



1950

# Partially Disclosed Agency and Its Significance

Delmer Ison

*University of Kentucky*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Agency Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Ison, Delmer (1950) "Partially Disclosed Agency and Its Significance," *Kentucky Law Journal*: Vol. 39 : Iss. 2 , Article 5.

Available at: <https://uknowledge.uky.edu/klj/vol39/iss2/5>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

is admissible under some principle and that it is safe to admit it as part of the *res gestae*. Every principle included within the term *res gestae* is recognized by the Court as a separate principle of evidence. Therefore, it is apparent that the use of the term *res gestae* is unnecessary.

From the foregoing it would seem obvious that the most desirable course of action on the part of the Court would be the abandonment of the term *res gestae*, and substituting therefor those separate exceptions to the hearsay rule that have been pointed out as comprising the general term. The least that should be done is that the Court should verbalize a recognition of a definition of *res gestae* as being a categorical term including the five separate exceptions to the hearsay rule which have been discussed herein; namely;

1. Verbal act
2. Spontaneous exclamation
3. Circumstantial evidence
4. Mental or physical condition
5. Admissions made by agent

HOLLIS E. EDMONDS

#### PARTIALLY DISCLOSED AGENCY AND ITS SIGNIFICANCE

One of the purposes of this note is to determine when and to what extent the distinction between "undisclosed" agency and "partially disclosed" agency is material in the actual determination of the legal rights and liabilities of principal, agent and third party. Another purpose is to discuss the duties of the parties as to disclosure of, and inquiry into, the agency relationship, and determine the consequences of the failure to carry out these duties. A brief discussion also will be devoted to the theories behind the duties of the parties and the soundness of these theories in the light of their application.

##### I. DEFINITION OF TERMS AS USED IN THIS ARTICLE.

A. *Agency*. A relationship between one party (the agent) and another party (the principal), the purpose of which is to create, modify, terminate and otherwise affect contractual relations between the principal and third persons.

B. *Fully Disclosed Agency*. The relationship where the fact of agency and the identity of the principal are known by both the agent and the third party.

C. *Partially Disclosed Agency*. The relationship where the fact of agency is known by both the agent and the third party, but the name of the principal is unknown by the third party.

D. *Undisclosed Agency*. The relationship where the fact of agency is unknown to the third party.

##### II. LIABILITY OF THE PRINCIPAL OR AGENT.

One who deals with a fully disclosed agent must normally look only to the principal for legal responsibility in matters arising out of such dealings, in the absence of any open pledge of the agent's credit.<sup>1</sup> This rule is basic in the law of agency. Furthermore, where the relation of principal and agent legally exists,

<sup>1</sup> *Whitney v. Wyman*, 101 U.S. 392, 396, 25 L. Ed. 1050 (1879); *See Gordon v. Brinton*, 55 Wash. 568, 104 Pac. 832, 833 (1909). Throughout this note, cases where agent acts in excess of his authority are excluded.

although undisclosed, the principal may be held liable because it is as much his contract as if the agency were fully disclosed, although here the agent may be held alternatively if the third party so elects.<sup>3</sup> For purposes of exempting the agent from liability to the third party, the disclosure of the agency must include the identity of the principal.<sup>4</sup> In other words, the agency must be fully disclosed at the time of the transaction if the agent is to be free of liability.<sup>5</sup>

It is not within the scope of this article to discuss what constitutes an election by the third party,<sup>6</sup> but generally, "It is only after discovery of the principal and opportunity to make a deliberate and intelligent choice that the third party is in a position to elect."<sup>7</sup> An election, made with full knowledge of the circumstances of the case and with freedom of choice, is irrevocable.<sup>8</sup> In the majority of juris-

<sup>2</sup> *Kayton v. Barnett*, 116 N.Y. 625, 23 N. E. 24, (1889). See *Baldwin v. Garrett*, 111 Ga. 376, 36 S.E. 966 (1900), construing a code section, held that where one dealt with an agent who failed to disclose his principal his right to proceed against the principal was not dependent on the diligence used in discovering the fact of the concealed agency.

