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# Agency -- Joinder of Resident Agent to Defeat Federal Jurisdiction -- Tort Liability of Agent

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**NOTES AND COMMENTS**

**Agency—Joinder of Resident Agent to Defeat Federal Jurisdiction—Tort Liability of Agent**

A power company and three of its employees were sued as joint tortfeasors. It was alleged that lack of proper supervision and inspection on the part of all defendants caused a pole carrying power lines

to fall with a resultant injury to the plaintiff. The power company was a non-resident of the state in which the action was brought and would have been entitled to removal to a federal court on the ground of diversity of citizenship if the employees, who were residents, had not been joined. On the theory that the employees were fraudulently joined, the power company removed the cause. The District Court, in considering a motion by the plaintiff to remand to the state court, held that the employees were not properly joined because they owed no duty to the plaintiff to inspect the pole and further, that if guilty, it was of nonfeasance rather than misfeasance. The distinction is that an employee may be liable to a third person for misfeasance but not for nonfeasance.<sup>1</sup>

The effect of cases in which the liability of an agent (or servant)<sup>2</sup> is involved has been obscured by an economic reality, a procedural peculiarity, and a verbal nonsensicality.

Economically a judgment against an agent is in most cases ineffective. Consequently suit is usually against the principal alone under the doctrine of respondeat superior. An appeal from such a suit does not involve the agent's liability. If the principal and agent are sued jointly the agent will seldom appeal since a judgment does not bother him so long as there is no attempt to enforce it. As a result the supreme courts seldom have an opportunity to discuss an agent's liability.

A procedural question motivates the majority of cases involving the employee's liability. The plaintiff joins the resident employee as a joint tortfeasor with his non-resident employer for the obvious purpose of preventing removal to a federal court.<sup>3</sup> If the employer thinks no cause of action against the employee exists he files a petition for removal in which he states the facts supporting his contention. On appeal from a ruling on this petition to the state supreme court these facts are deemed to be true and the court decides as a matter of law if a cause of action has been stated against the employee. If there is, of course, removal is denied. If there is not it is fraudulent joinder and the non-resident defendant is entitled to removal.<sup>4</sup> In the federal court the plaintiff may file a motion to remand to the state court. The court must then pass on the employee's liability and in doing so follow the law of the state in which the action originated.<sup>5</sup> Ostensibly it appears that the federal court is being asked to reach an opposite result,

<sup>1</sup> *Norwood v. Carolina Power & Light Co.*, 74 F. Supp. 483 (E.D.S.C. 1947).

<sup>2</sup> 7 *LABATT, MASTER AND SERVANT* §2585 (2d ed. 1913) (no distinction between liability of an agent or a servant).

<sup>3</sup> *Chicago, R. I., and Pacific Ry. v. Schwyhart*, 227 U.S. 184 (1912) (motive for joinder is immaterial so long as a cause of action against the employee is stated).

<sup>4</sup> *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE* §§287-289 (1929); *Crisp v. Champion Fibre Co.*, 193 N.C. 78, 136 S.E. 238 (1927).

<sup>5</sup> *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

on the same set of facts, from that of the court whose law it is bound to follow. The federal court, however, is not restricted to the facts as alleged in the petition but determines the actual facts.<sup>6</sup> If there is a disparity then there is a new situation which must be passed on as a matter of state law. As stated before, the great majority of cases in the state court which involve the question are those ruling on the petition for removal and unfortunately most of these are summarily dismissed with "the facts stated in the petition are (are not) sufficient to justify removal."<sup>7</sup> It would seem that more state decisions, even by way of dictum, which declared the status of the law in that state would be of great aid to parties seeking removal in determining what facts to include in their petition and to the federal courts in determining the law which they are bound to follow.

The verbal handicap in this field has arisen out of an attempt to determine liability by use of the expression of misfeasance or nonfeasance. The rule was that an agent is liable in tort to a third person for misfeasance but not for nonfeasance.<sup>8</sup> Varied interpretations have been given this rule: (1) The strict interpretation that for affirmative acts (misfeasance) there is liability but for failure to act (nonfeasance) there is no liability.<sup>9</sup> The absurdity of this is that an agent would never be liable for negligence which, by its very definition, is *not doing* what should have been done.<sup>10</sup> (2) Acts of omission or commission which breach a duty owed to a third person (misfeasance) impose liability, but omission of an act which breaches a duty owed solely to the principal (nonfeasance) imposes no liability on the agent to the third person.<sup>11</sup> This interpretation, in reality, destroys the rule since it makes duty, as in all tort cases, the determining factor. The majority of courts today recognize the duty relation as controlling, either by adopting the second interpretation or by discarding the misfeasance-nonfeasance rule altogether.<sup>12</sup> It is remarkable that these two words have survived as long as they have.<sup>13</sup>

<sup>6</sup> Chesapeake & Ohio Railway v. Cockrell, 232 U.S. 146 (1913).

