Rethinking Election: A General Theory

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Abstract

This article makes an overdue attempt to rationalise the notion of 'election' as applied by Anglo-Australian courts. It addresses a fundamental paradox in existing English and Australian law: while ostensibly resisting any effort to bring all election cases under a general theory, Anglo-Australian courts conceptualise an election in a way little short of radical, holding it invariably as a unilateral, informed choice between inconsistent options, which in itself furnishes a distinct legal basis for the irrevocability of such a choice. The article suggests that all election cases must be united under a general theory, but this theory should not be given the normative force the law currently espouses. It substantiates this suggestion by way of a critical review of two well-established categories of election at common law and concludes that disaffirmation and affirmation of contract are acts of distinct natures and cannot be accommodated under the same notion; election is ill-suited for determining whether a choice to sue an undisclosed principal or its agent is binding. In both cases it is estoppel, rather than election, that holds the best promise to justify, if at all, the irrevocability of the choice made. Consequently, the normative conception of election should be discarded and the general theory be reformulated in descriptive terms, parting with irrevocability as one of its essential elements.

I Introduction

'Election' is a simple yet mysterious word. It is widely used by common lawyers as a shorthand reference to a binding choice between alternative options. Yet, most strikingly, the binding force of such a choice seems to derive from the act of choosing itself. An election, once made, is perceived to be irrevocable without more. As if by magic, such an act somehow unleashes an inherent conclusory power. Upon closer scrutiny, however, this common usage of 'election' appears to have been better established than conceived. In recent years, the notion of 'election' has been the subject of numerous court decisions and a series of law journal articles in the United Kingdom and New Zealand.[1] Nevertheless, this

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1 For court decisions, see references throughout the paper. Law journal articles include: Rick Bigwood, 'Fine-Tuning Affirmation of a Contract by Election: Part 1' [2010] *New Zealand Law Review* 37; Rick Bigwood 'Fine-Tuning Affirmation of a Contract by Election: Part 2' [2010] *New Zealand Law Review* 617; Aleka Mandaraka Sheppard, 'Demystifying the Right of Election in

notion gives rise to two kinds of abnormality, which remain little exposed. The first abnormality is a seemingly universal judicial aversion to a general doctrine of election,[2] notwithstanding that the term is conceptually identical in its various applications. Thus, several discrete doctrines of election are said to operate separately in their respective fields, yielding to no overarching principle of law. Anglo-Australian case law, however, reveals consistent patterns in all those differing operations. To some extent, the current resistance to a generalisation of different categories has contributed to the second abnormality: an inexplicable lack of a rationale for all election cases. Although a long line of authorities, in both England and Australia, recognised and applied the above usage, there is still a patent paucity of theoretical explanations or justifications for the obligatory effect, or irrevocability, of an election.[3] It is widely assumed that such irrevocability should arise once an election is made. Indeed, it is nothing short of a paradox for the existing Anglo-Australian law, while resisting a general principle of election, to go so far as to insist that an election is invariably and innately irrevocable. In any event, the failure to furnish a jurisprudential basis for election constitutes a source of constant confusion and surprise. The law of election is thus in disarray and urgent work is required to provide more concrete theoretical underpinnings for it.

This article presents a general yet critical theory of election in response to the above paradox and two abnormalities, seeking their removal and a restoration of the notion of election to its proper role. The article first explores the questions whether existing categories of election share a common identity so as to be amenable to a general theory and, if so, what essential and distinctive elements such a theory must comprise. Ultimately, it is put into inquiry whether that theory, extracted as it is from the existing law, is capable of performing the normative role it claims to perform: furnishing a distinct legal basis for binding choices. The answer given in this article is 'no'.

The second part of the article seeks to substantiate this answer by offering a detailed assessment of the operation of election at common law, where the most significant categories of election are to be found: election between disaffirming and affirming a contract and election between an undisclosed principal and its agent. On the basis of the assessment undertaken, the concluding part of the paper will reorient and reconstruct the general theory. As it turns out, the notion of election will be shown to have a meaning congruent with a much more limited role, but will thereby acquire a more solid juridical foundation.

Contract Law' [2007] *Journal of Business Law* 442; K R Handley, 'Exploring Election' (2006) 122 *Law Quarterly Review* 82. See also K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2006); P Feltham, D Hochberg and T Leech (eds), *Spencer Bower: The Law Relating to Estoppel by Representation* (Tottel, 4th ed, 2004).

2 *O'Connor v SP Bray Ltd* (1936) 36 SR (NSW) 248, 263 (Jordan CJ) ('*O'Connor v SP Bray*'); *Lissenden v CAV Bosch Ltd* [1940] AC 412, 418 (Viscount Maugham); *Elder's Trustee and Executor Co Ltd v Commonwealth Homes & Investment Co Ltd* (1941) 65 CLR 603, 617; *Tiplady v Gold Coast Carlton Pty Ltd* (1984) 3 FCR 426, 453 (Fitzgerald J); *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, 28 (Robert Walker LJ) ('*Oliver Ashworth*').

3 See, eg, Bigwood, 'Fine-Tuning Affirmation of a Contract by Election: Part 1', above n 1, 39; James E Redmond, 'The Logical Basis of the Doctrine of Election in Contract' (1963) 3 *Alberta Law Review* 77; John F Andrews, 'Elections to Affirm or Disaffirm Contracts Voidable for Fraud or Material Breach' (1962) 36 *Tulane Law Review* 508, 519–20.

II The Orthodox Theory of Election

A Election as a Generic Concept

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 differing applications 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 article intends to define the contents of such a theory. As evidenced by existing Anglo-Australian law, there appear to be four elements essential to an election.

1 *The Elements of Election*

By its nature, 'election' is a term of distinct generality. It denotes an act of choosing between alternative options. 'Act' is meant to cover not only a positive action, but also inaction or omission manifesting a choice. The word 'act' captures one cardinal character of an election: that it is of a party's making. As a juristic act, an election is capable of general application in vastly diverse situations. This is at least partially evidenced by the terminological uniformity in describing the relevant act of choice in all cases, where the expression 'election' is consistently employed, not in a loose sense, but rather specifically to convey a universal yet confined technical meaning. As it is concerned only with the act of choosing itself, an election naturally raises two critical issues: an issue of constitution and an issue of legal effect. By asking recurrently what constitutes an election and whether once made it becomes legally binding, the law can develop a synoptic conceptual framework for all choices labelled 'election'. Yet, in reality, the necessity of adopting such a conceptual framework is consistently rejected.

Anglo-Australian law knows four major categories of election. At common law there are 'election between disaffirming or affirming a contract' and 'election between persons', while equity accommodates 'election between properties'. There is additionally a separate category of 'election in legal proceedings'. Each of these categories is said to embody a discrete doctrine of election. The key distinctions appear to lie in the nature and type of options, and the different settings which call for an election. Options in each of the categories vary. They may comprise rights, remedies, powers, and indeed any other benefits or advantages. Rights alone may be of various types: proprietary or personal, procedural or substantive, or of a private-law or public-law origin. Another difference is the operational environment: some categories operate at common law while others reside in equity. The doctrine of election is, accordingly, viewed as multicellular, consisting of multiple sub-doctrines. This view, however, results from a failure to discern the more fundamental similarities between each category. Significant though those intra-categorical differences might seem to be, they do not necessitate a different answer to either of the two critical issues raised above and thus the treatment of

each category as a separate doctrine is not warranted. An election may arise and operate in differing contexts and produce wide-ranging consequences, yet it has a unique conceptual axis that remains undisturbed. Under the existing Anglo-Australian law, an election is an informed unilateral manifestation of an intention to make a choice between alternative options, which, once made, becomes final and binding.

A generic concept of 'election' thus consists of four essential elements. First, an election is a unilateral act, being an expression of intent to adopt one of the options available. 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[4] 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. Second, an election is not just any choice — it is an inevitable choice between alternative options. 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. Third, an election is also an informed, conscious or even deliberate choice.[5] 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. Fourth, an election, once made, is in itself final, binding and irrevocable.[6] This 'assumed conclusiveness of choice' is said to be 'the only thread of identity that runs through' all categories of election.[7] All four elements — the third to a greater or lesser extent — are omnipresent wherever an instance of election is found, and no other element is required by the courts. Thus, the four elements, and they alone, constitute the uniting knots for all choices labelled 'election'.

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

5 *Insurance Corp of the Channel Islands, Royal Insurance (UK) Ltd v Royal Hotel Ltd* [1998] Lloyd's Rep IR 151, 161 (Mance J) ('*Insurance Corp v Royal Hotel*'); *Oliver Ashworth* [2000] Ch 12, 27 (Robert Walker LJ).

6 *Scarf v Jardine* (1882) 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); *Oliver Ashworth* [2000] Ch 12, 30 (Robert Walker LJ).

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

2 *The Normativity of Election*

The general theory comprising four essential elements of election has two crucial implications. First, a choice in law is not an election if it does not require any of those four elements or if it embraces any additional requirement. It must be stressed that an election should not be regarded as encompassing simply any legally significant, or binding, choice. The term 'election' is employed to identify some but not all such choices. The four elements articulated by the courts act as constraining criteria. Second and more importantly, of these four elements currently recognised and required by the courts, the last one deserves particular attention and constitutes the central concern of this paper. Without it, the notion of election amounts merely to a descriptive term of a certain class of legally significant choices which may or may not be irrevocable for reasons unconnected with their characterisation as elections. With it, the notion of election becomes, as it does under existing Anglo-Australian law, a normative concept that is not only referable exclusively to certain irrevocable choices, but is also intended to furnish in itself a justification or explanation for such irrevocability. The notion of election appears to embody an internally rationalised system. An election is irrevocable precisely because it is a unilateral informed choice between inconsistent options. We call this the normativity of election.

It is to be emphasised that the only 'normativity' to be dealt with in this paper relates to the fourth element — the internally justified irrevocability of an election — and no attempt will be made to explore any other sense of that word. 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 continued use in that specific 'normative' sense would disguise the true legal basis of the binding choice that it purports to explain. It follows that 'election' ought not to be regarded as a 'normative' concept in that sense. Whether this is indeed the case in all known areas in which that term has application 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 declarations of trust. It is an assessment of the widely assumed normativity of that notion. Therefore, the main body of the article (Part III) explores the case law relating to choices both labelled and explained by the notion of election. Whether that notion ought to be conceived as a normative concept necessitating irrevocability must be placed under close scrutiny. At this stage I will demonstrate some readily discernible difficulties caused by the normative conception.

It is first useful to note that where the 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. On this account, it is natural to seek to justify such irrevocability on the grounds of two essential elements embodied in the same general theory: inconsistency and knowledge. The question can be put thus: to what extent, if at all, does the fact that a legal choice is made between inconsistent options and/or with knowledge weigh in favour of its irrevocability?