In *Ballister v. Hamilton*, 3 La. Anno. 401 (1848), the Court said: "Mere knowledge that there is a principal, does not destroy the right of a party dealing with the agent to look to the principal when afterwards discovered.

<sup>3</sup> *Kingsley v. Davis*, 104 Mass. 178, 180 (1780), which case was approved in *Weil v. Raymond*, 142 Mass. 206, 7 N.E. 860, 865 (1886), but was disposed of on other grounds. See *Banjo v. Wacker*, 251 S.W. 456, 458 (Mo. 1923).

<sup>4</sup> *Argersinger v. MacNaughton*, 114 N.Y. 535, 21 N. E. 1022, 1023 (1889). See *Gordon v. Brinton*, 55 Wash. 568, 104 Pac. 832, 833 (1909).

<sup>5</sup> In *Mercer v. Leihy*, 139 Mich. 447, 452, 102 N.W. 972, 974 (1905), the Court said: "The question here seems to be whether anything less than a disclosure of the name of the principal is sufficient, and a number of authorities are cited which use language to the effect that disclosure of the name of the principal is essential.

"We are of the opinion that the statement, frequently found, that the agent, to avoid personal liability, must disclose the name of his principal, is due to the fact that such is, in the nature of things, the natural and ordinary, and many times the only convenient and practicable, way of identifying him. The important information to be given to the purchaser is that the auctioneer is an agent, acting for a principal whom he discloses, and it would seem that the accurate giving of his principal's name is not indispensable where other means of clearly pointing out and identifying him are adopted.

In *Falk v. Wolfsohn*, 7 Misc. 314, 27 N.Y.S. 903 (1894), it was pointed out that if the third party knows the principal, although he did not learn of him through the agent, the knowledge is still sufficient to relieve the agent of liability.

In *Royce v. Allen*, 28 Vt. 234, 236 (1856), the Court said: "The law upon this subject is well established, that, in simple contracts, if the agent does not disclose his agency, and name his principal, he binds himself, and is subject to all liabilities, express or implied, created by the contract, in the same manner as if he were the principal in interest.

In *Alexander Lumber Co. v. McGeehan*, 124 Wis. 325, 102 N.W. 571 (1905), the Court, in referring to the case of *Royce v. Allen*, *supra*, and approving the rule as quoted in that case, said: "That is a correct statement, but like most general rules it is not entirely without exceptions. The general statement should not be construed as requiring the agent under all circumstances to expressly declare his agency and the name of his principal—to do so regardless of whether the person dealing with him knows the facts, or is chargeable with knowledge thereof from circumstances brought to his attention.

<sup>6</sup> A discussion of an election is not a subject of this article. For an excellent selection of cases and a discussion on this entire subject, see 21 L.R.A. (N.S.) 786.

<sup>7</sup> 2 AM. JUR. 315.

<sup>8</sup> *E. J. Codd Co. v. Parker*, 97 Md. 319, 55 A. 623, 624 (1903); *Weil v. Raymond*, 142 Mass. 206, 7 N.E. 860, 865 (1886); *Kingsley v. Davis*, 104 Mass. 178, 180 (1870).

dictions, it becomes the duty of the third party to elect within a reasonable time after discovery of the principal, and a failure to do so will result in the principal being released from all liability.<sup>9</sup> Presumably, this is based on the theory that since the third party contracted with the agent thinking the agent was the real party in interest, and could, if he so elected, hold the agent solely liable, then if he fails to elect within a reasonable time after discovery of the true principal, it is a reasonable deduction that he desires to continue to look to the agent.

