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Agency - Liability of Agents to Thrid Persons For Nonfeasance in Performance of Duty to Principal

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AGENCY — LIABILITY OF AGENTS TO THIRD PERSONS FOR NONFEASANCE IN PERFORMANCE OF DUTY TO PRINCIPAL

Plaintiff, the beneficiary of a credit life insurance policy, sued the insurance company on the policy, and in the alternative, the agent who issued the policy and the agent's errors and omissions insurer. The insured, a mortgage debtor of plaintiff, had applied for credit life insurance, naming plaintiff as beneficiary. Due to a mistake on the part of the insurance agent, the policy was issued for an amount greater than that permitted by the terms of the policy for the insured's age group.[1] Before the error in the amount of coverage was detected by the insurance company, the insured died. The district court rendered judgment against the insurance company for the maximum liability as limited in the policy. Judgment for the balance (the difference between the amount specified as maximum liability and the amount for which the insurance agent issued the policy) was rendered against the agent and her errors and omissions insurer in solido.[2] On appeal by the agent's errors and omissions insurer to the Louisiana Court of Appeal, Second Circuit, *held*, reversed. Agents[3] are not liable to third persons by reason of acts constituting nonfeasance or mere omissions of duty owed to the agent's principal. *First Federal Savings and Loan Association of Winnfield v. Continental Equity Life Insurance Co.*, 124 So.2d 802 (La. App. 1960).

With reference to his principal, there is no doubt that an

regulation by the Commission were only direct sales in intrastate commerce, which comprise the largest part of sales to industrial consumers. It is difficult, however, to read this interpretation into the blanket exemption of direct sales found in the statute.

1. The insurance agent issued the certificate of coverage in the amount of $4,800, but both the certificate and the master policy limited liability to $2,000.

2. The exact figures are as follows: (1) $2,056 against the insurance company; (2) $250 against the insurance agent individually; and (3) $2,494 in solido against the insurance agent and her errors and omissions insurer. The $250 item was not at issue because the insurance agent did not appeal.

Of course, the obligation of the agent's errors and omissions insurer to pay this balance depended on the liability of the agent herself; curiously enough, however, the agent did not appeal.

3. The difficult question of whether the agent is acting for the insured or the insurer was not in issue inasmuch as the plaintiff predicated its case on the theory that the agent was the agent of the insured. 124 So.2d 802, 803. In this regard, see VANCE, INSURANCE 435, 461 *et seq.* (3d ed. 1951). As to Louisiana's position, see LA. R.S. 22:180 (1950): "No life insurer shall provide in any application, policy or certificate of insurance that the person soliciting such insurance or any person who is engaged in the business of soliciting insurance for the insurer and whose compensation is either paid by the insurer or is contingent upon the issuance of such policy, is the agent of the person insured. No such insurer shall insert in any policy or contract any provision to make the acts or representations of such person binding upon the insured." Amended by La. Acts 1958, No. 125.

agent may be liable for a failure to act.[4] The liability of an agent to a third person for his nonfeasance is, however, not so well settled. Early in agency law there arose a distinction[5] between a mere failure to act and a positive act which caused harm to another.[6] According to this theory an agent was not liable to a third person for an omission of duty, a mere nonfeasance.[7] Conversely, he was liable for an affirmative act, a misfeasance, that caused injury to the third party.[8] Louisiana was no exception to these general rules. One of the most famous American cases to which the oft-repeated statement "agents are not liable to third persons for nonfeasance, or mere omissions of duty" is attributed[9] is an early Louisiana case, *Delaney v. A. Rochereau & Co.*[10]

4. RESTATEMENT (SECOND), AGENCY § 401 (1958): "An agent is subject to liability for loss caused to the principal by any breach of duty."

5. Apparently the distinction is traceable to a dictum of Lord Holt in his dissenting opinion in Lane v. Cotton, 12 Mod. 488, 88 Eng. Rep. 1466 (1701). For a full discussion of the discrepancies in the various reporters concerning the exact language of Lord Holt, or, for that matter, even what the majority actually said, see Annot., 20 A.L.R. 97, 101 (1922). The distinction is often referred to as "Judge Storey's Rule," who seems to have adopted it from Lord Holt. See STOREY, AGENCY §§ 308, 309 (8th ed. 1874).

