, 31 (Walker LJ). See also Tilbury, above n 11, 24 [2010].

14 Note, ‘Election of Remedies’ (1923) 36 *Harvard Law Review* 593, 595.

15 Comment, ‘Modern Views of the Election of Remedies’ (1925) 34 *Yale Law Journal* 665, 670.

16 *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, 521, 522 (Lord Nicholls) (‘*Tang Man Sit v Capacious Investments*’).

17 E Allan Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* (Yale University Press, 1998) 188–9, 190.

18 Charles P Hine, ‘Election of Remedies, A Criticism’ (1913) 26 *Harvard Law Review* 707, 708; Note, ‘Election of Remedies’, above n 14, 594 n 13.

law, the election in question has also been placed under an ‘independent’ doctrine of approbation and reprobation.¹⁹ Most pertinently, as will be shown, it has been characterised as an equitable election in a good number of cases. This is taken as the preferred characterisation, given particularly the broad discretion given to the courts on matters arising in connection with the conduct of legal proceedings. However, in so far as the notion of election endeavours to bind up with the courts’ discretion in legal proceedings, this is a scheme doomed to failure. Before a close look is taken at the issue of irrevocability, a few words must be said of inconsistent options in legal proceedings.

The issue of inconsistency is said to precede any question of election. Whilst with respect to other types of election this may not be much a point of controversy, it seems to cause considerable difficulties in the present context. There is at first a question regarding the meaning of inconsistency. Inconsistency denotes that the options available are alternative and mutually exclusive: the elector cannot adopt both options; he must choose one or the other.²⁰ This distinguishes ‘election’ from *res judicata* and merger, which, albeit equally rooted in a need for finality in litigation,²¹ bar resort to a previously adjudicated cause of action, remedy or argument, rather than an alternative to a currently available cause of action, remedy or argument;²² and also from satisfaction, which does not require proof of inconsistency at all and instead blocks the pursuit of multiple remedies (whether alternative or cumulative) to the extent of double recovery.²³ Thus, no election arises between damages and relief based upon tracing,²⁴ but compensatory damages and damages calculated by reference to a ‘wayleave’²⁵ are inconsistent remedies and they may not both be granted. It has been much debated whether a compensatory remedy and a restitutionary remedy are alternative or cumulative.²⁶ In *Tang Man Sit v Capacious Investments*, where property was let by the defendant without the claimant owner’s knowledge or consent and was poorly looked after by the tenant, it was held that the claimant, who had accepted part payment under the trial judge’s award of an account of profits for the rents received by the defendant, would have been precluded from resorting to the same judge’s concurrent award of damages for the loss of use of the property during the period of tenancy but for his lack of requisite knowledge

19 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276, 297 [109], 300 [118] (McLure JA) (‘*Mandurah*’); *Commonwealth v Verwayen* (1990) 170 CLR 394, 421 (Brennan J).

20 *Island Records Ltd v Tring International plc* [1996] 1 WLR 1256, 1258 (Lightman J).

21 *Redcar and Cleveland BC v Bainbridge* [2009] ICR 133, 196 [218], [220] (Mummery LJ).

22 K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis Butterworths, 4th ed, 2009) [1.01]–[1.06], [21.01]. See also Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Oxford University Press, 2003) ch 40, see especially [40.05]; Adrian AS Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 2nd ed, 2006) ch 24.

23 *Tang Man Sit v Capacious Investments* [1996] AC 514, 522, 526 (Lord Nicholls).

24 *Kuwait Oil Tanker Co SAK v Al Bader* [2008] EWHC 2432 (Comm) [38] (Teare J).

25 The price for obtaining a licence for an interference with property rights: *Ministry of Defence v Ashman* [1993] 2 EGLR 102; *Ministry of Defence v Thompson* [1993] 2 EGLR 107.

26 See, eg, in the context of equitable remedies: *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 569 (‘*Warman v Dwyer*’); *Target Holdings Ltd v Redfern* [1996] AC 421.

when accepting the payment.²⁷ It is clear, however, that neither award precluded the claimant from obtaining damages for the loss sustained due to inappropriate use of the property.²⁸ In *United Australia v Barclays*, where a cheque payable to the claimant was converted by a company and collected for that company by the defendant bank, it was held that whereas two alternative remedies, such as tortious damages or restitution against the company, necessitated an election,²⁹ no election could arise between either of the above two remedies and tortious damages against the bank, the two being cumulative rather than alternative.³⁰ It must be noted that the only inconsistency existing in both of these ‘election’ cases is inconsistency between awards; there is no inconsistency between remedies per se, as they can all be pursued at the same time.³¹ If it is the award of different remedies, rather than their pursuit, that causes inconsistency, then satisfaction, rather than election, ought to be recognised as the controlling principle in such cases.³²

Inconsistency may produce other complications. The test of inconsistency is sometimes tied to the concept of indivisibility. Therefore, although a party may not ‘approve and reprobate’ the same instrument, such as an adjudication decision,³³ inconsistency is said to arise in connection with ‘a decision upon a dispute’ of which the party seeks to pick and choose one part to accept and another to reject.³⁴ Where there are different decisions on separate disputes or questions, the party is not required either to accept in whole all those decisions or

27 [1996] AC 514, 525 (Lord Nicholls).

28 Ibid 526 (Lord Nicholls).

29 [1941] AC 1, 18 (Viscount Simon LC), quoting American Law Institute, *Restatement (First) of the Law of Restitution* (1937) 525, 28–9 (Lord Atkin), 34–5 (Lord Romer).

30 Peter Birks, ‘Inconsistency Between Compensation and Restitution’ (1996) 112 *Law Quarterly Review* 375, 377. Similarly, no election between a wife’s matrimonial claim against her husband and her minor shareholder claim against a company controlled by her husband: *Nurcombe v Nurcombe* [1985] 1 WLR 370, 375 (Lawton LJ), 377 (Browne-Wilkinson LJ), cf 380 (Sir Denys Buckley).

31 *Kendall v Marsters* (1860) 2 De GF & J 200, 207; 45 ER 598, 601 (Lord Campbell LC) was sometimes understood to suggest the contrary, but in that case the blocked change of claim to compensation was pursued on appeal after a decree for an account of profits had been made. In *Warman v Dwyer* (1995) 182 CLR 544, the High Court of Australia cited *Kendall* seemingly for the proposition that a litigant had to make a binding election between the remedies: at 559, yet there was indication that an opportunity existed for switching to an alternative remedy prior to award: at 570.

32 It does not matter whether the restitutionary remedy is generated by a wrong or results from unjust enrichment: Birks, above n 30, 378; G H Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press, 1988) 98–100. See also *Baltic Shipping Company v Dillon* (1992) 176 CLR 344, 354–9 (Mason CJ); cf *Kleinwort Benson Ltd v Glasgow City Council* [1996] QB 678, 698 ff (Millett LJ). For an historical view of the fiction, see Stephen Watterson, ‘An Account for Profits or Damages: The History of Orthodoxy’ (2004) 24 *Oxford Journal of Legal Studies* 471.

