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# Fiduciary Obligations of Agents

Alvin E. Evans

**T**HIS PAPER was largely suggested by the *van Woy* case discussed at length below. It was prepared shortly before the appearance of Professor Seavey's recent *Studies in Agency*, which, among other matters, reproduces his reporter's notes on certain sections of the Agency Restatement. It is mainly concerned with the topics found under Sections 387-394 of the Restatement. It happens that the Seavey book does not supply notes upon these sections. This article may perhaps serve to implement these sections

to some extent, and also Section 407 and Professor Seavey's notes on that section. It deals with middlemen or go-betweens; double commissions; bribing the agent; conversion of the principal's property and anti-principal activity by him; profits obtained in

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various other ways; tips; poundage for friendly services; resales; and perhaps some items difficult to classify specifically.

## 1. THE MIDDLEMAN OR GO-BETWEEN

There are some situations where commissions are freely permitted from both the principal parties by contract, and usually there is no duty of disclosure upon the claimant of the commissions. Such claimants are called middlemen or go-betweens. The precise limits of the relationship between such claimants and the principal parties to the transaction have never been closely defined. They are said not to be fiduciaries, which statement seems to mean that they are not truly agents.<sup>1</sup> Middlemen may receive double compensation under a contract with each actor, and most courts hold that there is no duty of disclosure to either paymaster.<sup>2</sup> However, there is some disagreement on the point.<sup>3</sup>

<sup>1</sup> *Clopton v. Meeves*, 24 Idaho 293, 133 Pac. 907 (1913); *Tracey v. Blake*, 229 Mass. 57, 118 N.E. 271 (1918); *Friar v. Smith*, 120 Mich. 411, 79 N.W. 633 (1899).

<sup>2</sup> *Eaton v. Clabaugh*, 251 Fed. 575 (6th Cir. 1918); *McLure v. Luke*, 154 Fed. 647 (9th Cir. 1907); *Mullen v. Keetzleb*, 70 Ky. (7 Bush) 253 (1870); *Montross v. Eddy*, 94 Mich. 100, 58 N.W. 916 (1892); *Herman v. Martuneau*, 1 Wis. 136 (1853).

<sup>3</sup> *Walker v. Osgood*, 98 Mass. 348 (1867); *Rupp v. Sampson*, 82 Mass. (16 Gray) 398 (1860).

Possible tests of what constitutes a go-between have been made. The difficulty lies in the application of the tests. Thus, it is said that his sole duty is to bring the parties together in such a way that there is no conflict in his obligations to the two;<sup>4</sup> he is not a fiduciary<sup>5</sup> and cannot assist either party; he is not an agent;<sup>6</sup> he has nothing to do with the price or terms;<sup>7</sup> he enters into no negotiations but merely procures an interview between the two actors;<sup>8</sup> he exercises no discretion;<sup>9</sup> there is no reliance upon his judgment, no active participation by him;<sup>10</sup> he is indifferent as between the parties;<sup>11</sup> the chief actors do their own bargaining.<sup>12</sup> It is evident that these separate statements are largely a repetition, one of the other, but in different words.<sup>13</sup>

A Massachusetts case, *Walker v. Osgood*,<sup>14</sup> illustrates a situation which would seem clearly to establish the relationship of a go-between under the above tests. One of the parties said to the so-called agent: "If you send or cause to be sent to me by advertisement, or otherwise, any party with whom I may see fit and proper to effect a sale or exchange of my real estate above described, I will pay you the sum of \$200." It seems questionable whether there could be any duty upon a person so commissioned to take account of the character or credit of the one produced (fraud aside). In the *Walker* case, fraud was not in issue, but, rather, the question was whether a commission on both sides could be stipulated for. It was said there, however, that the service he performs must be in the interest of the first one to employ him, and he could not claim fees from both. An earlier case<sup>15</sup> was criticized for allowing double commissions under similar circumstances

<sup>4</sup> *Clark v. Allen*, 125 Cal. 277, 57 Pac. 985 (1899); *Tracey v. Blake*, 229 Mass. 57, 118 N.E. 271 (1918).

<sup>5</sup> *Clopton v. Meeves*, 24 Idaho 293, 133 Pac. 907 (1913).

<sup>6</sup> *Tracey v. Blake*, 229 Mass. 57, 118 N.E. 271 (1918); *Friar v. Smith*, 120 Mich. 411, 79 N.W. 633 (1899).

<sup>7</sup> *Montross v. Eddy*, 94 Mich. 100, 58 N.W. 916 (1892); *Knauss v. Krueger Brewing Co.*, 142 N.Y. 70, 36 N.E. 867 (1894).

<sup>8</sup> *McLure v. Luke*, 154 Fed. 647 (9th Cir. 1907); *Mullen v. Keetzleb*, 70 Ky. (7 Bush) 253 (1870); *Siegel v. Gould*, 7 Lans. 177 (N.Y. 1872).

<sup>9</sup> *McLure v. Luke*, *supra* note 8; *Knauss v. Krueger Brewing Co.*, 142 N.Y. 70, 36 N.E. 867 (1894).

<sup>10</sup> *Deakin v. Scheuer*, 182 Wis. 234, 196 N.W. 222 (1923); *Weinhagen v. Hayes*, 174 Wis. 233, 178 N.W. 780, *aff'd on rehearing*, 183 N.W. 162 (1921).

<sup>11</sup> *Clopton v. Meeves*, 24 Idaho 293, 133 Pac. 907 (1913).

<sup>12</sup> *Friar v. Smith*, 120 Mich. 411, 79 N.W. 633 (1899).

<sup>13</sup> In 9 HARV. L. REV. 349 (1896) it is stated that New York alone makes discretion, or the lack of it, the distinctive test feature as to whether an agent may represent both parties. This is a test as to whether or not he is a middleman and as shown is not peculiar to New York.

<sup>14</sup> 98 Mass. 348 (1867).

<sup>15</sup> *Rupp v. Sampson*, 82 Mass. (16 Gray) 398 (1860).

where there was no disclosure, but the non-disclosure was not the decisive factor. In spite of the language of the employment contract, the employee was not regarded as a middleman.

*Herman v. Martineau*<sup>16</sup> is similar. There, a farm owner said to his neighbor, "I will give you \$10 if you will find me a tenant." Another person, who was looking for a farm, said to the same one, "I will give you \$5 if you will find me a farm." Double commissions were allowed. The middleman exercised no discretion and there was no disclosure. Though the court held contra, it seems that the following case, *Fullwood v. Hurley*,<sup>17</sup> is essentially similar. There, an expectant buyer wrote to a broker and asked for a list of hotels that were for sale. The broker mailed him a list and added that "If business is done we shall act for you at the usual brokerage." The vendor and vendee came together and perfected a sale, the vendor's name being on the mailed list, and the latter paid a brokerage. The broker merely brought the parties together. So where a proposed seller asked another person to find a purchaser, which the latter did, there seems to be no objection to allowing him to bargain with a purchaser and split the profits.<sup>18</sup>

Where, however, a proposed vendor<sup>19</sup> agreed to pay the claimant "for services in finding a purchaser and selling my ranch," active participation by him seems to have been invited. The court, however, found that the latter took no part in the bargaining and could collect double commissions. A contrary result occurred in *Pinck v. Morford*,<sup>20</sup> where, on a claim being made for double commissions, it was shown that the one principal took the agent along "to help the thing through" and said that in his case it was better to "get someone else to do it for you."

## 2. DOUBLE TAKE

### (a) *In general*

Double commissions are held to be illegal for the reason that one person cannot loyally serve conflicting interests — at least at the same time. Some courts hold, however, that, besides middlemen, even active agents may have a commission from each of two principals under some circumstances. The authorities are divided about as follows:

1. Some say no recovery from either party may be had in any case.
2. Some courts allow double payments if each actor knew of the promise of the other to pay the agent. Consent is presumed from such knowledge.<sup>21</sup>

<sup>16</sup> 1 Wis. 136 (1853).

<sup>17</sup> [1928] 1 K.B. 498 (C.A. 1927).

<sup>18</sup> *Felbel v. Kahn*, 29 App. Div. 270, 51 N.Y. Supp. 435 (1st Dep't 1898).

<sup>19</sup> *Green v. Robertson*, 64 Cal. 75, 28 Pac. 446 (1883).

