RECENT CASES

AGENCY

ELECTION BETWEEN UNDISCLOSED PRINCIPAL AND AGENT

On a question of first impression in the federal courts, a United States District Court has held that one suing both an undisclosed principal and his agent need not elect which defendant to pursue to judgment, at least until the court has decided whether there was an agency relationship. Conducive to the result was an obvious dissatisfaction[1] with the entire doctrine which ordinarily requires an election of defendants in the undisclosed principal situation.

Denunzio Fruit Co. brought a statutory[2] suit for breach of contract in the Federal District Court for the Southern District of California, joining as defendants Crane, in whose name the contract was made, and Kasanjian, the partially disclosed principal of Crane. The court took under advisement a motion by both defendants at the close of the evidence to compel Denunzio to elect which defendant it would hold liable. In final disposition of the suit, the court dismissed the action against Kazanjian on the ground that Crane had acted beyond his authority. Damages were awarded against Crane. The district court further stated that there was no error in refusing to compel Denunzio to elect at the close of the evidence which of the defendants it would hold liable. *Joseph Denunzio Fruit Co. v. Crane,* 79 F. Supp. 117 (S. D. Calif. 1948).

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1. ". . . certainly, in justice, no litigant should be denied the fruits of a just judgment simply because, under the compulsion of the court he was held to an election, and, either through inadvertence or because of ignorance of the law, elected to hold the wrong party." 79 F. Supp. 117, 139 (S. D. Calif. 1948).

2. Action was brought before the War Food Administrator, Department of Agriculture, pursuant to Perishable Agricultural Commodities Act of 1930, § 1 *et seq.*, 46 STAT. 531 *et seq.* (1930), 7 U. S. C. § 499 a *et seq.* (1946). Respondent Crane appealed to the federal district court, as provided by Section 7 (b) of the Act, 46 STAT. 535 (1930), 7 U. S. C. § 499 3(b) (1946), from a reparation order of the Secretary of Agriculture affirming a prior award of the board in favor of complainant Denunzio. The action before the federal district court is a trial de novo.

Federal courts,[3] although following[4] the general rule[5] which allows a third party, *T*, to sue the party with whom he contracted, *A*, or *A's* undisclosed principal, *P*, have at the same time seemed to endorse the further rule which requires that *T* elect which of the defendants he chooses to pursue.[6] But the district court's avowed hostility to the election rule and its implicit declaration that it would if the question were presented adopt a policy of not requiring election[7] typify the present dubious state of the rule in federal courts. In the absence of explicit guidance from the Federal Rules of Civil Procedure,[8] reexamination of the bases of the election rule

3. In a diversity case the question might well arise under the doctrine of Erie v. Tompkins, 304 U. S. 64 (1938), whether the election rule is a "procedural" matter to be governed by federal rules or a matter of "substance" in which state law would govern. The statement in the *Denunzio* case that election is a procedural rule was unnecessary to the decision because federal jurisdiction was obtained on the federal question ground. See note 2 *supra*. For a discussion of substance and procedure under *Erie v. Tompkins*, see Note, 24 IND. L. J. 418 (1949).

4. *E.g.*, Pitt. Terminal Corp. v. Bennett, 73 F.2d 387 (3rd Cir. 1934). The liability of either *A* or *P* exists where *P* is partially disclosed as well as where he is undisclosed. Dorsey v. Martin, 58 F. Supp. 722 (E. D. Pa. 1945); Barrell v. Newby, 127 Fed. 656 (7th Cir. 1904).

5. RESTATEMENT, AGENCY §§ 144, 186, 321, 322 (1933).

6. It has been held error to permit an action against *P* and *A* to be prosecuted to judgment against both. The pleader should be put to his election *in limine*. The Jungshoved, 290 Fed. 733 (2d Cir. 1923), *cert. denied* 263 U. S. 707 (1923). Commencement of a suit against *A*, at least with an attachment, is an election and bars suit against *P*. Barrell v. Newby 127 Fed. 656 (7th Cir. 1904). The rendering of an interlocutory decree against *A* is an election as a matter of law. Johnson v. Garrigues, 30 F.2d 251 (2d Cir. 1929). But election involves a choice, and a judgment against *A* has been held not to be an election when *T's* suit against *A* had been in progress for two years and knowledge of *P* came to *T* only a few days before judgment was rendered but after there had been a verdict for *T*. Pitt. Terminal Corp. v. Bennett, 73 F.2d 387 (3d Cir. 1934).

