

However, analysis of the cases dealing with tort liability discloses that by using immediacy of filing as the controlling factor the courts have placed a heavy responsibility on the transferor for relatively minor delays. The ultimate question is whether, "in the interest of public welfare, to protect innocent purchasers, and to afford identification of vehicles and persons responsible in cases of accident and injury,"⁸⁰ the transferor should be required to pay so great a price for his noncompliance. The injured party's recourse against him is based on chance, since he can normally expect to look only to the operator, particularly if the operator is in fact the purchaser of the automobile.

Safeguards for the plaintiff should be provided through the compulsory driver responsibility statutes with required insurance coverage for owners and operators to equate the risk, not penalties for failure to register title transfers promptly.

Since business appears to be more commonly and efficiently operated by having the vendor handle communications with the department,⁸¹ the desired result can best be reached by allowing the transferor a period of grace to prepare and collect necessary papers. The period should be long enough to allow him to sell a vehicle on a holiday or outside business hours without responsibility for the *immediate* actions of his transferee.⁸² No more than a few days would be necessary, for public policy would require that the department be notified within a relatively short period of time. Legislative action establishing a grace period of two to five days after sale and before registration would provide a reasonable solution to the problem.

Harris W. Seed

UNDISCLOSED PRINCIPAL'S RIGHTS AND LIABILITIES: A TEST OF ELECTION OF REMEDIES

In the peculiar situation where an agent conceals the identity and existence of his principal, the courts find difficulty in fitting decisions into the established patterns of legal doctrine. Thus it is settled that the undisclosed principal may sue or be sued on his agent's contracts.¹ Yet he is not, by conventional standards of mutual assent, a party to those contracts.²

Because of this difficulty, the rules relating to the undisclosed prin-

⁸⁰ *Larson v. Barnett*, 101 A. C. A. 330, 334, 225 P.2d 297, 300 (1950).

⁸¹ See note 28 *supra*.

⁸² See *Johnson v. Barreiro*, *supra* note 31 at 217, 138 P.2d at 749 (In holding the dealer liable the court said: "Appellant argues that it made its report as soon as was reasonably possible, since January 1st was a holiday. But this would not necessarily relieve it of liability in the interim.").

¹ RESTATEMENT, AGENCY §§ 186, 302 (1933); 2 MEACHEM, AGENCY § 1731 (2d ed. 1914).

² WILLISTON, CONTRACTS 843 (rev. ed. 1936); 2 MEACHEM, AGENCY § 1730.

Where the agency is disclosed or partially disclosed, liability depends on whether the understanding was that the principal was a party to the contract. RESTATEMENT, AGENCY § 144 (1933). While it depends on the agreement between the agent and other party whether liability is to be joint or only the agent's or principal's, the inference is that both are liable, the principal primarily, the agent as surety. *Id.* § 146, comment b; see *Geary St., P. & O. R. R. Co. v. Rolph*, 189 Cal. 59, 207 Pac. 539 (1922).

principal's rights and liabilities have been subjected to some arbitrary limitations. An example is the refusal to extend the doctrines of undisclosed agency to sealed contracts and negotiable instruments, although Professor Seavey, reporter for the *Restatement of Agency*, finds no sound reason for those exceptions.³

One of the chief limitations imposed on the undisclosed principal's liability⁴ is the rule that the third party cannot pursue both principal and agent until his claim is satisfied, but must elect which he will hold.⁵ In part, this seems due to an over-technical view of legal relations which considers that since there is only one contract involved, there can be only one cause of action based on it. *Ewing v. Hayward*, which first applied the election rule in California, illustrates this kind of thinking:⁶

The agent is liable because credit was originally extended to him in the belief that he was acting for himself. The undisclosed principal is liable on the theory that, having received the benefit of the contract made by his agent, he should assume its burdens. There is but one contract upon which the plaintiff . . . can bring suit . . . [H]e cannot make two contracts out of the one contract by seeking to hold each of those persons liable severally as an independent obligor. . . . The result is that the liability . . . is . . . alternative.

Even when the existence of separate rights against agent and principal is recognized, as in the later California cases, the doctrine of election of remedies has been invoked to prevent plaintiff from asserting his rights against both.⁷

Both views, it would seem, are traceable to a fundamental uncertainty felt by courts as to the function of the undisclosed principal's liability. Whether it should supplement, or only be alternative to, the third party's

³ RESTATEMENT, AGENCY §§ 191, 192, 303(a) (1933); SEAVEY, STUDIES IN AGENCY 90 (1949).

⁴ Where the agency is disclosed or partially disclosed, recovery of a judgment against the agent does not discharge the principal. RESTATEMENT, AGENCY § 184 (1933); SEAVEY, STUDIES IN AGENCY 209. His liability is discharged only if the third party's claim has been satisfied. RESTATEMENT, AGENCY § 185. *But see* Hannin v. Fisher, 5 Cal. App. 2d 673, 679, 43 P.2d 815, 817 (1935), indicating plaintiff must elect as if the case were one of undisclosed agency. The decision reversing a joint judgment may be justified on the basis that only the principal was intended as a party (see note 2 *supra*).