<sup>20</sup> 142 Mich. 63, 105 N.W. 22 (1905)

<sup>21</sup> *Cf. Knauss v. Krueger Brewing Co.*, 142 N.Y. 70, 36 N.E. 867 (1894). One

3. Some say recovery may be had from the one who knew of and consented to the double payment, but not from the other principal, who did not know.

The first view is championed in Massachusetts, and *Rice v. Wood*,<sup>22</sup> decided in 1873, is often cited as the leading case for it. According to the court in the *Rice* case, the agent cannot recover even from the one who had knowledge and promised to pay. Not even the contrary custom of brokers could be allowed to control, and such a custom was regarded as vicious. Later, this court held that stock-brokers were not bound by the rule applicable to others, since they do not exercise any discretion.<sup>23</sup> Massachusetts, however, probably does not refuse double commissions to middlemen,<sup>24</sup> as such, but sometimes regards one who elsewhere is a mere go-between as something more than that.

Maryland also has emphatically taken the Massachusetts view.<sup>25</sup> Not even a promise to pay the commission made by a knowing promisor is enforceable. The court announced a maxim, "*Emptor emit quam minimo potest, venditor vendit quam maximo potest*," and it was feared that the maxim would be reversed if a recovery were allowed. The court quoted an English case to the same effect, *Morrison v. Thompson*<sup>26</sup> (which cited *Story*), apparently decided the same year. Rhode Island has held the same way,<sup>27</sup> as also Pennsylvania<sup>28</sup> and Wisconsin.<sup>29</sup> In Indiana<sup>30</sup> a principal who pays with knowledge cannot get the commission back.

Though a federal decision has stated that New York is committed to the first view,<sup>31</sup> yet, in *Reis v. Post*,<sup>32</sup> decided in a state court, the defendant-

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case, *Wolfe v. International Reinsurance Co.*, 73 F.2d 267, 269 (2d Cir. 1934), states that New York refuses recovery in all cases contrary to the general rule.

<sup>22</sup> 113 Mass. 133 (1873). See also *Farnsworth v. Hemmer*, 83 Mass. (1 Allen) 494 (1861)

<sup>23</sup> *Birch v. Arnold*, 288 Mass. 125, 192 N.E. 591 (1934)

<sup>24</sup> *Rupp v. Sampson*, 82 Mass. (16 Gray) 398 (1860)

<sup>25</sup> *Raisin v. Clark*, 41 Md. 158 (1874). See also *Glenn v. Rice*, 174 Cal. 269, 162 Pac. 1020 (1917); *Rice v. Davis*, 136 Pa. 439, 20 Atl. 513 (1890).

<sup>26</sup> L.R. 9 Q.B. 480 (1874)

<sup>27</sup> *Lynch v. Fallon*, 11 R.I. 311 (1876), 16 AM. L. REG. 333 (1877)

<sup>28</sup> *Rice v. Davis*, 136 Pa. 439, 20 Atl. 513 (1890)

<sup>29</sup> *Deakin v. Scheuer*, 182 Wis. 234, 196 N.W. 222 (1923). But see implication in *Weinhagen v. Hayes*, 174 Wis. 233, 178 N.W. 780, *aff'd on rehearing*, 183 N.W. 162 (1921), where it was held that if one principal had no knowledge of the double commission paid, he may rescind his purchase.

<sup>30</sup> *Alexander v. North Western Christian Univ.*, 57 Ind. 466 (1877)

<sup>31</sup> *Wolfe v. International Reinsurance Co.*, 73 F.2d 267 (2d Cir. 1934); *cf.* *Auerbach v. Curie*, 119 App. Div. 175, 104 N.Y. Supp. 233 (1st Dep't 1907)

<sup>32</sup> 183 App. Div. 696, 170 N.Y. Supp. 610 (2d Dep't 1918); *cf.* *Rowe v. Stevens*, 53 N.Y. 621 (1873)

principal wrote to the double agent that he would agree to a sale and exchange with "a client of yours," and named the amount of the commission,<sup>33</sup> and the agent recovered it. So also it was held that an attorney might act for both parties if both knew of the fact. An assignment was drawn for the debtor by an attorney who was also the attorney for his creditors. It is not shown whether this debtor paid for the services.<sup>34</sup> It has been stated that both must know in order that there may be a recovery from either one; otherwise a recovery against the one would aid a wrong against the other.<sup>35</sup> It is not entirely clear why this must be so. The third view also has support.<sup>36</sup> The one who knew must pay and it makes no difference whether the other one knew or not. So it has been said that there may be a double recovery where a knowing principal, a vendor, had fixed a certain price payable to himself.<sup>37</sup>

Another illustration of the "double take" is found in the so-called pooling agreements where the agents of each of the two principals combine their commissions under an agreement to split them. It makes no difference that the sale price was fixed and the total commissions paid do not exceed the amount that would have been paid separately. This arrangement tends to make each agent less concerned with the interests of his own principal.<sup>38</sup>

In *Ledirk Amusement Co. v. Schechner*,<sup>39</sup> the plaintiff employed a certain agent to buy a certain theatre building because he was believed to be the agent also for the seller. This agent, however, bought the premises for a competitor instead of for the plaintiff. The clean hands doctrine prevented the plaintiff from obtaining cancellation and specific performance. In another case of double agency<sup>40</sup> a lawyer was directed by his client to

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<sup>33</sup> Cf. *Eaton v. Clabaugh*, 251 Fed. 575 (6th Cir. 1918); *Napier v. Adams*, 166 Ga. 403, 143 S.E. 566 (1928); *Clopton v. Meeves*, 24 Idaho 293, 133 Pac. 907 (1913); *Boss v. Tamaras*, 251 Mich. 469, 232 N.W. 229 (1930); *Salomons v. Pender*, 3 H. & C. 639, 159 Eng. Rep. 682 (Ex. 1865).

<sup>34</sup> *Joslin v. Cowee*, 56 N.Y. 626 (1874). An auctioneer may be the agent for both parties, *Pike v. Balch*, 38 Me. 302 (1854), unless he is interested as seller, *Bent v. Cobb*, 75 Mass. (9 Gray) 397 (1857).

<sup>35</sup> *Bell v. McConnell*, 37 Ohio St. 396 (1881).

<sup>36</sup> *Wilson v. Atwood*, 81 N.H. 61, 122 Atl. 797 (1923); *Hirshfield v. Rice*, 249 S.W. 518 (Tex. Civ. App. 1923).

<sup>37</sup> *Ranney v. Donovan*, 78 Mich. 318, 44 N.W. 276 (1889).

<sup>38</sup> *Sweeney v. Chapman*, 295 Mich. 360, 294 N.W. 711 (1940). See also *Devine v. Hudgins*, 131 Me. 353, 163 Atl. 83 (1932); *Quinn v. Burton*, 195 Mass. 277, 81 N.E. 257 (1907); *Mees v. Grewer*, 63 N.D. 74, 245 N.W. 813 (1932); RESTATEMENT, AGENCY § 391 (c) (1933).

<sup>39</sup> 133 N.J. Eq. 602, 33 A.2d 894 (Ch. 1943).

<sup>40</sup> *Greenwood v. Spring*, 54 Barb. 375 (N.Y. 1857). So an attorney interested as plaintiff cannot enter a general appearance for defendant. *King Construction Co. v. Mary Helen Coal Corp.*, 194 Ky. 435, 239 S.W. 799 (1922). See AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL & JUDICIAL ETHICS, Canons of Professional Ethics, No. 6, 34, 38 (1936).

attach certain property of a debtor. The lawyer already had a power of attorney to mortgage it, and he mortgaged it to his client instead of attaching it. Needless to say, the mortgage was held to be invalid.

*Harrods, Ltd. v. Lemon*<sup>41</sup> is a case where an undisclosed agency on both sides did not prevent double commissions. The company had a real estate agency in one of its buildings, and a building business in another, and each operated as a unit. A would-be vendor employed the company in its first-named capacity to find a purchaser. The purchaser also employed this company in its second capacity to inspect the purchase, which it did, and it recommended to the purchaser that he require certain alterations to be made by the vendor. Neither department of this company knew of the employment of the other. The company recovered from each principal. There was nothing here to prevent the performance of the full duty in each case and any other outcome would have resulted in an unjust enrichment. But where there is a partnership between agents, one cannot act for one side while the other acts for the other party.<sup>42</sup>

Even though no commission is contemplated from the second principal, if the agent of the first principal also becomes the gratuitous agent of the second, there may arise a conflict of duties. It is necessary, therefore, to consider what kind of service to the second actor constitutes an agency. In one case,<sup>43</sup> after the contract had been made, the agent examined the title for the other party (his father) and discovered certain defects requiring the seller to give an indemnity bond. The agent was granted his commission since this service did not affect his duty.