Let us first examine inconsistency. It might be argued that an election is irrevocable simply because the elector is put to election between inconsistent options.[8] 'Inconsistency' is, however, an ambiguous word. It is usually taken to mean that the options are mutually exclusive: that is, they cannot *both* be adopted or realised, either simultaneously or sequentially — one cannot have one's cake and eat it too, nor can one blow both 'hot and cold'.[9] However, mutual exclusivity does not necessarily result in mutual destructiveness. That you must choose does not mean that you have only one chance to make the choice. The adoption of one option does not necessarily indicate 'a final intention to abandon the other'[10] inconsistent option. It does not necessarily preclude the elector from retreating from a previous choice and adopting a different one. In *Sargent v ASL Developments Ltd*, Stephen J famously stated that neither of two inconsistent options 'may be enjoyed without the extinction of the other'.[11] However, as his Honour explained, the reason for this is that the elector receives 'the benefit of enjoying [one option], a benefit denied to him so long as both remained in existence'. Thus put, the irrevocability of a choice rests upon the receipt or retention of a benefit by the person making the choice, and this is conceptually different from a mere choice between inconsistent options. Therefore, his Honour's statement cannot be used to controvert the proposition that inconsistency in conduct is not of itself a bar to a change of mind. In fact, 'inconsistency' arises in almost all cases where a party is called upon to make a choice. A party promises orally to make a gift. This is 'inconsistent' with a decision not to make the gift. Yet the promise to make a gift is not binding without consideration. A landlord gratuitously agrees to reduce the rent. This is 'inconsistent' with a claim for full rent. Yet the statement that the rent will be reduced is not binding without its being relied on by the tenant.[12] It can be seen that inconsistency alone does not constitute a sufficient reason for irrevocability and a different, stronger justification is required.

Knowledge, however, is hardly such a justification. The argument would be that an election, being an informed choice, should necessarily be irrevocable.[13] The elector's knowledge, of either the facts giving rise to the election or its right to elect, is indecisive. If a promise is unenforceable for lack of consideration, it is not rendered enforceable by the mere fact that it is made with full knowledge. Equally,

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8 *Smith v Hodson* (1790) 4 Term Rep 211, 217; 100 ER 979, 982 (Lord Kenyon CJ); *Sudan Import & Export Company (Khartoum) Ltd v Société Générale de Compensation* [1958] 1 Lloyd's Rep 310, 315 (Lord Evershed MR) ('*Sudan v Société Générale*'); *LC Fowler & Sons Ltd v Stephens College Board of Governors* [1991] 3 NZLR 304, 308 (Thomas J) ('*Fowler v Stephens*'); *Bolton MBC v Municipal Mutual Insurance Ltd* [2006] 1 WLR 1492 [32], [33] (Longmore LJ). See also T W Chitty, A T Denning and C P Harvey (eds), *Smith's Leading Cases* (vol 2) (Sweet & Maxwell, 13th ed, 1929) 147.

9 *Smith v Hodson* (1790) 4 Term Rep 211, 217; 100 ER 979; *Sudan v Societe Generale* [1958] 1 Lloyd's Rep 310.

10 G S Bower and A K Turner, *The Law Relating to Estoppel by Representation* (Butterworths, 3rd ed, 1977) 342.

11 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 641 ('*Sargent*'). It is notable that his Honour used the word 'enjoy', thus suggesting that a mere indication to adopt one option was insufficient to produce the effect of extinguishing the other option.

12 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 ('*High Trees*').

13 *Sargent* (1974) 131 CLR 634, 642 (Stephen J).

a statement may well be made with full knowledge, yet cannot work an estoppel without reliance. An act does not become irrevocable solely on the basis of the actor's knowledge. In truth, knowledge attending an act of choosing does not appear to cause, and is hence incapable of explaining, its irrevocability. To the contrary, it is submitted that the questions whether and, if so, to what extent, knowledge is required for an irrevocable election are dictated by reasons that account for such irrevocability. In itself, knowledge does not explain the 'once and for all' nature of an election. Clearly, knowledge of the irrevocability itself is irrelevant. A rule of law is not justified simply because it is made known to people. A knowing relinquishment of a right or benefit does not become irrevocable solely because such is the consequence intended by an informed elector. There is no good reason why knowledge of underlying facts or the right of election should fare better.

B *Election as a Distinct Concept*

Election is said to depend on 'common sense and fairness',[14] presumably in the sense of promoting consistency in conduct. The same consideration also informs other cognate concepts, particularly waiver and estoppel. The three concepts are thus characterised as alternative bases for 'the sterilization of a legal right otherwise than by contract'.[15] This parallel positioning of the notion of election alongside the other two concepts is often concealed by their distinctiveness in operation. But what is central to this juxtaposition is the assumption that, like the other two concepts, the notion of election is normative and furnishes a distinct rationale for the loss or suspension of a legal right or benefit.

1 *Election and Waiver*

'Election' is deeply entangled with, and, in some sense, absorbed by 'waiver'.[16] 'Waiver' is itself an elusive term.[17] Literally, it is defined in the *Oxford English Dictionary* as 'an act or instance of refraining from insisting on or from demanding a right or claim'. Like election, it leads to an 'abandonment' or 'relinquishment' of a right. A hybrid of similar yet distinct concepts, waiver has long been criticised as denoting no more than the 'end-result' of, most significantly, election or estoppel, and there have thus been calls for its distribution into more specific legal categories.[18] It could be said that 'waiver' has no substance of its own, tends to

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14 *Oliver Ashworth* [2000] Ch 12, 27D (Robert Walker LJ); *Union Music Ltd v Watson Black Night Ltd* [2002] EWCA Civ 680, [33] (Robert Walker LJ). See also *Johnson v Agnew* [1980] AC 367, 398E (Lord Wilberforce) ('common sense and equity').

15 *Commonwealth v Verwayen* (1990) 170 CLR 394, 421 (Brennan J) ('*Verwayen*').

16 *Craine v The Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, 326 ('*Craine*'); *R Durtnell & Sons Ltd v Kaduna Ltd* [2003] BLR 225 [46]. See also Edward L Rubin, 'Toward a General Theory of Waiver' (1981) 28 *UCLA Law Review* 478.

17 *Ross T Smyth & Co Ltd v T D Bailey & Son & Co* (1941) 164 LT 102, 106 (Lord Wright): 'a vague term, used in many senses'; *Oliver Ashworth* [2000] Ch 12, 28 (Robert Walker LJ): a waiver was not 'a precise term of art'.

18 *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 882–3 (Lord Diplock) ('*Kammins*'); *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama; The Mihalios Xilas* [1979] 1 WLR 1018, 1034 (Lord Scarman) ('*The Mihalios*

obscure the process by which an abandonment of a right is effected, and should be abolished; it is best viewed as either 'waiver by estoppel' or 'waiver by election'.[19]

Nevertheless, it remains true that some species of waiver cannot be re-categorised as either estoppel or election. Waiver is sometimes said to arise from a contract, presumably by way of release or variation.[20] In such cases an intention to contract is essential, and either consideration or deed must be present. More pertinently, a 'unilateral waiver' appears to be recognised in some quarters.[21] Although the precise legal basis of such a waiver is yet to be definitively stated, it is generally understood to apply where a party unilaterally and deliberately abandons a right solely for his benefit and it is manifestly unfair for him to reassert that right. A unilateral waiver seems to bear a high degree of resemblance to an election as it must be unequivocal, requires knowledge and is unilateral and irrevocable. It might be said that, unlike an election, such a waiver does not have to be effected in the face of inconsistent options. But the waiving party does have a choice between waiving and not waiving, two evidently inconsistent courses of action. However, a unilateral waiver differs from an election in that it must be 'intentional' in the sense of deliberateness, while an intention to elect is assessed objectively.[22] More importantly, such a waiver may be employed only as a defence and seems to be severely limited in scope. It has been said that its application is confined to the abandonment of a procedural right (such as a defence) in the adjudicative process.[23]

Xilas'); *Oliver Ashworth* [2000] Ch 12, 29A-B (Robert Walker LJ); *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 587ff (Gummow, Hayne and Kiefel JJ), cf 618–20 (Kirby J) ('*Agricultural and Rural Finance*'). See also Feltham, Hochberg and Leech, above n 1, [XIII.1.4], [XIII.1.20]–[XIII.1.21]; Tony Dugdale and David Yates, 'Variation, Waiver and Estoppel — A Re-Appraisal' (1976) 39 *Modern Law Review* 680; John S Ewart, *Waiver Distributed among the Departments: Election, Estoppel, Contract, Release* (Harvard University Press, 1917); J W Carter, 'Waiver (of Contractual Rights) Distributed' (1991) 4 *Journal of Contract Law* 59; F M B Reynolds, 'The Notions of Waiver' [1990] *Lloyd's Maritime and Commercial Law Quarterly* 453.

19 *Verwayen* (1990) 170 CLR 394, 406–7 (Mason CJ), 451–2 (Dawson J), cf 467–8, 472–5 (Toohey J), 481–2, 485 (Gaudron J), 491, 497 (McHugh J), 423–4, 428 (Brennan J); *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53, 57 (Lord Denning MR) ('*Panchaud*'). See also Bower and Turner, above n 10, 320; Bigwood, 'Fine-Tuning Affirmation of a Contract by Election: Part 1', above n 1, 67; Sheppard, above n 1. Cf Feltham, Hochberg and Leech, above n 1, [XIII.1.25], [XIII.1.28]; Kris Arjunan, 'Waiver and Estoppel — A Distinction without a Difference?' (1993) 21 *Australian Business Law Review* 86.

20 See, eg, *Stackhouse v Barnston* (1805) 10 Ves Jun 453, 466; (1805) 32 ER 921, 925–6 (Grant MR); *Banning v Wright* [1972] 1 WLR 972, 979 (Lord Hailsham). See also D B Dobbs, 'Pressing Problems for the Plaintiff's Lawyer in Rescission: Election of Remedies and Restoration of Consideration' (1972) 26 *Arkansas Law Review* 322, 339–40.

21 *Glencore Grain Ltd v Flacker Shipping Ltd; The Happy Day* [2002] 2 Lloyd's Rep 487, 506 [64] (Potter LJ); *Verwayen* (1990) 170 CLR 394, 467–8, 472–5 (Toohey J), 496–7 (McHugh J); *Agricultural and Rural Finance* (2008) 238 CLR 570, 587 (Gummow, Hayne and Kiefel JJ, Heydon J concurring), 620 (Kirby J).

22 *Fowler v Stephens* [1991] 3 NZLR 304, 308 (Thomas J). See also E Allan Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* (Yale University Press, 1998) 122, cf chs 16 and 19.