33 *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] CLC 739, [29] (Dyson J), cited with approval and applied in *PT Building Services Ltd v ROK Build Ltd* [2008] EWHC 3434 (TCC) [23], [26] (Ramsey J) and *Linnett v Halliwells LLP* [2009] 1 CLC 157, [116] (Ramsey J).

34 *Durtnell & Sons Ltd v Kaduna Ltd* [2003] BLR 225, 235 [31], 240 [47] (Judge Seymour).

not at all.³⁵ Consequently, a workman who had accepted compensation awarded by a county judge under the *Workmen's Compensation Act 1925* (UK) was held to be entitled to appeal from that judge's decision for under compensation. The reason was said to be that, unlike an arbitral award, the judicial award was no more 'indivisible' than an ordinary judgment and was thus appealable notwithstanding the acceptance of compensation³⁶ and the workman was not 'faced with a choice between alternative rights' and did not blow hot and cold; instead, by making the appeal he merely asked to 'blow hotter'.³⁷ The lack of inconsistency may also be determined by asking whether the putative elector has unequivocally represented, either by words or by conduct, to adopt one option and to abandon the other. The notorious term 'waiving the tort', raised and rejected in *United Australia v Barclays*,³⁸ can be explained away on the simple ground that by pursuing the restitutionary claim the claimant did not evince an unequivocal intention not to rely upon the tort as a cause of action.³⁹ Likewise, no abandonment of power to discontinue an adjudication process can be extracted from a mere failure to challenge the adjudicator's jurisdiction over the dispute.⁴⁰

Apart from requiring such an unequivocal intention, an election in legal proceedings must be 'an informed election',⁴¹ one made with knowledge of both all material facts⁴² and one's right to elect,⁴³ but not necessarily with knowledge as to the legal consequences of one's choice.⁴⁴ It is, above all, a choice 'from which [the elector] cannot resile'.⁴⁵ This last point brings us again to the question of whether, and if so when, the pursuit or adoption of one course of action in legal proceedings may reach a point of no return, thereby precluding a change to the other course of action. There remains, admittedly, grave obscurity as to the legal foundation of such irrevocability. In *First National Bank plc v Walker*,⁴⁶ for instance, a wife, having obtained and enforced a property adjustment order

35 Ibid 235 [31], 238 [41], 239 [43], 240 [48] (Judge Seymour). See at 235 [31], quoting with approval *Shimuzu Europe Ltd v Automajor Ltd* [2002] BLR 113, 123 [27]-[29] (Judge Seymour); *Farebrother Building Services Ltd v Frogmore Investments Ltd* (Unreported, Technology and Construction Court, Judge Gilliland, 20 April 2001).

36 *Lissenden v Bosch* [1940] AC 412, 419–20 (Viscount Maugham), 424–6 (Lord Atkin), 434 (Lord Wright), overruling *Johnson v Newton Fire Extinguisher Co Ltd* [1913] 2 KB 111.

37 Ibid 429 (Lord Atkin). See also at 434 (Lord Wright).

38 [1941] AC 1, 18 (Viscount Simon LC), 28–9 (Lord Atkin), 34–5 (Lord Romer). See also *Rice v Reed* [1900] 1 QB 54, 61 (Lord Russell); Birks, above n 30, 377.

39 See also *Tang Man Sit v Capacious Investments* [1996] AC 514, 526 (Lord Nicholls).

40 *John Roberts Architects Ltd v Parkcare Homes (No 2) Ltd* [2005] BLR 484, see especially 448–9 [19] (Judge Havery), revd on other grounds [2006] BLR 106.

41 *Island Records Ltd v Tring International plc* [1996] 1 WLR 1256, 1258–9 (Lightman J). See also *Durntnell & Sons Ltd v Kaduna Ltd* [2003] BLR 225, 239–40[46] (Judge Seymour).

42 *Mandurah* (2008) 38 WAR 276, 300 [122] (McLure JA).

43 *Evans v Bartlam* [1937] AC 473, 479 (Lord Atkin), 483 (Lord Russell), 485 (Lord Wright); *Banner Industrial & Commercial Properties Ltd v Clark Patterson Ltd* [1990] 2 EGLR 139 ('Banner v Clark Patterson').

44 *Sadiqi v Commonwealth (No 2)* (2009) 181 FCR 1, 46 [211] (McKerracher J).

45 *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112, 119 (Evershed MR). [2001] 1 FLR 505.

against her husband by taking a transfer of his interest in their matrimonial home, on the footing that the property was subject to a valid charge set up to secure a loan for his business, was precluded by a unanimous decision from setting aside the charge on the ground of undue influence. Their Lordships were, however, divided as to the legal route by which that decision was to be arrived at. Sir Andrew Morritt V-C was inclined to think that ‘estoppel, approbation and reprobation, abuse of the process, affirmation’ and ‘release’ all applied in the case.⁴⁷ By contrast, Chadwick LJ rested the conclusion on the court’s exercise of a discretionary power to regulate legal proceedings,⁴⁸ whilst Rix LJ regarded election as the operative doctrine, holding that the wife made a final choice when she enforced the order and took the transfer.⁴⁹ Several theories attempting to justify the use of election in this context can be identified and examined.

The first justification for the irrevocability of an election in legal proceedings is the finality of a judgment following and endorsing that election. It is well known that by contrast to a common law election, which is potentially in issue once alternative substantive rights arise, an election in legal proceedings is not in issue until a judgment is made and an order is entered in the elector’s favour.⁵⁰ Once a valid judgment is given, it must be final and binding and no change of pleading is permissible. Thus the finality of a judgment means that resort to any alternative pleading is, as a rule, barred. This is, however, not a ‘fixed and unyielding’⁵¹ rule and, after a judgment, particularly when it is a default or summary one, is given, extra time may be granted to the successful party to acquire information necessary for the making of an election whether to take the judgment or to make an alternative pleading.⁵² Nevertheless, there is an inherent contradiction in citing the finality of a judgment as a justification for the self-conferred irrevocability of an election. An election is made by a litigant whilst a judgment is given by a court. They are two distinct acts. An act of election cannot comprise the giving of a judgment. The policy supporting the finality of a judgment does not necessitate the irrevocability of an election. An election is nothing but a choice, not binding on its own, but it may be rendered irrevocable if and when solemnised by a subsequent judgment. Thus, the bar to an alternative

47 Ibid [55]. Vice-Chancellor Morritt regarded as essential the wife’s knowledge of her right to set aside the charge for undue influence: at [51]; cf at [49].

48 Ibid [77] (Chadwick LJ). See also at [42] (Morritt V-C).

49 Ibid [82], citing *Nurcombe v Nurcombe* [1985] 1 WLR 370.

50 *United Australia v Barclays* [1941] AC 1, 30 (Lord Atkin). See also *Morrison-Knudsen Co Inc v British Columbia Hydro and Power Authority* (1978) 85 DLR (3rd) 186, 227.

51 *Tang Man Sit v Capacious Investments* [1996] AC 514, 522 (Lord Nicholls).