6. An explanation is suggested by Dean Prosser, with reference to general tort liability. PROSSER, TORTS 183, § 38 (2d ed. 1955): "[T]he courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer harm because of his omission to act."

7. STOREY, AGENCY 402, § 308 (8th ed. 1874): "The agent is also personally liable to third persons for his own misfeasance and positive wrongs. But he is not, in general . . . [the author here notes that maritime law poses an exception], liable to third persons for his own nonfeasance or omission of duty." See Wadley v. Dooley, 138 Ga. 275, 75 S.E. 153 (1912); Southern R.R. v. Grizzle, 124 Ga. 734, 53 S.E. 244, 110 Am. St. Rep. 191 (1906); Johnson v. Barber, 10 Ill. 425, 50 Am. Dec. 416 (1849); Hough v. Illinois C. R.R., 169 Iowa 224, 149 N.W. 885 (1914); Englert v. New Orleans R. & Light Co., 128 La. 473, 54 So. 963 (1911); LeBlanc v. Sweet, 107 La. 355, 31 So. 766, 90 Am. St. Rep. 303 (1902); Buis v. Cook, 60 Mo. 391 (1875).

8. See quotation from STOREY, AGENCY, *supra* note 7. See also Dean v. Brock, 11 Ind. App. 507, 38 N.E. 829 (1894); Wendland v. Berg, 188 Iowa 202, 174 N.W. 410 (1919); Dudley v. Illinois C. R.R., 127 Ky. 221, 96 S.W. 835, 13 L.R.A. (N.S.) 1186, 128 Am. St. Rep. 335 (1906); Feltus v Swan, 62 Miss. 415 (1884); Hashaw v. Noble, 7 Ohio St. 226 (1857).

9. The quoted statement appears in the syllabus of the case, but apparently is not to be found in this precise form anywhere in the actual opinion. See discussion of Delaney v. A. Rochereau & Co., 34 La. Ann. 1123, 44 Am. Rep. 456 (1882) *infra* note 19.

10. 34 La. Ann. 1123, 44 Am. Rep. 456 (1882). The court further decided that the rule at common law and civil law did not differ.

There is an earlier Louisiana case concerning a failure of an agent to act which caused detriment to a third person. In Poydras v. Delamare, 13 La. 98 (1839), the defendant principal drew an order in favor of the plaintiff on the defendant agent, her attorney in fact, requesting him to pay a certain sum on demand, which sum the defendant principal owed the plaintiff. The order was presented to the defendant agent, but he refused to pay it. The district court rendered judgment against both the principal and agent. The Supreme Court reversed the judgment insofar as it applied to the agent, saying, "we do not think that by his neglect to obey the directions of his principal, that he has rendered himself liable in this action to the plaintiff." Id. at 101. However, the *Delaney* case is the more cited

The court, using the above rule, denied recovery to the plaintiff against the agent of an owner of a building.[11] This position has been followed many times subsequently by the Louisiana courts.[12] It will be noted that the statement of this theory ends with the

case, and even it did not mention the *Poydras* case. The only case found citing the latter as authority for the nonliability of agents to third persons for nonfeasance is Therbone v. Cougot & Joubert, 3 La. App. 771, 772 (1936), discussed *infra* note 12.

11. The defendant was the agent of the owners of a vacant house, the latter then residing in France. Without the knowledge or authority of the agent, a dance was held in the house, to which the plaintiff's son obtained entrance. During the course of the dance the plaintiff's son, among others, rushed upon a gallery which gave way, throwing the occupants to the street below. The gallery, to the knowledge of the agent, was in need of repair. Delaney v. A. Rochereau & Co., 34 La. Ann. 1123, 44 Am. Rep. 456 (1882).

12. Until 1926, no Louisiana case cited and used the rule of the *Delaney* case in determining the liability of an agent to a third person for nonfeasance. The Louisiana cases citing *Delaney* in these 44 years either distinguished that case from the one at bar, or did not discuss the distinction between nonfeasance and misfeasance. Those distinguishing the *Delaney* case were Cline v. Crescent City R.R., 41 La. Ann. 1031, 6 So. 851 (1889) (plaintiff's husband and father killed in accident involving a loose rail of defendant railroad company; no corporation was a party in the *Delaney* case) and S. Pfeiffer & Co. v. R. F. Mayer & Co., 3 La. App. 289 (1925) (failure of defendant to notify plaintiff that vendor of potatoes did not wish to sell "until arrival" of potatoes, caused plaintiff to pay more for potatoes due to a rise in market price; defendant was held to be a broker, and therefore agent of both plaintiff and vendor). In Burke v. Werlein, 143 La. 788, 79 So. 405 (1918), suit was brought against both the alleged property owner and the independent contractor for damages received due to an excavation in a public sidewalk. The *Delaney* case was cited as standing for the proposition that "an agent is liable to third persons for his own torts in like manner as other persons; his liability being neither increased nor decreased by the fact of his agency." *Cf.* cases cited in note 19 *infra*.