⁵ RESTATEMENT, AGENCY § 210(1): "An undisclosed principal is discharged from liability upon a contract if, with knowledge of the identity of the principal, the other party recovers judgment against the agent who made the contract"; *cf. id.* § 337; *accord*, RESTATEMENT, JUDGMENTS § 100 (1942).

This statement does not necessarily require an election when both parties are sued at the same time. But most American courts so apply the rule, some requiring election only if the defendants demand it, others as a matter of law. See the survey of cases in Merrill, *Election Between Agent and Undisclosed Principal: Shall We Follow the Restatement?*, 12 NEB. L. BULL. 100, 116-118 (1933); SEAVEY, STUDIES IN AGENCY 215.

⁶ 50 Cal. App. 708, 717, 195 Pac. 970, 974 (1920) (concurring opinion signed by two of three judges).

⁷ See *Klinger v. Modesto Fruit Co.*, 107 Cal. App. 97, 103, 290 Pac. 127, 129 (1930), 18 CALIF. L. REV. 569.

rights against the agent depends basically on the reasons advanced to justify the principal's obligations and rights.⁸

BASIS OF PRINCIPAL'S LIABILITY

The undisclosed principal's contractual liability has generally been explained on the basis that since he is entitled to the benefits of the agent's contracts, he should also bear the burdens.⁹ This may be acceptable as a crude expression of the equities of the situation, but it is hardly explicit enough to meet the objections advanced against the liability.

Thus it is said that treating one not disclosed at the time of the contract as a party is "opposed to the fundamental doctrines of mutual assent."¹⁰ The principal was not only not intended by the third party to be a party, but the agent intentionally left him unmentioned in the contract.¹¹ Consequently, from the liability side the third party might be considered to enjoy a windfall.¹²

Equitable Basis of the Liability

No compulsion of logic requires that the principal be found to be a "party" to the contract before his liability may be justified, if considerations of fairness justify imposing liability.¹³ From his side at least, both he and the agent intended that he should be the "owner" and beneficiary. Furthermore the principal was the cause of the contract, was in control, and was responsible for the plaintiff's situation either because of his own refusal to perform,¹⁴ or his choice of an irresponsible agent.¹⁵ Thus it is unjust not to require him to shoulder the burdens of the contract.¹⁶

⁸ The election rule has received much attention from writers, almost all of it critical. The most valuable discussions are found in SEAVEY, *STUDIES IN AGENCY* 215, and Merrill, *supra* note 5; see Clayton, *Election Between the Liability of an Agent and of His Undisclosed Principal*, 3 TEXAS L. REV. 384 (1925); Stecher, *The Doctrine of Election as Applied to Undisclosed Principal and Agent*, 7 MISS. L. J. 466 (1935); Wright, *Undisclosed Principal in California*, 5 CALIF. L. REV. 183, 189, 197 (1917); Comments, 39 YALE L. J. 265 (1929), 22 ILL. L. REV. 181 (1927); Notes, 18 CALIF. L. REV. 569 (1930), 24 IND. L. J. 446 (1949), 7 N.Y.U.L.Q. REV. 957 (1930).

⁹ Hulsman v. Ireland, 205 Cal. 345, 270 Pac. 948 (1928); Curran v. Holland, 141 Cal. 437, 75 Pac. 46 (1903); Ewing v. Hayward, *supra* note 6; cf. Shamlian v. Wells, 197 Cal. 716, 242 Pac. 483 (1925); Thomas v. Moody, 57 Cal. 215 (1881). See Merrill, *supra* note 5, 101 n.6, 103 n.17.

¹⁰ 1 WILLISTON, CONTRACTS 843.

¹¹ *Id.* § 286.

¹² 2 MECHEM, AGENCY § 1730.

¹³ As an original proposition, it was not necessary to put the principal's liability on a contract basis. It might have been limited to the cases where he was unjustly enriched, for example, so that plaintiff would have been allowed to recover only for the reasonable value of performance the principal actually received. But the law has not followed a path of such drastic restriction. For example, the principal's liability for breach of an executory contract has long been settled. 2 MECHEM, AGENCY § 1730.

¹⁴ Shamlian v. Wells, *supra* note 9; Cook v. Snyder, 16 Cal. App. 2d 587, 61 P.2d 53 (1936); Klinger v. Modesto Fruit Co., *supra* note 7; McDewitt v. Correia, 70 Cal. App. 245, 233 Pac. 381 (1924); Ewing v. Hayward, *supra* note 6.