52 *Island Records Ltd v Tring International plc* [1996] 1 WLR 1256, applied in *Tang Man Sit v Capacious Investments* [1996] AC 514, 521 (Lord Nicholls). Another qualification to the finality of a judgment is that a judgment may not be preclusive of an alternative pleading until satisfaction, see, eg, *Johnson v Agnew* [1980] AC 367, 398 (Lord Wilberforce). See also Gareth Jones and William Goodhart, *Specific Performance*, (Butterworths, 2nd ed, 1996) 14. Cf *Ogle v Comboyuro Investments Pty Ltd* [1976] 136 CLR 444, 452 (Barwick CJ).

pleading ‘rests upon the fact that the case was carried to judgment not upon any doctrine of election.’⁵³

It follows that, if an election exists at all, it has to be found in what occurs prior to judgment. The second justification might thus be said to reside in the court’s broad discretionary power to regulate pre-judgment inconsistent conduct. This is a power vested by civil procedure rules to conduct case management and to control abuse of process with a view to fulfilling such ‘overriding objectives’ as equality, efficiency, speediness and proportionality.⁵⁴ A possible outcome of exercising such a power is that a choice made by a litigant is held to be irrevocable. It has accordingly been suggested that the concept of equitable election should be extended to legal proceedings, where there is ‘some additional factor which on the basis of established equitable principles makes the further pursuit of one of the arguments inequitable.’⁵⁵ This formulation is, however, at odds with the general principle that litigants are free to pursue inconsistent options, to switch between alternative pleadings, and to make amendments, additions or substitutions, subject only to the avoidance of prejudice to the opponent.⁵⁶ As a rule, a pleading cannot of itself amount to an election and is not binding⁵⁷ unless, particularly, estoppel is brought into operation. Accordingly, the discretionary power to make an election irrevocable is by necessity exercised sparingly. The concept of equitable election can thus be said to be a less than effective regulatory mechanism for the regulation of inconsistent conduct in legal proceedings.⁵⁸ More fundamentally, there is a striking incompatibility between the existence of a discretionary power and the notion of election. A party is either bound or not bound by its unequivocally uttered choice.⁵⁹ The intervention of judicial discretion introduces uncertainty and alters fundamentally the process by which that party’s two alternative options crystallise into one. It takes the matter out of the party’s hands and it is no longer possible to say that its choice, once

53 *United Australia v Barclays* [1941] AC 1, 48 (Lord Porter).

54 *Civil Procedure Rules 1998* (UK) (‘CPR’) rr 1.1(2), 1.4(2)(h); *Civil Procedure Act 2005* (NSW) ss 56–63 and *Uniform Civil Procedure Rules 2005* (NSW), rr 2.1, 2.3. See generally Andrews, above n 22, chs 13, 16; Zuckerman, above n 22, [6.41] ff, ch 10.

55 *Nexus Communications Group Ltd v Lambert*, Times Law Reports, 3 March 2005, 130 [40], [68] (Deputy Judge Moss) (‘*Nexus v Lambert*’).

56 CPR 17.1(1), (2). See also Zuckerman, above n 22, [6.36]; B C Cairns, *Australian Civil Procedure* (Lawbook, 8th ed, 2009) 195–8 [6.150], 203–4 [6.190], ch 8.

57 *United Australia v Barclays* [1941] AC 1, 19 (Viscount Simon LC), 29–30 (Lord Atkin) citing *Kelly v Metropolitan Railway Co* [1895] 1 QB 944, 946 (Lord Esher MR); *Rice v Reed* [1900] 1 QB 54, 62–3 (Lord Russell), 66–67 (Vaughan Williams LJ). See also *Edwards v Culcairn Shire Council* [1964] NSWLR 873, 879; *Tang Man Sit v Capacious Investments* [1996] AC 514, 521 (Lord Nicholls), applied in *Redcar v Bainbridge* [2009] ICR 133, 202–3 [248]–[249] (Mummery LJ); *Island Records Ltd v Tring International plc* [1996] 1 WLR 1256, 1258 (Lightman J); *Mahesan s/o Thambiah v Malaysia Government Officers’ Co-operative Housing Society Ltd* [1979] AC 374, 382 (Lord Diplock); *First National Bank plc v Walker* [2001] 1 FLR 505, 515 [37] (Morritt V-C), 525 [82] (Rix LJ); *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142, 203–4 [251] (Neuberger J); *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] All ER (Comm) 14, 35 [66] (Rix LJ).

58 *Nexus v Lambert*, Times Law Reports, 3 March 2005, 130 [40], [46] (Deputy Judge Moss).

59 See, eg, *First National Bank v Walker* [2001] 1 FLR 505, 525 [82] (Rix LJ); cf at 524 [76] (Chadwick LJ), 516 [42] (Morritt V-C).

made, becomes unilaterally and automatically binding. Even if the court exercises its discretionary power in favour of the choice being irrevocable and such irrevocability is held to occur retrospectively at the time when the choice is made, the unilaterality of an election is permanently undermined. For the same reason, a rescission in equity, which is effected by a court order, not by a party's act,⁶⁰ cannot be an election which becomes irrevocable once made, as it 'does not confer the benefit of enjoying the right to rescind' unless and until the rescission order is granted.⁶¹ Once detached from the fixed anchor of self conferred irrevocability, and reattached to the floating ground of judicial discretion, the notion of election immediately loses its own identity and inner thrust. Like an 'abandonment' in legal proceedings,⁶² an election subject to the court's discretion becomes something entirely different from what it is conventionally perceived.⁶³ There is no such thing as an equitable election if the notion of election is to be conceptualised in normative terms.

The third justification seeks to invoke the principle of benefit and burden and to rest the irrevocability of an election on the receipt or retention of a benefit. This justification overlaps partially with both of the first two justifications. Thus, a judgment⁶⁴ or an arbitral award⁶⁵ can be said to constitute a benefit to the successful party who, having accepted that benefit, cannot then challenge its validity. In this respect the existence of an inconsistent judgment is often decisive.⁶⁶ Further, the retention of 'the benefit of an instrument without taking its burden' is perceived to be a common 'additional factor' which triggers the