*(b) One Principal Sues the Other for the Wrong of the Mutual Agent*

Suppose that in a state where double commissions are allowed (each principal having full knowledge) a false representation is made to one

<sup>41</sup> [1931] 2 K.B. 157 (C.A.), 4 CAMB. L.J. 373 (1932). See 44 HARV. L. REV. 984 (1931). In *Rosenbaum v. Sarasohn*, 184 App. Div. 204, 171 N.Y. Supp. 629 (1st Dep't 1918), plaintiff was agent for a corporation, X, which had lots to sell. After agreement with X on an advertising plan, he proposed it to defendant, a newspaper publisher, to the general effect that defendant would publish advertising matter for X and should receive compensation for it from X and would pay plaintiff a commission out of the profits. Plaintiff received a commission from X for each lot sold, but he did not disclose this fact to defendant. He sued defendant for the commission promised him as an advertising broker. He was non-suited by the trial court. *Held*: This was not compensation from two principals for the same service. His duties toward X were much wider and included the planning for the sales and preparation of advertising matter. The court also reasoned that he was a mere go-between, and need not disclose his agency for X. It is hard to see, however, that he was a mere go-between.

<sup>42</sup> *Crawford v. Surety Investment Co.*, 91 Kan. 748, 139 Pac. 481 (1914)

<sup>43</sup> *Owners Realty Co. v. Cook*, 123 Md. 1, 90 Atl. 602 (1914). See also *Short v. Millard*, 68 Ill. 292 (1873), where after the terms were agreed upon the agent prepared the deed for the purchaser at the latter's request.

principal who relies on it to his injury. Can he recover from the other principal for the loss on the ground that the agent's act was the act of the defendant in whose service it was rendered? In a Michigan case, *Boss v. Tamaras*,<sup>44</sup> two owners agreed to use the services of the same agent in a proposal to exchange lands. The agent misrepresented the land of the one to the other, but without the former's knowledge. It was held that neither principal was responsible to the other for his conduct.

But a good case can be made for a different rule. In *Brennert v. Kent*<sup>45</sup> rescission and cancellation were decreed against the principal who had innocently profited by the transaction. It was held that each party could rely upon the statements of the agent, as if made by the party himself.

Where there is a loss to each principal, and each is equally innocent, a splitting of the loss has been decreed. Thus, in *Schick v. Warren Mortgage Co.*<sup>46</sup> the agent of the borrower (to pay off incumbrances) was also the agent of the lender. He defaulted with the funds borrowed. Each principal was equally liable for the loss.

It appears, then, that there may be occasions when a single agent can adjust the requirements of two principals better than two can. There is no sufficient reason why each principal should not pay if he knows of the double employment.

### 3. TIPS

Tips paid to a boot-black, waiter, or other persons rendering similar services, are not claimable by the employer as a general rule.<sup>47</sup> In *Manubens v. Leon*<sup>48</sup> a hairdresser who had been wrongfully dismissed was held to be

<sup>44</sup> 251 Mich. 469, 232 N.W. 229 (1930). See also somewhat similar cases where rescission was not allowed—*Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275 (1891); *Austin v. Rupe*, 141 S.W. 547 (Tex. Civ. App. 1911). In the *Murdock* case the premises had been placed in the hands of an agent of both the mortgagor and the mortgagee, and due to his mismanagement the mortgagor suffered a loss. The case is distinguishable, for the mortgagee had no benefit from the wrong. See also *Brown v. St. John Trust Co.*, 71 Kan. 134, 80 Pac. 37 (1905).

<sup>45</sup> 206 Ala. 561, 90 So. 790 (1921). See also *Allen v. South Boston Ry.*, 130 Mass. 200, 22 N.E. 917 (1889); *Adams v. Barber*, 157 Mo. App. 370, 139 S.W. 489 (1911). In the *Allen* case the plaintiff had directed his agent to buy for him stock in a certain corporation. The agent was also the treasurer of the corporation. He filled in the plaintiff's name for an over-issue of stock in it which could not be created. The plaintiff was granted damages from the corporation though it was innocent. It was held in *Blight v. Schenck*, 10 Pa. 285 (1849), that an escrow holder is the agent of both parties, and the grantee may rely on his representations as the agent of the grantor.

<sup>46</sup> 86 Kan. 812, 122 Pac. 872 (1912), 12 COL. L. REV. 641, 25 HARV. L. REV. 467 See 8 N.Y.U.L.Q. REV. 514 (1930).

<sup>47</sup> *Zappas v. Roumeliote*, 150 Iowa 709, 137 N.W. 935 (1912). See also *Polites v. Barlong*, 149 Ky. 376, 149 S.W. 828 (1912). The statement in the text is the writer's interpretation of these cases. I do not know how Restatement of Agency § 388b is to be applied.

<sup>48</sup> [1919] 1 K.B. 208 (1918).



entitled to her regular wages as damages, together with the amount of the tips she could prove she would have received during the period of dismissal. In such cases there is no double agency and no conflict of duties of the servant and no question of disloyalty.<sup>49</sup> Tips seem to be highly personal gifts arising from a sense of obligation for a rather menial service, and so differ from other instances of profit. They can be claimed by the employer only when he contracts for them.

In *Harrison v. Kansas City Terminal Co.*<sup>50</sup> the question arose whether compliance with the Fair Labor Standards Act could be satisfied by the retention of so much of the tips received by the red-caps as would meet the minimum compensation. Here no question of conflict of duties arose. It was held that the employer could require the payment of the tips to itself by contract, and so could require that the amount retained should be received in lieu of direct compensation by the employer. It would appear, then, that tips and gratuities go to the servant to whom they have been paid, save when he has contracted away his right to them. In *Great Western Ry. v. Helps*<sup>51</sup> it was held that tips to a railway porter were earnings from the standpoint of determining compensation payable for injuries arising in the course of his employment.

#### 4. BRIBING THE AGENT

The methods used by agents to procure secret profits are many, such as buying for the principal at a discount, purchasing for the agent himself, selling to himself, forming pooling arrangements with the agent of the other parties to the transaction and splitting commissions, reselling while the first sale is still not determined, conversion of the principal's property, selling the agent's own property, claiming commissions from each of two parties whose interests are conflicting, obtaining secret rebates, and receiving bribes from the other party to a transaction. There are other duties, the breach of which may not benefit the agent, though it may harm the principal—such as the failure to disclose when there is a duty to do so.

For the moment, interest centers upon those cases where a known agent is offered a commission by a third person to induce the agent to see to it that the business in hand shall be done with himself. These are the bribery cases. The problem may come to the surface when the agent seeks to recover his salary or commission from one side or the other, or when he is

<sup>49</sup> The Restatement of Agency § 441b seems to deal with the relations between the tipper and the receiver, and not with those which may exist between the receiver and his employer.

<sup>50</sup> 36 F. Supp. 434 (W.D. Mo. 1941). An illustration similar to the case of *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 62 Sup. Ct. 659 (1942), is given in RESTATEMENT, AGENCY § 388 (1933). Cf. *Roberts v. Commissioner*, 176 F.2d 221 (9th Cir. 1949) (tip paid to taxi driver is taxable income and not gift).

<sup>51</sup> [1918] A.C. 141 (1917). See also *Penn v. Spiers*, [1908] 1 K.B. 766 (C.A.).

sued for the commission or profit already paid by the first employer, or when the third person is sued by the principal for the amount of the bribe, or when the second principal sues the first one for the price.

*Salford Corp. v. Lever*<sup>52</sup> seems to have been the first case clearly to lay down the proposition that where goods are sold through an agent who has been bribed by the other party the principal has two remedies which are concurrent and cumulative. (I hope later also to show that there is a third partial, cumulative remedy.) He may first recover the amount of the bribe from the agent because the latter, as a fiduciary, is entitled only to compensation.<sup>53</sup> Either after or before that he may recover the amount of the bribe also from the third person. The theory in this latter instance is that the amount of the bribe has been added to the price. The result in *Grant v. Gold Exploration Syndicate*<sup>54</sup> was similar, save that in this case there was an added fact that there had been a later arrangement between the agent and the third person for a reduction of the commission. It was held that a subsequent alteration of the bribe agreement was not binding upon the principal. Recovery from the agent does not determine whether or not there is a claim against the other party. Each claim has a different basis from that of the other.