¹⁵ See Argenti v. Brannan, 5 Cal. 351 (1855) (agent absconded); Hollywood Holding and Devel. Corp. v. Oswald, 119 Cal. App. 21, 5 P.2d 963 (1931) (unauthorized agreement); Thomas v. Moody, *supra* note 9 (agent irresponsible).

¹⁶ See SEAVEY, *STUDIES IN AGENCY* 88.

Nor does the principal's liability come as a windfall to the other party. The plaintiff's bargain with the agent was based on the economic advantage he thought the agent could provide. He expected that this advantage accompanied the agent's personal liability. Later he discovers that someone else was involved and that his obligor may not have been the real man of substance in the transaction.¹⁷ It is therefore just to permit him to pursue the economic advantage he contracted for insofar as it really lay with the principal.¹⁸

Enforcement of Agent's Right to Exoneration

The principal's liability has been justified on the basis of the agent's right to exoneration, which the third party sues to enforce.¹⁹ As a suitable rationale for the existence of the liability, this explanation presents difficulties. First, the cases do not require joinder of the agent, as would normally be required if suit were to enforce the agent's right against the principal. Instead they recognize a direct right.²⁰

Even if this direct right is explained as a shortcut,²¹ the full scope of the liability is not accounted for. The agent's right to exoneration exists only where he has acted with authority.²² But in some situations the undisclosed principal seemingly is found liable for acts done on his account without actual or apparent authority.²³ Furthermore, there is an overpowering artificiality in resting something as well-established as this liability on a basis not recognized by the cases, where the more realistic justifications already advanced make this unnecessary.

However, as a basis for circumventing the election rule this theory may

¹⁷ "It was [the principal's] credit which gave the agent assurance to enter the transaction and his support which gave the agent a standing in the mercantile world. To trust the owner of a business is not the same thing as to trust one who is not such owner and who is subject to the control of another in the transaction." SEAVEY, *STUDIES IN AGENCY* 90.

¹⁸ *Curran v. Holland*, *supra* note 9.

¹⁹ 1 WILLISTON, *CONTRACTS* § 289; 2 MECHEM, *AGENCY* § 1729.

²⁰ 1 WILLISTON, *CONTRACTS* § 289.

²¹ 2 MECHEM, *AGENCY* § 1729.

²² RESTATEMENT, *AGENCY* §§ 438, 439. For cases recognizing the agent's right to exoneration, see *Conner v. Hutchinson*, 12 Cal. 126 (1859); *Dolman Co. v. Rubber Corp. of America*, 109 Cal. App. 353, 293 Pac. 129 (1930).

²³ The *Restatement* recognizes that this liability for unauthorized acts cannot be sustained on the basis of apparent authority, since apparent authority rests on the third party's reasonable interpretation of the principal's acts as being manifestations of consent to the agent's acts. RESTATEMENT, *AGENCY* § 27. In the case of the undisclosed principal, there can be no such appearance of authorization. *Id.* § 194, comment *a*. His liability is limited to cases involving general agents, where the forbidden acts are incidental to authorized transactions, that is, acts within the scope of his employment, as in tort. The typical case is that of the manager-agent. See *id.* § 195. That a general agent's powers may be broader than his actual or apparent authority, see SEAVEY, *STUDIES IN AGENCY* 181; Seavey, *Agency Powers*, 1 OKLA. L. REV. 1, 10 (1948); RESTATEMENT, *AGENCY* §§ 6, 8, 12, 161, 194, 302.

Whether these rules pertain in California is far from clear. In Nielson, *The Power of an Agent to Bind His Principal—California and The Restatement*, 22 CALIF. L. REV. 392 (1934), it is concluded they are inapplicable. See *Hansen v. Burford*, 212 Cal. 100, 112, 297 Pac. 908, 913 (1931).

Nevertheless, in the following cases the undisclosed principal was held liable without proof of the agent's authority: *Marr v. Postal Union Life Ins. Co.*, 40 Cal. App. 2d 673, 105 P.2d 649 (1940); *Hollywood Holding and Devel. Corp. v. Oswald*, *supra* note 15.

offer genuine hope. In the significant Massachusetts case of *Evans, Coleman and Evans, Ltd. v. Pistorino*, plaintiff had obtained a judgment against the agent after discovering the undisclosed principal's existence.²⁴ The judgment could not be satisfied, so principal and agent were joined in an equity action brought to establish and subrogate the plaintiff to the agent's right to exoneration. The court recognized that plaintiff's prior judgment constituted an election, but held nevertheless that equitable principles warranted permitting his collection from the person liable to his debtor. While the debtor had not yet incurred a loss by paying the judgment, it was not necessary that he do so by borrowing or by being forced into bankruptcy, before the liability of his principal who was ultimately responsible could be enforced.