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- 60 *Radferry Pty Ltd v Starborne Holdings Pty Ltd* [1999] FCA 171. Cf *Brotherton v Aseguradora Closegueros SA* [2003] 2 All ER (Comm) 298, 311 [27] (Mance LJ), 216–17 [45]–[48] (Buxton LJ); *Alati v Kruger* (1955) 94 CLR 216. See also Janet O'Sullivan, 'Rescission as a Self-help Remedy: A Critical Analysis' (2000) 59 *Cambridge Law Journal* 509, see especially 528 ff; Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, 2008) 277 [11.55] ff.
- 61 O'Sullivan, Elliott and Zakrzewski, above n 60, 295 [11.109] n 109, citing *Sargent v ASL Developments Ltd*, (1974) 131 CLR 634, 640–1 (Stephen J), cf 517 [23.06]. Cf *Coastal Estates Pty Ltd v Melevende* [1965] VR 433, 451 (Sholl J); *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374, 378 (Young J); *Drake Insurance plc v Provident Insurance plc* [2003] 1 All ER (Comm) 759, 769 [35]–[37] (Moore-Bick J). More importantly, it is best not to view a rescission as an act of election at all, for its irrevocability rests upon its innately destructive force, see further Liu, above n 4, 611–12. This does not affect the analysis in the main text.
- 62 *Kuwait Airways Corp v Iraqi Airways Co (No 9) (Statement of Claim)* [2002] CLC 1021, 1026 [15] (Longmore LJ) citing *Worldwide Corp Ltd v Marconi Communications Ltd (formerly GPT Ltd)*, Times Law Reports, 7 July 1999, 506
- 63 Farnsworth, above n 17, 189.
- 64 *Evans v Bartlam* [1937] AC 473, 483 (Lord Russell); *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142, 204 [252], 205 [257] (Neuberger J); *Nexus v Lambert*, Times Law Reports, 3 March 2005, 130 [33], [37] (Deputy Judge Moss).
- 65 *Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd* [1926] 1 KB 348; *European Grain and Shipping Ltd v Johnston* [1983] QB 520.
- 66 *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320, 1329 (Browne-Wilkinson V-C); *Koshy v DEG-Deutsche Investitions-und Entwicklungsgesellschaft mbH, Gwembe Valley Development Co Ltd* (rec apptd) [2008] EWCA Civ 27 [38] (Arden LJ).

doctrine of equitable election.⁶⁷ Similarly, the principle of benefit and burden is also said to support the doctrine of ‘approbate and reprobate’,⁶⁸ whose extension to legal proceedings, albeit admittedly a ‘novel’ one,⁶⁹ is nonetheless well observed. It is clear that, in the present context, such an ‘election’ does not become irrevocable upon receipt of a benefit. To fix the time of irrevocability invariably at the time of receipt of a benefit will not provide the sort of flexibility and sensitivity required in the judicial oversight of legal proceedings. Therefore, the ‘election’ should become irrevocable at a later time, when the retention of the benefit is adjudged to have made it inequitable for the elector to change course. The requisite ‘benefit’ comprises not only a ‘net cash sum or an entitlement to a payment’, but also a non-monetary or even intangible benefit like taking possession of a building or the crystallisation of one’s liability ‘on an interim basis at a particular amount’.⁷⁰ Another example of such a benefit is the deployment of two inconsistent arguments at the same time in different proceedings, where the court in each proceeding may find it impractical if it has to wait for or speculate over the outcome of the other proceeding.⁷¹ Thus, the victim of a libel is not allowed to seek a justification in one proceeding and at the same time to make an apology in another, without having pursued either argument to judgment.⁷² A benefit must, however, be real and definite. No benefit is conferred by obtaining a stay of execution of a judgment,⁷³ by merely proving in liquidation proceedings,⁷⁴ or by receiving a payment liable to be forfeited if the recipient changes to an alternative course of action.⁷⁵ The introduction of an additional ‘benefit’ factor presents a strong justification for the irrevocability of the choice made. However, just like the imposition of judicial discretion, it simultaneously alters the very nature of the legal process in operation. The notion of election no longer supplies the underlying explanation for the irrevocability of the choice, but becomes no more than a misleading label for what now takes the central stage – the principle of benefit and burden.

None of the above three reasons justifies the normative conception of election as a legal basis for irrevocability in the context of legal proceedings. In fact, there has been judicial discomfort with the application of the notion of

67 *Nexus v Lambert*, Times Law Reports, 3 March 2005, 130 [33], [45], [70] (Deputy Judge Moss), citing *Banner v Clark Patterson* [1990] 2 EGLR 139, 140 (Hoffmann J).

68 *Banque des Marchands v Kindersley* [1951] Ch 112, 119 (Evershed MR) and cases cited at 120. See also *Evans v Bartlam* [1937] AC 473, 479 (Lord Atkin), 483 (Lord Russell); *Durnell v Kaduna* [2003] BLR 225, 240 [47] (Judge Seymour).

69 *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320, 1329 (Browne-Wilkinson V-C).

70 *Durnell v Kaduna* [2003] BLR 225, 240 [47] (Judge Seymour).

71 Hine, above n 18, 714–15.

72 *Adelson v Associated Newspapers Ltd* [2009] EMLR 10, distinguished in *McLaughlin v Newall* [2009] EWHC 1925 (QB) [30]–[31] (Judge Moloney). See also *Union Music v Watson* [2002] EWCA Civ 680 [27] (Walker LJ).

73 *Evans v Bartlam* [1937] AC 473, 483 (Lord Russell).

74 *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112, 121–2 (Evershed MR).

75 *Mandurah* (2008) 38 WAR 276, 300–1 [124]; see also at 297 [109] citing LexisNexis, *Halsbury’s Laws of Australia* (at 28 November 2011) 190 Estoppel, ‘1 General Nature and Principles of Estoppel’ [190–35].

election in this area. It has long been recognised that estoppel might serve as an alternative to election.⁷⁶ In *Tang Man Sit v Capacious Investments*, for instance, it was held that equity might have precluded the claimant from claiming loss of use damages had the defendant been misled to make payments under the account of profits award and suffered prejudice as a result of the belatedness of the claimant's choice.⁷⁷ Sometimes the existence of these two alternative grounds led inadvertently to a muddle of language and this shows that the precise foundation of the notion of election may still in doubt. Thus, an election in legal proceedings has been said to arise from the fact that the electee might be 'seriously embarrassed' by the elector's conduct, 'for by resisting one [contention the electee] ... may find himself inferentially conceding the other.'⁷⁸ More significantly, it has been doubted that an election in legal proceedings might become irrevocable in the absence of reliance.⁷⁹ There were thus suggestions that estoppel should replace election as the more desirable doctrine governing choices made in legal proceedings.⁸⁰ This view echoed some earlier studies by American scholars. It was said that this area of English and American law used to be dominated by estoppel *in pais*, or promissory or equitable estoppel as it has been known in England and Australia.⁸¹ In contrast, the invocation of the notion of election has been confined to a 'comparatively small class of cases' and is 'a plain sacrifice of justice for the sake of theoretical consistency.'⁸² Unlike estoppel,⁸³ it often operated at the expense of the elector, preventing 'an injured but ill-advised plaintiff from recovering against an admittedly guilty but well-

76 For example, an estoppel by convention which precludes one from disputing an adjudicator's jurisdiction: *Furniss Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep 236; *Maymac Environmental Services Ltd v Faraday Building Services Ltd* (2000) 75 Con LR 101; *Australian Workers Union New South Wales Branch v Minister for Natural Resources* (1991) 43 IR 158.

77 *Tang Man Sit v Capacious Investments* [1996] AC 514, 525–6 (Lord Nicholls).

78 *Banque des Marchands v Kindersley* [1951] Ch 112, 122 (Evershed MR).