However, in a federal case, Carey, Jr. v. Rochereau, 16 Fed. 87 (E.D. La. 1883), the court held, without discussing the facts of the case, that an agent is liable only to his principal for nonfeasance, and cited the *Delaney* case to show that the same rule prevailed under Louisiana law.

The *Delaney* case was approved and quoted from at length by the Louisiana Supreme Court in Allen v. Cochran, 160 La. 425, 107 So. 292 (1926). In this case it was alleged by plaintiffs that the omissions of duty of the defendants, who were officers and directors of a bank in which plaintiffs were depositors, enabled the cashier of the bank to embezzle its funds. The court found that the directors were the agents of the bank and thus were not responsible to third persons for mere negligence of duty. This same year, the Orleans Court of Appeal, in Therbone v. Cougot & Joubert, 3 La. App. 771 (1926), denied recovery on facts strikingly similar to those in the *Delaney* case. The plaintiff sued the defendant as agent for the owner of the property rented by plaintiff, for injuries received in falling down steps which were alleged to be defective. Plaintiff further alleged that the agents were repeatedly requested to repair the steps. The court in denying recovery relied heavily on the *Delaney* case for its decision. It should be noted, however, that there is at least one distinguishing feature in this case that separates it from *Delaney*, *i.e.*, the plaintiffs were tenants, not trespassers. The same court reaffirmed its stand on the non-liability of agents to third persons for nonfeasance in Smith v. Blanche, 140 So. 147 (La. App. 1932). The statement, however, was dictum, as the defendant agent was found to be a broker and the agent of both plaintiff vendee and defendant vendor, as in *S. Pfeiffer & Co. v. R. F. Mayer & Co.*, *supra*. As if to remove any doubt as to the status of the Louisiana law in this respect, the Louisiana Supreme Court, in 1936, announced its stand that "agents are not liable to third persons for nonfeasance or mere omissions of duty." Again, the statement was dictum, as the court actually found both the principal and the agent liable. Tyler v. Walt, 184 La. 659, 167 So. 182 (1936).

word "duty," without further elaboration as to *what* duty is owed to *whom*, and liability is predicated upon the classification of the agent's act as one of misfeasance distinguished from nonfeasance. However, in more recent times, there has been a general abandonment of this distinction in solving the liability of agents to third persons in a majority of American jurisdictions.[13] Under this new theory liability of the agent to a third party is predicated upon a *duty* owing by the agent to the third party.[14] Unless the agent's act or failure to act constitutes a breach of a duty owed to the third person, there is no liability imposed upon the agent.[15] Although no Louisiana Supreme Court

13. 2 AM. JUR., *Agency* § 325 (1936); Annot., 20 A.L.R. 97 (1922). Indeed, this change has not been confined to the United States, but is being experienced in England as well, at least insofar as the distinction between nonfeasance and misfeasance in general tort liability is concerned. See statement of Lord Justice Denning in Hawkins v. Coulsdon and Purley Urban District Council, [1954] 1 All E.R. 97, 104: "I would suggest that there is no longer any valid distinction to be drawn between acts of commission and acts of omission. It always was an illogical distinction. Many acts of commission can be regarded as acts of omission and vice versa. It all depends on how you look at them."

