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## Undisclosed Principal in California

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ABOUT thirty cases have arisen in this state, in which the courts have consciously applied the peculiar doctrines that have developed in regard to the rights and liabilities of agent, principal, and third party, when the agent makes a contract with the third party without disclosing his principal; and there are a number of other cases where the application of these doctrines has been involved in the result. While the cases are not sufficiently numerous or varied to furnish a complete exposition of the doctrine for use in all future situations, there are enough to make it worth while to collect and analyze them, so that those who have to deal with these situations in future may have the tools of precedent more readily at hand.

It is the purpose of this article merely to display these tools and not to discuss the theories upon which the doctrine has been based any further than is necessary for its better understanding.<sup>1</sup> It is now firmly fixed in the law, though it gives rights to, and fastens liabilities upon, one who has not himself appeared as a party to the transaction in issue. From the point of view of the law of contract such a result seems anomalous.<sup>2</sup> It may be said, of course, that the doctrine is based upon rules peculiar to the relationship of principal and agent, but such a statement hardly gives a reason. It merely states a result of judicial decision. In fact,

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<sup>1</sup> For such a discussion, see Mechem, *The Liability of an Undisclosed Principal*, 23 *Harvard Law Review*, 513, 590; Lewis, *The Liability of the Undisclosed Principal in Contract*, 9 *Columbia Law Review*, 116; Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 *Yale Law Journal*, 443, also in *Lectures on Legal History*, 453; Huffcut, *Agency*, 160; Story, *Agency* (9th ed.), § 1729. None of these learned authors have considered the doctrine from its practical side, except very briefly.

<sup>2</sup> But see Lewis, *the Liability of the Undisclosed Principal in Contract*, *supra*, n. 1.

when Lee, C. J., in *Scrimshire v. Alderton*,<sup>3</sup> allowed P to recover from T upon a contract between A, P's agent, and T, to which P was most obviously not a party,<sup>4</sup> he embarked the courts upon an uncharted sea without any clear guiding light to steer by in future cases. The doctrine has, however, much to commend it from the business man's point of view.<sup>5</sup> To him it is unreasonable that the person really interested in the ordinary commercial contract should not be allowed to sue upon it directly and should not be liable in the first instance,—quite as unreasonable as that the assignee of a commercial chose in action should not be allowed in his own name to sue the person liable. Perhaps the business man is wrong, perhaps he is right; but it is suggested that just as the business man's point of view is the only one that satisfactorily furnished a test whether the relationship of two or more persons is that of partners,<sup>6</sup> so in cases where the rights and liabilities of an undisclosed principal are involved, the test to be applied should be that of the business man's reasonable needs. In the absence of any other clear-cut test, are not the courts at liberty to use this one? It will not be the first time that judges have borrowed from the custom of merchants, which is not law, of course, until sanctioned by decision.<sup>7</sup> In fact the courts have undoubtedly been moved by this consideration. At any rate, notwithstanding the objections of its uncertainty, it is with this point of view in mind that the California cases are here discussed. The propriety of so doing is strengthened by section 2330 of the Civil Code, which recognizes the desirability of a short cut to immediate rights and liabilities between principal and third party, by providing that "all rights and liabilities which would accrue to the agent from transactions within such limit [the scope of his actual or ostensible authority], if they had been entered into on his own account, accrue to the principal." It is curious to note, however,

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<sup>3</sup> (1742-3), 2 Str. 1182.

<sup>4</sup> Except upon the fiction that, as A's principal, he was the real promisee of T,—obviously unsound, because T made but a single promise to A, which is enforceable by A, and can not be said to have made a second promise to P. See 9 *Harvard Law Review*, 507; 18 *Yale Law Journal*, 444 n. 10.

<sup>5</sup> Cf. *Huffcut*, Agency, 161; *Mechem*, Agency (2d ed.), § 1729; 9 *Columbia Law Review*, 124, seq.

<sup>6</sup> See *Cox v. Hickman* (1860), 8 H. L. C. 268.

<sup>7</sup> See 10 *Laws of England*, 259; *Pound*, *Readings on the History and System of the Common Law* (2d ed.), 181, seq.; *Goodwin v. Roberts* (1875), L. R. 10 Exch. 337.

that in reaching this same result the courts in this state in many cases have had recourse to decisions elsewhere and have not relied upon the sanction of the Code.<sup>8</sup>

