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AGENCY—1957 TENNESSEE SURVEY

F. HODGE O'NEAL*

Several interesting and significant decisions in the fields of agency and master and servant were handed down during the survey period. This article discusses the decisions in groups, each group being placed under a topic heading which is designed to give the reader an idea of the particular phase of agency law involved in that group of cases.

Establishing that Tortfeasor is a Servant of Defendant: It is elementary law of course that a master is liable for the torts of his servant acting within the scope of his employment. A question often arises, however, as to whether a particular tortfeasor is the servant of the person whom the aggrieved party is attempting to charge with liability. Two cases of this kind were decided during the survey period.

In *McAmis v. Carlisle*,¹ plaintiff's valuable bird dog was killed when struck by a truck. In an action for the value of the dog, testimony was given without objection that the driver of the truck, when apprehended, stated that he was employed by defendant, an Indiana corporation. Further, the evidence showed that the name of the defendant was printed on the doors of the truck, and that defendant was registered in the state of Indiana as owner of the truck. Defendant's president, however, although admitting that defendant owned the truck, testified that defendant had leased the truck for a period of two years and that the driver was an employee of the lessee. The jury's verdict was for the plaintiff, and the judgment based on the verdict was sustained by the Tennessee Court of Appeals. The court of appeals relied heavily on a Tennessee statute² which provides that proof of registration of a motor vehicle in the name of any person shall "be prima facie evidence that said vehicle was then and there being operated by the owner or by the owner's servant for the owner's use and benefit and within the course and scope of his employment." The court conceded that the statutory presumption vanishes when uncontradicted proof shows that the vehicle was in fact not being operated by the owner or by his servant for the owner's use and benefit, but held that when the evidence was conflicting on material points, as here, the presumption remained sufficiently strong to take the case to the jury.

The other case in which a question arose as to whether tortfeasors were servants of the party sought to be charged with liability was *Rural Educational Ass'n v. Bush*.³ In that case, a surgeon, who was on

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1. 300 S.W.2d 59 (Tenn. App. E.S. 1956).

2. TENN. CODE ANN. § 59-1038 (1956).

3. 298 S.W.2d 761 (Tenn. App. M.S. 1956).

the resident staff of a private hospital, left a sponge in plaintiff's intestines as a result of a nurse's miscount of the sponges. Plaintiff sued the hospital for the resulting injuries. Plaintiff was a pay patient in the hospital; he had no personal private physician attend him at the hospital, but on the contrary placed himself in the charge of the hospital's resident staff and submitted to the operation on the recommendation of members of that staff. Contrary to usual practice, no "circulating nurse" was provided for this operation to count the sponges a second time after the count by the "scrub nurse." Although the surgeon testified that he was an independent surgeon and that plaintiff was his private patient, the jury's verdict was for plaintiff, and the court of appeals affirmed, holding that the evidence warranted findings that both the nurse and the surgeon were agents or employees of the hospital and that accordingly the hospital was liable for their negligent acts.⁴ Among other things, the court commented that whether "an agency has been created is to be determined by the relations of the parties as the relations in fact exist under their agreements or acts, whether the parties understand that there is an agency or not."⁵

Some of the comments made by the court in its opinion are questionable. For instance, the court states that when "a nurse acts under the orders of a private physician in matters involving professional skill and decision, she is absolved from liability for her acts."⁶ Actually, however, it is an elementary principle of law that a servant is not relieved from liability for his negligence or other tort merely because he acts under orders from his master.⁷ Furthermore, the court states that a principal "is bound if an agent acts within his apparent or ostensible authority," and then proceeds to discuss apparent authority at some length. Although the court's statement is accurate as applied to a principal's liability on a contract or similar transaction entered into on his behalf by an agent, it is certainly misleading when used in a case in which the question involved is whether the defendant is liable for a tort committed by an alleged servant of defendant. When

4. In general the American cases hold that a physician or surgeon may be a servant. *MICHEM, AGENCY* § 436 (4th ed. 1952). As was said in *Treptau v. Behrens Spa, Inc.*, 247 Wis. 438, 20 N.W.2d 108, 114 (1945), "the better and more generally adopted rule is that, 'A hospital conducted for private gain is liable to its patient for injuries sustained by him in consequence of the incompetency or negligence of a physician treating him at its instance, under a contract binding it to furnish him proper treatment. A physician so employed is not an independent contractor.'" But see *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914); *Hillyer v. St. Bartholomew's Hospital*, [1909] 2 K.B. 820 (C.A.).