14. FERSON, AGENCY §§ 128, 132 (1954); MECHEM, AGENCY §§ 347, 348 (4th ed. 1952); 2 AM. JUR., *Agency* § 325, at 255 (1936) ("an agent who violates a duty which he owes to a third person . . . is answerable for such consequences whether the act be an act of malfeasance, misfeasance, or nonfeasance. Stated in this form there is probably no case to be found to the contrary."); Annot., 20 A.L.R. 99, 165 (1922) ("The numerical weight of authority as well as that of reason ignores the fact that the delict of the agent was a mere nonfeasance, toward his master, and tests the question by the duty which the servant owes to the person injured."); Annot., 99 A.L.R. 408, 426 (1935) ("Once a duty owed by a servant to a third party is recognized, the courts hold the servant liable for failure to perform that duty. . . . There is 'no distinction as regards the agent's liability, whether the injuries flow from his nonfeasance or misfeasance.'"). *But see* 3 C.J.S., *Agency* § 221, at 130 (1936): "An agent is liable to a third person for misfeasance or malfeasance, the commission or omission of an act which violates a legal duty owed to him." and *id.* § 223, at 134: "An agent is not liable to a third person for mere nonfeasance, the failure to perform a duty owed solely to his principal." *Quaere*: Is this not the same as saying that the agent is only liable toward those, principal or third persons, to whom he owes a duty, whether the duty be breached by nonfeasance or misfeasance?

15. Illustrative of cases recognizing the new theory, but denying recovery for want of a duty owed by the agent to the third person are Knight v. Atlantic Coast Line, 73 F.2d 76 (5th Cir. 1934) (failure of railroad foreman to remove combustible material from right of way states no cause of action, for the agent breached no duty except that owing to his principal, the railroad); Scott v. Burton, 173 Tenn. 147, 114 S.W.2d 956 (1938) (trustees of an educational institution found to owe no duty to third persons to reconstruct negligently constructed dormitory buildings, nor to keep elevator shafts free of trash). The following cases found a duty and allowed recovery against the agent for his act of nonfeasance: Giles v. Moundridge Milling Co., 351 Mo. 568, 173 S.W.2d 745 (1943) (manager of a milling company who failed to keep her principal's building in repair held liable to a third person who reaches for a bar across an elevator shaft to stop his fall, but unfortunately falls down the shaft because the bars are loose and give way); Lambert v. Jones, 339 Mo. 677, 98 S.W.2d 752 (1936) (manager of a dance studio who failed to keep his principal's building in repair held liable to third person who was injured in a fall); State, for use of Lay v. Clymer, 27 Tenn. App. 518, 182 S.W.2d 425 (1943) (mine inspector who failed to inspect a mine as it was his duty to do found liable to a third person killed in a mine explosion caused by this omission of duty).

decision has been found that rejects the supposed doctrine of the *Delaney* case, two recent decisions of Louisiana courts of appeal would seem to follow this new theory. In *Washington v. T. Smith & Son*,[16] decided by the Orleans Court of Appeal, the plaintiff was injured by a falling crate, which had been precariously leaned against the side of a building by defendant T. Smith & Son. Between the time the crates were so placed and the time that they fell, eleven days had elapsed, during which time the crates were in the control of defendant E. S. Binnings, steamship agent for the consignee of the crate and its contents. Defendant Binnings contended that he was merely the agent of another and had only been guilty of a failure to discover the precarious position of the crates and render their position safe, an act of nonfeasance for which an agent is not responsible to a third person. The court rejected this contention, saying, beginning even on the "assumption that Binnings was guilty only of nonfeasance, nevertheless, plaintiff has the right to recover for his damages."[17] The court decided that "we cannot absolve Binnings merely because he was someone's agent," for "everyone is under the obligation, whether his role be that of an agent or owner, of not allowing things subject to his control to injure another. . . . It matters not whether active or passive negligence caused the ultimate result."[18]

In spite of certain language suggesting application of the old theory and its distinction between nonfeasance and misfeasance,[19] it would seem that the instant case should be interpreted

16. 68 So.2d 337 (La. App. 1953).

17. *Id.* at 343.

18. *Id.* at 346. This view was heartily endorsed by the First Circuit Court of Appeal in Adams v. Fidelity and Casualty Co., 107 So.2d 496 (La. App. 1958), wherein it is said that the test or rule of the *Washington* case is the "correct one," and "the fundamental and proper method of approach." In the *Adams* case, plaintiff's husband was killed in the course of his employment by a 500-pound reel which fell from a stack of steel in his employer's yard. The petition alleged that the reel was negligently placed in this precarious position and allowed to so remain. Among the defendants were the director in charge of the yard, the safety director, and the vice-president of the employer corporation, all of whom were alleged to have knowledge of the danger the reel presented. Defendants contended that an agent of a corporation is not responsible to third persons for mere nonfeasance, or breach of duty owed to the corporation as such. The appellate court reversed the judgment of the court *a qua* for these defendants, using language which fairly states the premise upon which the new theory is based: "We can see no valid or logical reason for denying a plaintiff a cause of action for nonfeasance, as well as for misfeasance and malfeasance, if the nonfeasance was an omission by the defendant to perform a legal duty which he owed the party allegedly injured and because of his failure to act the party was injured, whether the guilty defendant be a director, officer, or agent." *Id.* at 502.