#### I. PRINCIPAL VERSUS THIRD PARTY.

In cases of this sort it is assumed that the agent, A, acting within the limitations on the authority given him by the principal, P, has made a contract with T, in which T has made a promise to A. Of course T's state of mind, whether expressed or unexpressed, with regard to P may be of various sorts. He may know that P himself is A's principal,—that is, he may know P's existence and also his name, or identity. In such a case, of course, the principal is disclosed, not undisclosed, and if in such a case, T, knowing all the facts, limits himself in contracting to a promise running to A alone, it can be argued with force that he has limited his liability to A, and that P should not be allowed to recover from T in a direct action. While in this event the business man may see no reason why P should not hold T directly, nevertheless T's right to exclude P from a right of action should be recognized. It might be argued that T should insert in the contract some express provision excluding P from such a right and that the mere making of a promise to A should not be enough, but the law has not taken this view, probably wisely.<sup>9</sup> But to proceed to cases where the principal is in fact undisclosed, and to a further analysis of T's state of mind: suppose T knows as a fact that A is acting as an agent and that there is some principal behind him, of whose name and identity he is ignorant. It can be argued that T, knowing the existence of a principal, whose identity he might demand for the purpose of contracting with him, has, by making a promise solely to A, chosen to limit his liability to A. On the other hand we can argue that T, recognizing that A is only an agent, and knowing that there is someone behind him, has, by failing expressly to exclude such person from liability, shown himself indifferent to the question whether or not he shall be liable to P. In any event, unless the court find more than that A

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<sup>8</sup> The writer has not found any other provisions, either in the Civil Code or Code of Civil Procedure, bearing directly upon the rights and liabilities of an undisclosed principal. The section above referred to may be founded upon Story's dicta in Commentaries on the Law of Agency. See Civil Code of the State of California (1st ed.), 1874, 77; Story, Agency, (9th ed.), § 417 seq.

<sup>9</sup> Cf. *Chandler v. Coe* (1874), 54 N. H. 561.

merely disclosed himself as agent, T has been held liable to P.<sup>10</sup> The case does not seem to differ greatly from that where T knows P's name or identity, but a different result is reached. There are two possible explanations. First, the law in case of fully disclosed principals grew up under the influence of rules relating to assumpsit and debt, and became solidified upon the point that P cannot hold T, when P's name or identity is known before the pressure of commercial needs had made itself felt. Such an explanation is historical. Second, the difference may also be explained on practical grounds, which presumes that T is more likely to prefer a contract with a known principal than with his agent, and therefore, if T, knowing who the principal is, contracts with A alone, he has shown that he has not entered into a liability to P. On the other hand, if he does not know who P is, he has not shown that he does not care to be liable to that particular man. There are several California cases, which hold that P can hold T, even though T knows that A is an agent for someone.<sup>11</sup> To continue the consideration of T's state of mind: he may know that A acts as agent sometimes, and sometimes for himself, or he may have no thought at all upon the subject, or he may suppose that A is acting solely for himself. In deciding the question of T's liability to P in these cases, no distinction is made, probably correctly. Of course, if T's state of mind is that first mentioned, and if he knows the law, he necessarily knows that he is more likely to be sued by some unknown principal than if he supposes that A is acting for himself. He might perfectly well have excluded himself from liability to anyone but A by expressly so providing,<sup>12</sup>

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<sup>10</sup> Existence of principal unknown: *Crosby v. Watkins* (1859), 12 Cal. 85; *McKee v. Cunningham* (1906), 2 Cal. App. 684, 84 Pac. 260; *Eldridge v. Mowry* (1914), 24 Cal. App. 183, 140 Pac. 978; *Ruiz v. Norton* (1854), 4 Cal. 355, *semble*; *Parker v. Otis* (1900), 130 Cal. 322, 62 Pac. 927, *semble*; *Nicholls v. Mapes* (1905), 1 Cal. App. 349, 82 Pac. 265, *dictum*; existence of principal in doubt; *Eddy v. American Amusement Co.* (1908), 9 Cal. App. 624, 99 Pac. 1115, *semble*; *dicta* of general application; *Ellis v. Crawford* (1870), 39 Cal. 523; *Wilcox-Rose Construction Co. v. Evans* (1908), 9 Cal. App. 118, 98 Pac. 83; *Schader v. White* (1916), 52 Cal. Dec. 385, 160 Pac. 557. For cases in other jurisdictions, see *Mechem, Agency*, (2d ed.), §2059 n. 11; 2 C. J. 874 n. 33, where, however, no distinction is made between cases where the principal's existence is known and cases where it is unknown.

<sup>11</sup> *Eddy v. American Amusement Co.*, *supra*, n. 10, *semble*; cf. *Eldridge v. Mowry*, *supra*, n. 10; and see cases cited in preceding note as containing *dicta* of general application.

<sup>12</sup> *Humble v. Hunter* (1848), L. R. 12 Q. B. 310; *Wise v. Marine Ins. Co.* (1856), 23 Mo. 80, cf. *Winchester v. Howard* (1867), 97 Mass. 303.

but if he has not done so, and if he will not be subjected to any more onerous burden or put in a worse position by being under an obligation to P, he should equally be liable whether he thinks A is possibly an agent, does not think at all, or thinks A is acting for himself only.<sup>13</sup>