7. See note 1 *supra*. The court in the *Denunzio* case quoted Judge A. Hand, dissenting in Johnson v. Garrigues, 30 F.2d 251, 254 (2d Cir. 1929). ". . . I feel that the doctrine of election ought only to apply to a case where there has been both judgment and satisfaction, and that anything less than a complete satisfaction or an estoppel in pais affords no logical basis for barring a remedy against both agent and undisclosed principal . . ." *See* Ore Steamship Corp. v. Hassell, 137 F.2d 326, 330 (2d Cir. 1943) (The harsh election rule rests on nothing more than barren logic and in the absence of estoppel there should be no election until a judgment is actually satisfied).

8. FED. R. CIV. P., 18 (a) allows a plaintiff in his complaint to join as many claims, independent or alternate, as he may have against an opposing party. FED. R. CIV. P., 20 (a) permits a plaintiff to join in one action as defendants all persons against whom plaintiff has any right to relief arising out of the same "transaction." Judgment may be given against one or more defendants according to their respective

may illuminate the question of what force it may have in the future.

Justifications for the application of the election rule have been as numerous as they have been unsatisfactory. It has been said that the rule serves a good purpose;[9] that it is founded upon a policy which forbids *T* to trifle with the courts;[10] that since *T's* action against *P* came as a windfall he cannot object when it is suddenly lost;[11] that *P* might be vexed with a double action;[12] that there might be two outstanding judgments with no way of showing that satisfaction of one was satisfaction of the other.[13] Still other cases have applied the election requirement on the theory that *T* has only one remedy against *A* or *P* and once *T* asserts the contract to be *A's*, he may not later say it is *P's*, for he has already denied it.[14] Common to these "reasons" is their tacit

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liabilities. While *T* obviously may join *A* and *P* under these rules, their "respective liabilities" would seem to be governed by the federal cases upholding the election rule. Thus *A* and *P* would not be jointly liable. The Jungshoved, 290 Fed. 733 (2d Cir. 1923). This would seem to necessitate a dismissal against either *A* or *P* during the trial, and a judgment taken thereafter against the remaining defendant, even though it might remain unsatisfied, would be an election. Johnson v. Garrigues, 30 F.2d 251 (2d Cir. 1929); Barrell v. Newby, 127 Fed. 656 (7th Cir. 1904).

9. Georgi v. Texas Co. 225 N. Y. 410, 122 N. E. 238 (1919).

10. Barrell v. Newby, 127 Fed. 656 (7th Cir. 1904).

11. Kendall v. Hamilton, 4 App. Cas. 504, 544 (1879). In a similar vein it is suggested that it would be contrary to justice to allow *T* to sue *A* and also *P* when at the time the contract was made there was no intention that he should do so. Kendall v. Hamilton, *supra* at 514; Ewing v. Hayward, 50 Cal. App. 708, 717, 195 Pac. 970, 974 (1920). But neither was it the intention of *T* that he should be allowed to hold *P* at all.

12. If the action were brought and judgment rendered against the agent, the agent would have a right of action for indemnity against *P*. If *P* were also originally liable to suit, he would be vexed with a double action. Sessions v. Block, 40 Mo. App. 569, 572 (1890).

13. Kendall v. Hamilton, 4 App. Cas. 504, 515 (1879).

14. Hatley Mfg. Co. v. Smith, 154 Miss. 846, 858, 123 So. 887, 890 (1929); Tuthill v. Wilson, 90 N. Y. 423 (1882); Fitzsimmons v. Baxter, 3 Daly 81, 84 (N. Y. 1869); Borrell v. Newell, 3 Daly 233, 235 (N. Y. 1870). Likewise, by prosecuting an action against *P* to judgment, *T* denies that the agent was acting for *P*. Murphy v. Hutchinson, 93 Miss. 643, 48 So. 178 (1908). The cases tendering this "reason" for the election requirement drew on the rationale of the English cases. In England a judgment against *A* or *P* is said to merge with the one contract and bars further action by *T*. Thus a judgment against *A* before *P* is discovered destroys any right against *P*. *E.g.*, Priestly v. Fernie, 3 H. & C. 977, 159 Eng. Rep. 820 (Ex. 1863); Moore v. Flanagan, [1920] K. B. 919, 926. American cases, however, have uniformly held that a judgment against *A* before *T* acquires knowledge of *P* does not bar further action against *P*. *E.g.*, Pitt. Terminal Corp. v. Bennett, 73 F.2d 387 (3d Cir. 1934); see also, Note, 119 A. L. R. 1324

reliance upon *a priori* assumptions and upon apparent fondness for logical symmetry.[15]

If the problem is approached with the realization that the election rule is the by-product of the more basic rule which gives *T* a right to sue both *A* and *P*, the true considerations which should expose the utility and validity of the election requirement become apparent. For clearly the two rules are working at cross purposes, one providing and the other to some extent depriving *T* of satisfaction of his claim.[16]

(1939). The refusal of the American courts to apply the merger doctrine seems to be a direct contradiction of the assumption that there is only one contract which is either *P's* or *A's*.