Is there a duty on the agent to disclose the fact of agency and the name of his principal, or, is there a duty on the third party to inquire to determine if he is dealing with an agent? Standing alone, this question cannot be answered categorically. It is well settled, however, that if the agent is to escape personal liability, the duty is on him to disclose, not only the fact of agency but the identity of his principal,<sup>10</sup> and the courts consistently hold that there is no duty on the third party to inquire to determine if he is dealing with an agent,<sup>11</sup> and, apparently, no duty to inquire as to the identity of the principal where the agency

---

<sup>9</sup> *Smethurst v. Mitchell*, 1 El. & El. 622, 102 E.C.L. 622, 120 Eng. Rep. 1043 (1859); *approved* in *Curtis v. Williamson*, L. R. 10 Q.B. 57, 59 (1874). See *James v. Bixby*, 11 Mass. 34-39 (1814). In 1 *AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW*, Second Ed., 1139, it is stated: "The principal will be released from all liability if the right of election is not exercised by the other party within a reasonable time after such principal is discovered."

<sup>10</sup> *Horan v. Hughes*, 129 Fed. 248 (S.D.N.Y. 1903); *affirmed* in 129 Fed. 1005 (C.C.A. 2d 1905); *Murphy v. Hilmrich*, 66 Calif. 69, 4 Pac. 958, 959 (1884); *Frederick Raff Co. v. Goeben*, 116 Conn. 83, 163 A. 462, 463 (1932); *Kelly v. Guess*, 157 Miss. 157, 127 So. 274, 276 (1929). See *Banjo v. Wacker*, 251 S.W. 456, 458 (Mo. 1923); *Cockran v. Rice*, 26 S.D. 393, 398, 128 N.W. 583, 585 (1910).

<sup>11</sup> *Frederick Raff Co. v. Goeben*, 116 Conn. 83, 163 A. 462, 463 (1932); *Fritz v. Kennedy*, 119 Iowa 628, 93 N.W. 603, 604 (1903). In *Raymond v. Crown Mills*, 2 Metc. (Mass. 1841) 319, 324, the Court said: "But it was contended, that if the plaintiffs had, at the time of the sale, the means of knowing that the goods were purchased on account of the defendants and for their benefit, and yet debited them to the account of Rogerson, this should bar the claim of the plaintiffs against the defendants, although they had no actual knowledge who the principal was. Such a principle as is suggested would present great practical difficulties in its application, and might do great injustice. The question at once arises, to what extent are means of knowledge to exist, to justify its application? Is it necessary that the vendor should avail himself of every possible means to learn whether the individual he is dealing with be principal or agent? If so, the mere neglect by the vendor to inquire of the person with whom he was actually dealing, whether he was acting as principal or agent, and if agent, the name of the principal, would be, in most cases, not using the means of knowledge which were at hand. We do not understand the rule to be applied with this strictness; but that, on the contrary, there must be actual knowledge, on the part of the vendor, of the relation of the parties, and their interest in the matter, to exonerate the principal by giving the credit to the agent. If, with such knowledge, the vendor chooses to give credit to the agent as his debtor, he discharges the liability of the principal. It is not however enough that there might exist circumstances, that would, in the minds of some men, have awakened suspicions and led to further inquiries. Nor is it enough (if we adopt the decision in the case of *Thomson v. Davenport*, 9 Barn. & Cres. 78), to exonerate an unknown principal, that the agent declared, at the time of the sale, that he was dealing for another, if he did not disclose the name of his principal. That case, while it fully recognizes the general rule already stated—that if one, knowing the name of the principal, elects to credit the agent, he cannot afterwards resort to the principal—denies its application to cases where the name of the principal was unknown, although the fact of agency of the one dealing with him was disclosed, and the vendor must have been apprized that another party might be made the debtor."

is partially disclosed.<sup>12</sup> But it should be pointed out that it is only in a situation where the third party is seeking redress that the duty of the agent to disclose becomes significant. This will be pointed out in the discussion to follow.

*Summary:* Where the third party is seeking redress:

(1) If at the time of the transaction the agency was undisclosed or only partially disclosed, the third party may hold the agent liable, or, upon discovery of the principal, may elect to hold either the principal or agent liable.