The situations so far discussed have raised no question as to the nature of the act which the third party has promised to do. It is at once apparent that being subjected to a suit for damages by the principal for failure to perform his promise is quite different from being compelled to perform his promise to, or to accept performance from, the principal instead of the agent. Once T, to resume the nomenclature heretofore adopted, has put himself in the wrong, it does not matter greatly whether he is compelled to pay *damages* to P or to A, provided by making payment in accordance with the court's judgment either to P or to A, whichever sues, he is under no obligation with reference to his broken promise to the other. Similarly, if T's obligation is merely to pay money, it does not matter greatly to whom he has to pay it, in the absence, of course, of a stipulation that it shall be paid in a particular way or at a particular place. We therefore find, as we should expect, that no difficulty has been made in this connection in California cases, where T's only obligation was to pay damages or to make a money payment,<sup>14</sup> except in one case. In *Walton v. Davis*,<sup>15</sup> A, acting as agent for P, in whose employ he was, made a contract to supply milk to T. T broke the contract, and P sued T for damages. The court refused to allow P to recover. The fact that T's liability, if any, was merely to pay damages and therefore was,

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<sup>13</sup> *Crosby v. Watkins*, supra, n. 10, agent's contract made "in his own name, without disclosing his principal;" *McKee v. Cunningham*, supra, n. 10, uncertain; *Eldridge v. Mowry*, supra, n. 10, existence probably unknown; *Ruiz v. Norton*, supra, n. 10, semble, existence unknown; *Parker v. Otis*, supra, n. 10, semble, uncertain; *Nicholls v. Mapes*, supra, n. 10, dictum, where A did not explain he was buying from P; *Eddy v. American Amusement Co.*, supra, n. 10, semble, existence "in doubt." See also cases cited in note 10, supra, as containing dicta of general application. For cases in other jurisdictions see 2 C. J. 874 n. 33.

<sup>14</sup> *Crosby v. Watkins*, supra, n. 13, damages for failure to deliver; *McKee v. Cunningham*, supra, n. 10, purchase price; *Eldridge v. Mowry*, supra, n. 10, professional services; *Ruiz v. Norton*, supra, n. 10, semble, purchase price; *Eddy v. American Amusement Co.*, supra, n. 10, semble, services as actors; *Wilcox-Rose Construction Co. v. Evans*, supra, n. 10, dictum, construction work. Cf. *Parker v. Otis*, supra, n. 10, statutory penalty; and *Schader v. White*, supra, n. 10, specific performance of a contract to convey land.

<sup>15</sup> (1913), 22 Cal. App. 456, 134 Pac. 795.

so to speak, a neutral obligation which might just as well be performed to P as to A, was not considered by the court. The court's decision was based, however, on the theory that the contract between A and T established a relationship for the performance of personal services, and that such a contract necessarily excluded the possibility of T's being liable to anyone else. This cannot be, because A, by being an agent, had no ability to make a binding contract to be performed on his part. The contract is perfectly good between A and T.<sup>16</sup> Why, therefore, should not P be allowed to sue, when he does not call upon T to do anything different from what he would have had to do if A had sued? Perhaps the answer is that the doctrine of undisclosed principal is a business man's doctrine, and it is not expected or demanded by the needs of commerce that principals in cases like *Walton v. Davis* should have rights of action. This explanation is fortified by cases outside of California, where the contract was for personal services.<sup>17</sup> It seems to the writer, however, that if the doctrines of undisclosed principal are to be given a logical and complete effect, there is no very good reason why P should not recover damages, even though the contract was not of such a nature that he could demand performance to himself or that he could himself satisfactorily perform.<sup>18</sup>

The recognition of the principal as a proper party to bring suit is not allowed to prejudice the third party, when the latter has looked upon the agent as his promisee. The anomaly of permitting the principal to sue has not been carried so far as to deprive the third party of counterclaims or defenses that he might have had against the agent, when he did not know that the agent was an agent merely. In many jurisdictions this question has arisen when the third party, not knowing the existence of the principal, has had a claim against the agent which he intended to set off against the obligation created,<sup>19</sup> or has subsequently become an obligee of the agent, intending to set off against such claim

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<sup>16</sup> See page 196, *infra*. Cf. *Kerry v. Pacific Marine Co.* (1898), 121 Cal. 564, 54 Pac. 89, where the agent was held liable to the third party on a charter party; and *Jewell v. Colonial Theatre Co.*, (1910), 12 Cal. App. 681, 108 Pac. 527, where the agent was held liable to the third party on a contract by which the third party was to appear as an actor.

<sup>17</sup> *Eggleston v. Boardman* (1877), 37 Mich. 14, dictum; *Kelley v. Thuey* (1891), 102 Mo. 522, 15 S. W. 62; *Winchester v. Howard* (1867), 97 Mass. 303. See also 2 C. J. 875 n. 39.

<sup>18</sup> *Mechem, Agency* (2d ed.), § 2067.

<sup>19</sup> *Mechem, Agency* (2d ed.), § 2077; 2 C. J. 877 n. 52.

his obligation to the agent.<sup>20</sup> The courts work out the right to a set-off upon estoppel. The agent has the real principal's authority to make a contract representing himself as principal and the real principal will not be allowed to say that the agent was in fact only an agent. Of course, the elements of an estoppel are lacking when the third party knows the agent is only an agent.<sup>21</sup> There are no cases in California in which this question has arisen, but the existence of an estoppel is recognized by section 2336 of the Civil Code, which provides that "One who deals with an agent without knowing or having reason to believe that the agent acts as such in the transaction, may set off against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of the agency."