5. 298 S.W.2d at 766.

6. *Id.* at 767.

7. *RESTATEMENT, AGENCY* § 343 (1933) reads as follows: "An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal, except where he is exercising a privilege of the principal, or a privilege held by him for the protection of the principal's interests."

courts are determining whether a defendant is to be held liable for the torts of another who assertedly is the defendant's employee, the courts usually talk in terms of a master's liability for the torts of his servant within the scope of his employment. Inquiry is made into an agent's "authority," "apparent authority" or "ostensible authority" to determine whether an agent has power to bind the principal in contract, not to determine whether the alleged employer is liable in tort. In determining a master's liability in tort, the servant's apparent authority seems to be relevant only if the injured party has in some way relied on the appearance of authority and as a result of that reliance has increased the risk that the injury would result.⁸

Duties of Employer to Employee: One of the duties that an employer owes to an employee is to comply with the terms of the contract of employment and to compensate the employee in accordance with the provisions of that contract. In *Delzell v. Pope*,⁹ the complaining employee had been continuously connected with the corporate defendant, the Executive Board of the Tennessee Baptist Convention, since 1942. In 1949 he was made Brotherhood Secretary, and he served in that capacity until he was summarily dismissed on March 1, 1955, in the middle of the corporation's fiscal year. The complainant sought damages for breach of his contract of employment. He alleged in effect that the budget for the Brotherhood Department showed an *annual* amount payable to the Brotherhood Secretary and that the corporate defendant had allowed complainant to plan the activities of the Department for the whole fiscal year. Defendant demurred on the ground among others that complainant in effect sought a recovery for breach of an implied contract and that the facts alleged if true did not amount to an implied contract; and the chancellor sustained the demurrer. On appeal, the Supreme Court of Tennessee held that the demurrer had been improperly sustained. The court accepted the proposition that "a hiring at so much per week, or month, or year is a hiring for that period, provided there are no circumstances to the contrary."¹⁰ The budget of the corporate defendant, which set up a program for the Brotherhood Department calling for an annual expenditure of over \$20,000 and fixing an annual salary of \$6,300 for the Brotherhood Secretary, was considered by the court as important evi-

8. For another case decided during the survey period in which a question was raised as to whether an alleged tortfeasor was a servant of the party whom the plaintiff was trying to hold liable, see *Funk v. Welden*, 292 S.W.2d 207 (Tenn. App. W.S. 1953) (evidence established that person supervising the unloading of a dragline was defendant's agent and that he directed the unloading in a negligent manner).

9. 294 S.W.2d 690 (Tenn. 1956).

10. *Id.* at 694. For a discussion of the divergence in the authorities on the duration of an employment when the employment contract states no definite term but fixes compensation at a specified amount per week, month or year, see *Annots.*, 100 A.L.R. 834 (1936), 11 A.L.R. 469 (1921).

dence of an implied contract for an annual hiring.¹¹

Another duty that an employer owes an employee, if he undertakes to furnish the employee a place to work and to provide him with tools or equipment, is to exercise reasonable care to furnish and maintain a reasonably safe place of work and to supply and keep in repair tools and equipment which are reasonably safe. In *Thurmer v. Southern Ry.*,¹² a railway employee brought an action under the Federal Employers' Liability Act for injuries sustained when a plug on a steam line valve flew out while he was opening the valve. Plaintiff charged that defendant was negligent in failing to discover the defective condition of the valve and particularly of the plug, in maintaining excessive pressure on the line, and in failing to cut off steam while plaintiff's duties required his presence in and around the valve. The circuit court rendered judgment on a directed verdict for defendant. On appeal, the court of appeals reversed and remanded for new trial, holding the evidence sufficient to allow the case to go to the jury. There was no admissible evidence concerning the condition of the valve, and defendant contended that a jury could only speculate as to whether or not the defect was latent or obvious and discoverable by the exercise of due care. For some years the steam pressure had been cut off when similar valves were opened in that yard, but this practice seems to have been discontinued in 1952 because of the time element. Steam pressure was applied in an inspection of the valve plaintiff was opening, several hours before plaintiff's injury, but at a lower pressure than was used at the time of injury. The court felt a jury could conclude that the employer had not made an adequate inspection. It commented thus:

As applied to this case involving a car which had been in defendant's possession long enough to permit it to be tested in the yard under adequate pressure, we think the case should have gone to the jury on the question of defendant's negligence in not cutting off the steam while the valve was being opened as had formerly been the practice. It was for a jury to say whether avoiding a delay in departure of the train was a sufficient excuse for changing from a safe practice to one which there is evidence to indicate was not safe. . . .