79 See, eg, *Verschures Creameries Ltd v Hull & Netherlands Steamship Co Ltd* [1921] 2 KB 608, 611 (Scrutton LJ).

80 *Lissenden v Bosch* [1940] AC 412, 420 (Viscount Maugham), 430 (Lord Atkin). See also *Proactive Sports Management Ltd v Rooney* [2010] EWHC 1807 (QB) [712] (Judge Hegarty), citing *Zang Tumb Tuum Records Ltd v Johnson* [1993] EMLR 61, 76 (Dillon LJ); Handley, *Estoppel by Conduct*, above n 2, [14-001], cited with approval in *Mandurah* [2008] WASCA 211, [105]–[106] (McLure JA). Similarly, in *Warman v Dwyer* (1995) 182 CLR 544, immediately after reference to 'election', the High Court of Australia gave a list of equitable defences to an account of profits: 'estoppel, laches, acquiescence and delay': at 559.

81 Hine, above n 18, 710, 712, 716–18. See generally Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press, 2000) chs 3–4. In Australia, some members of the High Court have expressed the view that promissory estoppel should be absorbed into a unified doctrine of equitable estoppel: see, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 445 (Deane J); *Commonwealth v Verwayen* (1990) 170 CLR 394, 413 (Mason CJ). See also Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing, 1999) 26 ff.

82 Hine, above n 18, 708, 710. See also Walter C Garey, 'Pleading: Election of Remedies' (1923) 8 *Cornell Law Quarterly* 386, 386; Note, 'Election of Remedies: A Delusion?' (1938) 38 *Columbia Law Review* 292.

83 Comment, 'Modern Views of the Election of Remedies' (1925) 34 *Yale Law Journal* 665, 670; Paul L Larsen, 'Election of Remedies: When is Election Irrevocable in Contract-Fraud Situations?' (1948) 36 *California Law Review* 636, 638.

advised defendant.⁸⁴ There have consequently been calls for its abolition in the regulation of legal proceedings.⁸⁵ The outcome is perhaps best expressed in the following statement: ‘[u]ntil satisfaction is had, in the absence of facts creating an equitable estoppel or merger by judgment, or bar by res adjudicate, it is axiomatic that pursuit of one remedy does not preclude resort to the others.’⁸⁶

B Election Between Properties

An election between properties⁸⁷ typically arises where, in one instrument (such as a will), A (a donor or testator) makes a gift to B (a donee, heir or other beneficiary) of A’s own property and (often by mistake⁸⁸) to C of B’s property.⁸⁹ B is then said to be put to ‘election’ between taking A’s property in full (‘taking under the instrument’) and keeping its own property (‘taking against the instrument’).⁹⁰ Where B takes under the instrument, it is under an equitable duty to hand its own property, wrongly disposed of by A, over to C. Where B takes against the instrument, equity requires it to compensate C out of A’s property for any disappointment suffered by C to the extent of the value of B’s property. In doing so, B has to give up A’s property in specie but not necessarily its entire value. Any surplus of A’s property after compensation still goes to B. It is for this reason that B’s election is said to proceed ‘upon the principle not of forfeiture but of compensation.’⁹¹ Yet in so far as B is required to make a choice

84 Comment, ‘Modern Views of the Election of Remedies’, above n 83, 666.

85 Donald E Pray, ‘Election of Remedies: A Judicial Weed?’ (1963) 16 *Oklahoma Law Review* 193; George B Fraser, ‘Election of Remedies: An Anachronism’ (1976) 29 *Oklahoma Law Review* 1.

86 Deinard and Deinard, above n 10, 359. See also Larsen, above n 83; Dan B Dobbs, ‘Pressing Problems for the Plaintiff’s Lawyer in Rescission: Election of Remedies and Restoration of Consideration’ (1972) 26 *Arkansas Law Review* 322, 340–1.

87 Sometimes also known as an ‘election between estates’. ‘Estate’ may not be wholly accurate as ‘the doctrine of election applies as between all kinds of property and interests in property’: LexisNexis, *Halsbury’s Laws of England*, vol 16(2) (2 November 2013) Equity, ‘4 Equitable Doctrines Affecting Property’ [729]. This includes receivables: see, eg, *Synge v Synge* (1874) LR 9 Ch App 128.

88 *Re Mengel’s Will Trusts; Westminster Bank Ltd v Mengel* [1962] Ch 791, 796 (Buckley J).

89 This doctrine also applies to a deed under which A agrees to confer a benefit on B whereas B agrees to bring property into the settlement and which turns out to be unenforceable: *Anderson v Abbott* (1857) 23 Beav 457; 53 ER 180; *Brown v Brown* (1866) LR 2 Eq 481; *Codrington v Codrington* (1875) LR 7 HL 854; *Re Vardon’s Trusts* (1885) 31 Ch D 275. Extension of the equitable doctrine to conduct (such as appeal) in legal proceedings was rejected in *Lissenden v Bosch* [1940] AC 412, 420 (Viscount Maugham), 436 (Lord Wright).

90 John McGhee (ed), *Snell’s Equity* (Sweet & Maxwell, 32nd ed, 2010) 141 [6-013] ff (‘*Snell’s Equity*’); R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 1091 [39-005] ff; A H Chaytor and W J Whittaker (eds), *Equity, also the Forms of Action at Common Law: Two Courses of Lectures by F W Maitland* (Cambridge University Press, first published 1909, 1929 ed) 225 ff (‘*Maitland*’); Philip H Pettit, *Equity and the Law of Trusts* (Oxford University Press, 10th ed, 2006) ch 33. The description in the text catches both ‘dual gifts’ and ‘mutual settlement’ cases: *Re Gordon’s Will Trusts; National Westminster Bank Ltd v Gordon* [1978] Ch 145, 153 (Buckley LJ). For an account of the civilian origin and earlier developments of the doctrine, see notes to *Dillon v Parker* (1818) 1 Swans 359, 403–9; 36 ER 422, 433–43.

91 *Lissenden v Bosch* [1940] AC 412, 419 (Viscount Maugham). See also *Pickersgill v Rodger* (1876) 5 Ch D 163, 174 (Jessel MR); *Brown v Gregson* [1920] AC 860, 869 (Viscount Haldane).

as to which property, A's or B's, is to be given up in specie, the election can be said to be an election between distinct properties.⁹²

A distinction must be drawn between two matters arising under this equitable doctrine. The first matter concerns whether, and if so on what basis, B ought to be allowed to choose between A's and its own property. To raise an equitable election certain requirements must be satisfied at the time when the instrument in question is intended to take effect.⁹³ A must evince through the instrument an unequivocal intention to dispose of both its own and B's property. Although there is a strong presumption that A intends to dispose of its own property only, extrinsic evidence can be adduced to rebut this presumption.⁹⁴ No knowledge is required from A. Thus it is generally immaterial that A is ignorant of the fact that one of the properties of which it purports to dispose belongs to B.⁹⁵ Both A's and B's property must be capable of being given away ('alienated') or available for compensation. This first matter thus relates to the necessity of an election. In contrast, the second matter concerns the question what constitutes an effective election by B. The general theory outlined in Part II applies. B must evince, whether expressly or impliedly,⁹⁶ an unequivocal and objective intention either to take under or against the instrument, and must do so knowingly. Such an intention must be communicated or made overt to the putative electee.⁹⁷ It has been suggested that there must be, on B's part, 'a deliberate choice made with full knowledge of the rules relating to election and the relevant circumstances, including the relative values of the properties'.⁹⁸ An 'election' made under a mistake is thus ineffective.⁹⁹ In short, an election between properties is 'a question of intention, based on knowledge.'¹⁰⁰ However, there is little in the existing literature expounding whether, and if so why, such an 'election' is of itself irrevocable. Much of the discussion concentrates on the first matter, namely, whether B ought to be put to election at the effective time of the instrument in question. Obviously, this is distinct from the central inquiry of this article, namely, whether the notion of election is a good justificatory reason supporting the irrevocability of a choice made by B and, if not, what that reason

92 There is some uncertainty as to whether B has to give up either property in specie or may hand over its value instead. There seem to be relatively few cases where the value of the property is claimed. At any rate, this does not affect the analysis below since the election in the present context is capable of being viewed either as one between properties or one between alternative courses of action.

