Comment on Recent Decisions

AGENCY—AGENT'S LIABILITY TO THIRD PERSONS—MISFEASANCE AND NONFEASANCE.—The defendant railroad company employed one Poppell, a citizen and resident of Georgia, as foreman in charge of the right of way adjacent to the land of the plaintiff. Poppell entered into performance of his duty to clear the weeds and other ignitable substances from the right of way, but failed to clear that section proximate to plaintiff's land. As a result, sparks from a passing locomotive enkindled the dry weeds, and the fire spread to the plaintiff's premises causing great damage. In an action in the state court against both the railroad and the agent there was a motion for a change of venue to the federal court since the railroad was a foreign corporation and the cause of action was for over $3000. *Held;* reversing the state court, that the plaintiff has no cause of action against the agent since his act was one of nonfeasance and not misfeasance. Change of venue granted. *Knight v. Atl. Coast Line R. Co.* (C. C. A. 5, Oct. 1934) 73 F. (2) 76.

There can be no doubt that an agent who violates a duty owing to a third person is liable to such person for the consequences of his tortious acts, whether they be malfeasance, misfeasance, or nonfeasance. *Bannigan v. Woodbury* (1909) 158 Mich. 206, 122 N. W. 531; *Humphreys Tunnel & Min. Co. v. Frank* (1909) 46 Colo. 524, 105 Pac. 1093; 2 C. J. 824, sec. 498. This simple rule based on ordinary tort law has been perverted by text writers, and through such influence an artificial nicety has entered the books. The rule thus created is that an agent is liable to third parties for *misfeasance,* but not for *nonfeasance,* since in the latter case his only duty is to his principal based on privity of contract; there being no privity between the agent and third persons. Story on Agency (1882), sec. 308; Wharton on Agency (1876), sec. 535; Dunlap's Paley's Agency (1847), sec. 396; Ewell's, Evans on Agency (1879), sec. 328. Modern scholars of the law are agreed that the rule enunciated by the above writers is the result of a misinterpretation of the dicta in a dissenting opinion by Lord Holt in *Lane v. Cotton* (1701) 12 Mod. 488; 88 Eng. Rep. 1466, which case did not have before it the liability of an agent to a third party. See *Atlantic Coast Line R. Co. v. Knight* (1933) 48 Ga. App. 53. The leading case of *Delaney v. Rochereau & Co.* (1882) 34 La. Ann. 1123, 44 Am. Rep. 456, nevertheless follows this mistaken view, and cites for its sole authority the textbooks which are responsible for it. *Carey v. Rochereau* (C. C. A. La., 1883) 16 F. 87, which other federal courts blindly follow, adopted the rule in the *Delaney Case,* supra. *Kelley v. Robinson* (D. C. E. D. Mo. 1920) 262 F. 695; accord. *Murray v. Usher et al.* (1889) 117 N. Y. 548.

The more modern cases refuse to be misled in this manner, and to escape the obvious injustice of the rule, have restricted the meaning of nonfeasance to the cases where the agent fails to enter into performance of the contract with his principal, but after the agent actually enters upon the performance of his work any tortious act which he does, whether by omission or commission, is misfeasance. *Orcutt v. Century Bldg. Co.* (1907)

210 Mo. 424, 99 S. W. 1062; *Brower v. Northern P. R. Co.* (1910) 109 Minn. 385, 124 N. W. 10; *Williams v. Dean* (1907) 134 Iowa 216, 111 N. W. 931; *Southern R. Co. v. Grizzle* (1906) 124 Ga. 735, 53 S. E. 244. Other authorities escape the confusion resulting from such a distinction by declaring that an agent who assumes the control of property is charged with the duty of so managing and using it as not to injure the property or person of another; thus creating a duty in law making the agent liable to third persons for misfeasance and "nonfeasance." *Tippecanoe Loan & Trust Co. v. Jester* (1913) 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E, 721.

At most, the foregoing limitations are inadequate. First, because the failure of the agent to enter into performance of the contract after lulling his principal into inactivity, may cause the injury to a third person. Secondly, the injury may result from an agency which does not allow the agent full control over the principal's property. The best means of escape from *Lane v. Cotton,* supra, and the error into which its misapplication lead the courts would seem to be to adopt the rule proposed by the American Law Institute: "An agent who undertakes to act for the principal under such conditions that some action is necessary for the protection of the person of others or of their tangible things is subject to liability to such others for physical harm to them or to their things caused by his undertaking and subsequent failure to act, if the need for action is so immediate or emergent that withdrawal from the undertaking is no longer possible without unreasonable risk to them, and the agent should so realize." American Law Institute, *Restatement of Agency* (1933), sec. 354.

H. A. G. '35.

BANKRUPTCY—LEASE TERMINATED BY SUCH—PROVABLE CLAIMS.—By the terms of the lease, the filing of a petition in bankruptcy against the lesee was to be deemed a breach of the lease, terminating it ipso facto and without entry or other action by the lessor. A further provision gave the lessor as damages for said breach an amount equal to the amount of the rent reserved for the residue of the term less the fair rental value. The bankruptcy petition was filed against the lessee prior to the termination of the lease. In an action to establish a claim for damages under the lease, *held,* affirming the judgment of the Circuit Court (69 F (2d) 90) that the lessor had a provable claim under the Bankruptcy Act. *Irving Trust Co. v. Perry* —U. S.—, (U. S. Law Week, December 4, 1934).

"Debts of the bankrupt may be proved and allowed against his estate which are a fixed liability . . . absolutely owing at the time of the filing of the petition against him." Bankruptcy Act 1898, ch. 541, sec. 63 a (1); 30 Stat. 562.

Contingent claims cannot be liquidated or proven. 2 Collier on Bankruptcy (12th Ed. 1921), 978. *In re Imperial Brewing Co.* (W. D. Mo. 1906) 143 Fed. 579. Accordingly, rent which the bankrupt has agreed to pay and which is to accrue subsequent to the filing of the petition in bankruptcy does not constitute a provable claim; it is not a "fixed liability" under section 63 a (1) nor an existing demand, but both the existence and the