23 *Verwayen* (1990) 170 CLR 394, 426–7 (Brennan J), 472–3 (Toohey J), 484 (Gaudron J), 497 (McHugh J); *Agricultural and Rural Finance* (2008) 238 CLR 570 599, 601 (Gummow, Hayne and Kiefel JJ, Heydon J concurring); [144] (Kirby J). Waiver is said to be restricted to a surrender of 'relatively minor' non-promissory conditions: Farnsworth, above n 22, 156; C McCauliff, *Corbin*

2 *Election and Estoppel*

Estoppel is, in one sense, much wider than waiver. While election leads inevitably to a 'waiver', or abandonment, of right,[24] estoppel is not confined to 'waiver by estoppel' but may produce consequences other than an abandonment of right. There are multiple species of estoppel, but the one most relevant to the present discourse is promissory or equitable estoppel, which seems to constitute, at least in Australia, a unified overarching principle.[25] Thus constricted, estoppel shares with election an 'important similarity' in 'the need for communication to the other party of an unequivocal representation' or promissory statement.[26] Despite suggestions that the statement required for an election is concerned with the exercise of a right or a choice between rights[27] as opposed to a failure to insist on a right or a choice between defences (both of which are governed by estoppel), or must additionally amount to an 'irrevocable commitment',[28] such distinctions are finely drawn and do not seem to be supported by the majority of case law. Nevertheless, it is well recognised that estoppel and election are conceptually distinct from each other,[29] even though some genuine forms of estoppel are still incorrectly labelled as 'election'.[30]

First, an estoppel is not a unilateral process. Its completion depends on reasonable reliance by the party to whom the statement is made. This usually means that that party must have altered its position as a result of the estopped party's statement.[31] Second, at least formally, the presence of alternative options is not a prerequisite for estoppel. In effect, however, one is estopped from doing what is inconsistent with one's statement. Third, leaving aside the peculiar case of 'proprietary estoppel', the party setting up an estoppel is generally not required to show that the party alleged to be estopped has knowledge of either the underlying

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on Contracts (LexisNexis, revised ed, 1999) vol 8, §40.1; *Restatement (Second) of Contracts* (1981) §84.

24 *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 397–8 (Lord Goff); *Tele2 International Card Co SA v Post Office Ltd)* [2009] EWCA Civ 9, [53], [54] (Aikens LJ).

25 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 ('*Waltons Stores*'). See also M Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart, 1999) 26 ff; E Cooke, *The Modern Law of Estoppel* (Oxford University Press, 2000).

26 *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 399 (Lord Goff); *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] All ER (D) 448 (Feb) [1], [66] (Rix LJ) ('*Kosmar*').

27 *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 (Lord Goff); *Kosmar* [2008] All ER (D) 448 (Feb) [66], also [52]; *Kammins* [1971] AC 850, 883A (Lord Diplock).

28 *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia* [1996] 2 Lloyd's Rep 604, 608 (Moore-Bick J) ('*Yukong*'); *Carillion JM Ltd v Bath & North East Somerset Council* [2009] EWHC 166 [17]–[18] (Coulson J).

29 *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 397–9 (Lord Goff).

30 See, eg, *Sea Calm Shipping Co SA v Chantiers Navals de l'Esterel SA; The Uhenbels* [1986] 2 Lloyd's Rep 294; *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, 213–14 (Lord Denning MR) ('*Alan v El Nasr*'). See also C J Rossiter, 'The Doctrine of Election and Contracts for the Sale of Land' (1986) *Australian Law Journal* 563, 565–6.

31 *Alan v El Nasr* [1972] 2 QB 189 213–14; *Société Italo-Belge pour le Commerce et l'Industrie v Palm and Vegetable Oils (Malyasia) Sdn Bhd; The Post Chaser)* [1982] 1 All ER 19, 26-27 (Robert Goff J); *Verwayen* (1990) 170 CLR 394, 415 (Mason CJ).

facts or its legal rights.[32] The want of actual knowledge is generally irrelevant where an unequivocal statement has been established.[33] Finally, a promissory estoppel does not become irrevocable unless and until the representee has permanently altered its position.[34] Its effect may thus be suspensory and temporary. This seems to differ from election, which is conventionally understood to bind the elector permanently.

III The Demolition of Common Law Election

That election is a normative concept means that an election may arise at common law only and there is no such thing as an equitable election, whose binding force inevitably hinges on an exercise of judicial discretion.[35] A party is either bound or not bound by its unequivocally uttered choice.[36] The notion of election at common law thus lies at the heart of our inquiry into the propriety of the normative conception of election and deserves a detailed treatment. The proposition to be tested here is not whether all or some choices are binding at common law, but whether the notion of election is the appropriate legal basis for those binding choices.

A common law election is an election between substantive rights. Unlike an election in legal proceedings, it is potentially in issue once alternative substantive rights arise.[37] An election between remedies not sought in legal proceedings, such as 'self-help' remedies like a rescission/termination of a contract, is viewed as a common law election. One elects at common law by communicating or making overt, either by words or by conduct, an unequivocal intention to exercise one of the alternative rights.[38] Whether such an election is effectively made is a question of fact.[39] Generally speaking, the intention to elect is assessed objectively and subjective state of mind is immaterial.[40] A common law election must be an

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32 *Bremer Handelsgesellschaft v Vanden Avenne-Izegem* [1978] 2 Lloyd's Rep 109 (HL) 126 (Lord Salmon); *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 399 (Lord Goff); *Oliver Ashworth* [2000] Ch 12, 27 (Robert Walker LJ); *Kosmar* [2008] All ER (D) 448 (Feb) [74].

33 *Sarat Chunder Dey v Gopal Chunder Laha* (1892) LR 19 Ind App 203 (PC Bengal), 215 (Lord Shand).

34 *Birmingham & District Land Co v London &North Western Railway Co* (1888) 40 Ch D 268, 286 (Bowen LJ); *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (No 3)* [1955] 1 WLR 761, 785 (Lord Tucker); *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 (PC Nigeria), 1330 (Lord Hodson).

35 For a more detailed treatment of equitable election, see Qiao Liu, 'The Use and Misuse of Equitable Election' (2013) 36(3) *University of New South Wales Law Journal* (forthcoming).

36 *First National Bank plc v* Walker [2000] EWCA Civ J1123-8 [82] (Rix LJ); cf [77] (Chadwick LJ); [42] (Sir Andrew Morritt VC).

37 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 30 (Lord Atkin).

38 *Scarf v Jardine* (1882) 7 App Cas 345, 361 (Lord Blackburn); *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] AC 773, 779 (Lord Dunedin); *The Mihalios Xilas* [1979] 1 WLR 1018, 1024 (Lord Diplock).

39 *Clarkson Booker Ltd v Andjel* [1964] 2 QB 775, 792 (Willmer LJ); *Champtaloup v Thomas* [1976] 2 NSWLR 264, 269 (Glass JA).

40 *Scarf v Jardine* (1882) 7 App Cas 345, 361 (Lord Blackburn); *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55 (Kitto J, Taylor and Menzies JJ concurring) ('*Tropical Traders*'); *Slough Estates v Slough BC (No 1)* [1969] 2 Ch 305, 318 (Lord Denning MR); *Kammins* [1971] AC 850, 883 (Lord Diplock); *North Ocean Shipping Co Ltd v Jyundai Construction Co Ltd; The Atlantic*

'informed', 'conscious' or even 'deliberate' choice.[41] The elector must 'at least know of the facts which give rise to those legal rights, as between which an election must be made',[42] but is not required to be aware of the legal consequences of the election.[43] The onus of proof rests upon the party who alleges that an election has been made.[44] Knowledge may be imputed to the elector by law on the basis of its own conduct[45] or its solicitor's knowledge of the law.[46] A common law election, once made, is said to be final, binding and irrevocable, without the need to show consideration, deed or reliance.[47] A common law election arises predominantly in two situations: a contracting party's choice either to disaffirm or to affirm the contract; and a third party's choice either to sue an undisclosed principal or the agent. Each requires a close examination.

A *Election between Disaffirming and Affirming a Contract*

1 *Disaffirmation*

Both disaffirming and affirming a contract are considered to be acts of election. However, these are two acts of distinct nature. A separate look at each reveals the falsity of the election theory. A disaffirmation is an exercise by a contracting party of a common law right, or perhaps more accurately a power, to put an end to the contract, terminating it (that is, bringing it to an end prospectively only) in the event of a fundamental breach by the other party[48] or rescinding it (that is, bringing it to an end both prospectively and retrospectively) in the presence of a vitiating factor such as, typically, fraud or duress.[49] The right to disaffirm must arise at common law or out of a contractual provision,[50] rather than in equity. A rescission

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Baron [1979] QB 705, 721 (Mocatta J) ('*The Atlantic Baron*'); *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 398 (Lord Goff). See also D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (Oxford University Press, 2008) [23.90]–[23.92].

41 *Oliver Ashworth* [2000] Ch 12, 27 (Robert Walker LJ); *Boyo v London Borough of Lambeth* [1994] ICR 727, 743 (Ralph Gibson LJ); *HB Property Developments Ltd v Secretary of State for the Environment* (1999) 78 P & CR 108, 114 (Sir Christopher Staughton); *Insurance Corp v Royal Hotel* [1998] Lloyd's Rep IR 151, 161 (Mance J).

42 *Sargent* (1974) 131 CLR 634, 642 (Stephen J).

43 *Kammins* [1971] AC 850, 883 (Lord Diplock).

44 *Matthews v Smallwood* [1910] 1 Ch 777, 787 (Parker J).

45 Such as a failure by the seller under a contract for sale of goods to take up a reasonable opportunity to examine defective goods*: Sale of Goods Act 1979* (UK) c 54, ss 34, 35.

46 *Peyman v Lanjani* [1985] Ch 457, 486–7 (Stephenson LJ).

47 *Clough v London and North Western Railway Co* (1871) LR 7 Ex 26, 34; *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 398, 399 (Lord Goff).

48 *Leigh v Paterson* (1818) 8 Taunt 540, 541, (1818) 129 ER 493, 494 (Dallas CJ); *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 (PC Hong Kong) 509 (Lord Sumner); *Heyman v Darwins* [1942] AC 356, 361–2, 365 (Viscount Simon LC), 373–4 (Lord Macmillan), 376 (Lord Wright). A disaffirmation by termination in this sense includes forfeiture of leases for breach of covenant, see, eg, *Matthews v Smallwood* [1910] 1 Ch 777.

49 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476–7 (Dixon J); *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525; *Dimskal Shipping Co SA v International Transport Workers Federation; The Evia Luck* [1992] 2 AC 152, 165; *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] 1 All ER 349, 378 (Lord Hobhous).

50 See, eg, *Sargent* (1974) 131 CLR 634; *Jansen v Whangamata Homes Ltd* [2006] 2 NZLR 300, discussed in Bigwood, 'Fine-Tuning Affirmation of a Contract by Election: Part 1' above n 1, 49 ff.

in equity is effected by a court order, not by a party's act.[51] It is not of itself irrevocable as it 'does not confer the benefit of enjoying the right to rescind', unless and until the rescission order is granted.[52] Just as an equitable election is fictional and depends for its constitution on an exercise of discretion, a rescission in equity must for the same reason be excluded from the scope of a disaffirmation. In disaffirmation cases, by contrast with a frustrated or void contract, the contract does not automatically come to an end but is merely rendered terminable or voidable at the innocent party's option.[53] From this it has generally been assumed that what follows is a matter of 'election' for that party. Yet the logic is disjointed. That the innocent party may decide whether to exercise its right to disaffirm the contract does not in itself create a situation of 'election'. There are two principal reasons.