93 For example, at the testator's death: *Snell's Equity*, above n 90, 149 [6-030].

94 *Frear v Frear* [2009] 1 FLR 391, 400 [38] (Wilson LJ), citing *Administration of Justice Act 1982* (UK) s 21.

95 *Welby v Welby* (1813) 2 V & B 187, 199; 35 ER 290, 294-5.

96 An example of the latter is where B's sale of its property of which A purports to dispose was held to amount to an election to take against the instrument: *Rogers v Jones* (1876) 3 Ch D 688.

97 *Re Shepherd* [1943] Ch 8.

98 *Snell's Equity*, above n 90, 149 [6-036], citing *Dillon v Parker* (1833) 1 Cl & F 303; 6 ER 930; *Wilson v Thornbury* (1875) LR 10 Ch App 239. See also *Pusey v Desbouvrie* (1734) 3 P Wms 315; 24 ER 1081; *Dillon v Parker* (1818) 1 Swans 359; 36 ER 422; *Worthington v Wiginton* (1855) 20 Beav 67, 74; 52 ER 527, 530 (Romilly MR).

99 *Kidney v Coussmaker* (1806) 12 Ves 136, 153; 33 ER 53, 59.

100 *Lissenden v Bosch* [1940] AC 412, 419 (Viscount Maugham).

might be. The first matter deals with the legal effect of the instrument, whilst we look at the legal effect of B's election. Nevertheless, these two issues are not unrelated. The irrevocability of B's election depends a great deal on the reasons why it arises in the first place. It is thus useful to examine three principal theories advanced to justify the necessity of an election to see if any one of them might shed light on the issue of irrevocability.

The first theory, the 'implied condition' theory,¹⁰¹ asserts that B's right to elect is based on A's explicit or presumed intention.¹⁰² A condition can accordingly be implied into the instrument in question to the effect that B cannot have both properties and must choose between its 'right to claim' A's property, thereby giving effect to A's expressed intention, and its 'right to disappoint' A's intention, by retaining its own property.¹⁰³ It is a matter of A's intention whether the instrument in question raises an equitable election or a conditional gift. For the latter, the intention is to forfeit the gift outright should B choose to retain its own property and accordingly no issue of compensation arises.¹⁰⁴ Since B's right to elect depends on A's intention, it may equally be ousted by contrary indications made by A.¹⁰⁵ Given that, in most cases, A made a mistake about the ownership of B's property, it is hard to resist the conclusion that the 'implied condition' theory is 'fictional or constructive'.¹⁰⁶ This seems to be reinforced by the courts' general disinclination to speculate as to whether A would have made a different disposition had it known of B's ownership.¹⁰⁷ It has been argued that A's unmistakable intention to bequeath its own property to B and its mistaken intention to bequeath B's property to C are 'separate and unrelated' and should thus be treated as such, with the effect that the former be respected and the latter disregarded.¹⁰⁸ A counter argument is that A's two intentions are in fact related and effect ought, as far as possible, to be given to both with a view to promoting equality between family beneficiaries.¹⁰⁹ As a compromise, B's election is said to be confined to the type of cases from which it was originally developed, where A

101 Neville Crago, 'Mistakes in Wills and Election in Equity' [1990] 106 *Law Quarterly Review* 487, 498.

102 *Noys v Mordaunt* (1706) 2 Vern 581, 583, 23 ER 978, 980 (Lord Cowper); *Dillon v Parker* (1818) 1 Swans 359, 394, 403 n 5; 36 ER 422, 436–7, 439 n 5; *Ker v Wauchope* (1819) 1 Bli 1, 25–26; 4 ER 1, 9 (Lord Eldon); *Cooper v Cooper* (1874–75) LR 7 HL 53, 70–1 (Lord Hatherley), 73–5 (Lord O'Hagan); *Lissenden v Bosch* [1940] AC 412, 419 (Viscount Maugham). See also *Snell's Equity*, above n 90, 142 [6-016], 148 [6-030]; Maitland, above n 90, 233.

103 *Cooper v Cooper* (1874–75) LR 7 HL 53, 77 (Lord Moncrieff).

104 *Brown v Gregson* [1920] AC 860, 869 (Viscount Haldane); *Snell's Equity*, above n 90, 141–2 [6-015] (1); Meagher, Heydon and Leeming, above n 90, 1092 [39-015].

105 *Re Vardon's Trusts* (1885) 31 Ch D 275, 279.

106 Meagher, Heydon and Leeming, above n 90, 1100 [39-080], quoting *Greeton v Haward* (1819) 1 Swans 409, 423–5; 36 ER 443, 447–8 (Plumer MR); *Douglas-Menzies v Umphelby* [1908] AC 224, 232 (Lord Robertson).

107 *Whistler v Webster* (1794) 2 Ves Jun 367, 370; 30 ER 676, 678 (Arden MR); *Thellusson v Woodford* (1806) 13 Ves Jun 209, 221; 33 ER 273, 277 (Erskine LC), affd *Rendlesham v Woodford* (1813) 1 Dow PC 249; 3 ER 689.

108 Crago, above n 101, 501–2.

109 P J Millett, 'Mistakes in Wills and Election in Equity' (1990) 106 *Law Quarterly Review* 571. Cf Neville Crago, 'A Reply' (1990) 106 *Law Quarterly Review* 572.

made no mistake and genuinely intended B not to have both properties.¹¹⁰ In such a case, it might be possible to infer that A intends B's election to be irrevocable once made. However, the intention based theory is obsolete. It is artificial to claim that B's right to elect is derived from A's actual or presumed intention. Still less can A's intention be invoked to justify the assertion that a choice of B between the two properties, once made, is to be regarded as having a binding force. It is unhelpful to resort to A's intention in search for a justification for the irrevocability of B's election – in truth, A is very unlikely to have directed his mind to that matter.

