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Undisclosed Principal

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COMMENT ON RECENT CASES

AGENCY—UNDISCLOSED PRINCIPAL—ELECTION—JOINDER.—[N. C.] In a recent North Carolina case[1] the North Carolina Lumber Company brought an action against the Spear Motor Company (principal) and R. L. Blalock & Son (agents) to recover the purchase price of lumber and to enforce a lien against the lot and building of the principal. The agents ordered a carload of flooring from the plaintiff—third person. This was shipped September 11, 1924. There is no definite statement of the date that the plaintiff was informed of the existence of the principal. However, in the opinion there is a statement that the principal was undisclosed. There was a settlement[2] between the principal and the agents on December 8, 1924. Notice and claim of lien were filed and, as stated, suit followed. On September 14, 1925, the plaintiff—third party had "judgment by default final" against the agents. Trial between the plaintiff and the principal occurred at the June term, 1926. The plaintiff moved for judgment at the close of the evidence. Motion was denied and there was a judgment on a verdict for the principal—defendant. On appeal the supreme court declared that there was error "in denying plaintiff's motion for judgment" and granted a new trial.

Thus far the decision seems to be clear. Uncertainty exists, however, because the defendant—principal raised the point that the plaintiff by having a judgment entered against the agents made an "election" and thus barred itself from a further judgment. The supreme court denied that the plaintiff—third party had made a binding election by taking the default judgment.

It was admitted in the opinion that the Supreme Court of North Carolina had previously held[3] that a third party had made an election by taking a judgment against an agent and could not thereafter obtain a judgment against the principal who was undisclosed at the time of the transaction which constituted the contract. There is an attempt to distinguish this decision from the principal decision under review by the following: "The agency was not only not disclosed before the action was begun; it was

1. (1926) 135 S. E. 115.

2. The bill for the flooring was presented to the principal by the agent. Apparently this occurred before the settlement between the principal and agent was consummated. Yet it is stated that no notice that the plaintiff's claim had not been paid by the agent was given to the principal "prior to its settlement" with the agent. If these facts constituted a defense to the plaintiff's claim there is no discussion of it in the opinion and there will be none here. See *Mechem* "Agency" (2nd ed.) secs. 1737-1749.

3. *Rounsaville* v. *Insurance Co.* (1905) 138 N. C. 191, 50 S. E. 619. Apparently the plaintiff sued the principal and the agent in the same action, first got judgment against the agent, and later at the close of the plaintiff's testimony suffered an involuntary nonsuit as to the principal.

denied by Spear Motor Company (principal) in its answer to the complaint."[4]

It is true that the Spear Motor Company argued that R. L. Blalock & Son were independent contractors and not agents. After due consideration the supreme court held, as a "matter of law" that they were agents and not independent contractors. It is necessary to qualify the court's statement that the agency was not "disclosed before the action was begun." The mere fact that the principal was made a party defendant seems to indicate that according to the plaintiff's theory there was a disclosed principal at the time the petition was prepared. The agency was not a disclosed fact only in the sense that the defendant—principal was denying an agency relationship at the trial.

Nevertheless, as stated above, the supreme court in the case under review held that there was no election and gave the following reason: "The plaintiff cannot be held to have made an election, until the issue involving their relationship, raised by the answer of Spear Motor Company in the action in which both the agent (sic) and the principal were defendants, had been determined."[5] This seems to be a curious and uncertain test of "election." If a judgment is necessary to determine "the issue" and the judgment is for the defendant—principal he is protected and an "election" thereafter is a meaningless proposition. If the judgment is for the plaintiff—third party he then has judgments against the agents and the principal and has not been compelled to elect up to that time.

So far as appears the result was that the third party could have sued out an execution on either judgment and at the same time could have claimed the benefit of its lien on the principal's lot. One may suspect that the judgment against the agents was of no practical value. Nevertheless, the result of the case, whatever its theory, seems to be an approach to the holding of the minority of the courts as illustrated by the frequently cited *Beymer* v. *Bonsall*.[6] While the latter case does not contain any definite statement that the third party sued the agent to judgment after he had learned of the undisclosed principal, yet it has been taken to stand for that.[7] Upon that basis the holding is that the third party may also sue the principal to judgment and there is a statement that

4. 135 S. E. 115, at 118. As a matter of fact there seems to be no such distinction. In the *Rounsaville* case the court held in the first place that the agreement was between the plaintiff and the so-called agent in his personal capacity. In other words the other defendant (Carr) was not an agent for the insurance company in the particular transaction. This seems to have been the main issue at the trial. Indeed it may be said that the holding of the court, according to the admission made in the opinion under review, is only a dictum.