It was formerly held in some jurisdictions that the inferred fact that the amount of the bribe had been added to the price was rebuttable.<sup>55</sup> Now, such a fact is conclusively presumed.<sup>56</sup> In *Smith v. Sorby*<sup>57</sup> the third party sued the principal for goods sold, and was not allowed a recovery in the trial court under an instruction that the second commission was not necessarily paid fraudulently, and so the interest of the principal was not conclusively betrayed. This instruction was held to be erroneous. In *Kunz v. Tonmole*<sup>58</sup> an agent to buy land found a seller who was willing to sell for

<sup>52</sup> [1891] 1 Q.B. 168 (C.A. 1890). See also *Raisin v. Clark*, 41 Md. 158 (1874); *City of Boston v. Simmons*, 150 Mass. 461, 23 N.E. 210 (1890); *In re Browning's Estate*, 177 N.Y. Misc. 328, 30 N.Y.S.2d 604 (Surr. Ct. 1941), *aff'd*, 262 App. Div. 489, 30 N.Y.S.2d 606 (1st Dep't 1941).

<sup>53</sup> *Burnham City Lumber Co. v. Rannie*, 59 Fla. 179, 52 So. 617 (1910).

<sup>54</sup> [1900] 1 Q.B. 233 (C.A. 1899).

<sup>55</sup> *Iserman v. Long Coal Co.*, 122 N.Y. Misc. 822, 204 N.Y. Supp. 98 (Sup. Ct. 1924).

<sup>56</sup> *Donemar v. Malloy*, 252 N.Y. 360, 169 N.E. 610 (1930), 10 B.U.L. REV. 437, 7 N.Y.U.L.Q. REV. 982; *Powell & Thomas v. Evan Jones & Co.*, [1905] 1 K.B. 11 (1904); *Hovenden v. Millhoff*, 83 L.T. 41 (C.A. 1900); *Grant v. Gold Exploration Syndicate*, [1900] 1 Q.B. 233 (C.A. 1899); *Cohen v. Kuschke*, 83 L.T. 102 (Q.B. 1900).

<sup>57</sup> 3 Q.B.D. 552 (1878), found in *Harrington v. Victoria Co.*, 3 Q.B.D. 549, 552n. (1878). See also *Sirkin v. Fourteenth St. Store*, 124 App. Div. 384, 108 N.Y. Supp. 830 (1st Dep't 1908); *Harrington v. Victoria Co.*, *supra*.

<sup>58</sup> 80 N.J. Eq. 373, 84 Atl. 624 (Ch. 1912). See also *Siegel v. Gould*, 7 Lans. 177 (N.Y. 1872); *Andrews v. Ramsay & Co.*, [1903] 2 K.B. 635.

\$14,000. He arranged with the latter that the price to the vendee-principal should be put at \$15,000; out of which he was to receive \$700. The seller was required to sell for \$14,000 and the buyer recovered the bribe from the agent. In *Kinzbach Tool Co. v. Corbett-Wallace Co.*<sup>59</sup> the agent for the buyer was bribed by the seller to find out how much the former would pay. After the sale, the buyer demanded that the bribe be deducted from the price. It would seem, however, that he was entitled to recover from each.

In *Donemar v. Malloy*<sup>60</sup> the agent purchased a debt due from his principal to the other party at a material discount and corruptly received a large gratuity therefor. The agent and the bribe-giver were sued jointly and the bribe money was recovered. Query, why not adopt the English theory and recover from each separately?<sup>61</sup> What is the basis of joint obligations? The general tone of the opinion leads one to think that it was regarded as contractual.

In *Harrington v. Victoria Co.*<sup>62</sup> the action was by the agent against his bribe-promisor, and recovery was denied. Could the first principal have recovered a promised but an unpaid bribe? In *Keator v. St. John*<sup>63</sup> the principal had first sued the agent for damages arising from his false representations and later, on hearing of the bribe, sued him for it also. The first suit was no bar to the second. It would seem that the principal should still be able to recover from the third party.

So in *Barnsdall v. Day*<sup>64</sup> it was held that a buyer of oil who sued the seller for the amount of the bribe paid to his agent was not prevented from recovering by the fact that he had previously recovered the same sum from the agent. The action against the agent arises out of fraud by a fiduciary. The action may be in contract or in tort, and several American cases declare a constructive trust of the proceeds in the hands of the agent. The action against the bribe-giver is in contract, and it makes no difference which suit is brought earlier. The argument that having already recovered from the agent no harm has now been done the principal and no damages have been proved is not sustained. Under the contract form of action against the agent it seems inconsistent to allow a similar recovery against the bribe-giver. Has he not already paid once to the agent who received the money for his principal, the plaintiff, as money had and received to the principal's use?

<sup>59</sup> 138 Tex. 565, 160 S.W.2d 509 (1942)

<sup>60</sup> 252 N.Y. 60, 169 N.E. 610 (1930) See also *Kinzbach Tool Co. v. Corbett-Wallace Co.*, *supra* note 59.

<sup>61</sup> See 10 B.U.L. REV. 437 (1930); 7 N.Y.U.L.Q. REV. 982 (1930); 2 MECHAM, AGENCY § 2137 (2d ed. 1914)

<sup>62</sup> 3 Q.B.D. 549 (1878)

<sup>63</sup> 42 Fed. 585 (C.C.D. Minn. 1890)

<sup>64</sup> 134 Fed. 828 (3d Cir. 1905)

A federal court in a case arising in Minnesota<sup>65</sup> has held that the agent and the third party are not joint tort-feasors, and so a recovery from the former does not prevent a recovery from the latter. In Texas, however, the bribe-giver and the bribe-taker are called joint tort-feasors, which implies a single recovery.<sup>66</sup> The problem in these cases is similar whether the suit is by the agent against the buyer for the price, or whether it is by the buyer against the agent for the commission erroneously paid, or whether it is against the seller for the amount of the bribe.<sup>67</sup> So in *Raymond v. Davies*,<sup>68</sup> where the manager of a farm had received stock in a farmer's cooperative as a bribe for buying supplies from it for the farm, it was held in a suit by him for his salary that he could not recover. Suppose that a bribe had been promised but not paid. Would the principal be permitted to prove the promise and recover the amount on the theory that the amount promised had been added to the price he had paid?

A somewhat different angle appears in a case where a repairman bribed the agent to throw to himself all the repair business of the principal. The theory of the bribe cases is simply that the bribe-giver has added the amount of the bribe to the price. If the principal in the repairs case sues for the loss thus occasioned him rather than for the bribe money, he should be content with a judgment for the sum paid above the fair cost of the repairs. The issue as to the measure of recovery was before the court in *Schank v. Schuchman*.<sup>69</sup> The principal was allowed to recover only the excess of his payments over the reasonable value of the service rather than the amount of the commission for which he did not ask. The fact that the plaintiff sought to recover the full amount paid by him for all services, which would result in a clear unjust enrichment, affected the result. The court, however, intimated that if the repairman had been the plaintiff it would leave him

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<sup>65</sup> *Glaspie v. Keator*, 56 Fed. 203 (8th Cir. 1893)

<sup>66</sup> *Parks v. Schoellkopf Co.*, 230 S.W. 704 (Tex. Civ. App. 1921). The action was by the agent against the principal for his salary, and the latter brought a cross action against the agent for his profits, no attempt being made to hold the third party also.

<sup>67</sup> See *Lister & Co. v. Stubbs*, 45 Ch. D. 1 (C.A. 1890), and *Morison v. Thompson*, L.R. 9 Q.B. 480 (1874), in which cases the principal sued the agent only. In *In re Browning's Estate*, 172 N.Y. Misc. 647, 15 N.Y.S.2d 864 (Surr. Ct. 1939), the bribe was recovered from the agent, and in *In re Browning's Estate*, 177 N.Y. Misc. 328, 30 N.Y.S.2d 604 (Surr. Ct. 1941), recovery was had against the bribe-giver. See also *Eaton v. Clabaugh*, 251 Fed. 575 (6th Cir. 1918); *Labinsks v. Holst*, 84 N.Y. Supp. 991 (Sup. Ct. 1903).