The practical importance of the Massachusetts decision lies in the fact that its scope seems unlimited by a requirement that the plaintiff have already obtained a judgment against the agent. In one case upon which the court relied, a plaintiff successfully employed the same procedure although he was not a judgment creditor but was only asserting ordinary contract rights against his debtor.²⁵ In other words, this authority might be used to support a judgment against principal and agent joined in a single suit. While the election doctrine might thus be circumvented effectively by indirection, this procedure is realistic in that it recognizes that the principal's liability is not alternative but rather is supplemental to the agent's liability, affording the third party additional protection which in fairness is due him.

BASIS OF PRINCIPAL'S RIGHTS

Notwithstanding an early decision which floundered on privity of contract theories,²⁶ California courts have always acknowledged the undisclosed principal's right to sue on contracts made for his benefit.²⁷ The existence of this right is revealing because it indicates that courts treat the principal as what he actually is, the one primarily interested in the transaction. It would cause undue perplexities to make his rights hinge on the agent's obtaining enforcement of them.²⁸

But if permitting the principal to sue would work injustice, the latter must suffer as part of the price for acting secretly. Here courts have manifested somewhat greater understanding of the third party's position where rights are being asserted against him, than where he attempts to assert his own rights. Thus where the third party could have set up defenses or

²⁴ 245 Mass. 94, 139 N.E. 848 (1923).

²⁵ *Forbes v. Thorpe*, 209 Mass. 570, 95 N.E. 955 (1911).

²⁶ *Argenti v. Brannan*, 5 Cal. 351 (1855).

²⁷ *Dabney v. Edwards*, 5 Cal. 2d 1, 53 P.2d 962 (1935), 103 A.L.R. 822 (1936); *Parker v. Otis*, 130 Cal. 322, 62 Pac. 571 (1900), *aff'd*, 187 U.S. 606 (1903); *Crosby v. Watkins*, 12 Cal. 85 (1859); *Ruiz v. Norton*, 4 Cal. 355 (1854); *Brooks v. Minturn*, 1 Cal. 481 (1851); *Buckley v. Shell Chemical Co.*, 32 Cal. App. 2d 209, 89 P.2d 453 (1939); *Simpson v. Bergmann*, 125 Cal. App. 1, 13 P.2d 531 (1932); *Cowan v. Tremble*, 111 Cal. App. 458, 296 Pac. 91 (1931).

²⁸ A rationale often advanced for the principal's direct rights against the third party is derived from the fact that the principal is held liable directly. Given this artificial liability, it is said, it is just and convenient to give the direct right. 2 MEACHEM, AGENCY § 2059.

counterclaims against the agent, these may be asserted against the principal as well.²⁹

For example, the defendant may have entered the contract intending to assert against the agent claims previously acquired,³⁰ or he may have acquired a claim subsequently for purposes of set-off.³¹ Since the principal invited sole reliance on his agent, he must take the consequences of the agent's conduct towards the third party. For the same reason, if the third party has rendered performance to the agent without notice of the principal's rights, he is discharged of his obligations to the principal.³²

Where performance necessarily involves personal relationships, the law also excuses the third party.³³ However, such cases come up rarely; none have been found in California.³⁴ The policy involved is narrow, and undue emphasis on this exception is more likely to produce confusion than justice. The judicial tendency to stretch the concept of personal services beyond the reasons underlying the classification is noticeable in this field as well as in others.

It might be urged in every case that the third party did not intend being bound to perform to the unknown principal. But in most cases the only legitimate concern of a contracting party is the other party's ability to perform his side of the bargain. When it is the third party trying to escape performance, it is largely irrelevant that he may have chosen the agent's honesty and credit to rely upon.³⁵

ELECTION TO SUE PRINCIPAL OR AGENT IN CALIFORNIA

The California courts recognize that the third party is liable to the undisclosed principal, and that he has rights against the agent and against the principal. However, the district courts of appeal have adopted the rule that the third party must elect between his rights.³⁶

²⁹ *White v. Kincaid*, 180 Cal. 135, 179 Pac. 685 (1919); *Ruiz v. Norton*, *supra* note 27; CAL. CIV. CODE § 2336.

³⁰ *White v. Kincaid*, *supra* note 29.

³¹ 2 *MECHEM*, AGENCY § 2079.

³² *Lumley v. Corbett*, 18 Cal. 494 (1861).

³³ *RESTATEMENT*, AGENCY §§ 309, 310; 1 *WILLISTON*, CONTRACTS § 291.

³⁴ However, in *Walton v. Davis*, 22 Cal. App. 456, 134 Pac. 795 (1913), the agent contracted to deliver cream to the third party who breached. On a suit brought by the principal, held since a personal service relationship was established, the possibility of liability to anyone but the agent was excluded. The case is justifiably criticised in *Wright*, *supra* note 8 at 186, on the ground that the third party's payment of damages might as well have been made to the principal without subjecting the former to any increased burden; see 2 *MECHEM*, AGENCY § 2067.