In holding that a jury could only speculate as to whether or not the defect was latent no doubt the learned Circuit Judge was influenced by *Memphis Street Ry. Co. v. Stockton*, 143 Tenn. 201, 226 S.W. 187, 188, 22 A.L.R. 1467. . . . In that case, however, there was no proof that a safer

11. One of the allegations of the bill in this case was that complainant was 58 years of age, that he would have been subject to retirement at the age of 60, and that his dismissal deprived him of retirement benefits to which he was entitled. The court concluded, however, that the bill was demurrable "insofar as the complainant seeks a recovery for alleged loss of retirement benefits, since he was not eligible for retirement when he was dismissed by the Board. It is not an element of damages to be recovered for breach of an implied contract." 294 S.W.2d at 693.

12. 293 S.W.2d 600 (Tenn. App. E.S. 1956).

practice could have been followed to avoid or lessen the danger. . . . The question of inspection was not involved.¹³

The extent of the employer's duty to warn an employee of dangers was presented in an unusual setting in *Union Carbide & Carbon Corporation v. Stapleton*.¹⁴ The company provided regular physical examinations for its employees. Although an eight-year series of X-rays of plaintiff-employee indicated that he had an arrested case of pulmonary tuberculosis, he was not told that fact. The tuberculosis became active. Plaintiff contended that had his employer given accurate information of his condition, he would have been able to seek medical treatment which would have arrested the onslaught of the disease. To the employee's complaint one of the defenses set up by the employer was that he had exercised care in employing physicians who conducted the examination and therefore as a matter of law he was not liable even if they were negligent, because they were independent contractors for whose torts he was not responsible. The court of appeals held, however, that where an employer provides medical examinations for his employees and fails to disclose to an employee that he is suffering from a tubercular condition, the employer is liable for injuries caused by the negligent omission. The court pointed out that there was no proof whatsoever of negligence of the physicians in the diagnosis of plaintiff's condition; the diagnosis which they made and recorded in the company's files was an accurate one. Therefore the case did not present the question of when, if ever, a principal may be liable for the negligent failure of a carefully selected physician in his employ to exercise the skill and judgment of a reasonably prudent and careful physician. Instead, the court said, the question was whether the employer had a duty to warn the employee of a danger known to the employer but not to the employee. Failure of the employer to disclose to the employee what its records showed his condition to be, the court held, was clearly a violation of the employer's duty to exercise ordinary care for the employee's safety. Just as an employer has a clear duty to warn an employee of a known but hidden defect on the employer's property, an employer has a duty to warn of the known but hidden danger in this case. The court conceded that an employer has no obligation to give an employee a physical examination, but stated that when the employer undertakes to provide an examination, an examined employee is entitled to rely on being told of any dangerous condition the examination discloses.

Authority and Apparent Authority: A discussion of the authority and apparent authority of an agent to bind his principal in contract

13. *Id.* at 604.

14. 237 F.2d 229 (6th Cir. 1956).