<sup>68</sup> 293 Mass. 117, 199 N.E. 321 (1936). Cf. *Thomas v. Newcomb*, 26 Ariz. 47, 221 Pac. 226 (1923), in which the vendee's agent made a misrepresentation as to the price and paid the vendor's agent one-half of the profit for colluding with him. He must repay the entire amount, not simply the amount left after the bribe was paid.

<sup>69</sup> 212 N.Y. 352, 106 N.E. 127 (1914). Action dismissed in *Hearn v. Schuchman*, 150 App. Div. 476, 135 N.Y. Supp. 52 (1st Dep't 1912), and new form of action brought in *Schank v. Schuchman*, 212 N.Y. 352, 106 N.E. 127 (1914).

without a remedy. It is not clear why the plaintiff did not sue the repairmen for the amount of the bribe, save perhaps the difficulty of proof.

In *Rush v. Curtiss-Wright Export Co.*<sup>70</sup> the purchasing agent of the government of Colombia accepted his position after he had been promised a commission on sales to his government. While so acting for the government of Colombia he assigned to the plaintiff his claim for commissions earned on purchases by Colombia made later, and the plaintiff as assignee of the claims sued for them. The government of Colombia was not made a party. It was held that the plaintiff could recover, but only as a constructive trustee for the government. In *Powell & Thomas v. Evan Jones & Co.*<sup>71</sup> an agent employed a sub-agent for the purpose of negotiating a loan for his principal. The sub-agent was paid a commission by the lender for finding a borrower. The first agent sued the borrower for his commission and the latter counter-claimed for the amount of the commission paid to the sub-agent by the lender. It was held that the sub-agent was a fiduciary to the borrower and accountable for commissions. Here there was no sufficient evidence that the lender knew of the prior obligation, and so no bribery was involved.

Thirdly, under the theory that the bribe-taker has been an unfaithful servant the principal may refuse to pay his salary or fees, or if it or they have already been paid, he may get back again what he has paid.<sup>72</sup> Thus, the principal has three concurrent and cumulative remedies. On a single he is credited not with a triple but with three hits. As shown above, he may also in a proper case sue the agent and recover for false representations.

*Wendt v. Fischer*<sup>73</sup> may serve to tie the cases here with those involving problems of secret profits. It appears that a vendor of land sold the land

<sup>70</sup> 175 N.Y. Misc. 873, 25 N.Y.S.2d 597 (Sup. Ct. 1941). Thus the doctrine of "pari delicto" was avoided. See 6 WILLISTON, CONTRACTS § 1737 (rev. ed. 1938); Notes, 5 COL. L. REV. 319 (1905), 55 HARV. L. REV. 143 (1941). The decision in the *Curtiss-Wright* case was reversed on appeal, 263 App. Div. 69, 31 N.Y.S.2d 550 (1st Dep't 1941), *aff'd*, 289 N.Y. 562, 43 N.E.2d 712 (1942). It was held that there was no jurisdiction in an action at law to make the plaintiff a trustee for Colombia, especially since that government was not a party. The plaintiff cannot recover for herself because of the illegality of the contract. There is an intimation that though this "short cut" was not tenable yet the government of Colombia may probably have a cause of action.

<sup>71</sup> [1905] 1 K.B. 11 (1904).

<sup>72</sup> *Keator v. St. John*, 42 Fed. 585 (C.C.D. Minn. 1890); *Raymond v. Davies*, 293 Mass. 117, 199 N.E. 321 (1936); *Little v. Phipps*, 208 Mass. 331, 94 N.E. 260 (1911); *Jansen v. Williams*, 36 Neb. 869, 55 N.W. 279 (1893); *Palmer v. Goodwin*, 13 Ir. Ch. R. 171 (1862). See 6 TULANE L. REV. 310 (1932) on disloyalty as forfeiting compensation, note on same subject in 72 CENT. L. J. 396 (1911), and *van Woy v. Willis*, 153 Fla. 189, 14 So.2d 185 (1943), *overruled in that regard on rehearing*, 155 Fla. 465, 20 So.2d 690 (1945).

<sup>73</sup> 243 N.Y. 439, 154 N.E. 303 (1926) Cf. RESTATEMENT, CONTRACTS § 336, comment c (1932).

through the agency of three partners, to a corporation. One partner was the head of the corporation and held all its stock as trustee for his fiancée. The partners represented that this vendee was a client of theirs. There was, however, no sufficient disclosure of their relationship to the transaction. The corporation took with notice. It sold the land at a profit. The commission paid to the unfaithful agents was recovered, as also the profits accruing to the purchaser from a resale. No bribe appears.

Finally, where the double employment is not competitive in the sense that a profit to the second principal would be a direct loss to the first, and so no issue of bribery can be present, it has still been held that the commissions paid by the second employer can be recovered from the agent by the first principal. That was the holding in *Bennett-Picaud Co. v. Dunlop*,<sup>74</sup> where the agent had been employed full time by the plaintiff in mining operations and in prospecting. The defendant agent also received compensation from another company similarly engaged. But this commission was not a bribe. It would seem more appropriate to seek damages for defective services if the agent neglected his duties while serving the second principal.

##### 5. CONVERSION AND ANTI-PRINCIPAL ACTIVITY BY THE AGENT

No effort will be made to define the wrong precisely as between embezzlement, larceny, or other similar wrongful acts, nor is any issue raised whether the wrong-doer is an agent or a servant.<sup>75</sup>

In *Sundland v. Korfund Co.*<sup>76</sup> the plaintiff worked on both a salary and a commission basis. After taking property belonging to his employer for his own benefit, he sued for his commissions and salary then due. He was not permitted to recover even the difference between his peculations and the sums due him for his efforts. A disloyal agent, it was said, cannot recover for his services. In Minnesota<sup>77</sup> the reasons given for the inability of the servant to recover the difference between the smaller sum wrongfully

<sup>74</sup> [1933] Ont. L.R. 246, 2 D.L.R. 237, 47 HARV. L. REV. 352 (1934). Compare the case of a lumber-broker who became the agent of several competitive dealers in piles. The proposal was to sell their piles to a company about to erect a large pier. He did not disclose his agency for one seller to other sellers. It was held that his obligation toward one prevented his employment by another without disclosure. *Murray v. Beard*, 102 N.Y. 505, 7 N.E. 553 (1886).

<sup>75</sup> See RESTATEMENT, AGENCY §§ 399-409 (1933) In *Johns v. Parsons*, 185 Ky. 513, 215 S.W. 194 (1919), *A* was agent for his sister in an exchange of lands. She had conveyed. *A* induced the other party to destroy the deed to her without her knowledge and convey to another person. She recovered in tort for the destruction.

<sup>76</sup> 260 App. Div. 80, 20 N.Y.S.2d 819 (1st Dep't 1940). *Brown v. Croft*, 6 C. & P. 16, note (g), 172 Eng. Rep. 1127, note (a) (N.P. 1828), is similar. A servant had wrongfully taken money and spoons. See also *Libhart v. Wood*, 1 W. & S. 265 (Pa. 1841), where a seaman had stolen a trunk and later sued for his wages.

<sup>77</sup> *Peterson v. Mayer*, 46 Minn. 468, 49 N.W. 245 (1891). See also *Little v. Phipps*, 208 Mass. 331, 94 N.E. 260 (1911).

taken and the sum due on wages are that there is an implied condition in the contract of employment for faithful performance; the contract is entire; failure to recover is an incentive to faithfulness; and it is difficult to weigh the value of the services of an unfaithful employee. It is admitted that the principal may thus often be unjustly enriched. Even where no criminal act has been committed a claimant may fail to recover, because of his wrongful conduct, for services rendered. In *Ressig v. Waldorf Astoria Hotel*<sup>78</sup> a cook had agreed not to strike except on eight days notice in writing and only at the end of the month. For breach of this contract he had agreed that as liquidated damages all wages due at the time of striking should be forfeited, and it was so held. This is somewhat analogous to the conversion cases.