15. The reasons given for requiring an election could conveniently be disposed of by assuming from the beginning that a joint judgment may be given against *A* and *P*. Arkansas, under an elastic system of procedure, has allowed joint judgment. Williamson v. O'Dwyer, 127 Ark. 530, 192 S. W. 899 (1917).

16. The remedy given *T* on the contract against *P* was unique for common law courts, especially in view of the fact that, "a fundamental notion of the common law is that a contract creates strictly personal obligations between the contracting parties." HUFFCUT, AGENCY 158 (2d ed. 1901). However, the action on the contract was the most desirable remedy from *T's* viewpoint. He was placed in a much better position than if he had been given an action in deceit (often difficult to prove), or an action for benefit conferred (under which recovery would be denied where the contract was still executory). Ames described the contract action against *P* as an anomaly, not to be encouraged. Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 YALE L. J. 443 (1909). But it is unanimously agreed that *T* has such an action. Hospelhorn v. Poe, 174 Md. 242, 198 Atl. 582 (1938); 2 MECHEM, AGENCY § 1731 (2d ed. 1914). If the practical consideration which supports this right in *T* is that *T* should be allowed to realize the economic advantage for which he has bargained, the election rule, aside from bare legal logic, must be classified as no more than an absurdity. If *T* elects to pursue an execution-proof party he is denied the satisfaction which would have been his had he made a different choice. Two well considered cases in the state courts have held that *T* may pursue *A* and *P* until satisfaction. Williamson v. O'Dwyer, 127 Ark. 530, 192 S. W. 899 (1917) (joint judgment allowed); Beymer v. Bonsall, 79 Pa. 298 (1875) (judgment against *A* no bar to action against *P*). New York, after years of indecision, dispensed with the election rule by statute, N. Y. CIVIL PRACTICE ACT § 112-b (1939). Much writing supports satisfaction. 2 MECHEM, AGENCY § 1751; STORY, AGENCY § 295 (9th ed. 1882); Merrill, *Election Between Agent and Undisclosed Principal; Shall We Follow the Restatement?* 12 NEB. L. BULL. 100 (1934); Comment, 39 YALE L. J. 265, 270 (1929); Notes, 18 CALIF. L. REV. 569, 571 (1930); 22 ILL. L. REV. 181, 183 (1927); 24 MICH. L. REV. 298, 299 (1926); 7 N. Y. U. L. Q. REV. 957 (1930). *Contra:* 3 TEX. L. REV. 384 (1925), accepting the doctrine of merger. Perhaps, if in the facts of a particular case there is no good reason for allowing an action against both *A* and *P*, it may be said that the election rule works no hardship on *T*. *See* Blackburn, J., in Armstrong v. Stokes, L. R. 7 Q. B. 598, 610 (1872) (It might have been a mistake to allow *T* to have recourse at all against one to whom he never gave credit; perhaps illogical exceptions have been established to cure the fallacy of the rule allowing an action against *P*.)

The key to the validity of the election rule then is the desirability and business utility[17] of its progenitor, the rule allowing *T's* bifurcated right of action against *P* and *A*. If for sufficient reasons it is useful to give *T* such an advantage then it may confidently be said to be unwise to whittle away the advantage through meaningless legalisms. Agency law should be flexible enough to keep step with changing business practices. Considerations which guided the development of the law of undisclosed principal in the 19th century should not necessarily control today.[18] Examination of modern business methods as opposed to those of the 19th century,[19] of the needs and expectations of contracting parties

17. The law of agency presupposes a commercial community. MECHEM, AGENCY § 10. It is concerned with everyday business relations and should be realistic in reflecting the underlying social factors as society changes. STEFFEN, CASES ON AGENCY 1-12 (1933); Llewellyn, *Agency*, 1 ENCYC. SOC. SCI. 483 (1930). Much of the law of agency grew out of the introduction of some of the more advanced ideas of the Chancellor concerning the law merchant. 5 HOLDSWORTH'S HIST. OF ENGLISH LAW 297 (1924).