is contained in *Morristown Lincoln-Mercury, Inc. v. Roy N. Lotspeich Publishing Co.*¹⁵ In that case, Doyle, the president of plaintiff, a corporation engaged in the retail sale of automobiles, went to the classified advertising department of defendant newspaper to arrange for an advertisement announcing a sale of cars planned by plaintiff. Upon arrival at the department, he was referred to an employee, Mrs. Tate, who suggested that he could obtain a better rate by signing a yearly contract. A printed contract was signed by Doyle and by Mrs. Tate as clerk for defendant. The printed contract contained a line for the signature of defendant's president, and it provided that all advertising copy would be subject to approval or rejection by the publisher. According to Doyle, however, neither of these provisions was called to his attention. On the contrary, Mrs. Tate not only accepted copy for the advertisement but assured Doyle that it would be run and attached the copy to the signed contract, a copy of which she turned over to Doyle. Later defendant refused to run the advertisement because of objections by a competitor of plaintiff. Plaintiff thereupon brought suit seeking damages. Defendant's position was that Mrs. Tate had no authority to bind defendant on the contract, that only defendant's president and the manager of the classified ad department had that authority. The circuit court entered judgment on a verdict for plaintiff as reduced by remittitur. On appeal, the court of appeals sustained the finding that Mrs. Tate had power to bind defendant on the contract. The scope and extent of an agent's authority and apparent authority, the court pointed out, are to be determined from all the facts and circumstances in evidence, and the determination is to be made by the triers of facts; and further, assuming the defendant by the contract reserved the right to approve or reject advertising, the question of whether there had been a waiver of that right was for the jury. The court quoted¹⁶ the following sentence, among others, from the late Professor Floyd R. Mechem's book on agency:¹⁷

The principal may, either expressly or by implication, put the agent in such a position or charge him with such duties, that the making of representations will fall within the scope of his authority, as where, expressly or by implication, he refers persons to the agent for information or authorizes him to do acts to which the making of representations is a necessary or a usual incident.

Apparently what the court had in mind was that a principal can

15. 298 S.W.2d 788 (Tenn. App. E.S. 1956) discussed, regarding amount of damages allowable, in Hartman, *Contracts—1957 Tennessee Survey*, 10 VAN. L. REV. 1013 (1957).

16. 298 S.W.2d at 792-93.

17. MECHEM, *AGENCY* § 1987 (2d ed. 1920). The book is now in a fourth edition, the fourth edition having been prepared by Professor Philip Mechem.

expressly or by implication give an agent authority to make representations to customers of the principal which will create in the agent an apparent authority to do acts or to enter into contracts which are beyond the actual authority of the agent. This of course is in a sense an exception to the usual rule that apparent authority is created by manifestation from the principal to a third person and that an agent by his own statements or acts cannot give himself apparent authority.

Although the contract was held to bind defendant, plaintiff was permitted to recover only nominal damages. The court of appeals concluded that plaintiff's refusal to publish the advertisement had not been established with sufficient certainty to support an award of actual damages.

Lowe v. Wright,¹⁸ among other things, involved the power of a real estate agent to bind the owner of real estate by entering into a contract of sale and executing a deed to the property. In that case, complainants, the owners of a seventy acre tract of land, surveyed the tract and had a plat made of it. They later employed Parrish, a realtor, as their agent to develop and sell a subdivision, about fifty acres of the tract being subdivided into lots for that purpose. Complainants entrusted Parrish with almost unlimited authority in selling the lots. He told the owners that he had a notary public who knew the signatures of each of them and that it was not necessary for them to go before the notary to acknowledge deeds. Accordingly, he would have one or the other of them sign the names of both to deeds, have the notary affix his seal and certificate to the deeds, deliver the deeds to the purchasers, receive the purchase money, and later account to complainants. Parrish was often delinquent in his payments to complainants.

Adjoining the subdivision lots was a 3.74 acre lot owned by complainant, the lot involved in this case. Parrish put a "for sale" sign on it at the same time he placed signs on the subdivision lots. Defendant Wright saw the sign, and bought the lot from Parrish, giving Parrish checks made out to Parrish as payee for earnest money and title insurance policy and a check for the bulk of the purchase price made out to complainants as payee. Parrish took the check made out to the complainants to them and told them that he had just closed a deal in another locality and that the proceeds belonged to him; and they thereupon deposited the check to their account, deducted the amount he owed them, and gave him a check for the difference. Complainants filed this bill to cancel and remove as a cloud on their title the deed that Parrish gave defendant, on the ground that Parrish had forged the deed.¹⁹ The chancellor directed that title to the lot remain

18. 292 S.W.2d 413 (Tenn. App. M.S. 1956).