The agent or servant who is a converter does not always lose his wages, salary, or commission. Thus, in *Turner v. Kouwenhoven*<sup>79</sup> a servant who was entrusted with marketing produce and collecting for it, had not accounted fully for his collections. In a suit for his wages he prevailed to the extent that the wages unpaid were in excess of the sums retained by him. Mere failure to account is not such dishonesty as to violate the employment contract seriously and substantially. So mere acts of disloyalty not involving conversion nor amounting to an abandonment of the employment do not prevent recovery of salary where no criminal charge is made.<sup>80</sup>

## 6. PROFITS OF THE AGENT

### (a) *In general*

The agent to sell must obtain the best price known to be available. Thus, if he learns of a better prospect while a deal is on but not closed and does not divulge it, he is liable for the ensuing loss,<sup>81</sup> but he may be allowed his

<sup>78</sup> 185 App. Div. 4, 172 N.Y. Supp. 616 (1st Dep't 1918), *aff'd*, 229 N.Y. 553, 129 N.E. 912 (1920)

<sup>79</sup> 100 N.Y. 115, 2 N.E. 637 (1885). See also *Thigpen v. Arant*, 213 Ala. 516, 105 So. 644 (1925); *Meyers v. Roger J. Sullivan Co.*, 166 Mich. 193, 131 N.W. 521 (1911)

<sup>80</sup> *Abrahamson v. Dry Goods Refolding Co.*, 166 N.Y. Supp. 771 (App. Div. 1st Dep't 1917); *cf. Lamdin v. Broadway Surface Co.*, 272 N.Y. 133, 138, 5 N.E.2d 66, 67 (1936).

<sup>81</sup> *Keppel v. Wheeler*, [1927] 1 K.B. 577 (C.A. 1926) In *Laing v. Chichon*, 110 W. Va. 3, 156 S.E. 746 (1931), 79 U. OF PA. L. REV. 1155, the agent of the plaintiff sold the plaintiff's stocks at the market. At the time he had knowledge that the price might be enhanced by an unusual situation likely to develop. He was held liable for the entire profit though he did not receive it all for himself. An agent is under a duty to disclose the identity of the buyer where it has importance to the principal. See *Olson v. Pettibone*, 168 Minn. 414, 210 N.W. 149 (1926) In *Cooper-Fortieth Co. v. Keller*, 75 N.E.2d 809 (Ohio App. 1947), it was held that where an agent had failed to sell the property for the principal and thereafter made a direct offer of purchase for himself, he was not bound to disclose better offers that came to his notice, pending the consideration of his offer. This seems clearly wrong

regular commission in the absence of bad faith. Query, whether it would amount to bad faith to disclose to a would-be purchaser that his principal had offered the property at a price lower than that offered to the proposed vendee?<sup>82</sup> In *Hegenmeyer v. Marks*<sup>83</sup> a vendor sold a lot not knowing that there was a house on it which increased its value. The agent learned that fact before the sale to a purchaser with notice was completed. The agent was to have as compensation all he could get above a fixed price. The vendor asked for a reconveyance, which was granted. Alternatively she might have had the profit accruing to the agent. In *Dutton v. Willner*<sup>84</sup> the principal had delivered to the agent an insurance policy which was to be surrendered in consideration of the discharge of the insured from certain notes given for premiums to the company. The agent however took the policy over and renewed it for himself as beneficiary paying the premiums past due. On the principal's death, the agent was required to account for the proceeds.

The agent cannot retain secret profits. Thus, where the principal sent certain goods to a purchaser directly but mailed the invoice to his agent, who made out a new one at a higher rate, which the customer paid the agent, the latter must pay over the profit.<sup>85</sup> If he settles a claim against the principal for less than the amount due,<sup>86</sup> or buys for less than he is authorized to pay, the benefits go to the principal.<sup>87</sup> In *Louisiana Mortgage Corp. v. Pickens*<sup>88</sup> the president of a corporation disclosed for a fee to himself paid by a judgment creditor of the corporation, the existence and location of unknown assets of the corporation. Even though no damage was done to the latter it was allowed to recover the fee. So also a deposit for-

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unless it is controlled by the statute requiring the agent to have a license, and that seems doubtful.

<sup>82</sup> See *Jansen v. Williams*, 36 Neb. 869, 55 N.W. 279 (1893). An agent is under no duty not to disclose his principal's dishonest acts to the party prejudicially affected by them. See *Willig v. Gold*, 75 Cal. App.2d 809, 171 P.2d 754 (1946), 31 MINN. L. REV. 293 (1947).

<sup>83</sup> 37 Minn. 6, 32 N.W. 785 (1887).

<sup>84</sup> *Dutton v. Willner*, 52 N.Y. 312 (1873).

<sup>85</sup> *Nitedals v. Bruster*, [1906] 2 Ch. 671.

<sup>86</sup> *Ash v. Frank Co.*, 142 S.W. 42 (Tex. Civ. App. 1912). In *Blackburn v. Union Bank and Trust Co.*, 269 Ky. 699, 108 S.W.2d 806 (1937), a bank president obtained for himself a service charge made to borrowers. In *Hippisley v. Knee Bros.*, [1905] 1 K.B. 1 (1904), an auctioneer charged his employer with the gross cost of advertising bills on which he received the customary discount.

<sup>87</sup> *Langford v. Thomas*, 200 Cal. 192, 252 Pac. 602 (1926); *Thompson v. Stoakes*, 46 Cal. App.2d 285, 115 P.2d 830 (1941); *Whiting v. Delozier*, 82 Cal. App. 525, 255 Pac. 861 (1927); *Old Settlers Club v. Haun*, 245 Wis. 213, 13 N.W.2d 913 (1944); *Caveney v. Caveney*, 234 Wis. 637, 291 N.W. 818 (1940).

<sup>88</sup> 167 So. 914 (La. App. 1936).



fettered by a buyer cannot be retained by the agent.<sup>89</sup> In a similar way an agent to sell notes at a named price is bound to disclose to his principal not merely the lower offer of his customer but also the fact that the buyer to his knowledge is willing, if necessary, to pay the authorized price. If he wires the principal a lower offer for the purpose of beating down the price, without making such disclosure, he cannot later claim a commission for an offer at the first price communicated to the principal after the latter has himself sold them.<sup>90</sup>

(b) *The Agent Buys for Himself and Sells his own Property*

On occasion, an agent sells to the principal his own property or property in which he has an interest or for the sale of which he is an agent on the other side. In the case<sup>91</sup> where an insurance agent reinsured for his company in another company for which he was also an agent, it was held that the contract was unenforceable. A genuine hardship, however, might occur to the insured before the double dealing was discovered.

An interest of the agent in the property sold is illustrated in *Langford v. Thomas*,<sup>92</sup> where the agent had sold but had not conveyed certain land to a prior vendee before the present transaction. He thereupon bought back for himself the vendee's interest and resold the land to the principal. The latter was permitted to recover the profit. In *Dorsey v. Strand*<sup>93</sup> a joint committee of fish-packers, boat-owners, and fishermen agreed among themselves to procure a plane for the purpose of enabling them to search for schools of fish. One member of the committee secretly formed a corporation, in which he owned nearly all the stock, to buy a plane, and contracted to have it perform the service required. The corporation was not permitted to recover for the hire. Thus, in a sale, or hire, by an agent of his own property the principal may rescind or in a proper case claim the profits or refuse to pay a commission.<sup>94</sup>

A sale of the principal's property by the agent to himself is illustrated in *De Bussche v. Alt*,<sup>95</sup> where the agent received a vessel for sale at a named price. Not being able to dispose of it at once, he bought it for himself at the price, and soon resold it at a profit, for which he was obliged to account. In another case he sold to himself the waste from a mill, processed it, and

<sup>89</sup> *Pederson v. Johnson*, 169 Wis. 320, 172 N.W. 723 (1919).

<sup>90</sup> *Wadsworth v. Adams*, 138 U.S. 380, 11 Sup. Ct. 303 (1890).

<sup>91</sup> *Empire State Ins. Co. v. American Cent. Ins. Co.*, 138 N.Y. 446, 34 N.E. 200 (1893).

<sup>92</sup> 200 Cal. 192, 252 Pac. 602 (1926). See also *Birch v. Arnold*, 288 Mass. 125, 192 N.E. 591 (1934).

<sup>93</sup> 21 Wash. 2d 217, 150 P.2d 702 (1944).