19. 124 So.2d 802, 803 (La. App. 1960): "The opinion in the cited case [*Delaney v. A. Rochereau & Co.*] . . . held that agents are not liable to third

as following the *Washington*[20] case in conforming to the new theory of liability based on duty. The following language of the court in the instant case is suggestive of this interpretation: "[The agent] was acting in behalf of her principal . . . and plaintiff occupied the status of a . . . *third party without interest or right against the agent* for acts of *negligence* or errors which were detrimental to the principal."[21] (Emphasis added.) It is submitted that the negative implication of the third party being without right is that the agent was under no correlative duty. Further, it should be noted that here the court did not classify the negligence as nonfeasance. Should this interpretation of the instant case be correct, it would seem that this is the more desirable approach both from a theoretical and practical stand-

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persons by reason of acts constituting non-feasance or mere omissions of duty. This rule has been reiterated and followed in numerous cases."

It is submitted, however, that a close reading of the *Delaney* case itself will reveal that it is susceptible of being interpreted as in accord with the new theory. Pertinent are the following passages: "For non-feasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. *No man is bound to answer for such violations of duty or obligation except to those to whom he has become directly bound or amenable for his conduct.* . . . Everyone, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character and which the law imposes upon him, independent of contract. *No man increases or decreases his obligations to strangers by becoming an agent.* . . . An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him *purely from his agency*, since he cannot, *as agent*,. be subject to any obligations toward third persons other than those of his principal." (Emphasis added.) Delaney v. A. Rochereau & Co., 34 La. Ann. 1123, 1128, 44 Am. Rep. 456, 457 (1882). The foregoing would seem to say, in effect, that an agent, simply by so becoming, does not assume any additional duties except those relating to his principal; however, should a duty arise to a third person, he is responsible to the latter for its breach regardless of his status as agent.

The diverse reaction of courts in other jurisdictions to the *Delaney* case would seem to indicate that this view is not without merit. For example, the following cases cite the *Delaney* case in support of the rule that agents are not liable to third persons for nonfeasance: Cornick v. Wier, 212 Iowa 715, 237 N.W. 245 (1931); E. H. Emery & Co. v. American Refrigerator Transit Co., 193 Iowa 93, 184 N.W. 750, 20 A.L.R. 86 (1921); William White & Co. v. Lichtner, 16 Tenn. App. 375, 64 S.W.2d 542 (1933); Lough v. John Davis & Co., 30 Wash. 204, 70 Pac. 491 (1902). The following cases cite the *Delaney* case as standing for either the proposition that agents are not liable to third persons unless there is a duty owing to such third person, or, what is almost the same thing, that the liability of a person is not affected by his becoming an agent: Myerson v. New Idea Hosiery Co., 217 Ala. 153, 115 So. 94, 55 A.L.R. 1231 (1927); Stiewel v. Borman, 63 Ark. 30, 37 S.W. 404 (1896); Baird v. Shipman, 132 Ill. 16, 23 N.E. 384 (1890); Baird & Bradley v. Shipman, 33 Ill. App. 503 (1889); Montanick v. McMillin, 225 Iowa 442, 280 N.W. 608 (1938); Riley v. Bell, 120 Iowa 618, 95 N.W. 170 (1903); Hagerty v. Montana Ore Purchasing Co., 38 Mont. 69, 98 Pac. 643 (1908); Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358 (1899); Burns v. Petheal, 27 N.Y. Supp. 499, 75 Hun. 437 (1894); Schlosser v. Great Northern Ry., 20 N.D. 406, 127 N.W. 502 (1910).