(2) After discovery of the principal, the third party must make his election within a reasonable time, or the principal will be relieved of all liability.

(3) The duty is on the agent to disclose the fact of agency and the name of his principal, and not on the third party to inquire.

(4) For purposes of relieving the agent of personal liability, the disclosure of the agency must include the name of the principal; hence for this purpose there is no distinction between a partially disclosed and an undisclosed agency.

### III. LIABILITY OF THE THIRD PARTY.

Having concluded that a third party may, on discovery of the true principal, hold the principal liable on the contract, it follows, and the courts are unanimous in holding, that the undisclosed principal may appear at any time in his true character and claim the benefits of the contract.<sup>13</sup> However, the principal can enforce the contract only to the extent that his doing so does not prejudice the rights of the third party. In other words, if in dealing with the agent the third party thought he was dealing with the real party in interest, then, when the principal appears and sues on the contract the third party may ordinarily set up any defense or set-off which he could have set up against the agent had the agent been sued as principal.<sup>14</sup> The cases have given two theories for this rule. (1) The

*See* *Estes v. Jones*, 119 Miss. 142, 80 So. 526; 528 (1919); *Johnston v. Farrott*, 92 Mo. App. 199, 204 (1902); 2 C.J. 817.

<sup>12</sup>*Nelson v. Andrews*, 19 Misc. (N.Y.) 623, 44 N.Y.S. 384 (1897); *Rollins v. Phelps*, 5 Minn. 373, 378 (Gilf. 1860-1861). *See* *Mills v. Hunt*, 20 Wend. 431, 433 (N.Y. 1838).

<sup>13</sup>*Ford v. Williams*, 21 How. (U.S.) 287, 289, 16 L. Ed. 36, 38 (1858); *Bell Grocery Co. v. Letts-Fletcher Co.*, 211 Ky. 147, 149, 277 S.W. 295 (1925). The reason for the rule is set out in *Sullivan v. Shailor*, 70 Conn. 733, 736, 40 A. 1054, 1055 (1898), wherein the Court said: "But, as the reason of the rule which permits the principal to sue in such cases in his own name is that he is entitled to the ultimate benefit of the contract made by his agent, so, in seeking to recover that benefit, he must assume the position of the agent whose contract he is enforcing, and the action so instituted by him is open to the defenses which might have been interposed to a suit commenced by the agent at the time the principle first sought to enforce the contract."

In *Barry v. Page*, 10 Gray 398, 399 Mass. (1858), the Court said: "As the contract of an agent is in law the contract of the principal, the latter may come forward and sue thereon, although at the time the contract was made the agent acted as and appeared to be the principal."

<sup>14</sup>*Ford v. Williams*, 21 How. (U.S.) 287, 289, 16 L. Ed. 36, 38 (1858); *Bell Grocery Co. v. Letts-Fletcher Co.*, 211 Ky. 147, 149, 277 S.W. 295 (1925). In *Barry v. Page*, 10 Gray 398, 399 (Mass. 1858), in qualifying the rule with respect to the principal's appearing and claiming the benefits of the contract, the Court stated: "There is a qualification of the rule, by which it is held that when a contract has been made for an undisclosed principal, who permits his agent to act as apparent principal in the transaction, the right of the former to intervene and bring suit in his own name is not allowed in any way to affect or impair the right of the other contracting party, but he will in such case be let in to all the equities,

principal permitted his agent to practice deception on the third party, and the loss should fall upon the party whose conduct made the deception possible. This theory is based upon the idea that it would be unjust to put the third party in a worse over-all position by withholding the true facts from him, than he would have been in had the facts actually been as he was led to believe them to be. (2) The principal must take the contract as he finds it; he must assume the burdens of the contract as well as its advantages.<sup>15</sup> The application of the second theory is somewhat broader than the theory itself. For instance, it is a reasonable inference, on the basis of the second theory, that the rule would apply only to those defenses or set-offs that are connected with the contract which the undisclosed principal is attempting to enforce. However, this is not at all true. The cases hold that the third party may set up any defense or set-off which existed in his favor against the agent at any time prior to the action by the principal, whether *connected* with that particular contract or not.<sup>16</sup>