<sup>94</sup> *Birch v. Arnold*, 288 Mass. 125, 192 N.E. 591 (1934); *De Bussche v. Alt*, 8 Ch. D. 286 (1878); *Benson v. Heathorn*, 1 Y. & C.C.C. 326, 62 Eng. Rep. 909 (Ch. 1842).

<sup>95</sup> 8 Ch. D. 286 (C.A. 1878).

resold for a profit. Here he had to account for the profits, but interestingly enough he was allowed the processing costs.<sup>96</sup> In *Salomons v. Pender*<sup>97</sup> the agent was denied a commission for the sale of the principal's property where a sale was made to a company in which the agent was interested.

In *van Woy v. Willis*<sup>98</sup> Miss Maud van Woy desired to purchase "The Casements," former home of Mr. Rockefeller, Sr., near Daytona Beach, Florida, to be used as a school for girls. The defendant contacted her with a view of selling it to her. He falsely represented that he was the exclusive agent of the Rockefeller estate for that purpose. He also falsely stated that the price was \$75,000. She asked him to seek an interview with the representative for her so that she might ask for a better price and easier terms. This he twice pretended to do but did not, and reported back that no change could be made. She then gave him as a down payment a check for \$5,000, payable to Mr. Rockefeller. This he never tendered to the owner, but falsely stated that the latter desired that the check should be made out to the so-called agent himself, and instead of one check for \$5,000, two, one for \$4,000 and one for \$1,000, be executed. He falsely told her that the owner wanted a new contract to be made whereby Willis, the said agent, was to be in control of the sale and relieve the owner of the incidental details of the negotiations. Thus Willis represented to the plaintiff that there was no other access to the owner save through himself. He manipulated the transaction so that he in effect became the purchaser from the owners, and then sold the premises to Miss van Woy. He used her deposit to make the down payment. Without her knowledge he represented her interests at a meeting with the attorneys for the owner. He required her to pay him a regular commission, and after she had tendered the full purchase price of \$37,500 he took to himself from her a second mortgage for the balance—

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<sup>96</sup> *Anderson Cotton Mills Co. v. Royal Mfg. Co.*, 221 N.C. 500, 20 S.E.2d 818 (1942).

<sup>97</sup> 3 H. & C. 639, 159 Eng. Rep. 682 (Ex. 1865). See also *Empire State Ins. Co. v. American Century Ins. Co.*, 138 N.Y. 446, 34 N.E. 200 (1893); *New York Central Life Ins. Co. v. National Protective Ins. Co.*, 14 N.Y. 85 (1856). In *Dillard v. Gill*, 231 Ala. 662, 166 So. 430 (1936), the agent held a power of attorney to transact all of the principal's business. He executed deeds of the principal's property to himself. The deeds were held voidable. In *Carluccio v. 607 Hudson St. Co.*, 141 N.J. Eq. 449, 57 A.2d 452 (Ct. Err. & App. 1948), a broker, desiring to obtain certain property for himself, induced his associate to arrange a sale to an ostensible buyer, a straw man acting for the brokers. *Held*, the sale is voidable. In *Olson v. Eulette*, 332 Ill. App. 178, 74 N.E.2d 609 (1947), it appears that an agent cannot become the assignee of the purchaser from the principal in order to conceal a direct sale to himself and to procure an additional commission.

<sup>98</sup> 153 Fla. 189, 14 So.2d 185 (1943). On rehearing in *Willis v. van Woy*, 155 Fla. 465, 20 So.2d 690 (1945), the agency was fully recognized. Willis, however, was allowed his commission. Disallowance is the usual rule. See 3 SCOTT, TRUSTS § 479 (1939).

namely, \$37,500— which, together with what she had paid, was represented to her as the total cost. The plaintiff on learning the facts sued for an accounting, for cancellation of the notes and second mortgage, and for the commission which she had paid. Her claims were fully sustained on the first hearing.

The court's principal difficulty seems to have been to determine whether or not the defendant was the plaintiff's agent. It stated *inter alia*, "We concede *arguendo*, that the pertinent allegations of the amended bill fail to establish the relationship of principal and agent between Willis and Maud van Woy."<sup>99</sup> Yet, the court found that there was a fiduciary, that is to say, a confidential, relationship— which two terms were regarded as the equivalent the one to the other. It also cited a clear case of an agency and another one similar to this one on the facts. Why should the court concede that there was no agency? Presumably because the defendant falsely pretended to be the agent of the vendor. The facts above stated, however, are believed entirely adequate to establish an agency for Miss van Woy.

(c) *Resale*

Where an agent for the sale of property has found a customer willing to buy, the question may arise as to how long the fiduciary obligation of the agent to his principal continues, and how soon may he act for the customer as a subsequent principal.

In *Loebel v. Jeroleman*<sup>100</sup> a broker had negotiated a sale. Before this agreement had been reduced to writing, he resold for the buyer. In this case it was decided that his duty in the first sale had been fully performed, the Statute of Frauds did not stand in the way, and he could take on the customer as a new principal.

In *Bartleson v. Vanderhoff*<sup>101</sup> the principal sold a lot through an agent to a customer. Thereafter the agent sold the lot for the customer to a second purchaser at an advanced price. The first principal thereupon sued the agent and the first vendee for the profit, alleging fraud on the part of the agent in not informing him of the possibility of a sale at a better price and claiming that the vendee was in collusion with him. However, the fact developed that the principal was suspicious that such a resale was under way, had the means of knowledge, but failed to make use of it. She was denied a recovery.

In such cases it may often be difficult to determine just when the resale for a profit can be made in good faith. It is believed that the courts will scrutinize such a transaction closely.

<sup>99</sup> 153 Fla. at 199, 14 So.2d at 190.

<sup>100</sup> 128 Atl. 609 (N.J. Sup. Ct. 1925)

<sup>101</sup> 96 Minn. 184, 104 N.W. 820 (1905) See also *Tilleny v. Wolverton*, 54 Minn. 75, 55 N.W. 822 (1893) Cf. *Ballard v. Nye*, 138 Cal. 588, 72 Pac. 156 (1903).

(d) *Poundage for Friendly Services*

There is a class of cases which illustrates what Lord Ellenborough once denominated and condemned as "poundage agreed to be paid for recommending customers."<sup>102</sup> *Bollman v. Loomis*<sup>103</sup> is a good illustration. A certain Mrs. R. desired to purchase a piano and she requested the plaintiff, a close friend and something of an expert, for his opinion of it. The opinion was favorable. Later, in order to spur on the sale the dealer asked the plaintiff, the friend and adviser, to urge the purchase upon Mrs. R. and offered him a commission. The plaintiff did so, but was denied an award in an action. In another case<sup>104</sup> one friend said to another, "Find a builder whom you can recommend." The builder whom the latter found and recommended promised him a commission. It may well be expected that the builder would add the amount of the commission promised to his estimate of costs. This looks much like a bribe and at least it illustrates the "poundage" condemned by Lord Ellenborough. In still another case<sup>105</sup> a friend of a woman was requested to suggest an attorney to her. This friend recommended the defendant, who promised to share his fee with the recommending friend. The adviser was not allowed to recover his share of the fee. The woman, however, seems not to have been informed about the possibility of a recovery for herself from the promisor in the case. Was the share promised added to the fee?

The "poundage" principle is discoverable in unexpected places. In *Wachowski v. Lutz*<sup>106</sup> a father-in-law purporting to advise his son-in-law as to his interests respecting an exchange of lands between the latter and another person was secretly in the pay of the other party to the exchange, and the son-in-law was defrauded in the trade. No recovery was sought against the father-in-law, but the other principal paid damages. A rescission would also be appropriate. Thus the son-in-law might have had one of several choices in an action against the other party: (a) recovery of a sum equal to the bribe, (b) damages for the fraud, (c) claim to the profits on a resale, or (d) a rescission. He could also (e) have recovered the father-in-

<sup>102</sup> *Wyburd v. Stanton*, 4 Esp. 179, 170 Eng. Rep. 683 (N.P. 1802). See 6 WILLISTON, CONTRACTS § 1737 (rev. ed. 1938); RESTATEMENT, CONTRACTS § 570 (1932).

<sup>103</sup> 41 Conn. 581 (1874). See also *Ward v. Andrews*, 44 Cal. App. 390, 186 Pac. 605 (1919); *Holcomb v. Weaver*, 136 Mass. 265 (1884).