5. 135 S. E. 115, at 118. Is the court thinking of a verdict before judgment as the thing that has determined "the issue"?

6. (1875) 79 Pa. 298.

7. *Mechem* "Agency" (2nd ed.) sec. 1759; 23 Harv. Law Rev. 590; *Mechem* "Cases on Agency" 345, note; *McLean* v. *Sexton* (1899) 44 App. Div. 520; *American Trading Co.* v. *Thomas Wilson Sons & Co.* (1902) 74 N. Y. S. 718. Cf. 14 Harv. Law Rev. 68.

satisfaction is the method that the agent or principal must use to obtain a discharge.

Objections have been offered to this decision because it violated some uncertain and confused notions about "election" and most courts have been persuaded to hold otherwise.[8] Writers for law reviews have had something to say about an equally unsatisfactory theory of merger.[9] So far as has been discovered, however, nobody has argued that the result in *Beymer* v. *Bonsall,* supra, was unworkable from the point of view of commercial affairs. Indeed, if one will accept as a premise that an undisclosed principal should be held for the contracts of his agent, the decision seems highly desirable. If so, the result in the North Carolina case at least approaches one's ideal.[10]

There is still another aspect of the decision that requires attention. Is it permissible to sue an agent and his undisclosed principal in the same suit? This problem must be considered from two points of view. In the first place is there any procedural objection to making them joint defendants? Secondly, does the rule of "election" prohibit a suit in which a third person sues both the principal and agent? These questions will be considered in order.

The procedural problem has received very little attention. All discussion that has been found assumes or states that the agent and his undisclosed principal are not jointly liable in the sense that members of a partnership are jointly liable on a partnership contract at common law. Nevertheless, there is authority that under code procedure there is only one cause of action and that a third person properly may proceed against the principal and agent in the same suit on this one cause of action. But it is difficult to keep this problem separated from the second problem of "election." They seem to run into each other.

In *McLean* v. *Sexton*[11] T sued P and A to foreclose a mechanic's lien on P's property. Apparently both defendants demurred separately and appealed separately from interlocutory judgments over-

8. *Lindquist* v. *Dickson* (1906) 98 Minn. 369, 107 N. W. 958 (dictum); *Barrell* et al. v. *Newby* (1904) 127 Fed. 656; *Georgi* v. *Texas Co.* (1919) 225 N. Y. 410, 122 N. E. 238; *Mechem* "Agency" (2nd ed.) sec. 1759.

9. 14 Harv. Law Rev. 68; 4 Columb. Law Rev. 221; 17 Harv. Law Rev. 414. See an article by Frank B. Clayton in 3 Texas Law Rev. 384, advocating the idea of merger. But he discards too many decisions as unsound. See pages 400-402. Merger seems to be a fiction and should not be used if it leads to undesirable results. There is an attempt to answer Mr. Clayton's article. See 98 Central Law Jour. 280. *Mr. Brennen & Sons* v. *Thompson* (1915) 33 Ont. L. R. 465, 22 Dom. L. R. 375, advocates merger.

10. This is contrary to the argument in *Barrell* et al. v. *Newby* (1904) 127 Fed. 656, that "election" in this branch of the law is founded on a public policy that forbids a plaintiff to trifle with the courts. The writer believes that this is a myth; that the third party wishes satisfaction and is doing all he can to secure it; and that artificial barriers should not be set up to prevent him from obtaining satisfaction. It is worthy of notice that in the same opinion it is stated that "he who pleads election need not show that it would be inequitable to permit the plaintiff to recover."