It is well settled that the third party cannot avail himself of any separate defense or set-off which he might have against the agent, where he knew of the agency at the time the contract was entered into, even though the agency was but partially disclosed.<sup>17</sup> Moreover, even in a case of undisclosed agency if by virtue of the nature of the transaction the third party was put on inquiry as to the fact of agency and with reasonable diligence could have learned of the agency, defenses and set-offs against the agent are not available to the third party in a suit by the principal against the third party.<sup>18</sup> It follows that for purposes of depriving the third party of the use of such defenses and set-offs, notice need not extend to the name of the principal. Contrary to the situation where the third party is seeking redress, the responsibility is not upon the agent to disclose the fact of agency, but the third party is under a duty to inquire, if he is to avail himself of such defenses and set-offs against the principal.

*Summary:* Where the principal is seeking redress:

(1) The principal, even though undisclosed, may appear at any time in his true character and claim the benefits of the contract.

(2) Where the agency was undisclosed, the third party may set up against the principal any defense or set-off which he could have set up against the agent had the agent been sung as principal.

(3) Where the agency was only partially disclosed, the third party may set up against the principal only such defenses and set-offs as arise out of the particular contract, or as he may have against the principal otherwise.

(4) If the facts within the third party's knowledge are such as would lead a person of ordinary prudence to believe he was dealing with an agent, a duty arises on the third party to inquire to determine if he is dealing with an agent. If he fails to inquire, and it later develops that he dealt with an agent, the de-

---

set-offs and other defenses to which he would have been entitled, if the action had been brought in the name of the agent."

<sup>15</sup> See *Frazier v. Poindexter*, 78 Ark. 241, — 95 S.W. 464, 466 (1906).

<sup>16</sup> *Hooke v. Crowe*, 100 Me. 399, 61 A. 1080 (1905); *Traub v. Milliken*, 57 Me. 63, 66 (1869).

<sup>17</sup> See *Munroe v. Adamo*, 136 Ky. 252, 124 S.W. 296 (1910); and *Winslow Bros. & Co. v. Staton*, 150 N.C. 264, 63 S.E. 950, 951 (1909).

<sup>18</sup> *Whelan v. McCreary*, 64 Ala. 319, 326 (1879).

<sup>19</sup> *Frazier v. Poindexter*, 78 Ark. 241, 95 S.W. 464, 466 (1906); *Miller v. Lea*, 35 Md. 396, 407 (1872); *McLachlin v. Brett*, 34 Hun. (N.Y. 1885) 478, 481.

fenses and equities existing between him and the agent are, nevertheless, cut off, except, of course, that the third party may always use defenses and set-offs arising out of the particular contract itself.

#### IV WHEN SHOULD THE AGENCY BE DISCLOSED?

A. *Protecting the Interests of the Agent.* It would always be in the interest of the agent to disclose fully the agency, since a failure to do so might result in an election by the third party to hold the agent liable. If the agent is to avoid liability, the disclosure of the agency must include the principal's name.

B. *Protecting the Interests of the Principal.* Of course, the principal is liable on his contract whether the agency be disclosed or undisclosed. Therefore, insofar as liability of the principal is concerned, disclosure is of little significance. It has been suggested, however, that nondisclosure of the agency serves to enhance the interests of the principal to the extent that the third party may elect to hold the agent solely liable. On the other hand, for purposes of cutting off the defenses and equities which the third party may have against the agent, and could otherwise set up against the principal, it is to the principal's interests that the agency be disclosed. It is submitted that the interests of the principal will be better served by the latter course than they would be by a nondisclosure of the agency because it is of more importance to cut off the defenses and equities existing between the agent and third party, since in an overwhelming majority of instances the third party will elect to hold the principal liable even with the right of election.