<sup>104</sup> *Holcomb v. Weaver*, 136 Mass. 265 (1884).

<sup>105</sup> *Reilly v. Beekman*, 24 F.2d 791 (2d Cir. 1928). See also *Auerbach v. Curie*, 119 App. Div. 175, 104 N.Y. Supp. 233 (1st Dep't 1907). But see *Libby v. Smith*, 293 Mass. 465, 200 N.E. 369 (1936), 20 MARQ. L. REV. 163. See also *Walsh v. Atlantic Research Associates*, 321 Mass. 57, 71 N.E.2d 580 (1947), 46 MICH. L. REV. 112; 44 HARV. L. REV. 121 (1931) on liability of a gratuitous agent for nonfeasance.

<sup>106</sup> 184 Wis. 584, 201 N.W. 234 (1924).

law's fee from the latter. "Poundage" is thus linked with the bribery cases. Lord Mansfield<sup>107</sup> condemned such conduct: "Good faith forbids either party, by concealing what he privately knows, to draw another into a bargain from his ignorance of the fact and believing the contrary."

#### SUMMARY

Some of the more significant implications arising from this study may be briefly recapitulated. First, the principal in the bribery cases has three cumulative remedies, at least where the transaction involves a purchase and sale or similar transactions. He may recover from the agent the commission paid by the other principal; he may also recover the same amount from the bribe-giver because of the conclusive presumption that the bribe was a sum added to the price. Next, he may refuse to pay a fee or salary to his agent for the services, and if he has already paid, he may recover it. One may recall in this connection the criminal prosecution years ago of the Honorable Albert B. Fall for receiving a bribe from one Edward Doheny. So far as this writer knows, no attempt was made to recover the bribe from Fall. That is substantially what happened, however, in *United States v. Carter*<sup>108</sup> where a federal engineer received gratuities from contractors, and a bill to follow them into their proceeds was sustained.

In addition to these three remedies the principal may recover the damages in a proper case for the loss arising from the unfaithful service. If, however, the first three remedies have been enjoyed, it is not likely that further damages could be proved.

The form of secret profits called "poundage" by Lord Ellenborough and described as a sum "agreed to be paid for recommending customers," fits into this discussion. The writer recalls the mild shock he received some years back when he learned that a well-known physician and columnist who had a syndicated newspaper column on health and diet, was secretly in the employ of the manufacturers of certain patented medicines, colorful appraisals of which he subtly introduced into his column. Poundage for recommending the medicines to readers seems a fitting description of such conduct since the column was written in a way to lead readers to believe that the recommendations were without bias.

As for the middle man, the general type of case is not difficult to identify, and he seems to be neither a fiduciary nor an agent. In cases where there is a genuine agency, and the fact of employment by both principals is known to each of them, it may be assumed that each consents. Whether such a double employment should in any case be lawful depends upon the degree of individualism the court happens to endorse as well as upon convenience

<sup>107</sup> *Carter v. Boehm*, 3 Burr. 1905, 1910, 97 Eng. Rep. 1162, 1164 (K.B. 1766).

<sup>108</sup> 217 U.S. 286, 30 Sup. Ct. 515 (1910).

of the principals. There are cases of genuine hardship where one principal relies upon the misrepresentation of the common agent to his injury and to the benefit of the other, though the misrepresentation was not authorized by or known to the latter. To this writer it seems that each principal should be able to rely upon the representations of the agent to the extent that they happen to benefit the other party. In many cases there is no profit to either from the negligence or wrong of the mutual agent. The Kansas rule of splitting the loss where there is no profit to either seems to make good sense.

The rule that the action against the agent for the bribe is at law, that the bribe proceeds cannot be followed into reinvestments made by him, and that the agent may plead the statute of limitations seems settled in England. If, however, the agent may be declared to be a constructive trustee as has been held in several American cases, it would seem that the statute of limitations would not run on the claim.

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#### ADDITIONAL NOTE ON THE FORM OF THE ACTION

The Restatement of Agency § 399 suggests eleven different possible remedies granted the principal where there has been a violation or threatened violation of the agent's duties. In this note there is a brief statement of the procedures followed in some of the cases.

The principal sues his agent for the commission paid by the other side in contract for money had and received. The proper form of the action was discussed historically and in detail in *Morison v. Thompson*, L.R. 9 Q.B. 480 (1874). There the action was in contract and the defendant argued that it should be in tort or should be in equity to set up a constructive trust. The contract action was held to be the appropriate form. The court cited Hargrave and Butler's note on *Coke's Littleton*, First Part, 2d bk., vol. 3, \*117a, n.161 (1812), on the right of the master to the servant's earnings paid by a stranger. The note relies upon *Treswell v. Middleton*, Cro. Jac. 653, 79 Eng. Rep. 563 (K.B. 1623), where it was stated that a master must sue in his own name rather than in the name of the servant for wages due.

If an accounting or discovery were required the action would be in equity. See *Massey v. Davies*, 30 Eng. Rep. 651 (Ch. 1794). Later, however, in an action by the buyer in *Chancery, Lister & Co. v. Stubbs*, 45 Ch. D. 1 (1890), a claim for commissions paid by the seller was held to be recoverable at law only, and the plaintiff could not follow them into the investments procured with them. Similarly, it was held in *Metropolitan Bank v. Heiron*, 5 Ex. D. 319 (1880), and in *Shultz v. Manufacturers and Traders Trust Co.*, 128 F.2d 889 (2d Cir. 1942), that the Statute of Limitations will run on such a claim. The action against the bribe-giver is also in contract. See *Hovenden v. Millhoff*, 83 L.T. 41 (C.A. 1900), and Comment, 64 U.S.L. REV. 514 (1930).

In some cases, however, a constructive trust has been set up. See, e.g., *Whiting v. Delozier*, 82 Cal. App. 525, 255 Pac. 861 (1927), and *Dutton v. Willner*, 52 N.Y. 312 (1873). In *Anderson Cotton Mills v. Royal Mfg. Co.*, 221 N.C. 500, 20 S.E.2d 818 (1942), where the agent bought in the waste from his principal's mills, processed it and resold at a profit, he was made constructive trustee of the profits. See note in 25 VA. L. REV. 848 (1939) on constructive trust imposed for profits received in breach of a fiduciary duty; and note on same subject in 22 TULANE L. REV. 197 (1947). Damages also have been recovered in tort, as in *Langford v. Thomas*, 200 Cal. 192, 252 Pac. 602 (1926). In *Grant v. Gold Ex-*

ploration Syndicate, [1900] 1 Q.B. 233 (C.A. 1899), it was suggested that the plaintiff could choose between contract and tort, and an action at law was considered an adequate remedy.

There are many cases where rescission and restoration of the status quo is the proper remedy, as in the case of *Kinney v. Lisman*, 239 App. Div. 595, 268 N.Y. Supp. 678 (4th Dep't 1934), 34 COL. L. REV. 552. In this case the bank, which had floated a certain stock issue, offered the broker (agent to buy for the plaintiff) a secret commission for taking 500 shares. The stock dropped from 35½ to 17, but the purchaser was declared entitled to cancel the purchase due to the double agency. In *Gordon v. Beck*, 196 Cal. 768, 239 Pac. 309 (1925), rescission of a sale contract was granted though neither principal knew of the double agency. For other rescission cases see *van Woy v. Willis*, 153 Fla. 189, 14 So.2d 185 (1943); *Napier v. Adams*, 166 Ga. 403, 143 S.E. 566 (1928); *J. C. Penney & Co. v. Schulte Real Estate Co.*, 292 Mass. 42, 197 N.E. 458 (1935), 22 VA. L. REV. 463; *Wendt v. Fischer*, 243 N.Y. 439, 154 N.E. 303 (1926). The plaintiff need not prove actual loss, and partial rescission may be appropriate.

Rescission is proper where the agent sells his own property as in *Gillett v. Peppercorne*, 3 Beav. 78, 49 Eng. Rep. 31 (Rolls Ct. 1840). Refusal of specific performance is complementary to rescission. See *Newell-Murdock Realty Co. v. Wickham*, 183 Cal. 39, 190 Pac. 359 (1920); *Ledirik Amusement Co. v. Schechner*, 133 N.J. Eq. 602, 33 A.2d 894 (Ch. 1943); *Truslow v. Parkersburg Ry.*, 61 W Va. 628, 57 S.E. 51 (1907).