20. See note 16 *supra* and accompanying text.

21. 124 So.2d 802, 804 (La. App. 1960).

point. The dichotomy of the old theory is not useful as a tool for determining liability, or as a means of stating a conclusion, because of two distinct problems created by the use of the terms "nonfeasance-misfeasance."[22] First, there is the difficulty, and resulting inaccuracy, in classifying a particular act as one of nonfeasance or misfeasance.[23] One authority has even stated that the distinction causes the courts to perform a "solemn legal jugglery with words."[24] Secondly, and more important, is the attempt to determine liability which should be based on a right-duty relationship through artificial means.[25] The classification of the agent's conduct as nonfeasance does not add to, nor facilitate, the solving of what should be the primary inquiry, *i.e.*, did the agent owe the third person a duty.[26]

On the particular fact situation presented in the instant case, it would seem that no different result would follow under either

22. Perhaps the best articulation of the problem is given by Dean Ferson, as follows: "This manner of stating the servants responsibility [misfeasance versus nonfeasance] is confusing and inaccurate. It is confusing because the word 'misfeasance' or 'nonfeasance' is an incomplete expression of an idea. Misfeasance or nonfeasance of *what duty? To whom was the duty owing?* The generalization is inaccurate because the servant's duty to a third person can be broken by the servant's nonfeasance as well as by his misfeasance or malfeasance." (Emphasis added.) FERSON, AGENCY 206-07, § 128 (1954).

23. The instant case presents an excellent example of this problem. "As applied in the cases of agency, nonfeasance has been many times defined to be the *total omission* or failure of the agent to enter upon the performance of some distinct duty or undertaking owed to his principal. Misfeasance means the *improper doing* of an act which the agent might lawfully do." (Emphasis added.) Washington v. T. Smith & Son, 68 So.2d 337, 343 (La. App. 1953). Would it not be just as reasonable to say that the defendant agent was not guilty of nonfeasance, but rather misfeasance, in that she *improperly* did an act she "might lawfully do"; *i.e.*, made the certificate out for $4,800 rather than $2,000?

24. 5 AM. JUR., *Agency* 255 (1936). See Hagerty v. Wilson, 38 Mont. 69, 98 Pac. 643, 25 L.R.A.(N.S.) 356 (1908), wherein the court decides that an agent's *omission* to perform a duty owed to a third person by the agent amounts, as far as that third person is concerned, to *misfeasance*, and thus the agent is responsible!

25. That is to say, if an agent's liability to third persons is determined by saying that he is not liable because his act was one of nonfeasance, then the duty (or rather, lack of one) has been admitted; the same result follows if it is said that the agent is liable because his act was one of misfeasance, for again the duty is assumed. Thus, the distinction could be entirely eliminated by merely inquiring whether a duty is owed to the third person by the agent, and then deciding whether the agent breached the duty. This would seem to be the true basis of liability.

26. By a mistake, consciously or otherwise, in classification of the agent's act (see note 23 *supra*), and devices such as that mentioned in note 24 *supra*, a court ostensibly adhering to the old theory can reach the same conclusion as would a court using the duty test of the new theory, and yet articulate its holding in terms of nonfeasance and misfeasance. This is quite often recognized by a court of a particular jurisdiction when it abandons the old theory and adopts the new theory. Thus, the Tennessee Supreme Court was cognizant of this fiction in Scott v. Burton, 173 Tenn. 147, 151, 114 S.W.2d 956, 958 (1938), when it said: "The modern rule [liability of an agent tested by his duty to a third person] seems to have been, as a matter of fact, applied by this court, although the particular omissions for which the agent was held were called acts of misfeasance."

theory. The instant case apparently stands for the proposition that an insurance agent, acting as agent of the insured, owes no duty, *per se*, to the beneficiary of a life insurance policy for failure to secure coverage in as great an amount as that requested by the insured, notwithstanding that such failure is due to the negligence of the insurance agent.[27] Such a result, at least with reference to the facts reported, would seem to be correct.[28]

Inasmuch as the principles of agency permeate virtually all areas of the law, it is not within the scope of this Note to discuss when a duty should come into existence in particular agent-third party fact situations, but it is believed that a clearer analysis of any such situation would be possible by handling cases in terms of the agent's duty to the third person, rather than through the artificial "nonfeasance-misfeasance" dichotomy. Consequently, it is submitted that the "rule" as stated in the words "agents are not liable to third persons for nonfeasance or mere acts of omission" should be discarded, and in its stead a test adopted that proceeds along the theory that agents are not liable to third

