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# Election (Undisclosed Agency) Revisited

Maurice H. Merrill
*University of Oklahoma College of Law*

# ELECTION (UNDISCLOSED AGENCY) REVISITED

**Maurice H. Merrill***

How dear to some hearts is the old oaken doctrine
Of the misinformed plaintiff's election to sue
The contracting agent or undisclosed principal
Whom research or fortune presents to full view.[1]
If, having full knowledge, you proceed to judgment[2]
You may have imperiled your chance to collect.[3]
Should the jury's discretion absolve your defendant,
Your suit 'gainst the other is totally wrecked.[4]

Chorus: The old oaken doctrine,
The iron-bound doctrine,
The moss-covered doctrine,
That hangs on so well.

How gladly from judges of old some receive it,[5]
Reinforced by approval of courts "very strong";[6]
Neither reason nor justice will tempt them to leave it.[7]
Thus ancient decision lends credit to wrong.
And even Restaters submit to its power,
Unable to break with the voice of the past;[8]
Ill-fated the judgment and rueful its hour—

*Research Prof. of Law, Univ. of Oklahoma, Norman, Okla.

1 See Muller-Freienfels, The Undisclosed Principal, 16 Mod. L. Rev. 299. 313-317 (1953); Ferson, Undisclosed Principals, 22 U. of Cin. L. Rev. 131, 144-147 (1953).

2 See Note, 24 Ind. L.J. 446 (1949).

3 See Note, 39 Calif. L. Rev. 409, 415 (1951).

4 Mechem, Outlines of the Law of Agency § 162 (4th ed. 1952); cf. Murphy v. Hutchinson, 93 Miss. 643, 48 So. 178 (1909).

5 Georgi v. Texas Co., 225 N.Y. 410. 122 N.E. 238 (1919) (Election principle "has become thoroughly embedded in our procedure by many decisions in this and other states").

6 Restatement, Agency, Explanatory Notes § 435 (Tent. Draft No. 4, 1929).

7 Professor Seavey's cogent argument as to the injustice and impolicy of the election rule has never been surpassed. See 7 Proceedings A.L.I. 256-257 (1929). All the great American writers on Agency concur that the ends of justice require that the third party be allowed to pursue both principal and agent until he obtains satisfaction. See Merrill, Election Between Agent and Undisclosed Principal: Shall we Follow the Restatement?, 12 Neb. L. Bull. 100, 102 (1933).

8 Restatement, Agency §§ 210, 337 (1933).

The doctrine established makes Justice aghast.[9]

The years in succession now number past twenty,
Since first I decried, in voluminous prose,
The errors in reason, the obstacles plenty,
The rule to the redress of guile doth impose.[10]
Decisions numeric then clearly amounted
To nothing resembling a well-settled trend.[11]
Rememb'ring that cases are "weighed and not counted,"[12]
Let's see to which orbit the judges now tend.

And first be it noted, there's little *decision*
In the years which have passed since the survey was made.
Most opinions, when scanned with an eye for precision,
On this point rise not above dictum in grade.[13]
The courts which allegiance first gave to election
Mostly stick to that theory,[14] joined by a few
Others, all in dictum;[15] but there's some deflection
'Twixt one group and the other; analyses ensue.

Carolina (del Norte), past judgment ignoring,[16]
Has *said* that election is fixed when the suit
Commences, the "burden on trial" deploring,

[9] Augustus N. Hand, dissenting in Johnson & Higgins v. Charles F. Garrigues Co., 30 F.2d 251, 254 (2d Cir. 1929), says 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 . . . . "

[10] See Merrill, Election Between Agent and Undisclosed Principal: Shall We Follow the Restatement?, 12 Neb. L. Bull. 100 (1933).

[11] Id. at 116.

[12] Furman, in Buchanan v. State, 4 Okla. Cr. 645, 653, 112 Pac. 32, 35 (1910).

[13] Noteworthy among these dicta are the strong disapprovals of the election principle voiced by judges of such eminence as Charles E. Clark, writing for a bench whereon also sat Thomas W. Swan and Jerome Frank, in Ore. S. S. Corp. v. D/S A/S Hassel, 137 F.2d 326, 330 (2d Cir. 1943).