It may further be doubted that the relationship actually involved services which the principal could not as well have rendered. *But cf.* *Moklofsky v. Moklofsky*, 79 Cal. App. 2d 259, 179 P.2d 628 (1947).

³⁵ *Hay v. Hollingsworth*, 42 Cal. App. 238, 183 Pac. 582 (1919). This would seem to be the case whether the suit is for damages or specific performance, subject to equity doctrines of mutuality. See Comment, 28 CALIF. L. REV. 492 (1940); *Schader v. White*, 173 Cal. 441, 445, 160 Pac. 557, 559 (1916); 2 *MECHEM*, AGENCY § 2063. An exception would, however, be justified in a case involving misrepresentation. See *Kelley Asphalt Block Co. v. Barber Asphalt Paving Co.*, 211 N.Y. 68, 105 N.E. 88 (1914); accord, *RESTATEMENT*, AGENCY § 304; 2 *MECHEM*, AGENCY § 2071.

³⁶ *Grosso v. Monfalcone*, 13 Cal. App. 2d 405, 56 P.2d 1266 (1936); *McDevitt v. Correia*, 70 Cal. App. 245, 233 Pac. 381 (1924).

The strong statement made in the *Ewing* case was sufficient to cut short the growth of a

In accordance with the prevailing view, a conclusive election is made only by taking judgment.³⁷ This is the case either where one party is sued separately to judgment,³⁸ or more commonly, where both are joined and the choice to take judgment against one is exercised in the course of trial.³⁹

The election rule puts an added burden on the already wronged third party since it forces him not only to fight his case but to determine which defendant is the more solvent and the more likely to stay solvent until a judgment can be satisfied. A federal district court sitting in California recently refused to apply the rule because of its unfair operation.⁴⁰

However, the California rule is not as harsh as the rule in some jurisdictions.^{40a} Principal and agent may both be joined as defendants.⁴¹ Election need not be made until after the close of the trial and establishment of the agency relationship.⁴² Thus plaintiff does not run the risk of having elected to hold the principal and then being unable to prove the alleged agency. The most important condition mitigating the rule is that if defendants fail to require an election,⁴³ they waive their rights, so that a judgment against both will be upheld.⁴⁴

The California Supreme Court has never squarely held that an election is necessary. In the cases coming before it the right to require election has

contrary line of authority without reference to it. *Jewell v. Colonial Theater Co.*, 12 Cal. App. 681, 108 Pac. 527 (1910); *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260 (1906) (recognition and disapproval of election rule in concurring opinion). It is possible that the *Ewing* opinion was the product of the advocacy of the election rule three years before in *Wright*, *supra* note 8.

³⁷ Taking a default judgment against either party when suit has been brought against both is a defense to further suit against the other. *Pratt v. Hopper*, 12 Cal. App. 2d 291, 55 P.2d 517 (1936). But obtaining an entry of default does not constitute an election. *Cf. Sears v. Whiston*, 139 Cal. App. 682, 34 P.2d 818 (1934) (alternative ground; the case seemingly did not involve an undisclosed principal).

³⁸ See *Wedge v. Security-First National Bank*, 219 Cal. 113, 119, 25 P.2d 411, 413 (1933).

³⁹ Cases cited note 36 *supra*.

⁴⁰ The rule was not applied on the ground it was merely a rule of procedure and hence not binding on federal courts sitting in California. See *Denunzio Fruit Co. v. Crane*, 79 F. Supp. 117, 138 (S.D. Cal. 1948).

^{40a} See *The Jungshoved*, 290 Fed. 733 (2d Cir. 1923); *Barrell v. Newby*, 127 Fed. 656 (7th Cir. 1904); *Weil v. Raymond*, 142 Mass. 80, 91 N.E. 223 (1910).

⁴¹ *Klinger v. Modesto Fruit Co.*, *supra* note 7; *Montgomery v. Dorn*, 25 Cal. App. 666, 145 Pac. 148 (1914).

⁴² *Klinger v. Modesto Fruit Co.*, *supra* note 7 at 103-104, 290 Pac. at 129.

⁴³ Election may be required by demurrer or other appropriate motion. *Fleming v. Dolfin*, 214 Cal. 269, 4 P.2d 776 (1931), 78 A.L.R. 585 (1932). But see *Karapetian v. Carolan*, 83 Cal. App. 2d 344, 346, 188 P.2d 809, 811 (1948) (election must be affirmatively pleaded). Neither defendant can, by moving the action be dismissed as to him, make plaintiff's election for him. *Miller v. So. San Francisco C. E. Society*, 125 Cal. App. 85, 13 P.2d 824 (1932). Nor is it for the trial court to insist on an election if defendants fail to do so. *Fleming v. Dolfin*, *supra*; *Klinger v. Modesto Fruit Co.*, *supra* note 7.