First, a disaffirmation requires no knowledge on the part of the disaffirming party and hence does not have to be an informed or conscious choice.[54] It has long been established that, generally speaking, a termination of a contract was justifiable by a valid reason unknown or undisclosed at the time of the termination, provided that the reason did exist then.[55] The same principle applies to a rescission of a contract at common law.[56] Thus to disaffirm a contract there need not be any knowledge either of the facts giving rise to the right to disaffirm or of the right to disaffirm itself. The accrual of a right to disaffirm is dictated by objective facts rather than by the disaffirming party's subjective conception or awareness. The dispensation of the knowledge requirement is partially compensated by the fact that the disaffirming party must communicate or make overt an unequivocal intention to bring the contract to an immediate end.[57] It is also aligned with the rule

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51 *Radferry Pty Ltd v Starborne Holdings Pty Ltd* [1999] FCA 171 (18 December 1998). Cf *Brotherton v Aseguradora Coloseguros SA* [2003] 2 All ER (Comm) 298, 311 (Mance LJ), 316–17 (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, 528 ff; O'Sullivan, Elliott and Zakrzewski, above n 40, [10.23], [11.55] ff.

52 O'Sullivan, Elliott and Zakrzewski, above n 40, [11.109], citing *Sargent* (1974) 131 CLR 634, 640–1 (Stephen J), cf [23.06]. Cf *Coastal Estates Pty Ltd v Melevende* [1965] VR 433, 451 (Sholl J) ('*Coastal Estates*'); *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 (Moore-Bick J), reversed on other grounds: [2004] QB 601 ('*Drake v Provident*').

53 *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1, 9 (Lord Atkinson); *Bristol & West Building Society v Mothew* [1998] Ch 1, 22 (Millett LJ).

54 See, eg, *London Borough of Enfield v Sivanandan* [2005] EWCA Civ 10 (20 January 2005) [83]–[84] (Wall LJ).

55 *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339, 357 (Cotton LJ), 364 (Bowen LJ), 370 (Fry LJ); *Taylor v Oakes Roncoroni & Co* [1922] All ER Rep Ext 866, 869 (Greer J); *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699, 722, 724 (Salmon LJ); *Cyril Leonard & Co v Simo Securities Trust Ltd* [1972] 1 WLR 80, 85–6 (Russell LJ), 88 (Sachs LJ), 89 (Stamp LJ); *Albion Sugar Co Ltd v William Tankers Ltd and Davies; The John S Darbyshire)* [1977] 2 Lloyd's Rep 457, 467 (Mocatta J); *Sheffield v Conrad* (1987) 22 Con LR 108; *Henry Dean & Sons (Sydney) Ltd v P O'Day Pty Ltd* (1927) 39 CLR 330, 359 (Starke J); *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359, 378 (Dixon J).

56 *Drake v Provident* [2004] QB 601, 623–4 [69] (Rix LJ); *Occidental Worldwide Investment Corp v Skibs A/S Avanti; The Siboen and Sibotre* [1976] 1 Lloyd's Rep 293, 337–8. ('*The Siboen and Sibotre*').

57 *Norwest Holst v Harrison* [1984] ICR 668 679, 680 (Cumming-Bruce LJ), 682 (Neill LJ), 683 (Sir Denys Buckley); *MSC Mediterranean Shipping Co SA v BRE-Metro Ltd* [1985] 2 Lloyd's Rep 239; *Vitol SA v Norelf Ltd; The Santa Clara* [1996] AC 800 812 (Lord Steyn) ('*The Santa Clara*'). Cf

that a disaffirmation requires 'no particular form' and need not be couched in specific language.[58] No express reference to 'rescission' or 'termination' is necessary. Thus, a notice that inadvertently describes itself as a 'rescission' or 'avoidance' of a contract may amount to an effective termination if the only ground that exists is a repudiatory breach of the contract;[59] conversely, a purported termination may be found instead to constitute a rescission[60] — provided, of course, that such findings do not contradict the disaffirming party's objectively exhibited intention. No 'election' between termination and rescission is required in these circumstances. By the same token, a purported exercise of a contractual right of termination may alternatively be seen as an effective termination of contract for repudiation, provided that it satisfies all requirements for the latter. Thus it is arguably more congruent with principle that no 'election' should be required between terminating pursuant to the terms of the contract and terminating under the general law, despite the fact that the two regimes may provide 'alternative rights which have different consequences'.[61]

Second, once a contracting party effectively exercises its common law right to disaffirm the contract, this act is irrevocable; yet such irrevocability cannot be attributed to a legal characterisation of the act as an election. For instance, a party who 'accepts' an anticipatory breach, by terminating the contract, cannot then affirm the contract.[62] To have a contract rescinded at common law is likewise in its nature permanent and irreversible.[63] But the same result will follow whether or not the acceptance or rescission is characterised as an election. The irrevocability of such a disaffirmatory act comes from its innate destructive force. A contract, once terminated or rescinded, cannot be re-established without the consent of both parties.[64] What is dead is dead.[65] To enable a party who disaffirms a contract to revive it unilaterally would profoundly undermine the bilateral character of the contract. Such irrevocability does not, however, necessitate or corroborate the election theory and will arise irrespective of the latter. The underlying idea of that theory, namely the preclusion of inconsistency in conduct, does not seem to play any part in the conferral of such irrevocability. In the case of a disaffirmation of a contract, therefore, it is wholly superfluous to resort to the notion of election for the purpose of explaining its innately destructive, hence irrevocable effect.

M Bryan, 'Rescission, Restitution and Contractual Ordering: The Role of Plaintiff Election' in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (Cavendish, 2004) 59, 68.

58 *The Santa Clara* [1996] AC 800 810–11 (Lord Steyn); *Chapman v Greater Midwest Insurance Pty Ltd* [1981] 1 NSWLR 479, 483 (Yeldham J).

59 Eg *Maredelanto Compania Naviera SA v Bergbau-Handel Gmbh; The Mihalis Angelos* (1971) 1 QB 164; *Stocznia v Latvian Shipping* [1997] 2 Lloyd's Rep 228, 237 (Colman J); *Stocznia v Latvian Shipping* [2001] 1 Lloyd's Rep 537, [179] (Thomas J); *Rawson v Hobbs* [1961] 107 CLR 466.

60 *The Siboen and Sibotre* [1976] 1 Lloyd's Rep 293, 337.

61 Cf *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2010] QB 27, 46 (Moore-Bick LJ).

62 *Hitchin v Campbell* (1772) 2 Black W 827; 96 ER 487; *Pearl Mill Co Ltd v Ivy Tannery Co Ltd* [1919] 1 KB 78, 84 (McCardie J); *Anderson v Equitable Life Assurance Society of the United States* (1926) 134 LT 557, 563 (Bankes LJ); *A-G v Pritchard* [1928] 97 LJR (KB) 561.

63 O'Sullivan, Elliott and Zakrzewski, above n 40 [11.53].

64 Ewart, above n 18, 83–4.

65 *Johnson v Agnew* [1980] AC 367, 398 (Lord Wilberforce); *Leofelis SA v Lonsdale Sports Ltd* [2008] ETMR 63.

2 *Affirmation*

An affirmation of a contract appears to cause even more difficulties on three major fronts. First, the existing legal test of an affirmation is wrongly targeted and an affirmation ought to be recognised as something narrower than the exact opposite of a disaffirmation, namely non-disaffirmation. Literally, to affirm a contract is to treat it as alive and continuing. An affirmation is consequently equated with the continuance of, or a failure to disaffirm, a contract. The existing test is focused on the question whether a contract subsists or ceases to subsist. The courts have shown a distinct inclination to find an affirmation where the contract is not rescinded or terminated. This orthodox test is misdirected and overly broad. In practice, it tends unduly to penalise the innocent party for making efforts to rescue the contract or for merely failing to disaffirm it promptly.[66] On notice of such undesirability the courts have attempted to rectify the existing test by requiring the affirming party (that is, the party who has allegedly affirmed the contract) to show an intention, to an unrealistic degree of absoluteness, to continue with the contract,[67] by allowing the innocent party a reasonable period of time to decide whether to disaffirm or to affirm the contract,[68] or by classifying an affirmation as 'revocable' where the legal ground for disaffirming the contract continues to exist.[69] None of these attempts manages to salvage the existing test from its predicament as all fail to recognise an affirmation as an act resulting in the loss, either permanently or temporarily, of a right to disaffirm the contract. The innocent party does not 'affirm' the contract, nor does it simply exercise a right arising from an antecedent event. It disposes of an extant right of disaffirmation. To do so the innocent party is required to represent unequivocally that the right of disaffirmation will not be exercised.[70] Mere performance or enforcement of a contract, just as a simple failure to disaffirm it, does not usually amount to such a statement.[71] For this reason, it is questionable and oversimplistic to hold, as the courts often did, that a party's decision whether or not to exercise a right that becomes available to it, 'being a matter of choice', must be 'called in law an election'.[72] Where a party faces such a choice, it is given two options which are inconsistent with each other but which 'are such that the adoption of one of them

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66 *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327, 348 (Fullagar J).

67 *Yukong* [1996] 2 Lloyd's Rep 604, 607, 608, 609 (Moore-Bick J).

68 *Stocznia Gdanska SA v Latvian Shipping Co (No 3)* [2002] 2 All ER (Comm) 768, [87] (Rix LJ) ('*Stocznia No 3*').

69 *Safehaven Investments Inc v Springbok Ltd* (1996) 71 P & CR 59, 67, 68 (Jonathan Sumption QC); *Stocznia No 3* [2002] 2 All ER (Comm) 768 [96] (Rix LJ), affirming [2001] 1 Lloyd's Rep 537 564–6 (Thomas J); *Allcard v Skinner* (1887) 36 ChD 145, 187; *The Atlantic Baron* [1979] QB 705, 720–1. Cf G H Treitel, 'Affirmation after Repudiatory Breach' (1998) 114 *Law Quarterly Review* 22, 26.

70 Some indications of this can be found: *Yukong* [1996] 2 Lloyd's Rep 604, 608 (Moore-Bick J); *Stocznia No 3* [2002] 2 All ER (Comm) 768 [88]–[92] (Rix LJ); *McRae v Bolaro Pty Ltd* [2000] VSCA 72 (5 May 2000) [31] (Ormiston JA); *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia Ltd; The Laconia* [1977] 1 All ER 545.

71 See, eg, *Immer (No 145) Pty Ltd v The Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, 30 (Brennan J) ('*Immer*'); *Johnson v Agnew* [1980] AC 367; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 260 (Mason CJ).