[14] Williams v. Investors Syndicate, 327 Mass. 124, 97 N.E.2d 395 (1951). See Northwest Atlanta Bank v. Willingham, 69 Ga. App. 258, 25 S.E.2d 154 (1943); Hartwig-Dischinger Realty Co. v. Unemployment Compensation Comm'n, 350 Mo. 690, 168 S.W.2d 78 (1943); Allen v. Liston Lbr. Co.. 281 Mass. 440, 183 N.E. 747 (1933).

[15] Dumaine & Co. v. Gay. Sullivan & Co., 192 So. 117, rehearing granted, 194 La. 777, 194 So. 779 (1940); Pittsburgh Term. Coal Corp. v. Bennett, 73 F.2d 387 (3d Cir. 1934) (remarkable for ignoring the Pennsylvania decisions, though indicating that, in general, Pennsylvania law applies to the case); Collins v. Aetna Ins. Co., 103 Fla. 848, 138 So. 369 (1931).

[16] North Carolina Lbr. Co. v. Spear Motor Co., 192 N.C. 377, 135 S.E. 115 (1926).

By way of investing its words with repute.[17]
Maryland, still declaring the need for election,[18]
Satisfaction proclaims as also the end
Of the plaintiff's full freedom in seeking protection
From conduct clandestine.[19] What may this portend?[20]

If the agent, discharging the judgment by payment,
Indemnity can't have, because of some fault,
The principal still must respond to the claimant,[21]
Since he's free from the agent's successful assault.
That's Tennessee doctrine,[22] but too much thereby's proven,
For never the master subjected can be
To agent's indemnity, unless there's been given
Satisfaction of judgment,[23] thus setting him free.

Pennsylvania steadfastly holds satisfaction
Alone puts an end to the obligee's choice.[24]

[17] Walston v. R. B. Whitley & Co., 226 N.C. 537, 39 S.E.2d 375 (1946). This is a novel reason, apparently not heretofore vocalized. Its closest resemblant is the forbidding "a plaintiff to trifle with the courts" notion expressed by Judge Baker in Barrell v. Newby, 127 Fed. 656, 661 (7th Cir. 1904). The utter unsoundness of the policy argument is demonstrated by the numerous decisions which allow actions brought against both principal and agent to proceed through trial, leaving the election as to who shall be cast in judgment either to the plaintiff or to the jury. See the analysis of decisions in Merrill, supra note 10 at 104-116. No suggestion ever has been made that the administration of justice in these states has broken down beneath the "burden on trial" imposed by this procedure.

[18] Hospelhorn v. Poe. 174 Md. 242, 259, 198 Atl. 582, 590 (1938).

[19] Hospelhorn v. Poe, 174 Md. 242, 257, 198 Atl. 582, 598 (1938). All statements relative to the point at which the third person is precluded from further pursuit of both principal and agent are but dictum, strictly speaking, as the case was decided at the stage of defendants' demurrers to declarations against both.

[20] The statements, of course, are equivocal. They *may* indicate judicial dissatisfaction with the election by judgment rule. They *may* be merely careless repetitions of statements found elsewhere.

[21] That is, he cannot interpose. as a defense to his liability to the third person, that the latter has an unsatisfied judgment against the agent, based on the contract made with the agent.

[22] See Hill v. Hill, 34 Tenn. App. 617, 241 S.W.2d 865, 870 (1951), citing Maple v. Cincinnati, H. & D. R.R.. 40 Ohio St. 313 (1883), a tort case. There was a prior dictum in Brummitt Tire Co. v. Sinclair Ref. Co., 18 Tenn. App. 270, 75 S.W.2d 1022, 1029 (1934) that the third person could not sue both principal and agent. This adds nothing to the dictum in Phillips v. Rooker, 134 Tenn. 457, 464, 184 S.W. 12, 13 (1916).

[23] See Stearns. Suretyship 517 (5th ed. 1951); 4 Williston, Contracts §§ 1274, 1285 (Rev. Ed. 1936).

[24] Joseph Melnick Building & Loan Ass'n v. Melnick, 361 Pa. 328, 64 A.2d 773 (1949).