The question of defenses to suits by the principal has arisen in decided cases in another connection, and it has been held that third party may rely upon a payment made to the agent.<sup>22</sup>

Of course other examples of defense may occur in future. One true rule for determining their validity, it is submitted, is that already indicated: the principal's right to sue, being anomalous, and for the purpose of a short cut, should never be allowed to permit him to deprive a third party, who has contracted with an agent as principal, of such defenses as he would have if the agent were in fact the principal and sued him directly. The rule is founded on estoppel, which ordinarily does not exist when the third party knew that there was a principal, i. e. that the agent was only an agent.<sup>23</sup>

## II. THIRD PARTY VERSUS PRINCIPAL.

The doctrine of undisclosed principal is not limited to giving the principal rights, but also is applied to make him directly liable

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<sup>20</sup> *Baxter v. Sherman* (1898), 73 Minn. 434, 76 N. W. 211, dictum; cf. *Frame v. William Penn Coal Co.* (1881), 97 Pa. 309; 2 C. J. 877 n. 52. But see 2 C. J. 878 n. 55; *Nicholls v. Martin* (1885), 35 Hun. 168.

<sup>21</sup> *Isaac Cooke & Sons v. Eshelby* (1887), L. R. 12 A. C. 271; *Ex parte Dixon* (1876), L. R. 4 Ch. D. 133; *Baxter v. Sherman*, *supra*, n. 20, dictum. See also *Mechem, Agency* (2d ed.), § 2079; 2 C. J. 878 ns. 57-61. But see note 49, *infra*. Of course, if at the time the claim to a set-off arises, the third party has learned of the principal's existence, the elements of an estoppel are lacking.

<sup>22</sup> *Argenti v. Brannan* (1885), 5 Cal. 351; *Lumley v. Corbett* (1861), 18 Cal. 494. In the former case there is a dictum that payment could be made even after knowledge of the agency. In some cases, of course, such a result may be justified on showing that the agent's powers included power to receive payment.

<sup>23</sup> See *Ruiz v. Norton*, *supra* n. 10; 28 L. R. A. (N. S.) 227 n., 231 n.

to the third party, not only in cases where the third party knew of his existence, but also in cases where the third party did not know he existed and contracted with the agent as principal. In these cases it is assumed, necessarily, that A, the agent, acting within the limitations on his authority, has made an enforceable promise to T, who either does not know that P exists or else knows that there is some unknown person for whom A acted. In California P has been held liable to T in each of these two situations.<sup>24</sup> The result is, needless to say, as anomalous as that which permitted P to sue, but is firmly fixed in the law,<sup>25</sup> and to the same extent has the needs of the business world behind it. In the same way, too, when T does in fact know P's identity he cannot hold him,—perhaps on the theory that knowing his identity and taking the personal promise of the agent instead, he can be said to have excluded him from liability.<sup>26</sup>

In these cases, also, the illogicality on contractual theories of the remedy permitted gives rise to difficult questions in connection with defenses. Here the California law is singularly lacking in view of the number of cases upon other points.

Perhaps the most difficult situation is that which arises when the principal, counting on the fact that the third party has contracted with the agent only, settles with the latter. When under such circumstances should he nevertheless be chargeable by the third party? This is not a question which has arisen in this state

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<sup>24</sup> Existence of principal unknown: *Thomas v. Moody* (1881), 57 Cal. 215; *Goss v. Helbing* (1888), 77 Cal. 191, 19 Pac. 277; *Dashaway Association v. Rogers* (1889), 79 Cal. 211, 21 Pac. 742; *Bradford v. Woodworth* (1895), 108 Cal. 684, 41 Pac. 797; *Curran v. Holland* (1903), 141 Cal. 437, 75 Pac. 46; *McKee v. Cunningham*, *supra*, n. 10; *Jewell v. Colonial Theatre Co.*, *supra*, n. 16, probably; *Montgomery v. Dorn* (1914), 25 Cal. App. 666, 145 Pac. 148, probably; *Sims v. Frew* (1914), 24 Cal. App. 725, 142 Pac. 106; *Puget Sound Lumber Co. v. Krug* (1891), 89 Cal. 237, 26 Pac. 902, dictum; existence of principal probably known: *Alta Planing Mill Co. v. Garland* (1914), 167 Cal. 179, 138 Pac. 738; *Schader v. White*, *supra*, n. 10; uncertain whether principal known or unknown: *Estrella Vinyard Co. v. Butler* (1899), 125 Cal. 232, 57 Pac. 980, dictum; *Schindler v. Green* (1905), 7 Cal. Unrep. Cas. 229, 82 Pac. 341. See *Ellis v. Crawford* (1870), 39 Cal. 523, for a dictum of general application. The dictum of Sawyer, J., in *Sayer v. McNulty* (1864), 1 Cal. Unrep. Cas. 130, at p. 133, is opposed to many of the foregoing decisions and is therefore probably no longer law.