72 *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 398 (Lord Goff).

does not necessarily indicate a final intention to abandon the other'.[73] To 'affirm' the contract does not necessarily indicate a final intention to abandon the extant right of disaffirmation. Hence, an affirmation must not be seen merely as what is not a disaffirmation. It requires a positive manifestation of an intention not to exercise the right of disaffirmation.

Second, the courts' endeavour to determine whether an affirmation has been made is further unsettled by a perennial debate over whether it is necessary to show the affirming party's knowledge of its legal right to elect. The debate is of general relevance to a common law election, but the issue becomes most acute when it comes to contract affirmation. The decided cases are divided on the matter. The prevailing view in England, stated several times by the Court of Appeal, is that the affirming party's knowledge of its right to elect, particularly of its right to disaffirm, is required for an effective affirmation to occur.[74] This seems, however, to contradict previous dicta of the House of Lords.[75] The prevailing view was criticised on the basis that to require such knowledge would 'encourage perjury and reward those who do not seek advice'[76] and contravene 'objective standards' favoured by the common law.[77] In Australia, therefore, the balance of authority seems to go in the opposite direction.[78] This view is, of course, open to the criticism that a choice made without knowing that there is a right to choose can hardly be described as an informed or conscious choice.[79] A more refined analysis takes note of the tension between intention and knowledge. An unequivocal intention not to disaffirm the contract is objectively assessed irrespective of the affirming party's knowledge, although the opposite party's knowledge might play some role in its interpretation.[80] However, it appears to be a necessary inference from such a manifestation of intention that the affirming party must at least have some 'apparent awareness' of both the facts and its right to elect.[81] This inference is drawn objectively and raises a rebuttable legal presumption that the requisite

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73 Feltham, Hochberg and Leech, above n 1, 426, cf 427. Cf Handley, *Estoppel by Conduct and Election*, above n 1 [14-002], [14-003].

74 *Peyman v Lanjani* [1985] Ch 457, 486–7 (Stephenson LJ), 494 (May LJ), 500 (Slade LJ); *Stevens & Cutting Ltd v Anderson* [1990] 1 EGLR 95; *HB Property v Secretary of State for the Environment* (1999) 78 P & CR 108, 113, 114 (Sir Christopher Staughton), 117 (Aldous LJ), 118 (Henry LJ).

75 *Kammins* [1971] AC 850, 866 (Lord Morris), 877–8 (Lord Pearson), 883 (Lord Diplock).

76 Ibid 878 (Lord Pearson).

77 Handley, 'Exploring Election', above n 1, 96–7.

78 *Sargent* (1974) 131 CLR 634, 645, 656–8; *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622, 634 ('*Khoury*'); *Tiplady v Gold Coast Carlton Pty Ltd* (1984) 8 FCR 438, 451 (McGregor and Spender JJ); *Re Hoffman; Ex parte Worrell v Schilling* (1989) 85 ALR 145, 151 ('*Re Hoffman*'); *Wiltrading (WA) Pty Ltd v Lumley General Insurance Ltd* (2005) 30 WAR 290, 304–5 ('*Wiltrading*'); and, to a certain extent, *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 256 ALR 644, 664 (McLure JA). Cf *Coastal Estates* [1965] VR 433.

79 Feltham, Hochberg and Leech, above n 1, 430, 431–2.

80 *Stocznia No 3* [2002] 2 All ER (Comm) 768 [90] (Rix LJ); *Immer* (1993) 182 CLR 26. Cf *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048, 1052–3 (Lord Denning MR), 1054–5 (Buckley LJ), 1056–7 (Cairns LJ); *Elder's Trustee and Executor Co Ltd v Commonwealth Homes & Investment Co Ltd* (1941) 65 CLR 603, 618. See also O'Sullivan, Elliott and Zakrzewski, above n 40 [23.46].

81 *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions* [2002] 2 All ER (Comm) 1053 [21] (Tuckey LJ). See also *Youell v Bland Welch & Co Ltd (No 2)* [1990] 2 Lloyd's Rep 431, 450–1 (Phillips J).

knowledge is present.[82] The requirement that the affirming party must know of its right to elect was accordingly said to be a 'blunt instrument' designed to ameliorate the harshness of the objective test applied to ascertain an unequivocal intention.[83] Clearly, a lesser measure of knowledge would not so effectively achieve that constraining purpose. This analysis thus confines knowledge to a passive role. It is not necessary to show knowledge in order to establish an affirmation, but an affirmation otherwise attested may be disproved by the absence of knowledge. Notwithstanding its apparent force, this analysis fails to address problems that lie at the root of the knowledge debate, namely the parlous position that an affirmation is an act of election and the affirming party's knowledge, particularly of its legal right, is required to form at least part of the justification for the irrevocability of that affirmation. In fact, whether, and if so to what extent, knowledge is required hinges on whether election or estoppel is taken as the true legal ground for an irrevocable affirmation. If the position this article adopts as a result of the ensuing discussions on the third difficulty ('irrevocability') is correct — that the basis of contract affirmation should rest principally upon promissory estoppel — then an allegation of an affirmation ought not to be defeated solely by contrary evidence that shows the affirming party's absence of knowledge.

Third, an election to affirm is, by definition, irrevocable in the absence of consideration, deed or reliance, yet there is a blatant failure to furnish a cogent justification for such irrevocability. In this respect, a contrast has notably been drawn between affirmation and promise-making, with the former being held the more likely to bind as it embodies a present as opposed to future consent[84] and disposes of a 'mere legal power', rather than something of a larger 'magnitude' like a 'full-blown claim-right'.[85] These distinctions are prone to over-generalisation. It is not obvious that a legal power to disaffirm a contract must be less material than a right to contract performance. The power of disaffirmation, albeit a present one, is exercisable within a bounded future period of time. Thus there appears to be little substantial difference between an affirmation and a promise not to do a future act. Further, the assumption underpinning the present-future distinction — that one is more adept in dealing with present than future matters — whether sustainable or not, is plainly no conclusive proof of the irrevocability of a disposition of a present power or right. Hence, more specific justifications have to be identified, and there are three that merit substantial treatment. The first justification asserts that an election to affirm is binding for the reason that the elector is 'confronted' with inconsistent rights, or, in other words, because 'the stage has been reached' where a choice must be made 'once and for all'.[86] This appears to be what distinguishes a common law election between substantive rights from an election in legal

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82 *Insurance Corp v Royal Hotel* [1998] Lloyd's Rep IR 151, 162–3 (Mance J); *Yukong*[1996] 2 Lloyd's Rep 604, 609 (Moore-Bick J).

83 O'Sullivan, Elliott and Zakrzewski, above n 40 [23.49].

84 P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979) 754–6: see also Farnsworth, above n 22, 120–1;

85 Bigwood, 'Fine-Tuning Affirmation of a Contract by Election: Part 1', above n 1, 75.

86 *Immer* (1993) 182 CLR 26, 41, 42 (Deane, Toohey, Gaudron and McHugh JJ), citing with approval Bower and Turner, above n 10, 313. The requirement of 'confrontation' is apparently kept intact in the latest edition: Feltham, Hochberg and Leech, above n 1, 360.

proceedings.[87] No satisfactory guideline has, however, been offered as to how to decide whether or not a party is so 'confronted' with inconsistent rights. Sometimes, the argument is simply locked into a logical conundrum, in the form of an assertion that an election is not due when, if made, it would not be irrevocable.[88] Sometimes, 'confrontation' seems to be tied to the expiry of a 'reasonable time', which might turn a mere failure to disaffirm into an affirmation.[89] Sometimes, the underlying rationale is even broadly stated to be 'to do justice to the other party'.[90] Apparently, the requirement of 'confrontation' is not reducible to a clearly defined and meaningful criterion and has the dangerous potential to cause confusion and disruption to the law. The first justification must, therefore, be rejected.

The second and third justifications both grow out of a theory that the two parties to an election are in a 'power-vulnerability' relationship, in which the elector holds a power to choose against the electee, thus putting the latter in a vulnerable position relative to the former.[91] This imbalance in position naturally calls for some measure of check on the exercise of the power to choose. The electee, at the receiving end of that exercise of power, might be perceived to be a weaker party in need of special protection. Yet this vulnerability is easily overstated. It is often overlooked that any such protection must be cast in view of and counter-balanced against the goals that the law seeks to achieve by conferring the entitlement to disaffirm in the first place. The critical decision thus lies in whether the legal characterisation of an affirmation as an 'election' is a necessary and better conceived safeguard against unscrupulous or unreasonable exercise of the power to choose. Accepting that a power to choose, particularly a power to affirm, is not exercisable at will due to the existence of a 'power-vulnerability' relationship, the question remains: does this necessitate the characterisation of an affirmation as an election? Let us continue with the second justification, namely certainty and justice to the electee. It is said that the electee is 'entitled to assume that the innocent party will not change his mind' as it 'needs to know with certainty whether the contract … has been terminated or kept alive, for, if it is still alive, he will yet have the opportunity of performance'.[92] Evidently, this rationale is primarily concerned with the effect of the elector's conduct on the electee. Yet it requires no proof of any actual reliance by the latter. The difficulty in proving reliance, particularly 'negative' and 'plausible' reliance, is often cited in support of its dispensation.[93] However, it causes considerable discomfort to realise that the

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87 *Nexus Communications Group Ltd v Lambert* [2005] EWHC 345 (Ch) (31 January 2005) [67]; *Sadiqi v Commonwealth (No 2)* (2009) 260 ALR 294, 333.

88 *Verwayen* (1990) 170 CLR 394, 408–9 (Mason CJ).

89 Ibid 427 (Brennan J).

90 *O'Connor v SP Bray Ltd* (1936) 36 SR (NSW) 248, 262 (Jordan CJ), reversed on other grounds: (1937) 56 CLR 464; see also *Immer* (1993) 182 CLR 26, 31–2 (Brennan J).

91 Farnsworth, above n 22, 181–2.

92 *Stocznia Gdanska SA v Latvian Shipping Co* [1997] 2 Lloyd's Rep 228, 235–6 (Colman J). Similarly, *Kosmar* [2008] All ER (D) 448 (Feb) [38], [66] (Rix LJ); *Sargent* (1974) 131 CLR 634, 656 (Mason J); *Zucker v Straightlace Pty Ltd* (1986) 11 NSWLR 87, 95 (Young J); *Jansen v Whangamata Homes Ltd* [2006] 2 NZLR 300, 303, 307 (Chambers J).