It should be pointed out that the disclosure need not include the principal's name, but is sufficient if the third party is put on inquiry.

#### V DUTY TO DISCLOSE VS. DUTY TO INQUIRE.

In speaking of liability of the agent, the authorities say:

"It is the duty of the agent, if he would avoid personal liability on a contract entered into by him on behalf of his principal, to disclose not only the fact that he is acting in a representative capacity but also the identity of his principal, as the person dealt with is not bound to inquire whether or not the agent is acting as such for another."<sup>19</sup>

At the same time, and in the next breath, in cases where the principal is seeking to hold the third party liable, we find one authority saying: the third party

" must be cautious, and not act regardless of the rights of the principal, though undisclosed, if he has any reasonable grounds to believe that the party with whom he deals is but an agent. Hence, if the character of the seller is equivocal; if he is known to be in the habit of selling sometimes as principal and sometimes as agent and if the buyer chooses to make no inquiry, and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of his set-off. If by due diligence the buyer should have known in what character the seller acted, there would be no justice in allowing the former to set off a bad debt at the expense of the principal."<sup>20</sup>

At first blush, it would appear that there is an inconsistency in the above

<sup>19</sup> 2 C. J. 816.

<sup>20</sup> *Miller v. Lea*, 35 Md. 396, 406 (1872).

rules, but a careful study of the two rules and the results of their application will serve to remove objection thereto. In the first place, the above rules are applicable to wholly separate and unconnected interests of entirely different individuals. Thus the duty is placed upon the third party to inquire for the protection of the partially disclosed or undisclosed principal, rather than for the protection of the agent. It is not only well settled by authority but common sense dictates that one should not be permitted to disregard the interests of an undisclosed principal and deal with an unscrupulous agent to the principal's detriment, when he was on notice, actually or constructively, of the agency relationship. In other words, such notice should be deemed to change an undisclosed agency into a partially disclosed agency.

On the other hand, the duty is placed upon the agent to disclose the agency for the obvious reason that one should not be permitted to transact business in his own name and then seek immunity from liability by saying that the contract is not his. The duty to disclose certainly is not burdensome for the agent. The agent, from the very beginning, could relieve himself of all liability by informing the party with whom he deals of the agency relationship and the identity of the principal. In fact, if he fails to disclose the agency at all it is reasonable to assume that he intends to be liable; and the law goes further and requires the disclosure of the principal's identity, if the agent is to be relieved of liability. This is based on the theory that the third party is entitled to know the identity of someone whose credit will stand behind the contract.

These two rules then, considered in the light of their application, are not only consistent, but are sound in both principle and result.

#### VI. CONCLUSION: SIGNIFICANCE OF PARTIALLY DISCLOSED AGENCY.

A. *As Affects the Principal's Rights and Liabilities:* Partial disclosure of the agency will cut off defenses and equities existing between the agent and third party, which the third party might otherwise set up against the principal if the agency were undisclosed. These would only include claims and set-offs of the third party against the agent arising from other transactions. Although the agency is partially disclosed, the principal will nevertheless be relieved of liability if the third party elects to pursue the agent. However, the partial disclosure of the agency does not serve to enhance or reduce the liability of the principal, because he may be held liable when discovered whether the agency be fully disclosed, partially disclosed or wholly undisclosed.

B. *As Affects the Agent's Rights and Liabilities:* Partial disclosure of the agency has very little, if any, significance as to the agent's liability, since even though the agency is partially disclosed, the agent may still be held liable if the third party so elects. If the agent is to avoid liability the agency must be fully disclosed.

C. *As Affects the Third Party's Interests:* Partial disclosure of the agency will prevent the third party from availing himself of defenses and equities, in a suit brought by the principal, existing between the agent and the third party and arising from other transactions. However, partial disclosure of the agency does not prevent the third party from electing to hold the agent liable on the contract. To deprive the third party of this right, the agency must be fully disclosed.