

not dismiss the bill, but the plaintiff having refused to elect, he dissolved an injunction which he, the plaintiff, had obtained, to restrain the defendant from proceeding at law upon a judgment rendered in their favor.

In the case now before the court, the application to compel the complainant to elect, was made by one of several defendants, and the remaining defendants have submitted the cause under the rule, upon the bill, answers, exhibits, and proofs, in the cause.

The order to compel the plaintiff to elect, was passed on the 30th of June, 1849, and the commission with the proofs, was returned on the 20th of the same month, and it is possible, therefore, that the plaintiffs had collected all their evidence before they were put to their election. But the question is, whether they could, after they were put to their election, proceed in this cause in any way until they actually elected so to do. If they had come here, and asked to have the commission remanded, upon any ground, however strong, or for any other order, essential to the preparation of their cause, for the consideration of the court, would they not have been told, your doing so is an election to proceed in this court, and your suit at law must be enjoined ; the rule being that any decisive act of the party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies. *Sawyer vs Wood, 3 Johns. Ch. Rep., 416.*

It may seem to be hard, that these defendants, who desire to have a decision of the case upon the merits, shall not be permitted to do so, because their associate defendant, without their concurrence, has put the plaintiffs to their election ; but I do not see how the inconvenience to them is to be avoided, without subjecting the plaintiffs to hardships still more intolerable.

The most I can do, therefore, is, in my opinion, to dismiss the bill with costs, the liability to which may, in a majority of cases, be regarded as a sufficient security for such evils.

T. S. ALEXANDER for complainants.

WM. SCHLEY for defendants.