93 Farnsworth, above n 22, 59, 183: 'negative' reliance refers to lost opportunities; 'plausible' reliance refers to the availability of substitutes in the market. See also L L Fuller and William R Perdue, 'The Reliance Interest in Contract Damages I' (1936) 46 *Yale Law Journal* 52, 56; Bigwood, 'Fine-Tuning Affirmation of a Contract by Election: Part 1', above n 1, 79; Dobbs, above n 20, 340.

only injustice the electee can be said to have suffered is 'hypothetical hardship'.[94] This is particularly so considering that there is not so strong a need to encourage reliance upon an affirmation as in the case of a promise. Unlike a promise, which initiates a new transaction, an affirmation disposes of a legal power of a remedial nature, often in response to the other party's wrongdoing. It is evidently more difficult to maintain that the mere likelihood of reliance would be a sufficient ground for holding the innocent party to its affirmatory conduct. A more appropriate approach is to require the other, often guilty, party to show 'actual hardship' before the innocent party can be divested of its power of disaffirmation.[95] Consequently, affirmation rules do not require giving the 'vulnerable' guilty party absolute certainty. Instead, a different legal formula, which provides a suitably lesser degree of certainty, should be preferred to the election doctrine.

The third justification is the so-called 'anti-speculation principle',[96] which rests upon a perception of a contract as a vehicle to shift market risks and a 'pronounced judicial distaste for allowing one party to speculate at the other's risk'.[97] Where a contract is made to shift market risks, say, an 'aleatory' (such as gambling or insurance) contract or, more commonly, a contract for the sale of fungible goods, it is conceived to be inappropriate to allow the elector to uphold the contract when the market is in favour of contract performance, and then disaffirm it when the market turns against it. It is thus said that, in order to discourage such speculative conduct, the elector must be required to choose once and for all whether to disaffirm or affirm the contract. This anti-speculation principle cannot justify the elective view of an affirmation. An initial point is that this principle is inapplicable where a contract is made for purposes other than risk-shifting, such as one whose main objects encompass the development and maintenance of business relationships. More importantly, the anti-speculation principle is focused on the impropriety of the act of power-exercising; but 'speculation' allows for no easy definition. Apparently, the election doctrine is not built upon either low motives arising from opportunism or bad faith on the elector's part. Even though the elector's knowledge of its right to disaffirm the contract might go some way towards suggesting likely speculation,[98] this does not mean that an election to affirm is ineluctably or even commonly speculative. Thus, just as the certainty argument suffers from the fiction of 'hypothetical hardship', the anti-speculation principle is guilty of too readily assuming the existence of speculative, hence wrongful, conduct. Founded on an assumed rather than established act of 'speculation', the election doctrine casts the net too wide and is overly biased in favour of the electee.

Not only is the conferral of irrevocability upon an affirmation in prevention of likely speculation excessive in measure, but it is also wholly unnecessary given

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94 Treitel, above n 69, 27. Cf *Stocznia No 3* [2002] 2 All ER (Comm) 768 [99] (Rix LJ).

95 O'Sullivan, Elliott and Zakrzewski, above n 40 [23.11]; Bigwood, 'Fine-Tuning Affirmation of a Contract by Election: Part 1', above n 1, 80.

96 Farnsworth, above n 22, 184–5.

97 Ibid. See also Roy Kreitner, 'Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk' (2000) 100 *Columbia Law Review* 1096, 1097 nn 2–3.

98 See, eg, *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 (PC-Canada).

that a speculative exercise of the power to choose is already under check by an existing mechanism. The mechanism requires a party in whom a power of disaffirmation is vested to exercise that power within a reasonable time; otherwise the power would be taken out of its hands.[99] This 'reasonable time' rule is said to rest upon the fact that procrastination would prolong 'the time during which the other party is at [the elector's] mercy'.[100] However, the rule protects the other party not from the exercise of the power to choose per se, but from such power-exercising as would cause injury or prejudice to the other party.[101] Consequently, where it is held that the power to choose lapses after a reasonable time, an element of reliance or detriment seems to be essential to the inquiry whether that 'reasonable time' has been reached. The rule is thus based on the effect of one's choice upon the other. By contrast to the anti-speculation principle, this is a more solid ground on which a loss of a power to disaffirm may rest. Thus, a failure to disaffirm the contract within a reasonable time, whether characterised as affirmation[102] or acquiescence[103] or 'affirmatory' laches,[104] is best viewed not as an act of election, but as an implicit statement not to disaffirm capable of giving rise to a promissory estoppel. *Ex hypothesi* harm is not a good justification for irrevocability in the present context. With a more balanced approach already in place, it must be regarded as intuitive for the law to have accepted the elective view of an affirmation.

The preceding survey casts serious doubt on the propriety of the use of 'election' as a choice between disaffirming and affirming the contract. The notion of an election to disaffirm or affirm is, in fact, a fiction. It disguises the fact that there are actually two distinct issues, incapable of being accommodated under one single legal concept. The first is whether a contract has been justifiably and effectively disaffirmed. The irrelevance of the disaffirming party's knowledge of either the facts or its right to disaffirm has all but obviated the elective view. Rather than being a legal consequence of the disaffirming party's choice, irrevocability results naturally from the destructive effect of a disaffirmation. The second issue is whether the party with the power to disaffirm is precluded, either temporarily or permanently, from exercising that power. A mere unequivocal statement to give up that power does not of itself produce a conclusory effect. Estoppel, most relevantly promissory estoppel, has, in fact, long been applied to

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99 *Halkett v Earl of Dudley* [1907] 1 Ch 590, 597 (Parker J); *Berners v Fleming* [1925] 1 Ch 264, 275 (Sargant LJ), 269–70 (Pollock MR); *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 398 (Lord Goff); *Newnham v Baker* [1989] 1 Qd R 393, 404 (Derrington J). Cf *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823, 828–9 (Browne-Wilkinson J).

100 Farnsworth, above n 22, 184–5. See also *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1281 (Lord Blackburn).

101 *Clough v London and North Western Railway* (1871) LR 7 Ex 26, 35; *Allen v Robles* [1969] 1 WLR 1193, 1196; *Scarf v Jardine* (1882) 7 App Cas 345, 360 (Lord Blackburn); *Nelson v Rye* [1996] 1 WLR 1378, 1392; *Coastal Estates* [1965] VR 433, 443 (Sholl J); *Almond Investors Ltd v Kualitree Nursery Pty Ltd* [2011] NSWCA 198 (27 July 2011) [82] (Bathurst CJ).

102 *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 398 (Lord Goff); *Smethurst v Mitchell* (1859) 1 El & El 622, 120 ER 1043; *Scarf v Jardine* (1882) 7 App Cas 345, 360 (Lord Blackburn); cf *Allen v Robles* [1969] 1 WLR 1193.

103 *Vigers v Pike* (1842) 8 Cl & Fin 562, 651–2; 8 ER 220, 254 (Lord Cottenham LC).

104 As a contrast to 'prejudicial' laches: O'Sullivan, Elliott and Zakrzewski, above n 40 [24.17]; see also *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 (PC Canada), 239–40.

effectuate an affirmation or its equivalent.[105] Most cases decided under the common law doctrine of election are equally explicable by promissory estoppel.[106] Indeed, two cases most frequently cited in support of the elective view, *Bentsen v Taylor, Sons & Co (No 2)*[107] and *The Kanchenjunga*,[108] were both on their facts testaments to the need for establishing reliance.[109] It is difficult to find a case where an irrevocable election to affirm was found in the absence of facts supporting a promissory estoppel. There appears to be no direct authority where a mere statement to give up the power to disaffirm, without being relied upon, was held to be binding. Instead, the election cases often contain reference to the elements of injury, prejudice or reliance.[110] It has been suggested that 'in the interest of simplicity and uniformity', promissory estoppel should be adopted as 'the ruling criterion in all such cases'.[111] This suggestion was echoed both judicially[112] and in academic works.[113] Perhaps the overriding policy in regulating contract affirmation should not be simplistically defined as the promotion of consistency in conduct per se, but more significantly, it should be associated with the prevention of windfalls obtained or injuries inflicted by inconsistent conduct. The prevention of windfalls is the role of the principle of benefit and burden,

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105 *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741; *Legione v Hateley* (1983) 152 CLR 406; *Goldsworthy v Brickell* [1987] 1 Ch 378, 410 (Nourse LJ); *Peyman v Lanjani* [1985] Ch 457, 488 (Stephenson LJ), 500–1 (Salde LJ); *Yukong* [1996] 2 Lloyd's Rep 604, 608 (Moore-Bick J); *MSC Mediterranean Shipping Co SA v BRE-Metro Ltd* [1985] 2 Lloyd's Rep 239; *Stocznia v Latvian Shipping* [2001] 1 Lloyd's Rep 537 [176]; *Foran v Wight* [1989] 168 CLR 385, 458–9 (Gaudron J); *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, 304.

106 In Australia, this would be the case if we accept the view that promissory estoppel could act as a sword and create a cause of action: see, eg, *Waltons Stores* (1988) 164 CLR 387, 400 (Mason CJ and Wilson J), 425–6 (Brennan J). Contrary views have been expressed by some other High Court judges: (1988) 164 CLR 387, 444–5 (Deane J); *Verwayen* (1990) 170 CLR 394, 445 (Deane J), 459 (Dawson J).

107 [1893] 2 QB 274.

108 [1990] 1 Lloyd's Rep 391, applied in a way akin to promissory estoppel: *Round Imports v Rexam Glass Barnsley Ltd* (Unreported, England and Wales Court of Appeal, Nourse, Chadwick and Hale LJJ, 5 October 2000) [37], [42] (Hale LJ).

109 See also Treitel, above n 69, 25.

110 The Australian courts seem to adopt a rule that dispenses with the requirement of knowledge of right where an affirmation prejudices the other party: *Coastal Estates* [1965] VR 433, 443 (Sholl J), 453 (Adam J); *Sargent* (1974) 131 CLR 634, 657–8 (Mason J); *Turner v Labafox International Pty Ltd* (1974) 131 CLR 660, 670 (Mason J), cf 665 (Stephen J); *Khoury* (1984) 165 CLR 622, 633; *Re Hoffman* (1989) 85 ALR 145, 152; *Wiltrading* (2005) 30 WAR 290, 304.

111 N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot's Law of Contract* (LexisNexis Butterworths, 10th Australian ed, 2012) [21.28].

112 *Charles Rickards Ltd v Oppenhaim* [1950] 1 KB 616 623, 626 (Lord Denning); *Panchaud* [1970] 1 Lloyd's Rep 53, 57 (Lord Denning), cited with approval in *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce; LORICO* [1997] 2 Lloyd's Rep 386, 397–8 (Evans LJ); *Stocznia v Latvian Shipping* [2001] 1 Lloyd's Rep 537, 566.