<sup>25</sup> *Mechem, Agency* (2d ed.), §§ 1731 n. 47, 1732 ns. 50, 51; 2 C. J. 840, 841, ns. 70-72. The principal's liability to the third party has been spoken of as a "God-send," *Blackburn, J.*, in *Armstrong v. Stokes* (1872), L. R. 7 Q. B. 598.

<sup>26</sup> *Ferguson v. McBean* (1891), 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65. See also 2 C. J. 841 ns. 73, 74.



except in one case,<sup>27</sup> where, however, the court did not find a completed settlement such as exonerated the principal from liability to the third party. Outside California, there seem to be two theories, both of which can be traced to leading English cases. One starts with the assumption that by the law relating to undisclosed principal the latter is liable to the third party, and being chargeable with knowledge of the law can only settle with the agent at his peril. The practical result of this theory is that the principal can only escape liability, when he has been induced by conduct or representations of the third party to believe that the latter does not intend to look to him. Such a theory, needless to say, favors the third party. Is it logical? It starts with the premise that the third party can hold the principal, and its conclusion depends on the validity of that rule,—but we have seen that the whole doctrine is anomalous,<sup>28</sup> and, as has been already suggested, courts are at liberty to regard this premise as *prima facie* merely, and to decide the question from the practical standpoint of the needs of business men.<sup>29</sup> The second theory permits the principal to settle with his agent in the ordinary way,<sup>30</sup> though of course the third party should be allowed to charge the principal if he notifies him that he intends to do so in time. It is suggested that this latter rule is fairer to all parties and better serves business needs. The third party unexpectedly finds himself with an extra string to his bow,—a “God-send.” He has shown a willingness to look only to the agent. There is no reason why he should be permitted to use that extra string to prevent the principal from settling with his agent in the ordinary way. It is quite apparent that in the case of distant factors and brokers the principal will be in serious trouble if he is not allowed so to do, and if he must wait till his agent makes settlement, for he cannot safely put the agent in funds.

Of course the foregoing rules do not apply when the existence of the principal is disclosed, for being chargeable with knowledge

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<sup>27</sup> *Sims v. Frew*, supra, n. 24, and see Cal. Civ. Code, § 2335.

<sup>28</sup> See p. 183, *infra*.

<sup>29</sup> *Heald v. Kenworthy* (1855), 10 Exch. 739, is the leading case standing for this doctrine. For a full discussion of both doctrines, see *Mechem, Agency* (2d ed.), § 1738-1749. It is favored by Mr. Mechem and also in *Beaumont, The Liability of an Undisclosed Principal for Goods Purchased by his Agent*, 23 *American Law Review*, 565. See also 2 C. J. 847 n. 14.

<sup>30</sup> *Armstrong v. Stokes*, supra, n. 25; *Fradley v. Hyland* (1888), 37 Fed. 49. See also references in preceding note and 2 C. J. 847 n. 12.

of his agent's acts, the principal is bound to know that the third party may wish to use his extra string.<sup>31</sup> It is to be hoped that the California courts when the question arises will apply the latter rule rather than the former. It is possible that they are bound to do so by section 2335 of the Civil Code, which provides that "If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him responsible." But it is not clear exactly what "good faith" referred to in the statute, means. It can be argued with force, however, that this section contains a recognition of the second theory rather than the first, for certainly the principal can act in good faith even though the third party has made no positive representation to him.

While there are no California cases settling conclusively this important question, there is one case that bears on another question perhaps as important. How far should the third party be allowed to pursue one of his two remedies against agent or principal without prejudicing his chance to succeed on the other? The authorities permit no satisfactory conclusion as to what conduct constitutes such an election. All that can be said is that there may be conduct having this effect. Clearly, charging the agent or some other person on the third party's books ought not to be regarded as a binding election.<sup>32</sup> But suppose the third party has begun a suit against the agent before seeking to charge the principal, either with or without knowledge of the principal's existence?<sup>33</sup> It is suggested as a fair working rule that when he was without knowledge of the principal's existence, he should be allowed to discontinue on paying ordinary legal costs, but if he had such knowledge, while it is unfair to deprive him of all right against the principal, he ought not to be allowed to pursue that right without paying the agent the actual expense to which the agent was

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<sup>31</sup> Mechem, *Agency* (2d ed.), § 1749; but in *Irvine & Co. v. Watson & Sons* (1880), 5 Q. B. D. 414 this distinction is repudiated.

<sup>32</sup> *McKee v. Cunningham*, *supra*, n. 10, but see the opinion of Smith, J.