⁴⁴ *Miller v. So. San Francisco C. E. Society*, *supra* note 43; *Klinger v. Modesto Fruit Co.*, *supra* note 7; *Rudolph Wurlitzer Co. v. Cutting*, 66 Cal. App. 38, 225 Pac. 11 (1924).

Where there is other basis for joint liability, a judgment against both is of course proper. *Dashaway Assn. v. Rogers*, 79 Cal. 211, 21 Pac. 742 (1889) (joint venture); *Rudolph v. Johnson*, 127 Cal. App. 451, 16 P.2d 152 (1932) (partnership). Compare *Schwaegler Co. v. Marchesotti*, 88 Cal. App. 2d 738, 199 P.2d 331 (1948); see *Marr v. Postal Union Life Ins. Co.*, 40 Cal. App. 2d 673, 105 P.2d 649 (1940), where a joint judgment was affirmed against parent and subsidiary corporations. Evidence showing that the parent was the subsidiary's "alter ego" was held sufficient to prove the agency relationship.

been held waived by defendants so that joint judgments are upheld.⁴⁵ However, it would be extreme to say that because the court has not decided the point, the election rule laid down by the intermediate appellate courts is not settled. It has been often recognized in supreme court dicta.⁴⁶ But by reliance on the waiver principal the court has emphasized that the election rule is only a procedural device.

Accordingly, while the election by judgment rule was launched in California on the theory that there was only one contract and only alternative liability,⁴⁷ this view has given way to an election of remedies doctrine which recognizes that the third party has different rights against principal and agent but requires him to choose between them.⁴⁸ Only on this basis can judgments against both be rationalized.

Mention has already been made of the remedy available in Massachusetts which permits plaintiff to sue both agent and principal to judgment, on the theory that he is enforcing the agent's right to exoneration against the principal.⁴⁹ This remedy stands side by side with the election rule. Since in California the plaintiff can join both as defendants, the only adaptation required to invoke this remedy would be a change in pleadings. No reason appears why a court convinced of the inequity of the election rule would not allow such a procedure, and its use would effectively dispose of the election bar.

But while a cautious attorney might chance relying on this remedy to opposing the accumulated weight of California cases following the election rule, it is obvious that the end to be gained is exactly the same—a joint judgment. The fundamental inquiry, then, must be into the doctrine of election of remedies on which the current law is founded.⁵⁰

ELECTION OF REMEDIES—A NEW APPROACH

On its face, the idea that one who has been wronged must stake his hope for relief on a single theory, or on a judgment against a single person where principal and agent have combined to produce his difficulties,⁵¹ is reminiscent of the ancient forms of action.⁵² Under them, choice of the proper procedural forms was indispensable to enforcement of substantive rights.

⁴⁵ *Craig v. Buckley*, 218 Cal. 78, 21 P.2d 430 (1933); *Fleming v. Dolfin*, 214 Cal. 269, 4 P.2d 776 (1931).

⁴⁶ Cases cited note 45 *supra*; *Wedge v. Security-First National Bank*, *supra* note 38.

⁴⁷ *Ewing v. Hayward*, *supra* note 6.

⁴⁸ *Klinger v. Modesto Fruit Co.*, *supra* note 7.

⁴⁹ See text at note 24 *supra*.

⁵⁰ Except for the doctrine of election of remedies, "there appears to be no good reason why each defendant who would otherwise be obligated, should not be liable." *Klinger v. Modesto Fruit Co.*, *supra* note 7 at 104, 290 Pac. at 130.

⁵¹ Election of remedies is not always thought to be relevant where the remedies are against different individuals. *Perkins v. Benguet Consol. Mining Co.*, 55 Cal. App. 2d 720, 753, 132 P.2d 70, 90 (1942); see Comment, 38 COL. L. REV. 292, 301 (1938); Note, 116 A.L.R. 601, 604 (1938).

⁵² CLARK, CODE PLEADING 498 (2d ed. 1947); Deinard and Deinard, *Election of Remedies*, 6 MINN. L. REV. 341 (1922); see Comment, 38 COL. L. REV. 292 (1938); Note, 36 CALIF. L. REV. 636, n.3 (1948); *Perkins v. Benguet Consol. Mining Co.*, *supra* note 51, at 753-762, 132 P.2d at 90-96.

In applying election of remedies in other fields, the California courts have properly based it on estoppel principles.⁵³ According to the language of the cases, an election is not made unless the third party's actions have induced detrimental reliance, and is not required unless his separate claims against principal and agent are so inconsistent as to preclude asserting them simultaneously.⁵⁴

This basis for the election doctrine has been entirely overlooked in the case of suits against an undisclosed principal and his agent.⁵⁵ Here election has been required mechanically without consideration of the reason for its application. Yet in the usual instances where the third party attempts to hold both principal and agent no estoppel may properly be said to arise, so that no reason exists for invoking election.