113 Treitel, above n 69; F M B Reynolds, 'Election Distributed' (1970) 86 *Law Quarterly Review* 318, 324 n 31; Bower and Turner, above n 10 [310], cited and applied *Nurcombe v Nurcombe* [1985] 1 WLR 370, 379, 380 (Sir Denys Buckley). Cf Feltham, Hochberg and Leech, above n 1, 359 n 1, 417; S M Waddams, *The Law of Contracts* (Canada Law Book, 5th ed, 2005) [610], cited with approval in *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co* (1994) 115 DLR (4th) 478, 486.

which centres on the receipt and/or retention of a benefit.[114] There were already suggestions that a party, having reaped benefits or advantages from the continuance of the contract, could not be allowed to disaffirm it.[115] By analogy to promissory estoppel, whether the receipt and/or retention of a benefit should produce such a preclusive force and hence support an affirmation of the contract is best left in the hands of equity. Thus, the principle of promissory estoppel, coupled with that of benefit and burden, ought to be the favoured means of implementing the overriding policy. On the whole, the use of 'election' is an example of the form subduing the substance and the terminology eclipsing the principle. It is unfounded and supererogatory, and should be discarded.

B *Election between Persons*

Election between persons is said to arise where, as between two persons answerable alternatively, but not jointly or jointly and severally,[116] to a claim brought by a third party, that third party chooses to hold one of them liable. It mainly involves the application of one facet of the doctrine of undisclosed principal, under which a principal, undisclosed at the time of an act done on its behalf by an agent with proper authority, can, once discovered, be sued by a third party affected by that act. The third party is hence said to be put to election between holding either the principal or the agent liable and such an election, once made, is irrevocable.[117]

Such an election must not be confused with a merger. In a number of cases it was held that a judgment obtained against either the principal or the agent precluded an action against the other.[118] The judgment was sometimes said to evidence an 'election' made by the third party.[119] But the better view seems to be that these cases rested upon a theory that the third party had but one cause of action which was then extinguished by and merged into the judgment even where the third party lacked necessary knowledge as to which parties might be sued.[120]

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[114] See, eg, *Long v Lloyd* [1958] 2 All ER 402; *Sargent* (1974) 131 CLR 634, 641 (Stephen J) and the discussion accompanying n 11 above. See generally Christine J Davis, 'The Principle of Benefit and Burden' (1998) 57 *Cambridge Law Journal* 522.

[115] *Craine* (1920) 28 CLR 305, 326 (Issac J); *Sargent* (1974) 131 CLR 634, 641 (Stephen J); *Tropical Traders* (1964) 111 CLR 41, 55 (Kitto J). Cf Rossiter, above n 30, 564.

[116] In the case of successive or joint tortfeasors, satisfaction would be the only bar: *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 19–20 (Viscount Simon LC), 31 (Lord Atkin), 54 (Lord Porter); *Fowler v Stephens* [1991] 3 NZLR 304, 309 (Thomas J), noted F M B Reynolds, 'Election and Merger' [1994] *Journal of Business Law* 149.

[117] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 30 (Lord Atkin); *Clarkson Booker Ltd v Andjel* [1964] 2 QB 775, 791 (Willmer LJ), 794, 795 (Russell LJ); *Chestertons v Barone* [1987] 1 EGLR 15.

[118] *Kendall v Hamilton* (1879) 4 App Cas 504; *Buckingham v Trotter* (1901) 1 SR (NSW) 253; *Moore v Flanagan* [1920] 1 KB 919; *Firm of RMKRM v Firm of MRMVL* [1926] AC 761 (PC Shanghai).

[119] *Morel Bros & Co Ltd v Earl of Westmoreland* [1903] 1 KB 64, 77 (Collins MR), affirmed [1904] AC 11, 14 (Earl of Halsbury LC), 15 (Lord Davey). See generally, Kenneth R Handley and George Spencer Bower, *Res Judicata* (LexisNexis, 4th ed, 2009) [19.01]–[19.02], [22.05]–[22.06].

[120] *Kendall v Hamilton* (1879) 4 App Cas 504, 515 (Lord Cairns), 526 (Lord Penzance), 539 (Lord Selborne), 542 (Lord Blackburn); *Moore v Flanagan* [1920] 1 KB 919, 924, 925 (Bankes LJ), 925–6 (Scrutton LJ), cf 928 (Atkin LJ); *Marginson v Ian Potter & Co* (1976) 136 CLR 161, 169

Merger, therefore, stems from the making of a judgment and, unlike election, is not an act of or an informed choice by a litigant, but occurs upon judgment and operates irrespective of the litigant's knowledge. This does not, of course, mean that merger is the only ground on which those cases can be explained. Election might still be relevant where the third party is conceived to have not one, but two separate causes of action,[121] and is therefore precluded by a judgment against the agent from suing the principal if it possesses 'knowledge of the identity of the principal' at the time of the judgment.[122] In such circumstances, however, there might be no inconsistency between the two causes of action and consequently the third party is free to pursue both until the satisfaction of its claim.[123] Further, since a merger is undone once a judgment given is set aside, there is a risk in relying solely upon merger in the face of that likelihood.[124] It might therefore be necessary to inquire whether there might arise an election prior to and/or short of judgment.

Again, it has been stated that an election requires the manifestation of an unequivocal intention to abandon the alternative option,[125] and that the elector must have both 'full knowledge of all the relevant facts'[126] and 'actual knowledge of [its] right to [elect]'.[127] There is, however, grave uncertainty as to whether the notion of election is a tenable legal concept. The underlying rationale of the doctrine of undisclosed principal has long been a source of controversy. In particular, it is far from clear on what basis the principal is made liable to the third party. This will create some difficulties in satisfying the requirement that there must be alternative liabilities. The principal's liability might be a contractual one as the principal might be said to have given its general consent to any contract entered into by the agent within the scope of authority. There is only one contract and the principal either is or is not party to it.[128] However, the liability of the principal and the agent might still be in the alternative if the question is made to turn upon the construction of the agency contract, or if the principal's liability is imposed by the law to afford greater protection to the third party's expectation

(Gibbs and Mason JJ); *Simon v O'Gorman Pty Ltd* (1979) 27 ALR 619, 638–9 (Lockhart J). Cf Note, 'Election of Remedies' (1923) 36 *Harvard Law Reform* 593, 595 n 19.

121 For example, one cause of action arises from the contract against the agent and the other imposed by law against the principal: Maurice H Merrill, 'Election between Agent and Undisclosed Principal: Shall We Follow the Restatement?' (1933) 12 *Nebraska Law Bulletin* 100, 121–2; James Barr Ames, 'Undisclosed Principal — His Rights and Liabilities' (1909) 18 *Yale Law Journal* 443, 449–50.

122 *Restatement (Second) of Agency* (1958) § 210. See also *Fowler v Stephens* [1991] 3 NZLR 304, 312.

123 *Restatement (Third) of Agency* (2006) § 6.09. Merrill, above n 121, 118; Mark A Sargent and Arnold Rochvarg, 'A Reexamination of the Agency Doctrine of Election' (1982) 36 *University of Miami Law Review* 411, 431; Michael L Richmond, 'Scraping Some Moss from the Old Oaken Doctrine: Election between Undisclosed Principals and Agents and Discovery of Their Net Worth' (1983) 66 *Marquette Law Review* 745.

124 *C Inc plc v L* [2001] 2 All ER (Comm) 446, [102]–[107]; *Petersen v Moloney* (1951) 84 CLR 91, 102–4.

125 *Chestertons v Barone* [1987] 1 EGLR 15, 16 (May LJ), 17 (Croom-Johnson LJ); cf *Pyxis Special Shipping Co Ltd v Dritsas & Kaglis Bros Ltd; The Scaplake* [1978] 2 Lloyd's Rep 380.

126 *Clarkson Booker Ltd v Andjel* [1964] 2 QB 775, 795 (Willmer LJ); *Fowler v Stephens* [1991] 3 NZLR 304, 308, 310.

127 *C Inc Plc v L* [2001] 2 All ER (Comm) 446 [111]. See also *Moore Large v Hermes Credit & Guarantee plc* [2003] 1 Lloyd's Rep 163, 179 ff (Colman J).

128 *Fowler v Stephens* [1991] 3 NZLR 304, 308.

interest. At any rate, even accepting that there are alternative liabilities, the self-conferred irrevocability of an election is on shaky ground. Despite repeated affirmative assertions of its validity by the courts, that notion has not been, as a matter of either authority or principle, as well established as one might think.[129] Few direct authorities in support of it can be found. Perhaps the most notable of indirect authorities is the English Court of Appeal's decision in *Clarkson Booker Ltd v Andjel*.[130] It was held there that the third party's institution of proceedings against the agent prima facie constituted an act of election.[131] In that case, however, no election was found as the presumption of election was rebutted by facts suggesting the equivocalness of the third party's conduct, particularly the fact that it had made demands to the principal, the only person to whom credit had been given.[132] There is, however, very little in *Andjel* or in other undisclosed principal cases justifying the irrevocability of an election, which, inevitably, requires a choice to be made once and for all. Yet no trace of this theory can be found in the existing body of case law. 'Election' is thus criticised as a 'solving word', a 'substitute for thought' and 'one of those vague words that covers oblique references to other more precisely definable doctrines', and is accordingly considered to be a guise for what is truly in operation, namely promissory estoppel.[133] As shown in the context of contract affirmation, there is little doubt that, in contrast to election, estoppel is more firmly anchored in both legal principle and authority. It is no coincidence that the small number of cases in which an election between persons was found to have been made can all be explained on the ground of promissory estoppel.[134] Evidently, promissory estoppel may operate as an alternative to election as a ground for the doctrine of undisclosed principal.[135] But it may well be that wider recognition needs to be given to the fact that promissory estoppel plays a dominant role in this area. Similarly, the notion of election is overshadowed by the proposition that, in the absence of merger or estoppel, an election is binding only when the third party has received some benefit from the choice it makes.[136] This is in effect an implicit adoption of the principle of benefit and burden in substitution for the election doctrine. Clearly the binding force comes from the third party's inability to revert to the status quo rather than its act of choosing. There is much to be said for the view that a choice to sue either the principal or the agent ought not to be held irrevocable unless it works an estoppel or constitutes a receipt of benefit under the principle of benefit and burden. This view will undermine the notion of election, as is illustrated by a leading authority often cited in this connection, *Scarf v Jardine*.[137]

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129 Reynolds, above n 113.

130 *Clarkson Booker Ltd v Andjel* [1964] 2 QB 775.

131 Ibid 791 (Willmer LJ) ('strong evidence'), 795 (Russell LJ); see also *Chestertons v Barone* [1987] 1 Estates Gazette Law Reports 15, 17 (May LJ) ('clearest evidence').

132 *Clarkson Booker Ltd v Andjel* [1964] 2 QB 775, 792–3 (Willmer LJ), 795 (Russell LJ).

133 Reynolds, above n 113, 323–5; Frank B Clayton, 'Election Between the Liability of an Agent and of his Undisclosed Principal' (1925) 3 *Texas Law Review* 384, 389, 391, 408, quoting D Pound, 'Foreword' in Ewart, above n 18.

134 See, eg, *Smethurst v Mitchell* (1859) 1 El & El 622; 120 ER 1043.

135 *Restatement (Third) of Agency* (2006) § 6.09 cmt (d).