<sup>33</sup> Cf. *Puget Sound Lumber Co. v. Krug* (1891), 89 Cal. 237, 26 Pac. 902, where the third party, after learning of the principal's identity, had proved in bankruptcy against the agent. No objection on the ground of election was made to his maintaining an action later against the principal, a right apparently admitted.

put.<sup>34</sup> Suppose further that the suit against the agent goes to judgment. Here we have a new factor to be considered. If the third party has but a single right of action, that right of action is necessarily merged in the judgment and he cannot later pursue the principal, but if he has two rights of action, the rules above indicated could fairly be applied so long as judgment is not satisfied. Has the third party one or two rights of action? As will be seen, the third party has an undoubted right against the agent on the contract as made.<sup>35</sup> He is also allowed to sue the principal. This can scarcely be because the law creates out of whole cloth an independent collateral obligation. It should go no further than to make the principal liable on the contract made by the agent. There is, then, a single obligation with two obligors, who are not joint obligors but probably, if the term may be used, alternative obligors, or at least so a business man would regard them.<sup>36</sup> Judgment against one merges the right of action or obligation in the judgment. The third party after obtaining judgment against the agent, whether with or without knowledge of the principal's existence, should not be allowed to proceed against the other.<sup>37</sup> These views, however, are merely suggested, since the whole subject has not been consistently worked out by judicial decision.<sup>38</sup>

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<sup>34</sup> There is no judicial sanction for this view that the writer has been able to discover. The cases are in much confusion and for the most part decide what is not an election.

<sup>35</sup> See p. 194, *infra*.

<sup>36</sup> *Kendall v. Hamilton* (1879), L. R. 4 A. C. 504; *Brannan v. Purcell* (1884), 41 Oh. St. 187, 202; cf. *Morel Bros. & Co., Ltd. v. Earl of Westmoreland*, [1902] 1 K. B. 64, *aff'd*, [1904] A. C. 11, not a case of undisclosed principal; see *Booth v. Barron* (1898), 29 App. Div. 66, 51 N. Y. Supp. 391.

<sup>37</sup> See 2 C. J. 846 ns. 6-8; 21 L. R. A. (N. S.) 786 n.; 6 L. R. A. (N. S.) 729 n; and particularly, *Kendall v. Hamilton* *supra*, n. 36; but in the following cases the existence of a doctrine of merger independent of the doctrine of election was in effect denied, and it was held that when the third party has obtained judgment against the agent without knowledge of the principal, such judgment, so long as unsatisfied, is not a bar to an action against the principal: *Lindquist v. Dickson* (1906), 98 Minn. 369, 107 N. W. 958; *Greenberg v. Palmieri* (1904), 71 N. J. L. 83, 58 Atl. 297; *Remmel v. Townsend* (1894), 83 Hun. 353, 31 N. Y. Supp. 985; *Brown v. Reiman* (1900), 48 App. Div. 295, 62 N. Y. Supp. 663. *Beymer v. Bonsall* (1875), 79 Pa. 298 is to the same effect, even though the third party had such knowledge.

<sup>38</sup> See the authorities cited in the preceding note and also *Mechem, Agency* (2d ed.), §§ 1750-1762; 17 *Harvard Law Review*, 414. In California, if the third party brings one suit against both principal and agent, apparently questions of election and merger have no place. See *Cal. Code Civ. Proc.*, §§ 383, 427. In *Jewell v. Colonial Theatre Co.*, *supra*, n. 16, in the same suit judgment was entered against both principal and agent, but apparently no objection on the ground of merger or election was made by

So far the discussion has related to the anomalous parts of the whole doctrine that has grown up around the undisclosed principal. We now proceed to situations, where the question of liability can be worked out according to contractual rules, and the effect of the principal's liabilities or obligations is indirect.

### III. THIRD PARTY VERSUS AGENT.

This is the simple situation where the third party, having made a contract with the agent, chooses to hold the agent, ignoring or ignorant of his claim against the principal.<sup>39</sup> In all these cases the questions that arise, apart from those bearing on defenses that will be discussed later, relate to whether or not there was a contract between third party and agent. This, of course, is a question of the law of contracts and not properly within the scope of this article, except in one particular. Let us suppose that the existence of a principal, but not his identity, be disclosed: it can be argued that the third party in such a case cannot look upon the agent as intending to bind himself. Such an argument has persuasive force when the agent contracts as agent only, or when the contract is of such a nature that it is unlikely that the agent intended to be bound.<sup>40</sup> But unless these added elements appear, the agent is liable,<sup>41</sup> even though the existence of a principal is known.<sup>42</sup> It has so been held in California.<sup>43</sup> Such a view is obviously correct

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either defendant. In *Montgomery v. Dorn*, *supra*, n. 24, where suit was also brought against both agent and principal, there was a dictum that judgment against the agent was no ground for objecting to a judgment against the principal.

<sup>39</sup> Cases where one is given by another such appearance of ownership as creates an estoppel against the other are not here discussed. Cf. *Amann v. Lowell* (1885), 66 Cal. 306, 5 Pac. 363.

<sup>40</sup> E. g., *Chase v. Debolt* (1845), 7 Ill. 371; *American Alkali Co. v. Kurtz* (1905), 134 Fed. 663 *aff'd* (1905), 138 Fed. 392; *Southwell v. Bowditch* (1876), 1 C. P. D. 374. See also 2 C. J. 818 n. 29.

<sup>41</sup> *Mechem, Agency* (2d ed.), § 1410 n. 90; 2 C. J. 818 n. 30.

