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Article 9

Principal and Agent - Real Estate Brokers - Double Employment

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Liability on the bond should not be endless. See also *Miller* v. *State,* 35 Ind. App. 379, 74 N.E. 260 (1905). The prevailing view does not recognize the distinction. The principal contractor and the surety are liable for the materials and labor furnished despite payment to the subcontractor and lack of notice by remote claimants. *Heine Safety Boiler Co.* v. *United States,* 35 D.C. App. 273 (1926); *Oliver Constr. Co.* v. *Williams,* 152 Ark. 414, 238 S.W. 615 (1923); *United States* v. *American Surety Co.,* 200 U.S. 197, 26 Sup. Ct. 168, 50 L.ed. 437 (1906). One court sees in the recognition of an exception to recovery the danger of inviting a collusive scheme between principal contractor and subcontractor where, through the latter's premeditated default, both would be unjustly enriched. *Portland* v. *New Eng. Casualty Co.,* 78 Or. 195, 152 Pac. 253 (1915). In the instant case a suggestion of collusion found by the trial court was deemed not justified by the record. Contractor and surety may protect themselves against undisclosed claimants by requiring security from the subcontractor. *McCrary* v. *Dade County,* 80 Fla. 652, 86 So. 612 (1920).

The lien law has been changed to grant the right to "every person," removing the formerly existing barrier to recovery by a subcontractor of the second degree under that statute. WIS. STAT. (1935) § 289.02. But the court declares that Section 289.16 is a reference statute, a legislative device used to avoid encumbering the statute book by constant repetition. Applying a rule of statutory construction, the Public Works Act is said to have adopted the then limits of the lien statute and cannot be affected by subsequent additions or modifications of the latter statute, in the absence of express intent. It has been observed that no other rule would furnish certainty as to whether a change in the one law would compel a corresponding construction to the other. *United States* v. *McMurray,* 5 F. Supp. 515 (W.D. Ky. 1933). Usually adoption by reference is denied where the reference to the statute sought to be incorporated is descriptive. *Vallejo & N. R. Co.* v. *Reed Orchard Co.,* 177 Cal. 249, 170 Pac. 426 (1918), index number; *Haas* v. *Lincoln Park Com'rs.,* 339 Ill. 491, 171 N.E. 526 (1930), specific title. Where the reference is general it includes not only the law in force at the date of the adopting act, but all subsequent laws on the particular subject. *Lynam* v. *Ramey,* 195 Ky. 223, 242 S.W. 21 (1922). The language of the public works statute does not point to either category. A scrutiny fails to reveal the "necessary implication" found by the court. Nevertheless, it is submitted that such a determination easily leads to a transcendental inquiry in which appreciation of the evils sought to be remedied is obscured. Disregard of traditional rules of statutory construction where their application would defeat an apparent social need is manifest in *City of Klamath* v. *Oregon Liquor Control Commission,* 146 Or. 123, 29 P. (2d) 564 (1934). See also *Posselius* v. *First Nat. Bank,* 264 Mich. 687, 251 N.W. 429 (1933). A similar realistic approach might lead to the conclusion that the same economic considerations which motivated the legislature to amend the lien law to embrace claimants however far removed from the principal contractor would impel the conferring of an equal benefit to claimants under the statute enacted as its substitute.

It is submitted that the decision in the instant case might have been supported by reason of the fact that the principal contractor was not in default. The court went farther than was necessary and laid down an inflexible rule of statutory construction which may bar from recovery a subcontractor of the second degree whose only recourse is on the bond because of the insolvency or misconduct of both principal contractor and subcontractor.

LEONARD BESSMAN.

PRINCIPAL AND AGENT—REAL ESTATE BROKER—DOUBLE EMPLOYMENT.—The plaintiff is a real estate broker. The defendant is a business man with some experience in the management and leasing of buildings. The evidence shows that *A* casually mentioned to the plaintiff, an old acquaintance of his, that he was looking for a location for a meat market, and he asked the plaintiff if there was any suitable place on his list. The plaintiff promised to look over his lists. The plaintiff then called the defendant, who was a stranger to him at the time, told the defendant that he was a broker, asked the defendant if he cared to lease his store, and upon receiving an affirmative answer, asked him further if he would care to have the plaintiff to handle the transaction for him, to which the defendant assented. The plaintiff then introduced *A* to the defendant, and after several weeks of negotiation, the lease was signed. The plaintiff now sues the defendant for his commission, which the defendant has refused to pay on the grounds (1) that the evidence does not show that the plaintiff was employed by the defendant; and (2) that the plaintiff may not recover because he was acting for both parties to the lease. Verdict for the plaintiff, with leave reserved to enter a verdict for the defendant. On appeal, *held,* judgment for the plaintiff should be entered on the verdict. The evidence shows the employment of the plaintiff by the defendant, and fails to show that the plaintiff acted for both parties. *Libby* v. *Smith,* (Mass. 1936) 200 N.E. 369.