<sup>7</sup> Kerley v. Standard Oil Co., 224 N.C. 465, 31 S.E. 2d 438 (1944).

<sup>8</sup> Burch v. Caden Stone Co., 93 Fed. 181 (C.C. Ky. 1899); Drake v. Hagan, 108 Tenn. 265, 67 S.W. 470 (1902); Mitchell v. Durham, 13 N.C. 538 (1828).

<sup>9</sup> Consolidated Gas Co. v. Connor, 114 Md. 140, 78 Atl 725 (1910).

<sup>10</sup> Campbell v. Model Steam Laundry, 190 N.C. 649, 654, 130 S.E. 638, 640 (1925).

<sup>11</sup> Murray v. Cowherd, 148 Ky. 591, 147 S.W. 6 (1912); Morey v. Shenango Furnace Co., 112 Minn. 528, 127 N.W. 1134 (1910).

<sup>12</sup> Edwards v. Southern Ry., 212 N.C. 61, 65, 192 S.E. 855, 858 (1937) ("The omission of an employee . . . to perform a legal duty owed to a third person ordinarily imposes liability on both employee and employer."); Clevenger v. Grover, 211 N.C. 240, 189 S.E. 782 (1937); Wachovia Bank & Trust Co. v. Southern Ry., 209 N.C. 304, 183 S.E. 620 (1935); McCourtie v. Bayton, 159 Wash. 418, 294 Pac. 238 (1930) (there is "no distinction as regards the agent's liability, whether the injuries flow from his nonfeasance or misfeasance.").

<sup>13</sup> See Note, 28 L.R.A. 433 (1895) (misfeasance-nonfeasance rule has from its origin been based on a misconception).

The question remains; when and to whom does an agent owe duties? This may be resolved into three categories:

(1) Duties imposed on the agent as a responsible individual, in common with all other members of society.<sup>14</sup>

(2) Statutory duties regulating the particular phase of work in which the agent is employed. The fact that one is an agent does not excuse a noncompliance with these statutes.<sup>15</sup>

(3) Duties to third persons which the contract of employment imposes on the agent. A hypothetical case illustrates the problem involved. *P* (principal) owes *T* (third party) the duty of performing act *X*. *P* employs *A* (agent) to perform act *X*. *A* does nothing and as a result of act *X* not being performed *T* is injured. Two actions are obvious. *T* against *P* in tort or contract, and *P* against *A* for breach of contract. Is there an action by *T* against *A*? Some courts have said not because there is no privity.<sup>16</sup> This may rule out a contract action but it would not affect an action in tort. Other courts have called this nonfeasance for which there is no liability.<sup>17</sup> Still others have said that the duty is owed solely to the principal, obviously meaning a contractual duty, and refuse to mention a possible tort liability to *T*.<sup>18</sup> A step toward imposing a duty in such cases was taken by the decisions which hold that if *A* once begins performing act *X*, and then stops, any resultant injury will expose him to liability.<sup>19</sup> A similar tendency is shown in the cases holding agents in charge of property to a peculiar responsibility to perform all acts for which they contract in regard to the property.<sup>20</sup> The final step in the process will be to hold an agent liable in all cases for the natural and probable consequences of a failure to perform the acts which his employment contemplates.<sup>21</sup>

Although the law has been thus extended where an independent contractor is involved,<sup>22</sup> no cases in the field of agency have yet adopted such a rule. It is suggested as the logical result. It would be in line with an increased recognition of the social responsibility undertaken by a contracting party towards those who rely on his performance.

HOYT PATRICK TAYLOR, JR.

<sup>14</sup> Cases in this category consist largely of the misperformance of acts which there is a perfect right to perform in a proper way. See *Alpha Mills v. Watertown Steam Engine Co.*, 116 N.C. 797, 21 S.E. 917 (1895).

<sup>15</sup> *Illinois C.R.R. v. Archer*, 113 Miss. 158, 74 So. 135 (1916); *Patry v. Northern P.R.R.*, 114 Minn. 375, 131 N.W. 462 (1911).

<sup>16</sup> *Delaney v. Rocherau*, 34 La. Ann. 1123 (1882) ("For nonfeasance the responsibility must arise from some express or implied obligation between parties standing in privity of law or contract with each other.").

<sup>17</sup> *Coffer v. Bradshaw*, 46 Ga. App. 143, 167 S.E. 119 (1932).

<sup>18</sup> *Olsness v. State*, 58 N.D. 20, 224 N.W. 913 (1929).

<sup>19</sup> *Osborne v. Morgan*, 130 Mass. 102 (1881); *Orcutt v. Century Building Co.*, 201 Mo. 424, 99 S.W. 1062 (1907).

<sup>20</sup> *Drake v. Hagan*, 108 Tenn. 265, 67 S.W. 470 (1902); *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491 (1902).

<sup>21</sup> PROSSER, TORTS §§206-210 (1941).

<sup>22</sup> *Fisher v. Greensboro Water Supply Co.*, 128 N.C. 375, 38 S.E. 912 (1901).