Joint Judgment Against Principal and Agent

Detrimental reliance could not be caused by a suit brought against both principal and agent. This only indicates that the plaintiff is seeking to enforce the rights the law purports to give him. Nor are these rights inconsistent.

The remedy provided against the agent is a matter of basic contract law. It was his credit and character which were thought to insure performance, and the discovery of a hidden principal should not deprive the plaintiff of what may still be his best hope of enforcement.⁵⁶

Yet it is only just to extend his right by allowing suit without election. The undisclosed principal's very appearance on the scene renders the agent's position ambiguous, raising doubts as to who really is capable of satisfying a judgment.⁵⁷ This is exemplified by an aberrant decision in which specific performance of a contract for the sale of land was decreed against an undisclosed principal and agent.⁵⁸ The court recognized that ordinarily an election should have been required; however, the agent still had possession of the principal's deed. Here the tangible nature of the benefit sought made it crystal clear to the court that adequate relief could only be obtained by a decree against both. That the ability to hand over a deed may be quite analogous to the ability to pay damages seems, however, not yet to have been realized.

Furthermore, the responsibility for the breach of contract will ordi-

⁵³ *Commercial Centre Realty Co. v. Superior Court*, 7 Cal. 2d 121, 59 P.2d 978 (1936); *Verder v. American Loan Society*, 1 Cal. 2d 17, 32 P.2d 1081 (1934); *Baumann v. Harrison*, 46 Cal. App. 2d 84, 88, 115 P.2d 530, 533 (1941) ("A change in remedies does not bring about an election of remedies unless the change involves prejudice to the opposing party As the doctrine of election of remedies is based upon the doctrine of estoppel, in order to sustain a theory of irrevocable election it must be shown that the two remedies are inconsistent and repugnant and that by the exercise of both the defendant would suffer unconscionable, unfair and unjust detriment.").

⁵⁴ Thus a principal may ratify or disaffirm an unauthorized transaction but he cannot do one and then the other at his pleasure. *RESTATEMENT, AGENCY* § 97, comment *a*.

⁵⁵ *E.g.*, *Klinger v. Modesto Fruit Co.*, *supra* note 7.

⁵⁶ *Miller v. So. San Francisco C. E. Society*, *supra* note 44; *Clark v. Baen*, 75 Cal. App. 389, 242 Pac. 872 (1925) (principal a bankrupt corporation).

⁵⁷ See *Curran v. Holland*, *supra* note 9 at 439, 75 Pac. at 47.

⁵⁸ *Menveg v. Fishbaugh*, 123 Cal. App. 460, 11 P.2d 438 (1932).

narily have been the principal's. Thus the election rule not only may permit him to enjoy the benefits of the contract without cost, but also may allow him to escape the consequences of his wrong.⁵⁹

Previous Judgment Against Principal or Agent

The California appellate courts have not yet been confronted with a suit brought against an undisclosed principal, where a judgment was first obtained against the agent while plaintiff was still ignorant of the principal's existence. American courts overwhelmingly hold that the first judgment in this situation does not constitute an election barring a subsequent judgment against the principal.⁶⁰ A plaintiff can hardly be said to have "elected" when he had no indication that a choice was available.⁶¹ In view of the strong current of authority reaching this result, and its accordance with election of remedies theory in other fields,⁶² it is reasonably certain that the California courts would entertain the second suit. Of course, to allow a subsequent judgment only where plaintiff was ignorant of the principal's existence means that the degree of protection accorded him hinges on the accident of not discovering the principle until after he has asserted his rights.

When the agency has been disclosed before the judgment has been obtained against only agent or principal, a subsequent judgment should not be precluded. Certainly this is true where the plaintiff makes it clear that he does not intend to abandon his claim against the other party in the event the first judgment cannot be satisfied. But even if his actions are equivocal, where judgment was first obtained against the agent the principal would normally have no grounds for claiming he changed his circumstances in reasonable reliance on plaintiff's action. Suit against the agent while indicating an intent to rely on him does not indicate readiness to abandon the claim against the principal.

Where judgment was first obtained against the principal, this argument may not appear quite as strong. The principal was, after all, the prime mover and chief beneficiary in the transaction. It may be that the agent could with more justification change his circumstances, supposing the third party's action showed an intent to look only to his master.⁶³

⁵⁹ *E.g.*, the agent of an undisclosed principal contracted with plaintiff to have plaintiff sell the principal's land. This plaintiff did and brought suit against both for his commission. He was given judgment only against the agent by the trial court. Had this judgment stood, principal would clearly have benefited without cost. *Held*: the defendants had waived their rights to require election. *Fleming v. Dolfin*, *supra* note 43.

⁶⁰ *Merrill*, *supra* note 8 at 118; *RESTATEMENT, AGENCY* § 210(2).

⁶¹ *RESTATEMENT, AGENCY* § 210, comment *a*.