The second theory, the 'natural equity' theory,¹¹¹ states that equitable election 'proceeds on a rule of equity founded upon the highest principles of equity', rather than an expressed or presumed intention of A.¹¹² The courts are accordingly empowered to make a just and equitable distribution of property between B and C.¹¹³ This theory does not explain, however, why the courts, in making such a distribution, are required to embrace the notion of election by not only allowing B to choose between the properties, but also, more strikingly, by holding that such an election should of itself be irrevocable once made. As pointed out earlier, an election between properties is 'equitable' not because its irrevocability is subjected to the court's equitable jurisdiction, but because its remedial consequences are shaped and governed by equitable principles. Thus, the policy of ensuring a just and equitable distribution of property supports the imposition of a duty upon B either to hand his property to C or to compensate C according as he elects. Nevertheless, the 'natural equity' theory might be said to give rise to two principles both based on the idea of 'inconsistency', thereby lending support to the concept of equitable election. The first principle states that a person must either adopt or reject an instrument as a whole, and cannot pick and choose which parts of the instrument will be accepted and which will not.¹¹⁴ We have seen above that for such a principle to apply the instrument in question must be 'indivisible'. It is inconsistent to adopt some parts of the instrument and at the same time to reject other parts. The second principle is that of 'approbate

110 Elise B Histed, 'Election in Equity: the Myth of Mistake' (1998) 114 *Law Quarterly Review* 621, 622, 634, 637.

111 Crago, above n 101, 498.

112 *Cooper v Cooper* (1874–75) LR 7 HL 53, 67 (Lord Cairns LC). See also *Douglas-Menzies v Umphelby* [1908] AC 224, 232 (Lord Robertson); *Re Mengel's Will Trusts* [1962] Ch 791, 797 (Buckley J).

113 *Brown v Gregson* [1920] AC 860, 870 (Viscount Haldane), quoted with approval in *Re Gordon's Will Trusts*; *National Westminster Bank Ltd v Gordon* [1978] Ch 145, 154 (Buckley LJ); *Frear v Frear* [2009] 1 FLR 391, 398 [32] (Wilson LJ). See also Note, 'The Doctrine of Equitable Election', (1909) 23 *Harvard Law Review* 138, 138–9.

114 *Birmingham v Kirwan* (1805) 2 Sch & Lef 444, 450 (Lord Redesdale); *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318.

and reprobate' originating in Scottish law.¹¹⁵ That term, being 'picturesque',¹¹⁶ 'descriptive',¹¹⁷ and 'expressive',¹¹⁸ has however been criticised as not being properly defined¹¹⁹ and consequently as having become 'unfashionable'.¹²⁰ This principle is often equated with the concept of equitable election.¹²¹ There are, however, cases where it was extended to circumstances beyond the ambit of the latter.¹²² In all cases the principle implements the idea that one is not allowed to act inconsistently. Neither of the above two principles of 'inconsistency' compels the adoption of the concept of equitable election. Inconsistency must be distinguished from irrevocability and is not of itself a sufficient reason for the latter to arise. The mere need to make a choice between inconsistent options does not necessarily mean that the choice must be made once and for all and cannot be resiled from once made. This is not to say, however, that the 'natural equity' theory is of no relevance. It might be argued that such 'natural equity' requires properties to be distributed not only justly and equitably, but also in a way that promotes stability and finality in the determination of property rights. Accordingly, B should be allowed one opportunity only to make the election. This argument appears plausible but it has never been articulated in any great detail in relevant cases. More importantly, it is confined to the specific context in which an election between properties arises and hence cannot constitute a general justification for the irrevocability of all types of equitable election.

A third theory states that an equitable election requires the retention of a benefit¹²³ and it is the latter that necessitates a choice to be made and renders it inequitable not to conform to all the provisions on the same instrument.¹²⁴ This 'retention of benefit' theory can be said to form part of a general principle of

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- 115 From the Latin maxim *quod approbo non reprobo* ('what I approve I do not disapprove'). Similar expressions in England include the 'more homely' phrase of 'blowing hot and cold': *Banque des Marchands v Kindersley* [1951] Ch 112, 119 (Evershed MR), citing Justice Harman's judgment at the lower court; and the 'less technical versions' of 'one cannot have one's cake and eat it ... one cannot have the penny and the bun': *PW & Co v Milton Gate* [2004] Ch 142, 203 [250] (Neuberger J).
- 116 *Lissenden v Bosch* [1940] AC 412, 418 (Viscount Maugham).
- 117 *Ibid* 429 (Lord Atkin).
- 118 *Banque des Marchands v Kindersley* [1951] Ch 112, 119 (Evershed MR).
- 119 *Ibid*; *Lissenden v Bosch* [1940] AC 412, 435 (Lord Wright). It thus tends to 'distract the Court's mind from the actual exigencies of the case': at 435.
- 120 *United Australia v Barclays* [1941] AC 1, 32 (Lord Atkin).
- 121 *Lissenden v Bosch* [1940] AC 412, 417–18 (Viscount Maugham), 435 (Lord Wright). See also *Snell's Equity*, above n 90, 140–2 [6-013] citing *Re Lord Chesham* (1886) 31 Ch D 466, 473 (Chitty J); *Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd* (1941) 65 CLR 603 617–18. See also *Agricultural & Rural Finance Pty Ltd v Bruce Walter Gardiner* (2008) 238 CLR 570, 588–9 [57] (Gummow, Hayne and Kiefel JJ); *Sadiqi v Commonwealth (No 2)* (2009) 181 FCR 1, 46 [208] (McKerracher J).
- 122 The principle of approbate and reprobate has been regarded as an election both at common law and in equity: *Lissenden v Bosch* [1940] AC 412, 429 (Lord Atkin), or depicted in the language of a common law election: *Banque des Marchands v Kindersley* [1951] Ch 112, 119 (Evershed MR), preferred in *Durnell v Kaduna* [2003] BLR 225, 238 [39]; or even considered an 'independent' doctrine: see text to above n 19.
- 123 See, eg, *Greenhill v North British Insurance Co* (1893) 3 Ch 474; *Re Lart*; *Wilkinson v Blades* [1896] 2 Ch 788, 792–5 (Chitty J). See also Maitland, above n 90, 236.
- 124 *Codrington v Codrington* (1875) LR 7 HL 854, 861 (Lord Cairns LC).

benefit and burden, under which a choice to accept a benefit made available by an arrangement leads to subjection to a burden imposed under the same arrangement.¹²⁵ Naturally, the recipient's choice to receive the benefit will not be regarded as irrevocable unless and until it becomes impossible to return the benefit received without causing loss to the other party.¹²⁶ It has been suggested that the recipient may return the benefit only if his choice to receive the benefit is made without knowledge.¹²⁷ An ignorant recipient is allowed to revert to the original position,¹²⁸ but a knowing recipient is not.¹²⁹ The binding force of the recipient's choice is accordingly made dependent on its knowledge. However, it is not easy to see why the recipient's knowledge should make any difference if substantial justice can be done by a reversal of the benefit. Clearly, it is the retention, rather than mere receipt, of a benefit that is capable of making an election irrevocable. Paradoxically, the 'retention of benefit' theory, though invoked to justify the irrevocability of an election, undermines the notion of election instead. There are two slightly different points here. First, B's receipt and retention of a benefit is, at least conceptually, extrinsic to his unilateral manifestation of choice. B might, of course, manifest the choice by his act of receiving or retaining the benefit. Even in this case, however, it cannot be said that an irrevocable election arises from the act of choosing itself. The 'retention of benefit' theory thus inevitably perverts the unilaterality of an election. Secondly, in deciding whether it is inequitable for B to resile from a previous choice, the court will necessarily engage in a discretionary adjudication involving an assessment of the viability of restitution.¹³⁰ This gives rise to the abovementioned incompatibility between the existence of a discretionary power and the notion of election. The matter will be taken out of B's hands and, even if his election is held to be irrevocable, such irrevocability is not self conferred but extraneously generated. The controlling concept ceases to be the notion of election. The irrevocability of B's choice will be dictated by an entirely different being, an equitable doctrine resting upon the retention of a benefit.