19. Defendant filed a cross-bill against complainants, a notary public, the

vested in defendant, unless complainants paid into court the amount of the check they had received from Parrish and deposited, and that if complainants did pay that amount into court, title should vest in them. On appeal, the court of appeals affirmed, holding that, even though the deed was forged and thus void, complainants could not repudiate the contract of sale without first restoring to defendant the amount of the check they had received from Parrish. The court pointed out²⁰ that to authorize an agent to execute a deed in the name of another as his principal, the authority to do so must be by deed or by writing of equal formality with a deed;²¹ but the authority of an agent to enter into a binding contract to sell land in the name of his principal need not be in writing. Although the Statute of Frauds²² requires a contract for the sale of land or a memorandum of it to be in writing and signed by the party to be charged or by his duly authorized agent, it does not require that the agent's authority be in writing.²³ The court concluded that the weight of the evidence was that Parrish had authority not only to sell the subdivision lots but also the adjoining lot involved in this case.²⁴ Further, the court said, complainants were in no position to repudiate the contract and ask relief in a court of equity without first restoring what they had received under it.²⁵ Apparently this last ground, this equitable ground, is the real basis of the court's decision; because, if Parrish had authority to enter into a contract of sale and did enter into a contract which bound complainants, it would seem that defendant would be entitled to the property under the valid contract of sale and could go into equity and require complainants to execute a deed to it.

Real Estate Agent's Right to Commission: Two cases²⁶ decided during the survey period by the Tennessee Court of Appeals involved a real estate agent's right to a commission. One of the decisions, *Robinson v. Kemmons Wilson Realty Co.*,²⁷ contains a comprehensive review of previous decisions on real estate agents' commissions and sets forth²⁸ in full a previously unreported opinion of the Supreme

surety on the notary's bond, and a bank. The discussion here is limited to agency questions and does not go into some of the issues raised by the cross-bill.

20. 292 S.W.2d at 417.

21. Citing TENN. CODE ANN. § 64-503 (1956); *Cain v. Heard*, 41 Tenn. 163, 166 (1860); *Farris & Hampton v. Martin*, 29 Tenn. 495, 498 (1850); *Smith v. Dickinson*, 25 Tenn. 261, 262 (1845).

22. TENN. CODE ANN. § 23-201(4) (1956).

23. Citing *Cobble v. Langford*, 190 Tenn. 385, 230 S.W.2d 194 (1950); *Texas Co. v. Aycock*, 190 Tenn. 16, 227 S.W.2d 41, 17 A.L.R.2d 322 (1950).

24. 292 S.W.2d at 418.

25. *Id.* at 418-19.

26. *Robinson v. Kemmons Wilson Realty Co.*, 293 S.W.2d 574 (Tenn. App. W.S. 1956); *Bell v. Strauch*, 292 S.W.2d 59 (Tenn. App. W.S. 1954).

27. 293 S.W.2d 574 (Tenn. App. W.S. 1956).

28. *Id.* at 581.

Court of Tennessee²⁹ laying down principles said never to have been clearly enunciated elsewhere. The following paragraphs set forth a summary of the Tennessee law on real estate agents' commissions, a summary extracted from the discussion in the *Robinson* case.

The right of a real estate agent to a commission is said to be "dependent upon a contract of employment and upon service under the contract before its termination, a service which approximately results in a sale."³⁰ If the owner of real estate employs an agent to sell the property or to assist him in its sale, and he is unwilling to pay the usual and customary commissions, he should make a special contract with the agent. If he does not do so, the agent will be entitled to reasonable commissions such as real estate agents in that particular locality by usage and custom receive for similar services.³¹

A real estate agent is entitled to a commission (absent a contract stipulation to the contrary) if he was the efficient agent in or procuring cause of a sale.³² Whenever an agent produces a person who ultimately purchases the property, the agent is generally held to be entitled to a commission even though the trade is effected by the owner.³³ The owner will not be permitted to delay consummation of the sale until the agency has expired and deny liability for a commission on a subsequent sale to the purchaser produced by the agent.³⁴ On the other hand, whenever a sale has not been made before the termination of the agency, the owner may sell to a purchaser without liability for the agent's commission, if the owner acts in good faith and has not interfered with the agent in closing the sale before the agency terminated.³⁵ Among matters to be considered in determining the rights of an agent to a commission on sales consummated after the termination of the agency are the following:³⁶ (1) nearness to completion of a sale by the broker when the agency ended; (2) whether negotiations through the broker were terminated in good faith by the

29. *Marx & Bendorf, Inc. v. Hall*, Tenn., Jan. 15, 1938, (293 S.W.2d at 581-84).