California, still, whatever the action,
Allows judgment 'gainst both,[25] unless with strong voice,
Demand for election is stoutly asserted,[26]
A claim with propriety not to be made
Till chance for all error in choice is averted,
At close of the trial, by evidence's aid.[27]

Most salient response to the complex reagent
New Hampshire provided: both actors were sued;
Dismissal of principal; judgment 'gainst agent;
Later suit versus principal held to be good.[28]
Thus standeth the line-up, as presently voted,
Both doctrine[29] and statute[30] show definite trend
Away from election;[31] and much to be noted

[25] Luce v. Sutton, 115 Cal. App.2d 428, 252 P.2d 352 (1953); Hansen v. California Bank, 17 Cal. App.2d 80. 61 P.2d 794 (1936).

[26] McEwen v. Taylor, 106 Cal. App.2d 25, 234 P.2d 754 (1951); Grosso v. Monfalcone, 13 Cal. App.2d 405, 56 P.2d 1266 (1936); see Pratt v. Hopper, 12 Cal. App.2d 291, 55 P.2d 517 (1936).

[27] See Merrill, supra note 10. at 106-108; Note, 39 Calif. L. Rev. 409, 415 (1951). The right to require election at the close of the trial was held to be purely procedural and therefore not binding on a federal court in Joseph Denunzio Fruit Co. v. Crane, 79 F. Supp. 117 (S.D. Cal. 1948), repudiating the whole notion of election.

[28] Manchester Supply Co. v. Dearborn, 90 N.H. 447, 10 A.2d 658 (1940).

[29] The only statement indicating favor to election in a jurisdiction previously committed to satisfaction is in Ralston v. R. B. Whitley & Co., 226 N.C. 537, 39 S.E.2d 375 (1946). Only three cases in previously uncommitted jurisdictions contain dicta favoring election and no new jurisdiction gives allegiance to it by decision. See note 15 supra. Dicta favorable to satisfaction are found in two jurisdictions previously standing for election. Hill v. Hill, 34 Tenn. App. 617. 628-629, 241 S.W.2d 865, 870 (1950); Hospelhorn v. Poe, 174 Md. 242, 259, 198 Atl. 582, 590 (1938). Manchester Supply Co. v. Dearborn, 90 N.H. 447, 10 A.2d 658 (1940), clearly decides for satisfaction. Klasse v. Holt. 233 Iowa 826, 10 N.W.2d 540 (1943), holding that an agreed settlement with the agent after disclosure of the principal precludes pursuit of the latter, clearly seems to assume the satisfaction rule.

[30] "Where rights of action exist against an agent and his undisclosed principal, the institution or maintenance, after disclosure of the principal, of an action against either, or the recovery of a judgment against either which is unsatisfied, shall not be deemed an election of remedies which shall bar an action against the other." N.Y. Civ. Prac. Act § 112-b (Cahill-Parsons ed. 1946). Thus does the New York legislature throw Georgi v. Texas Co.. 225 N.Y. 410, 122 N.E. 238 (1919) on the trash heap of obsolete authorities.

[31] "This harsh doctrine, resting at most on a rather barren logic, appears to be giving away to the more equitable view that, in the absence of some estoppel, there is no election until a judgment is actually satisfied." Clark, in Ore. S. S. Corp. v. D/S A/S Hassel, 137 F.2d 326, 330 (2d Cir. 1943). See also Note, 25 So. Calif. L. Rev. 116, 119 (1951).

Is Judge Burch's opinion, so cogently penned,[32]
That "the trend of . . . decisions is now toward reality."[33]
Where both rights in their nature so clearly consist,[34]
No one need to choose 'twixt remedial duality.[35]
On full satisfaction the law should insist.[36]
Let's trust, then, our law, with its well-known propensity
To mould its commands by experienced light,
To abandon election, that height of nonsensity,[37]
May the Restatement adopt a position so right![38]

[32] State Bank of Kingman v. Braly's Estate, 139 Kan. 788, 33 P.2d 141 (1934).

[33] Id. at 792, 33 P.2d at 144.

[34] Ibid. ("the essence of the doctrine of election of remedy is choice between two inconsistent rights").

[35] Id. at 793, 33 P.2d at 144.

[36] Id. at 794, 33 P.2d at 145.

[37] See Note, 49 Mich. L. Rev. 438, 439 (1951); cf. Ferson, Principles of Agency §§ 170-175 (1954).

[38] See Mechem, Outlines of Agency 106 (4th Ed. 1952).