27. "An interesting problem is posed by asking the question of whether a proposed beneficiary of a life insurance policy can recover against an agent who negligently fails to secure the desired contract. It has been held that no duty is owed by the agent to such a prospective beneficiary." Comment, 12 VAND. L. REV. 839, 849 (1959). The case referred to is Duffie v. Bankers' Life Ass'n, 160 Iowa 19, 139 N.W. 1087 (1913), where the court refused recovery to the widow of the prospective insured in her own name as plaintiff beneficiary, but reversed the judgment of the lower court against the widow as intervenor in her capacity as administratrix of the estate of the deceased. No Louisiana case has been found on the subject, but apparently the instant case represents the same view taken by the Iowa Supreme Court in the *Duffie* case.

28. Of course, there does arise the question of whether the plaintiff could recover as a third party beneficiary to a stipulation pour autrui made in its favor. Plaintiff's argument in this respect might be as follows: The basic contract was an undertaking by the agent that she would procure $4,800 in credit life insurance for the insured, payable to the plaintiff as beneficiary. In promising that she would do this, the agent was undertaking to do something for the benefit of the plaintiff, thus making the latter a third party beneficiary. However, she failed to perform her obligation completely. In causing an effective policy in the amount of $2,000 to be issued, she merely discharged her obligation to that extent. But to the extent of $2,800 of her undertaking to procure $4,800 in credit life insurance, her obligation was not discharged. Thus, the plaintiff is entitled, as a third party beneficiary, to demand full performance by the agent of her obligation entered into with the insured for its (the plaintiff's) benefit, and this can be accomplished by the agent being ordered to pay $2,800 to the plaintiff.

Since no facts or circumstances surrounding issuance by the agent of the policy in an excessive amount are detailed in the reported case, it would be pure speculation to attempt to determine here whether recovery should have been allowed on this ground.

For a recent case allowing recovery against the agent for her failure to procure immediately, *per her oral agreement with her principal*, additional fire insurance on a building which was mortgaged as security for a loan, see White v. Calley, d/b/a Blanch Calley Insurance Agency, 67 N.M. 343, 355 P.2d 280 (1960). Of course, this case is readily distinguishable from the instant case, in that the principal, not the beneficiary third party, is suing the agent.

persons for *any* act of negligence, unless there is a *duty* owing from the agent to the third person.

Andrew J. S. Jumonville

CIVIL LAW PROPERTY — APPORTIONMENT OF ALLUVION BETWEEN RIPARIAN OWNERS

Over a period of years alluvion formed along the shore of the adjacent riparian properties of plaintiff and defendant. At one time the Mississippi River made a large loop around the alluvion, but its course was diverted in 1933, and from that time the main channel of the river has lain along only one side of the alluvion. Plaintiff sought a declaratory judgment apportioning the alluvion, contending it should be divided by the acreage method which would mean that each riparian owner would be given acreage in the alluvion in proportion to the original river frontage that each owned. In rejecting this contention the district court held that each proprietor should receive new river frontage in the same proportion as each proprietor's old river frontage had borne to the total old river frontage. The district court's holding[1] was affirmed by the court of appeal but on writ of certiorari to the Louisiana Supreme court, *held,* reversed. When alluvion which has formed in front of the estates of riparian proprietors is to be divided the court must take each case as it is presented and order apportionment by the method which will most nearly give each owner a fair proportion of the new acreage and a fair proportion of the new frontage. This can best be accomplished here by giving each riparian owner acreage in the alluvion in proportion to the original river frontage that each owned. *Jones v. Houge,* 129 So.2d 194 (La. 1961).

By the principle of accession, the accretions which form successively and imperceptibly to the soil situated on the shore of

1. Another issue of considerable interest in the case was the question of the time at which the apportionment should be made. The extent of the alluvion at various periods of its growth was described by five successive surveys made by the United States Corps of Engineers and the defendant contended that the alluvion should be divided as it was represented in the various surveys. The trial court adopted the defendant's increment method of division. The court of appeal reversed the holding on this issue and the Supreme Court affirmed the holding of the court of appeal stating: "It is our opinion that courts must and should accept the extent and area of an alluvial deposit as it exists, be it much or little, at the time the apportionment between riparian owners is sought." Jones v. Hogue, 129 So. 2d 194, 199 (La. 1961).