18. But the *approach* of the 19th century courts is to be commended. With the exception of the election rule the early English cases concerning the liability of an agent and his undisclosed or partially disclosed principal were not arbitrarily decided, but were the result of thinking about the intentions of the parties and the customs of the trade. *See* Addison v. Gandassequi, 4 Taunt, 574, 580, 128 Eng. Rep. 454, 457 (C. P. 1812); Irvine v. Watson, 5 Q. B. D. 102, 107 (1879). The legal effect of the cases was that *A* was liable on the contract because he personally bound himself, Jones v. Littledale, 6 A. & E. 486, 490, 112 Eng. Rep. 186, 188 (K. B. 1837), and *P* was liable because the purchase was made for him by his agent, Waring v. Favenck, 1 Camp. 85, 170 Eng. Rep. 886 (N. P. 1807). But at least one early case recognized that the liability of *P* should depend upon the circumstances of the case, and *P* should not be made liable where to do so would be unfair. See cases cited in note to Addison v. Gandassequi, 4 Taunt. 574, 128 Eng. Rep. 454 (C. P. 1812). However, where there was possible unfairness to both *T* and *P* it was difficult to say which the court would prefer and the cases reached opposite results. It was said that if the state of accounts between *P* and *A* had been altered to *P's* prejudice, *P* might not be held. Thomas v. Davenport, 9 B. & C. 78, 109 Eng. Rep. 30, (K. B. 1829). But a later case favoring *T's* interest said *P* could be relieved of his liability only if payment to *A* by *P* had been induced in reliance on *T's* representations. Herald v. Kenworthy, 10 Exch. 739, 156 Eng. Rep. 638 (1855). But the election rule operated independently of considerations of fairness to the parties; where election was the question the sole consideration was the intention of *T* to look to either *A* or *P* to the exclusion of the other. Curtis v. Williamson, L. R. 10, Q. B. 57 (1874). The reasons for election were not satisfactorily explained. WHARTON, AGENCY § 471 (1876).

19. Even the rapid changes of the 19th century scarcely compare with the business innovations of the 20th. Corporations today are responsible for 92% of manufacturing output, and the widespread influence of trade associations today creates an economic superstructure far removed from the system of the Manchester School. LYNCH, THE CONCENTRATION OF ECONOMIC POWER 101 *et seq.* (TNEC 1946).

in an era when nearly all business is carried on through natural or corporate agents—these are the factors which should determine the future of the election rule. For these are the factors upon which depends the real problem: Of what contemporary utility is the entire law of undisclosed principal? Failure of the courts to consider[20] these governing factors accounts for the vacuous unrealism which distinguishes the twentieth century case law in this area.

DUE PROCESS

BROAD SCOPE OF STATE REGULATORY POWER REAFFIRMED

The Family Security Life Insurance Company, a corporation, was promoted by South Carolina funeral directors. Most of its stockholders and agents were either owners or employees of mortuaries.[1] The company had qualified to do business and its agents had been duly licensed under the provisions of a very comprehensive and stringent state in-

20. Even the reporters of the Restatement of Agency failed to approach the election rule realistically. As to the undisclosed principal situation they followed what they perceived to be the weight of authority and adopted the election requirement. But the reporters voiced their dissatisfaction with the rule. RESTATEMENT, AGENCY, EXPLANATORY NOTES § 435 (Tent. Draft No. 4, 1929). At least in the partially disclosed principal situation they did not advocate the application of the election requirement. See RESTATEMENT, AGENCY §§ 184, 210, 336, 337 (1933). They should have felt no compulsion to follow such cases as Georgi v. Thomas Co., 225 N. Y. 410, 122 N. E. 238 (1919) and Barrell v. Newby, 127 Fed. 656 (7th Cir. 1904), supporting the rule because it "serves a good purpose" and is "founded upon a policy which forbids *T* to trifle with the courts." The rule perhaps is not as prevalent as the reporters thought it to be. Merrill, *supra* note 16. For a discussion which puts aside such question-begging assumptions as "alternate liability" and approaches the liability of *A* and *P* from a standpoint of public policy, see Comment, 39 YALE L. J. 265 (1939), which reaches the conclusion that *T* should be allowed to pursue *A* and *P* until satisfaction, but that in the usual *partially* disclosed situation involving factors, brokers, etc., an *early* election should be required.

1. Plaintiff insurance company had 34 stockholders, all but one of whom either owned, managed, or were employed by a mortuary. Of the company's 79 agents, 51 were connected with undertaking establishments. Its president, and four of the five directors were owners or managers of mortuaries. *See* Family Security Life Ins. Co. v. Daniel, 79 F. Supp. 62, 64 (E. D. S. C. 1948).