11. (1899) 44 App. Div. 520, 60 N. Y. Supp. 871. The nature of the action here may explain the joinder of both parties.

ruling the demurrers. The objections were that the causes of action had been improperly united and that they did not affect both defendants. The interlocutory judgments were affirmed. The court announced the following principles: (1) "There is really but one cause of action"; (2) "It is a mistake to suppose that a principal and agent can never both be severally liable upon the same contract"; (3) "If they may be sued in separate actions, there is no good reason why both the principal and agent who are liable for a debt should not be sued in the same action."[12]

This decision was followed by a divided court in *Tew* v. *Wolfsohn*.[13] It was there repeated that a demurrer would not lie where T has sued both P and A. Against the objection that causes of action had been improperly united it was held that the complaint stated "but a single cause of action."[14]

The same is true of *American Trading Co.* v. *Thomas Wilson Sons & Co.*[15] The opinion was written by Clarke, J., in special term of the supreme court. Therein he stated: "The multiplication of defendants does not necessarily increase the number of causes of action, even though such defendants are not jointly, but merely severally, liable."

There is a Missouri decision[16] that may be inconsistent with the above New York cases. The point of view of the court was not clearly expressed. The result seems to be definite. T sued A and two undisclosed Ps in the same suit and had judgment against the three. On appeal the defendants argued that "election must be made before suit." The court of appeals, however, affirmed the judgment. It stated that defendants' position was that there was a misjoinder of parties defendant.[17] The answer to this was that such a defect must be raised by demurrer. This procedural difficulty was confused with what is submitted to be a distinct problem, i. e., "election." For the court stated in two places that if a demurrer had been filed the plaintiff would have been required to "elect."[18]

12. The next sentence in the opinion was: "Both will be discharged by the satisfaction of the debt, and neither can be discharged without it." This was a dictum and one that has not stood the test of time in New York. See *Georgi* v. *Texas Co.* (1919) 225 N. Y. 410, 122 N. E. 238.

13. (1902) 77 App. Div. 454, 79 N. Y. Supp. 286. The case reached the court of appeals. See (1903) 174 N. Y. 272.

14. There is also a statement in the opinion that under the New York code a demurrer was not available for a *misjoinder* of parties defendant.

15. (1902) 74 N. Y. Supp. 718.

16. *Central, etc., Co.* v. *Building & Construction Co.* (1915) 189 Mo. App. 405, 176 S. W. 409.

17. With respect to demurrers there is a difference between the provisions of the New York code involved in the New York cases, supra, and the Missouri code. See (1909) Mo. Rev. Sts. sec. 1800. Cf. *Belt* v. *Washington Power Co.* (1901) 24 Wash. 387.

18. Possibly, there may have been further confusion. The opinion contains this statement: "The rule is well settled in such cases that principal and agent are not jointly liable." If this means that a principal and his agent are not normally joint contractors there has been no dissent. But it is a different question whether they may be joined in the same law suit. Cf.

Finally, the more numerous decisions which deal with the problem from the standpoint of "election" demand attention. They are not harmonious. The two points of view may be set forth by contrasting the opinion by Learned Hand, J., in *The Jungshoved*[19] with the opinion of Hough, J., in the same case on appeal. The former in a well considered opinion held that both the agent and the undisclosed principal may be proceeded against in the same suit to a final decree which should provide for "a single satisfaction from either or both." There was to be a provision in the decree that execution should issue against the principal first. However, Judge Hand arrived at his conclusion on the theory that an action on a warranty is in tort as much as in contract and thus no "election" is necessary. Whatever may be the justification of this premise on historical grounds, it is not thought that modern courts know legal history sufficiently to make it likely that the idea will be followed.[20]

This decision was modified on appeal in an opinion by Hough, J.[21] It was ordered that the libel against the agent he dismissed because the principal was disclosed during the negotiations which resulted in the contract. The majority of the court, however, expressed an opinion that if the principal was undisclosed he and the agent could not be sued in one and the same suit.[22]

There are four New York cases which relate to this problem. In *Mattlage* v. *Poole*[23] T sued P and A in the same action. Both were served but P neither answered nor appeared. The trial court

Sessions v. *Block* (1890) 40 Mo. App. 569. Suit by T against both A and P. Trial court required election and T elected to proceed against A. T got judgment but could not collect. Later T sued P. Held that demurrer against T was properly sustained. There is a dictum, however, that T "cannot proceed against both" and "his action against the agent and the principal jointly was unadvisably brought." See also *United, etc., Co.* v. *Granite, etc., Co.* (Mo. App. 1922) 245 S. W. 351; *Anchor Warehouse Co.* v. *Mead* (Mo. App. 1916) 181 S. W. 1057.