30. *Ibid.*; *Nance v. Smyth*, 118 Tenn. 349, 99 S.W. 698 (1907); *Glascok v. Vanfleet*, 100 Tenn. 603, 46 S.W. 449 (1898); *Gilchrist v. Clarke*, 86 Tenn. 583, 8 S.W. 572 (1888); *Parker v. Walker*, 86 Tenn. 566, 8 S.W. 391 (1888); *Miller v. Bacon*, 12 Tenn. App. 123 (E.S. 1930).

31. *Arrington & Farrar v. Cary*, 64 Tenn. 609, 611 (1875).

32. *Royster, Waldran & Bacon v. Mageveney*, 77 Tenn. 148 (1882).

33. *Arrington & Farrar v. Cary*, 64 Tenn. 609 (1875).

34. *Marx & Bendorf, Inc. v. Hall*, Tenn., Jan. 15, 1938, (293 S.W.2d at 581-84). "[W]hen the broker has commenced a negotiation for the sale, the owner cannot deprive him of compensation by taking that negotiation out of his hands and completing the sale himself." *Royster, Waldran & Bacon v. Mageveney*, 77 Tenn. 148, 150 (1882).

35. *Marx & Bendorf, Inc. v. Hall*, *supra* note 34; cf. *Newman v. Hill*, 29 Tenn. App. 388, 391-93, 196 S.W.2d 1008, 1009 (W.S. 1945) ("[T]he agent is not entitled to the commission unless the contract is obtained within the time limited.").

36. *Marx & Bendorf, Inc. v. Hall*, Tenn., Jan. 15, 1938, (293 S.W.2d at 581-84).

owner; (3) whether the subsequent sale bears relation to and was a sequence of the broker's introduction of the buyer to the owner; (4) whether the owner delayed the sale until after termination of the agency to avoid a broker's commission; (5) whether the purposes of the agency were accomplished and the agency terminated in good faith before expiration of the broker's authority to sell; and (6) whether or not as a result of changed conditions, the owner and purchaser, without reference to the introduction of the purchaser by the agent, entered into the subsequent contract of sale. Any or all of these elements, the Supreme Court of Tennessee has said, "are to be considered in determining whether or not the broker was the procuring cause of the sale, for, after all, the right of a broker to collect the commission is dependent upon whether the broker actually made the sale or was the procuring or introducing cause of the sale."³⁷

In the *Robinson* case³⁸ the owner of real estate first authorized a broker to sell it for \$24,500. Later the owner reduced the price to \$23,000 with the understanding that the broker was to receive a commission if the sale was made at that price. The prospect secured by the broker would not purchase at that price, and the owner told the broker to "forget the deal." At that time, the owner had no intention of resuming negotiations. About three weeks later, however, the prospective purchaser communicated with the owner and offered to buy for \$21,500; the owner accepted. The Tennessee Court of Appeals held that the broker was not entitled to the commission. The court commented³⁹ that the case turned almost entirely on whether negotiations between the owner and the prospect were broken off in good faith and whether the sale was the result of new and independent negotiations. The court observed⁴⁰ that in previous Tennessee cases in which a broker had recovered a commission, the recovery was based either on the express terms of a contract or resulted from some element of bad faith, sharp practice, fraud, or attempt to overreach the broker. The evidence in this case, the court held, showed clearly that the broker was not the moving and efficient cause of the sale and that the owner had not interrupted negotiations with intent to delay the sale and avoid liability for the agent's commission.

The other case on a real estate agent's commission was *Bell v. Strauch*,⁴¹ which raised the question of the right of an agent who arranges an exchange of property to collect commissions from both parties to the exchange. In that case each of the parties knew of the

37. *Ibid.*

38. *Robinson v. Kemmons Wilson Realty Co.*, 293 S.W.2d 574 (Tenn. App. W.S. 1956).

39. *Id.* at 577.

40. *Ibid.*

41. 292 S.W.2d 59 (Tenn. App. W.S. 1954).

dual agency and made no objection to it. The court held that a broker may properly represent both parties if his agency for each is known to the other, and that he is entitled to commissions from both.