125 Christine J Davis, 'The Principle of Benefit and Burden' (1998) 57 *Cambridge Law Journal* 522, 532–5. The principle comes from the Latin maxim: *qui sentit commodum sentire debet et onus; et e contra* ('a person who enjoys the benefit ought also to bear the burden; and the contrary'). See also LexisNexis, *Halsbury's Laws of England*, vol 16(2) (2 November 2013) Equity, '4 Equitable Doctrines Affecting Property' [724].

126 *Dillon v Parker* (1818) 1 Swans 359, 385; 36 ER 422, 431 (Plumer MR). See also Davis, above n 125, 546; see especially at 546 n 199.

127 LexisNexis, *Halsbury's Laws of England*, vol 16(2) (2 November 2013) Equity, '4 Equitable Doctrines Affecting Property' [737] nn 3, 4.

128 See, eg, *Codrington v Lindsay* (1873) LR 8 Ch App 578, 584, 594 (Lord Selborne LC).

129 See, eg, *Worthington v Wiginton* (1855) 20 Beav 67; 52 ER 527; *Whitley v Whitley* (1862) 31 Beav 173; 54 ER 1104.

130 *Lissenden v Bosch* [1940] AC 412, 430 (Lord Atkin). See also Meagher, Heydon and Leeming, above n 90, 1099 [39-075], quoting Joseph Story, *Story's Equity Jurisprudence* (Fred B Rothman, first published 1886, 1988 ed) Vol 2, 436 [1097]. Story was citing Swanston's note in *Dillon v Parker* (1818) 1 Swans 359, 403 n 3; 36 ER 422, 434–5 n 3 (among other cases).

On account of the above analysis, it appears that the existing case law on an election between properties is primarily concerned with the necessity of a choice by the beneficiary between two distinct properties and with equitable duties arising out of a binding choice; it does not attempt to answer the question whether, and why, such a choice, once made, should be held to be irrevocable and thus constitute an election. The point that a unilateral manifestation of will to take under or against the instrument might be irrevocable in its own right is never raised. None of the above theories advanced to justify the necessity of an election supports the normative conception of election, which conceives the notion of election as a distinct legal basis for the irrevocability of the choice made. It might be that such a choice should be held irrevocable by virtue of the policy of promoting finality in the bequeathal or settlement of properties. No trace of this reasoning, however, can be found in the case law. At any rate, this reasoning is context specific and cannot be extended beyond the realm of property settlement. More promisingly, the irrevocability of the choice should be made dependent on an equitable doctrine based on the retention of a benefit. But then the clinching issue will cease to be one of making an election, but, more challengingly, one of reversing it.

IV REORIENTING EQUITABLE ELECTION

The above assessment of two major categories of equitable election casts serious doubt on the orthodox normative conception of 'election' as a self-sustained and internally rationalised system. This conception, whilst holding some theoretical appeals, ultimately undermines the legitimacy of that notion. The irrevocability (if any) of an equitable election is not justifiable by the mere fact that it is a unilateral informed choice between inconsistent options. There can be no omnipresent policy in support of the proposition that all such choices should of themselves be irrevocable. The supposedly self-conferred irrevocability of an election falls apart once equity steps in. Such irrevocability is in fact not self-conferred. Rather, resort must be had to extrinsic considerations in establishing and justifying such irrevocability, thereby leading to an externalisation of the rationale of the notion of election. And a consequential breakdown of that notion as a self-sustained system is inevitable.

This critical assessment of both election in legal proceedings and election between properties has identified the principle of promissory or equitable estoppel and that of benefit and burden (applied as an equitable principle centred on the retention of a benefit) as better founded doctrinal bases for a binding choice leading to the loss of a legal right or advantage. Both principles discarded the notion of self-conferred irrevocability embedded in the normative conception of election, not only by introducing into the operative formula an extra extrinsic factor, reliance and the retention of a benefit respectively, but also by reinvesting the court with an equitable discretion, and hence the ultimate control, over the issue of irrevocability. Both principles have further been advocated as preferable substitutions for the notion of election in areas other than those covered by the

two categories discussed above. For instance, the principle of benefit and burden seems to have been extended to the case of contract affirmation,¹³¹ where it fulfils the overriding policy of preventing windfalls obtained by inconsistent conduct. There, the binding force of one's choice should come from its inability to revert to the status quo by restoring the benefit received, rather than from the act of choosing itself. In all cases, in comparison to election, estoppel and benefit retention evidently furnish improved rationality and flexibility in so far as the determination of irrevocability is concerned. Apart from these two broadly applicable principles, some miscellaneous justificatory reasons may also be found to support the irrevocability of an election in more specific contexts. An example is the policy of achieving finality in the settlement of properties, which seems to render a donee's choice between distinct properties immediately binding once that choice is uttered. Further, the giving of a judgment may crystallise a prior election in legal proceedings. In both examples, the determinative factor for conferring the legal effect of irrevocability has drifted away from the act of making an election. The justifications for its irrevocability have been externalised.

It is, therefore, a fiction to regard the notion of election as a self-sustained system that generates in itself the legal effect of irrevocability. Time has come to dispel this fiction and limit that notion to its suitable role. Open recognition must be given to the fact that that notion does not deal with the issue of irrevocability within itself. This will have significant implications for the other three elements enunciated under the general theory. In its nature, an election must still be unilateral. Unilaterality shows that the focus should always be on the act of making a choice. The choice is invariably between inconsistent options. Inconsistency will become the new conceptual core of the reoriented notion of election. It necessitates a choice and tells us when only one of the options can be taken and that a choice must be made. Cases involving both election between properties and election in legal proceedings are illustrative of the importance of a finding on the presence of inconsistent options. In contrast, the issue of knowledge is so closely tied to the issue of irrevocability that both issues must be extricated from the notion of election. Knowledge is in issue only when the binding force of a choice is called into question. Then, whether and if so to what extent knowledge is required must turn upon the justification operative in the particular case for the irrevocability of the election made. Where, for example, such irrevocability rests upon the principle of benefit and burden, the role of subjective awareness should be minimal since to make an irrevocable choice the person receiving and retaining a benefit does not have to do it deliberately or in an informed manner. The law binds that person to its choice when it is inequitable to allow any regression. In conclusion, the notion of equitable election must be reoriented with the consequence that it is confined to the issue whether and when a choice must be made, leaving the irrevocability of the choice

131 See also Liu, above n 4.

made to be dealt with by better anchored doctrines and concepts such as estoppel and benefit retention. Consequently, it has become imperative that the normative conception of equitable election should be discarded and irrevocability should cease to be granted solely on the basis that a person has 'elected' by making the choice called for.