136 Clayton, above n 133, 390–1, 408–9.

137 *Scarf v Jardine* (1882) 7 App Cas 345.

Scarf v Jardine is not an undisclosed principal case. The claimant supplied goods on credit to a partnership constituted by S and R, without knowing that S had dropped out and had been replaced by B. S, having given authority to R to deal as his agent but then having failed to bring his withdrawal from the partnership to the attention of the claimant, who had 'acted upon the faith that that authority continued',[138] was thereby 'estopped'[139] or 'precluded'[140] from denying liability. Clearly, the claimant had to choose which pair of partners, either S and R, as apparent partners, or B and R, as actual partners, to hold liable.[141] The troubling question was, however, not the existence of alternative liabilities, but the legal basis on which the claimant might be said to be bound by his choice. It was held by a unanimous House of Lords that when the claimant, after acquiring knowledge of the truth, brought an action against B and R and subsequently proved against them in liquidation proceedings, he had by doing so made a final and conclusive election which precluded him from subsequently suing S.[142] Their Lordships all explicitly accepted that the claimant's choice, being an election, became irrevocable at once.[143] Yet the legal route by which this conclusion was reached was, to say the least, oblique. For instance, Lord Selbourne invoked the ill-defined terminology of 'approbate and reprobate',[144] while Lord Blackburn relied upon some old vague authorities.[145] On the facts of the case, it does not seem just to dismiss the claim against S before the claimant recovered anything from R and B. A better view is that that claim is barred only if the claim against R and B has been wholly or substantially satisfied. Naturally, a satisfaction of only an insubstantial part of the latter claim will not have this preclusive force. It can be argued that this amounts only to one of the factors to be considered when determining whether the claimant has reached a point of no return. This suggests the introduction of an equitable criterion, which will inescapably signify the demise of the notion of election.

A few comments must be added on the notion of ratification. Ratification is a unilateral manifestation of will by a person (the 'principal') to adopt an act (usually the making of a contract) of another (the 'agent') in the name or on behalf of, but without authority from, the principal, with the effect that the principal is retrospectively put into the same position as if the agent had acted with authority. As a unilateral juristic act, a ratification is sometimes confused with an election.[146] But it is best seen as a notion of its own kind. Ratification and election are distinguishable in several respects, particularly in that ratification does not require

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138 Ibid 357 (Lord Blackburn).
139 Ibid 349 (Lord Selborne LC).
140 Ibid 357 (Lord Blackburn).
141 Ibid 350–1 (Lord Selborne LC), 359 (Lord Blackburn), 363 (Lord Watson), 364 (Lord Bramwell).
142 Ibid 353 (Lord Selborne LC), 362 (Lord Blackburn), 364 (Lord Watson), 364–5 (Lord Bramwell).
143 Ibid 353 (Lord Selborne LC), 360 (Lord Blackburn), 363 (Lord Watson), 364–5 (Lord Bramwell).
144 Ibid 353.
145 Ibid 360, citing notes to *Dumpor's Case* 1 Sm LC 8th ed 47, 54 and *Coke upon Littleton* 146a.
146 See, eg, *Verschures Creameries Ltd v Hull & Netherlands Steamship Co Ltd* [1921] 2 KB 608. The owners whose goods were delivered by forwarding agents to a customer contrary to their instruction sued and obtained judgment against the customer. It was held that they were thereby precluded from suing the agents in tort. Bankes and Scrutton LJJ based their decision on election, yet the preferable approach seems to be that adopted by Atkin LJ (at 612), suggesting that the owners had ratified the act of the agents. See also *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 31 (Lord Atkin).

such knowledge on the part of the principal as is necessary to give rise to an election. The reason is said to be that a ratifying party is seeking to 'extend his rights, by seeking an advantage for himself over and above what he would have absent the ratification', whereas an elector is having his rights limited and therefore needs 'protection of not recognising the effect of what he did unless he knew not only the facts but also the law'.[147] In this regard, ratification can be analogised to contract disaffirmation. Both are irrevocable irrespective of full knowledge and, even if solely for that reason, should not be regarded as acts of election.

IV Conclusion: the Reconstruction of the Election Theory

The dismantling of the notion of common law election calls for a reconstruction of the general theory of election. Two major propositions have been suggested. The first is that the notion of election is susceptible to a general theory, which applies in all cases where that notion is invoked. An election is a juristic act constituted by identical, well-defined components. It is well established that all choices labelled 'election' invariably comprise four essential elements. An election is a unilateral choice between inconsistent options. According to the orthodox view, it must also be an informed choice, made with some degree of knowledge, and is universally accepted and often unhesitatingly pronounced as final and binding. The actual or presumed presence of these elements in all election cases gives rise to a general theory which addresses such common issues as the constitution and legal effect of an election and, by doing so, binds different categories and species of election into a conceptual whole. The unity of this general theory is not impaired by species of election falling outside the four well-recognised categories. For instance, under voyage charters, a valid nomination of port or berth by the charterer is regarded as an election, as opposed to a 'selection', and is accordingly irrevocable unless otherwise provided under the charter.[148] However, the above orthodox theory suffers obvious weaknesses with respect to its fourth element (irrevocability) and is consequently in need of reconstruction.

The second proposition is that the orthodox theory, wrongly in my view, conceives 'election' as a normative concept comparable to estoppel and (perhaps) waiver, resulting in the loss or suspension of a legal right or benefit. This conception is embodied in the fourth element (irrevocability) and there is a distinction between a common law election and an equitable election in that the former's irrevocability springs up automatically from the unilateral choice itself, while the latter does not become irrevocable unless and until the court exercises its discretion to so hold. Only in a common law election does there reside the 'normativity' of election in the sense used here. In other words, the notion of election when operating at common law is regarded as in itself furnishing a distinct rationale or justification for the irrevocability of choices so labelled. Under the orthodox theory, the normativity of election consists in justifying the irrevocability

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147 *SEB Trygg Liv Holding AB v Manches* [2006] 1 WLR 2276, 2295–5 (emphasis in original).

148 J Cooke et al, *Voyage Charters* (Informa London, 3rd ed, 2007) [5.22], [5.23], [7.28] and cases cited therein, particularly *Brightman & Co v Bunge y Born Limitada Sociedad* [1924] 2 KB 619, 637 (Atkin LJ), affirmed on other grounds: *Bunge y Born v Brightman* [1925] AC 799.

of an election by its intrinsic qualities only. The notion of election hence becomes a self-sustained and internally rationalised system. Despite its apparent simplicity and attractiveness, this normative conception of election is at odds with the reality of how that notion operates. In truth, no court has explicitly attributed the irrevocability of an election to any of its essential elements. A choice simply cannot be said to be irrevocable solely based on the fact that it is a unilateral informed choice between inconsistent options. The case law offers little indication whether any other explanatory element might lurk behind such irrevocability or, if there is one, what it is. In any event, if the irrevocability of an election is to be explained by a hidden element, this might have the unintended effect of turning the 'election' into something else, such as, very often, a choice unilateral no more. This is evidenced by a review of two major categories of common law election, which has demonstrated Anglo-Australian law's failure to answer properly, and really its striking inattention to, the questions whether and how such widely assumed irrevocability might be justified. The principle of promissory or equitable estoppel should be adopted as the principal controlling concept in respect of both an affirmation of a contract and a choice to sue either an undisclosed principal or the agent. An election to nominate a port or berth in voyage charters ought similarly to be viewed as estoppel-based in that its irrevocability is conferred to avoid putting the shipowner to unreasonable expense and inconvenience.[149] This principle and the principle of benefit and burden are better founded than the notion of election as they target only inconsistent conduct that causes undue detriment or windfall. Whether it is the principle of promissory estoppel or the principle of benefit and burden that comes into play, an extra factor extrinsic to a unilateral choice (reliance and benefit respectively) is introduced into the equation and the issue of irrevocability is made a matter for judicial discretion. The irrevocability of an 'election' may also be justified by context-specific reasons, such as contract provisions,[150] operation of law,[151] or statutes.[152] Again, they are external to a unilateral choice. Resort to such extrinsic considerations in justifying the irrevocability of an election is bound to lead to an externalisation of the rationale of that notion, and hence its breakdown as a self-sustained normative system becomes inevitable. The invocation of external justifications destroys the normativity of the notion of election.

The better view, therefore, is to recognise that the notion of election should cease to be a normative concept and that it does not deal with the issue of irrevocability. Unlike estoppel, election does not in itself justify or explain the irrevocability (if any) of a choice. The primary purpose of a general theory of election, which governs both a common law election and an equitable election, is

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149 *Cape of Good Hope Motor Ship Co Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, 720 (Viscount Radcliffe).

150 For example, a 'payment in lieu of notice' clause in an employment contract that confers on the employer alternative options may set out the binding effect of a choice thereof: *Cerberus Software Ltd v Rowley* [2001] IRLR 160, 164–5 (Sedley LJ), noted in D Pearce, 'Election Latest' (2001) *Cambridge Law Journal* 261.

151 *Tropical Traders* (1964) 111 CLR 41, 55 (Kitto J); *Craine* (1920) 28 CLR 305, 326 (Isaacs J).

152 For example, a counter notice served by a tenant pursuant to s 25(5) of the *Landlord and Tenant Act 1954* (UK) 2 & 3 Eliz 2, c 56 might be regarded as irrevocable as a matter of statutory interpretation: *Pennycook v Shaws (EAL) Ltd* [2004] Ch 296, 308 (Arden LJ).

to be confined to the identification of inconsistency (which necessitates a choice) and a determination whether a choice has been made. It tells us when only one of the options can be taken and that a choice must be made. It also tells us whether an 'election' is completed by way of an extraneous and objective manifestation of one's inner decision. But it no longer offers any answer to the questions whether and when such an election is to be held irrevocable. In this sense, the normative conception of election should be discarded and the term 'election' should be used in a descriptive sense only. This does not mean that a unilateral choice will never be binding. Some choices may be; others may not. Where the choice becomes irrevocable as a result of the operation of promissory estoppel, it does not bind unilaterally. But a unilateral choice may still be binding as a result of the contractual, statutory or social context in which it is made. The key point is, however, that even where a unilateral choice is binding, it is binding not because it constitutes an act of election, but because there is some other good reason compelling that conclusion. It follows from the parting with irrevocability as an essential element of an election that there is no good reason to insist upon the requirement of knowledge in all election cases. The relevance and extent of knowledge is dictated by the justificatory reason operating to render an election irrevocable. Where such irrevocability rests upon a principle like that of promissory estoppel, the role of subjective awareness is diminished almost to the point of irrelevance. Conversely, there will inevitably be circumstances in which the commanding reason necessitates the conclusion that a mistaken or otherwise involuntary choice is revocable. Therefore, almost a century after Ewart's call for a distribution of waiver into better-anchored subcategories, election included,[153] it has become clear that election must endure a similar fate and a redistribution of it into normatively more tenable doctrines is required by both rationality and justice.

[153] Ewart, above n 18.