19. (1921) 272 Fed. 122.

20. This does not mean, however, that the result at which Learned Hand, J., arrived is undesirable. It is well to mention that the suit was in admiralty. If this adds any peculiar feature it is not mentioned in the opinion.

21. (1923) 290 Fed. 733. The majority opinion is criticized in 22 Mich. Law Rev. 255. Mayer, J., dissented from the opinion and apparently agreed in substance with Learned Hand, J., who wrote the opinion of the district court.

22. The court stated its point of view most strongly in these words: "But whenever or however election must or may be made, it is formally and logically impossible to sue principal and agent in the manner here attempted." Cf. the following remarks: "Doubtless both principal and agent may be made defendants; but if there was an agency, and nothing more, the judgment can never be joint. It results that under any view of the law, and on the facts as alleged in the petition, the pleader should have been put to his election *in limine*." What advantage would there be in suing both the undisclosed principal and his agent if the next step after obtaining service would be to elect between them? See statement, apparently dictum, in *Berry* et al. v. *Chase* (1906) 146 Fed. 625.

23. (1878) 15 Hun (N. Y.) 557.

dismissed the complaint but this action was reversed and remanded. It was thought that there had been no "election."[24]

In *Cherrington* v. *Burchell*[25] T sued P and A in the same suit and judgment was rendered against both. This result was not favored by the appellate division, the court saying: "The plaintiff had the duty to elect after he obtained knowledge of the situation whether he would hold the husband for the failure to disclose the principal, or whether he would hold the wife for the act of the agent." No doubt, it may be inferred from this statement that the "election" should be made as shortly as possible after the knowledge is obtained. In this case the knowledge was obtained before the suit was brought. Thus it may be that the court disapproved of joining P and A in the same action. On the other hand the decision does not necessarily mean more than that an "election" must be made before judgment is rendered. If so, the "election" may be postponed until after the evidence has been presented in court.

Likewise *O'Grady* v. *Howe & Rogers Co. and Thoms*[26] is not very decisive. T sued P and A to obtain specific performance. At the beginning of the trial T moved for judgment on the pleadings against A and the motion was granted. This was followed by trial and judgment was rendered against P. On appeal, the court uttered a dictum that if P had made the proper motion it would have been held that T's conduct in taking a judgment on the pleadings would have been an "election" to hold the agent only. However, the point was held to have been waived and the deficiency judgment against P and A was merely modified so that an execution would not issue against defendant Thoms "until the return of an execution therefor against the defendant Howe and Rogers Company unsatisfied in whole or in part."

In a later case[27] the appellate term held that the trial court erred in directing T to elect whether he would continue his action against P or A.[28] The court stated that "there can be no doubt that the plaintiff had the right to unite the agents and their undisclosed principal as parties defendant in the suit" and then argued that it would be unjust to require "election" before trial.[29] Apparent

24. The appellate court offered the following advice: "The plaintiff may discontinue against O'Donoghue (principal). Strike her name from the complaint and there remains an undoubted right of action against Poole." See *Montague M. M. Co.* v. *All Package G. S. Co., Inc.* (1918) 182 App. Div. 500. See also *Rosenzweig* v. *Raubitschek* (1914) 166 App. Div. 448.

25. (1911) 147 App. Div. 16.

26. (1915) 166 App. Div. 552.

27. *Schwartzreich & Goodman Co.* v. *Quitman* et al. (1920) 181 N. Y. S. 784.

28. T had first sued A alone thinking that A was P. In an examination before trial A disclaimed acting as P. Thereupon T with leave of court amended his complaint and joined P and A as parties defendant.

29. "If the plaintiff were so compelled, the plaintiff, in electing to hold the agent, might be defeated upon the ground that both the agency and the name of the principal were disclosed, and, if it elected to hold the principal, the jury might find that the contract was not made for the latter." Cf. *Columbia Graphophone Co.* v. *Levitan* et al. (1924) 209 App. Div. 215, 204 N. Y. Supp. 421.

approval was given to a passage from *Tew* v. *Wolfsohn,* supra, that an election can not be required until the close of the case.