⁶² *Verder v. American Loan Society*, *supra* note 53 at 32-33, 32 P.2d at 1087; *cf.* *Schenck v. State Line Tel. Co.*, 238 N.Y. 308, 144 N.E. 592 (1924), 35 A.L.R. 1149 (1925).

⁶³ *Compare* *RESTATEMENT, AGENCY* § 209: "An undisclosed principal is not discharged from liability upon a contract made for him by an agent by the fact that, after the discovery of his existence or identity, the other party looks only to the agent for payment or performance," *with id.* § 337: "An agent . . . is discharged from liability . . . to the extent that he is prejudiced thereby, if he changes his position in justifiable reliance upon the other's manifestation that he will look solely to the principal for payment." (Emphasis added.) See *Stecher*, *supra* note 8.

The point of real importance, however, is that consideration of election of remedies has no place in these cases. Its application has been at variance with the estoppel principles by which it has elsewhere been justified.⁶⁴ Taking a judgment which later cannot be satisfied only shows a mistake on the plaintiff's part as to the sufficiency of his remedy.⁶⁵ To put the risk of the mistake on him is inequitable since it is the defendants who concealed the true state of affairs when the contract was made.

CONCLUSION

When the rights of an undisclosed principal are in question, courts recognize that he was in a better position to protect himself than the outsider. Therefore, his rights are limited by any defense or claim the defendant third person had against the agent. But this concern for the third party's plight is not as evident when he is the one trying to assert rights. Because the nature of the transaction was hidden from him at the outset, he had no opportunity to demand the obligation of both principal and agent, as he otherwise might well have done.⁶⁶ Yet on his discovery of the true facts the election rule is interposed to prevent his doing the same thing.

Requiring an election of remedies by one dealing with an undisclosed principal ignores the policy considerations which distinguish the undisclosed principal's obligation from that of the agent. All of them furnish arguments that his liability should not be alternative to the agent's but available to the third party in addition. Only if it is so available can the latter have any fair assurance he will be able to satisfy his claim.

The branch of the law of agency under discussion, like the rest of the field, is apparently thought to be so well settled that few cases reach the appellate courts. The situation has probably been aggravated by the American Law Institute, which unfortunately has taken the side of the election rule.⁶⁷ The restaters themselves have admitted it was only accepted grudgingly, being thought to be too well settled to permit declaration of a better one.⁶⁸ But the text of the *Restatement* contains no hint of this.⁶⁹

⁶⁴ If in an unusual case there has been a justifiable detrimental reliance, estoppel may be invoked to prevent injustice. Introducing the panoply of election of remedies only serves the end of confusion.

⁶⁵ See *Schenck v. State Line Tel. Co.*, *supra* note 62, holding that the election of a remedy not in fact available (because barred by statute of limitations) does not preclude suit on another theory.

⁶⁶ See note 2 *supra*.

⁶⁷ See note 5 *supra*. The authority of the *Restatements* was recognized in *Canfield v. Security-First National Bank*, 13 Cal. 2d 1, 30-31, 87 P.2d 830, 844-845 (1939), where it was said great consideration was due them considering the circumstance of their drafting and their aim to state the better rule where there is a conflict.

⁶⁸ SEAVEY, *STUDIES IN AGENCY* 215. That the cases did compel this conclusion is denied by Merrill, *supra* note 8. Seavey, while crediting this contention, notes that since the publishing of the *Restatement* most of the decisions have been in accord with the rule it lays down.

⁶⁹ As is not unusual in the *Restatements*, neither the black-letter rules nor the explanatory comments reveal the marked conflict in the cases. It seems strange that the writers of the *Restatements* not only reserved for treatment elsewhere the criticism they sometimes felt the rules they were laying down deserved (see text preceding note 3 *supra*), but even failed to indicate the existence of strong contrary authority sustaining what was thought to be the better rule (note 68 *supra*).

Two avenues leading away from the unfairness of the election rule may be available. In following the first, suggested by the Massachusetts court in the *Pistorino* case,⁷⁰ plaintiff would attempt to obtain a joint judgment by suing the agent on the contract, and joining the principal in order to enforce the agent's right to exoneration against him. By this method one procedural device would be pitted against another to produce the desired result.

The more straightforward way would consist in challenge of the election rule itself. The barriers here are not as awesome as it might seem. It is to be remembered that the California Supreme Court has not yet passed on the election rule.⁷¹ For it to permit the third party to proceed against both of the others until his claim was satisfied would require no overturning of substantial rights. All that is involved is a procedural rule which works inequities. Refusal to sanction it would end improper application of the election of remedies doctrine, and would close an escape hatch which those who participate in wronging another can presently employ.

Grover R. Heyler

⁷⁰ See note 24 *supra*.

⁷¹ In New York it was necessary to pass a statute to overthrow the rule. N. Y. CIV. PRAC. ACT § 112-b (added 1939).