<sup>42</sup> *Mechem, Agency* (2d ed.), § 1411 n. 92; 2 C. J. 817 n. 25; 2 L. R. A. 812 n.; 47 L. R. A. (N. S.) 232 n. 11.

<sup>43</sup> Agent liable to third party: *Murphy v. Helmrich* (1884), 66 Cal. 69, 4 Pac. 958 existence of principal probably not disclosed; *Bradford v. Woodworth* (1895), 108 Cal. 684, 41 Pac. 797 existence not disclosed; *Kerry v. Pacific Marine Co.* (1898), 121 Cal. 564, 54 Pac. 89 where agent signed as "managing owner;" *Jewell v. Colonial Theatre Co.*, *supra*, n. 16, existence probably not disclosed; *Bogart v. Crosby* (1889), 80 Cal. 195, 22 Pac. 84 dictum, agent liable if he failed to "make known" his principal; *Puget Sound Lumber Co. v. Krug*, *supra*, n. 33, dictum, agent liable if existence of principal not disclosed; *Alta Planing Mills Co. v. Garland* (1914), 167 Cal. 179, 138 Pac. 738, dictum, same; *Nicholls v. Mapes*, *supra*, n. 10, dictum, agent liable if he does not explain he was buying for his principal. Cf. *Schader v. White*, *supra*, n. 10, where the court regarded

in both cases. There is, of course, no reason why an agent should not obligate himself personally, if such be his communicated intention. Such is usually the intention of the ordinary commercial agent, when he does not make it plain that he is acting for a definite named person. There is less difficulty, of course, in the case where the existence of the principal is not revealed. There, obviously, the communicated intention of the agent is to bind himself.

In all these cases there coexists the liability of the principal, which is important in relation to defenses set up by the agent to such a suit. Here again there are no California cases, though the situation is likely to arise.

The first of these possible defenses is that of election and merger, upon which the writer's views have already been given.<sup>44</sup> It is suggested that in this connection it is unimportant whether it is principal or agent who is relying upon an election or a merger. The reasons for the rules are based on procedural expediency rather than on the merits of the issues involved. The principal is not a surety, but an alternative obligor. It does not therefore matter whether it be he or the agent who sets up the defense of an election against the other, or a merger of the third party's right of action in a judgment against that other. There may, however, be this difference of fact. The case, already adverted to, where the third party sues one of his two alternative obligors without knowing of the existence of the other, can, of course, only occur when he sues the agent first, and therefore the case where he should be allowed to discontinue upon paying no more than legal costs is limited to the case where he so sues.<sup>45</sup>

Other matters of defense which the agent might set up readily occur; for example, payment by the principal.<sup>46</sup>

Should the agent be allowed to set off against the third party

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the case as one of undisclosed principal (but query), and the agent's liability was apparently conceded, if his defenses failed. In *Montgomery v. Dorn*, supra, n. 24, the court below dismissed the action against the agent, who signed a contract in his own name without qualification, on his showing that he contracted as agent only, although apparently there was no evidence the third party knew of this fact. Agent not liable: *Schindler v. Green*, supra, n. 24, *semble*, where third party knew the agent was an agent only and the contract was for work and labor; cf. *Chase v. Debolt*, supra, n. 40.

<sup>44</sup> See p. , supra. See also *Cobb v. Knapp* (1877), 71 N. Y. 348, 27 Am. Rep. 51.

<sup>45</sup> As previously stated the writer has found no legal sanction for these views.

<sup>46</sup> See *Morrison v. Currie* (1854), 4 Duer (N. Y.) 79, 84.

claims by the principal against the third party? This is a matter depending on statutory construction. If set-offs are limited to the parties to the suit, there should clearly be no such set-off, but if they can be asserted between the real parties in interest, then clearly a set-off should be allowed, since the right to a set-off is not conditioned upon knowledge by the other party that it exists.<sup>47</sup> Such statutes exist in some states,<sup>48</sup> but not in California, where the statute on the subject provides that counterclaims must be those existing in favor of a defendant and against the plaintiff.<sup>49</sup>

#### IV. AGENT VERSUS THIRD PARTY.

Here again the question of liability turns upon whether or not the third party made a contract with the agent as his promisee, and the doctrines of undisclosed principal influence the situation only when we come to the question of the third party's defenses. Although the law gives the principal a right against the third party directly, it does not do so at the expense of the agent's contractual right.<sup>50</sup> The doctrines of undisclosed principal are not in lieu of contractual rights into which the parties have let themselves. The agent may generally recover if a contract to him was in fact made.<sup>51</sup>

The question of defenses next arises.

If the third party has already paid or performed to the prin-

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<sup>47</sup> Where the statute is in the usual form no such set-off is allowed: *Forney v. Shipp* (1857), 4 Jones Law, 527; *Elwell v. Skiddy* (1879), 77 N. Y. 282. Of course, if the set-off arose out of the same transaction the agent may avail himself of it, as being personal to himself. See *Leterman v. Charlottesville Co.* (1910), 110 Va. 769, 67 S. E. 281; and dicta in the first two cases above cited, and 25 A. & E. Encyc. of L. (2d ed.), 539.