The Supreme Court of Minnesota[30] fairly may be said to have approved of the New York idea[31] that T may sue A and the undisclosed P in the same action and that "election" will not be required—at least where P is denying that he was such—before T has put in his evidence.

Illinois has contributed a decision with an apparently practical result.[32] T sued P and A in the same suit. P denied joint or several liability and A denied joint liability. T had judgment against both defendants. P alone appealed. The appellate court reversed and remanded the judgment but only "to require defendant in error to elect whether it will take judgment against plaintiff in error or L. A. Shadburne, and when it has so elected then to enter judgment accordingly." This may be said to imply that an "election" is not required until the time has arrived for the rendition of judgment.[33]

Texas seems to agree with Illinois in its solution of the problem. In one case,[34] T sued A, who answered that there was a P and named him. T then filed a "supplemental petition" asking judgment against P and A. The trial court, however, would not permit T to show the existence of P. On appeal this was held to be reversible error, the appellate court adding by way of guidance: "In such a case plaintiff could not recover judgment against both Roquemore (agent) and Lightburne & Co. for the debt, but, if plaintiff should succeed in making proof of undisclosed principal as offered it would have to elect which of the two it would ask judgment against."

In the second case,[35] T sued A and P in the same suit and obtained judgment against both defendants. On appeal, this judgment was reversed and the cause remanded for failure of T to elect. On a motion for rehearing, however, it was held that T might elect in the appellate court in view of the fact that he had not been required to elect theretofore. This seems to be a sensible result for a court that does not wish to follow the Pennsylvania case of *Beymer* v. *Bonsall.*

30. *Gay* v. *Kelley* (1909) 109 Minn. 101.

31. As developed in *McLean* v. *Sexton* and *Tew* v. *Wolfsohn* supra, which were cited by the Minnesota court.

32. *Limousine, etc., Co.* v. *Shadburne and Sbarbaro* (1914) 185 Ill. App. 403. Cf. *Messenden* v. *Raiffe* (1907) 131 Ill. App. 456. But see *Kadish* v. *Bullen* (1882) 10 Ill. App. 566. It is not very clear but it may be said that it denies that the principal and agent can be sued by a third party in the same suit.

33. Other courts, as shown herein, seem to insist upon "election" at an earlier date, such as at the close of plaintiff's case or at the close of all the testimony.

34. *Pittsburg Plate Glass Co.* v. *Roquemore* (1905) 88 S. W. 449.

35. *Ft. Terrett Ranch Co.* et al. v. *Bell* (1925) 275 S. W. 81. There is a good review of the case in 24 Mich. Law Rev. 298. The decision seems to depend in part upon a Texas statute.

There is a decision in Wisconsin[36] which seems in effect to arrive at the same result as the Illinois decision, supra.

California, also, seems to be committed to the idea that T may sue both P and A in the same suit,[37] even though an "election" must be made before judgment is rendered.

On the other hand there are at least expressions that it is improper for T to make A and the undisclosed P defendants in the same suit. Indeed, *Weil* v. *Raymond*[38] holds that a demurrer to a bill in equity by T against P and A will be sustained because he "cannot make both principal defendants in one suit, whether he charges them conjunctively or alternatively." The "election" must be made before suit is started unless separate suits are instituted.[39]

A New Jersey[40] case involved a suit against two corporations and two individuals. "Judgment final was entered by default" against the two corporations. On trial a separate judgment was rendered against the two individuals. This judgment was reversed on writ of error. Said the court: "The plaintiff was in doubt as to who was really Cottentin's principal, the West End Company, the Cottentin Hotel Company, or Meyer and McKenna. She could not have believed it to be the joint contract of all four. If Cottentin was in fact the agent of Meyer and McKenna the suit should have been brought against them alone. If, however, either the West End Company or the Cottentin Hotel Company was the principal, the suit should have been brought against that corporation which was in fact liable. It may be that the plaintiff had the election to hold either one of the corporations or Meyer and McKenna. She sought to avoid making such an election by suing all parties. She could not prove a joint contract, and up to the time when she entered the judgment against the corporations it was still open to discontinue as to the corporations and to hold Meyer and McKenna; but by entering that judgment she evinced an election to hold the corporations and could not thereafter hold Meyer or McKenna." While in this passage the court seems to direct T to "elect" before filing suit, still there seems to be no penalty in mind if T sues both P and A in the same suit. For it appears that even if he does that, he may dismiss as to one or the other at a later stage of the trial. However, the holding of the court

36. *Dornfeld* v. *Thompson* (1922) 177 Wis. 4, 187 N. W. 683 (not very clear when "election" must be made where T has sued P and A in the same suit nor whether another trial would be required in the particular case.)