In the instant case the court discusses the proposition: whether or not a broker may recover compensation from either or both principals when he has acted in the transaction for both of them. The cases are in general agreement that where the broker acts merely to bring the parties to a transaction together to make their own bargain, and he is not required to exercise his discretion in the deal, then he may recover from either or both of them, even though neither party may know that compensation is being paid to the broker by the other. *McLure* v. *Luke,* 84 C.C.A. 1, 154 Fed. 647 (C.C.A. 9th, 1907); *Herman* v. *Martineau,* 1 Wis. 151 (1853); *Orton* v. *Scofield,* 61 Wis. 382, 21 N.W. 261 (1884); *Kilpinski* v. *Bishop,* 143 Wis. 390, 127 N.W. 974 (1910); *Tasse* v. *Kindt,* 145 Wis. 115, 128 N.W. 972 (1911); *Litts* v. *Morse,* 145 Wis. 472, 130 N.W. 460 (1911). Some courts place their decision on the theory that where the duties which a broker owes to each of two principals are not incompatible, then the broker may recover commissions from both parties. *Sessions* v. *Pacific Improvement Co.,* 57 Cal. App. 1, 206 Pac. 653 (1922); *Thompson, Swan & Lee* v. *Schneider,* 127 Wash 533, 221 Pac. 334 (1923). The conflict in the cases appears when the duties to be performed by the broker demand the exercise of his skill and judgment and when such duties are conflicting, as for example where the broker is representing the buyer and the seller in closing a deal for the sale of land. When such a case arises, then these questions of fact become important: was the broker acting in good faith or fraudulently? What was the extent of the knowledge of one principal as to the relation between the agent and the other? Did such knowledge amount to implied consent? Was there express consent of both principals to the double employment? It is generally held that where the two principals know that the broker is acting for them and they consent thereto, then the broker, in the absence of any evidence of fraud, may recover commissions from both. *Loots* v. *Knoke,* 209 Ia. 447, 228 N.W. 45 (1929); *Carlson* v. *Babler,* 144 Minn. 125, 174 N.W. 824 (1919). But see *Walworth County Bank* v. *Farmers' Loan & Trust Co.,* 16 Wis. 629 (1863). Mere knowledge by one principal that his broker is also acting for the other party is not sufficient to allow the broker to recover compensation from him. The broker must further show the consent of both before he may recover from either. *Meyer* v. *Hanchett,*

43 Wis. 246 (1877); *Deakin* v. *Scheuer,* 182 Wis. 234, 196 N.W. 222 (1923). Of course, even though both principals know and consent to the broker's double employment, if fraud is present and it is shown that the broker has dealt unfairly with one of his principals to the benefit of the other, then he may not recover. *Featherston* v. *Trone,* 82 Ark. 381, 102 S.W. 196 (1907). But *cf. Hafner* v. *Herron,* 165 Ill. 242, 46 N.E. 211 (1896). In the absence of knowledge of the principal concerning the double employment of his broker, the broker may not recover. *Bunn* v. *Keach,* 214 Ill. 259, 73 N.E. 419 (1905); *Bowers & King* v. *Roth,* 189 Iowa 1264, 179 N.W. 859 (1920). Note (1932) 80 A.L.R. 1075, 1087.

It is submitted that in every case of double employment, before the broker may recover his commissions, two important inquiries of fact must be made concerning (1) the knowledge of the principals as to such employment and their consent thereto; and (2) the acts of the broker in handling the transaction as indicating the fairness with which he has dealt with both parties.

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BOOK NOTE

How to Conduct a Criminal Case, by William Harman Black. Revised edition, Prentice-Hall, Incorporated, New York, 1935, pp. lxxvi-481.

This book is a fine example of a type that is greatly needed by the legal profession. There is no field of law in which there is a greater paucity of necessary legal literature than in that of criminal procedure. It was extremely difficult—if not impossible— for the practicing lawyer to find a modern textwork in criminal procedure that would explain every step in a criminal case from the arrest of his client to the final conviction or acquittal. But now this book, written by a former Justice of the Supreme Court of New York, solves this problem.

An unusual feature is provided by means of a graphic chart which visualizes the whole procedure in a criminal case. The chart is also an instantaneous index to the book with a reference to the page or form mentioned on the chart. The chart seems somewhat complex due to the extensive field that it covers. Perhaps a series of smaller charts would be more useful for the purpose intended by the author.

Although the material in the book refers to a criminal case in the New York courts, the general principles of procedure are equally applicable to all states. The author is qualified to deal with such a subject as criminal procedure. He has served for many years as acting district attorney of New York City.

Another feature that deserves special mention is the placing in convenient parts of the volume the many forms that are necessarily used in the prosecution of a criminal case.

This book should be in the library of every practicing lawyer. The law student can likewise learn much from a careful study of it.

J. WALTER MCKENNA.