<sup>48</sup> See 25 A. & E. Encyc. of L. (2d ed.), 527 ns. 2, 3; 34 Cyc. 717 n. 40.

<sup>49</sup> Cal. Code Civ. Proc., § 438. But cf., § 440, which provides that "When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other. . . ." Could it not be argued that since the principal, if sued, could have set up a counterclaim, the third party's claim must be regarded as "compensated," i.e. paid, in a suit against the agent, so that a defense of payment could be made? If this argument were to prevail, it would equally apply, when a principal whose existence is known, sues the third party who has a counterclaim against the agent. Cf. note 21, *supra*.

<sup>50</sup> *Tustin Fruit Assoc. v. Earl Fruit Co.* (1898), 6 Cal. Unrep. Cas. 37, existence of principal not disclosed; *Bliss v. Sneath* (1894), 103 Cal. 43, 36 Pac. 1029, *semble*; *Eddy v. American Amusement Co.*, *supra*, n. 10, *semble*, existence of principal apparently disclosed. Cf. *Phillips v. Henshaw* (1855), 5 Cal. 509.

<sup>51</sup> *Mechem, Agency* (2d ed.), § 2025 n. 10; 2 C. J. 830 n. 8.

principal, he should not be liable a second time to the agent. The principal is, of course, entitled to the benefit of the contract made by his agent, and his receiving these benefits discharges the third party of all liability. California courts would undoubtedly so hold.<sup>52</sup>

Suppose that the third party has a counterclaim or set-off against the principal, and is sued by the agent. No question of estoppel can, of course, arise, since he could not have entered into this contract, relying on a set-off against one whom *ex hypothesi* he did not know had an interest in the contract. The question must therefore turn on the form of the statute, and if no set-off is allowed against the real parties in interest but only between the parties to the suit, it would seem clear that the third party can only enforce his right against the principal in a separate action. In California there is one case upon this point, decided under section 438 of the Code of Civil Procedure.<sup>53</sup> It was held that the third party might set-off against the agent's suit a counterclaim arising out of a separate transaction against the principal. No mention was made of section 440 of the Code of Civil Procedure.<sup>54</sup> The only statute under discussion was limited to counterclaims between plaintiff and defendant. The decision is hard to support. If the court had section 440 in mind, the court would probably have so stated. Under that section also, the proper pleading would, perhaps, not be of a set-off or counterclaim, but of payment, on the theory that the right of action upon which the agent relied was "compensated" or paid, since in a suit by the principal against the third party the third party could have counterclaimed. Perhaps the answer is that section 440 cannot be thus collaterally relied on. If so, the case under discussion seems doubly wrong.

All the possible combinations of parties, in which questions under the doctrine of undisclosed principle may arise, have now been discussed,<sup>55</sup> although it be obvious that a very great num-

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<sup>52</sup> 2 C. J. 830 ns. 15, 16.

<sup>53</sup> Bliss v. Sneath, *supra*, n. 50.

<sup>54</sup> See n. 49.

<sup>55</sup> It is probably unnecessary to state that the doctrines of undisclosed principal do not apply to negotiable instruments or to instruments under seal in jurisdictions where the distinction between sealed and unsealed instruments has not been wholly abolished. Mechem, Agency (2d ed.), §§ 1734-6, 2064, 2065; 2 C. J. 843, 876 seq. The writer has found no California cases bearing upon the application or nonapplication of the doc-

ber of defenses beyond those herein mentioned may come before the courts.<sup>56</sup> In making their decisions, the courts have practically a free hand, for there are few legislative enactments upon the subject, and they can develop the doctrine, guided by principle and precedent, without the confusing and complicating effect of arbitrary statute law. As Antaeus gained strength from mother earth, the courts in wrestling with these problems should remember their source and the impulse that is responsible for the doctrine. They are as free now as they ever were to look to the law merchant for guidance. It is true that any rule based on the understanding of business men must needs be vague, but the doctrine is with us to stay, bringing its vagueness with it, and there is no other test that is adequate.

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trine to negotiable instruments. The latter exception is probably unimportant here: *Pacific Improvement Co. v. Jones* (1912), 164 Cal. 260, 128 Pac. 404; cf. *Ferguson v. Bean*, supra n. 26; *Bliss v. Sneath*, supra, n. 50.

<sup>56</sup> For example: When the agent acts for several principals, the plaintiff failed to recover in *Beckhusen v. Hamblet*, 6 Times L. Rep. 278, where the third party sued the principals, and in *Roosevelt v. Doherty* (1880), 129 Mass. 301, and *Midwood v. Alaska Packers Assoc.* (1907), 28 R. I. 303, 67 Atl. 61, where one of the principals sued the third party. See also *Mechem, Agency* (2d ed.), §§ 2080-2082, defense in suits by principal against third party; *Mechem, The Liability of an Undisclosed Principal*, 23 *Harvard Law Review* 590, at 602. As to the liability of an undisclosed principal for unauthorized acts of his agent, see *Durant v. Roberts*, [1900] 1 Q. B. 629, criticized in 14 *Harvard Law Review*, 153.