37. *Montgomery* v. *Dorn* (1914) 25 Calif. App. 666, 670; *Ewing* v. *Hayward* (1920) 50 Calif. App. 708 (concurring opinion of Finlayson, P. J.); *Garcia, etc., Co.* v. *Colvin* (1921) 53 Calif. App. 79 (dictum). There is a statement in *M. Brennen & Sons* v. *Thompson* (1915) 33 Ont. L. R. 465, 22 Dom. L. R. 375, that T may, if he wishes, sue both undisclosed P and A in one action subject to an "election" at the proper time.

38. (1886) 142 Mass. 206.

39. This case gives the impression that T was uncertain of his facts, i. e., whether one or the other was the agent. Would it be more convenient to permit T to sue both P and A in one action? What harm would come of it?

40. (1910) 80 N. J. L. 48.

with reference to the default judgment seems to be contrary to that of the North Carolina court in the case under review.[41]

Whatever may be the state of the authorities, one may venture to suggest that nothing has been discovered which has caused any doubt of the feasibility of T's suing A and the undisclosed P in the same suit. This can be permitted without adopting the theory of *Beymer* v. *Bonsall,* supra. Up to this point the North Carolina court seems to have a majority of the authorities in its favor. It was a different and a further result when this court permitted two judgments to be rendered.

KENNETH C. SEARS.

BEST EVIDENCE—PROOF OF CONVICTION BY CROSS-EXAMINATION.—[Massachusetts] An interesting question under the "best evidence" rule is presented by a recent Massachusetts case.[1] The defendant was prosecuted under a statute increasing the penalty where the accused had previously been convicted of the same offense. The information charged a prior conviction, but the prosecution did not introduce any record to sustain it. When the defendant took the stand on his own behalf he was compelled to admit on cross-examination that he had previously pleaded guilty to a similar charge and paid a fine. The Supreme Court approved the conviction carrying the increased penalty on the ground that since the prior conviction could have been proved by the confession or extra-judicial admission of the defendant, it was equally provable by his admission on the witness stand, and that by taking the stand he waived his privilege and subjected himself to cross-examination on all elements of the offense.

There is suprisingly little authority on the point and apparently none supporting the present holding.

41. *Cross & Co.* v. *Mathews and Wallace* (1904) 91 L. T. R. 500, reached a result in accord with that in New Jersey. It should be noticed, however, that it was a case of a disclosed rather than an undisclosed principal. Upon that theory, there was no cause of action, normally, against the agent. Should the court, therefore, have disregarded the default judgment against him as the basis of an election? *Goodale* v. *Page* (1912) 92 S. C. 413, has some dicta that may be interpreted as requiring an "election" before suit is brought if T only desires to bring one suit.

In *Phillips* et al. v. *Rooker* et al. (1915) 134 Tenn. 457, a judgment against agents of a disclosed P by confession was held to be an election which would prevent "a further and final decree" against the principal. However, the court imputed to T that he had a definite theory by which he could proceed against the agents. It was suggested that T was attempting to hold the agents upon their implied warranty of authority or upon the theory that they had added their own responsibility. Thus, the case may be distinguished from *Cross & Co.* v. *Matthews & Wallace* supra.

M. Brennen & Sons v. *Thompson* (1915) 33 Ont. L. R. 465, 22 Dom. L. R. 375, is in accord with the New Jersey decision except that the court was even more strict. There T sued P and A together, got default judgment against A, was granted a motion to vacate judgment and amend as to P. On appeal, action was dismissed but judgment against A to remain.

1. *Commonwealth* v. *Fortier* (1927) 155 N. E. 8.