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Board has ruled that a petitioning union *must* have represented the employees on a *departmental* basis in order to qualify to sever such a unit. Or may such union qualify by having previously represented craft employees of the type to be included in the departmental unit involved? If prior departmental representation is a prerequisite, the effect would be to limit the possibilities of future departmental severance. But, if the answer be that a union may qualify as well by having traditionally represented the department's skilled employees on a craft basis, the number of unions which may qualify to sever "functionally distinct" departments is vastly increased.¹⁷

Daniel J. Shea

SALES — REAL ESTATE BROKERS — DUTY TO CONVEY
OFFERS TO CLIENTS

Defendant real estate firm was employed as agent to sell certain property. Plaintiff made several offers for the property which were rejected by defendant but with the notation that an offer of \$9,500 would be acceptable. Although plaintiff thereafter submitted such an offer to defendant's salesman, the latter, instead of communicating it to the owner, misrepresented to him that another party's offer of \$9,250 had been the highest. As a result the property was sold for the lower offer. Plaintiff sued the real estate firm and its salesman for the difference between his offer of \$9,500 and the price of \$25,000 subsequently asked for the property by the successful purchaser. The district court sustained an exception of no cause of action on the theory that no duty was owed to plaintiff by defendants. On appeal, *held*, reversed. The statute regulating real estate brokerage imposed a duty on defendants to communicate plaintiff's offer of \$9,500 to the owner. *Amato v. Latter and Blum, Inc.*, 227 La. 537, 79 So.2d 873 (1955).

The question presented by the instant case, whether a real estate agent who has received an offer from a prospective purchaser owes a duty to the latter to submit the offer to his prin-

17. In *Friden Calculating Machine Co., and Marchant Calculators, Inc.*, 110 N.L.R.B. 1618 (1954), the Board held that in the case of a union newly organized for the specific purpose of representing the "craft" to be severed, the *American Potash* requirement that the union seeking to sever the craft unit have a history of representing the type of employees in question would not be applied. In all probability the same rule would apply in the case of departmental severance.

cipal, appears to be a novel one in Louisiana and at common law. It is well established, both at common law and in the civil law, that an agent is not responsible to a third person for failure to perform a duty owed solely to his principal.¹ Thus, in the instant case, the breach of the agent's duty to his principal to secure the highest possible price seemingly would not render the agent liable to a third party prospective vendee. Liability of the agent² must result from the breach of some independent duty owed by him to the prospective vendee. Common law courts have been reluctant to find negligence from a simple failure to act.³ But where a party has undertaken to perform an act and then does it improperly, or has failed to complete the undertaking after having begun performance, it is considered more than a mere failure to act and recovery for negligence has been allowed.⁴ On the other hand, if a party simply fails to keep a promise to perform an act, no violation of a legal duty occurs at common law unless consideration for the promise has been received by the promisor. If, however, in consequence of a gratuitous promise the promisee is led to act to his detriment, the circumstances often call for relief. Thus, in one case a railroad

1. Knight v. Atlantic Coast Line R.R., 73 F.2d 76 (5th Cir. 1934); Delaney v. Rochereau, 34 La. Ann. 1123 (1882); Therbone v. Cougot and Joubert, 3 La. App. 771 (1926); Southern Ry. v. Grizzle, 124 Ga. 735, 53 S.E. 244 (1906) (dictum); RESTATEMENT, AGENCY § 357 (1933).

2. LA. CIVIL CODE art. 3016 (1870) provides: "The *broker* or *intermediary* is he who is employed to negotiate a matter between two parties, and who, for that reason, is considered as the mandatary of both." Where the courts have given effect to this article to permit recovery against a real estate broker as the agent of both parties, there has been a contract to purchase between the prospective purchaser and the owner-vendor prior to the institution of suit. Dunn v. Spiro, 153 So. 316 (La. App. 1934); Smith v. Blache, 19 La. App. 594, 140 So. 147 (1932); Izquierdo v. Kenner, 11 La. App. 594, 123 So. 366 (1929). These cases involved actions by the prospective purchaser for the return of a deposit from the broker. Likewise, in the case of a merchandise broker the courts have held that a broker is primarily the agent of the person originally employing him and becomes the agent of the other party only when a contract has been formed between the principals. Woods, Slayback and Co. v. Rocchi, 32 La. Ann. 210 (1880); Apple Growers Ass'n v. Kohlman Bros., 8 La. App. 165 (1928). It would thus seem that the broker could not be held to be the agent of the prospective purchaser of real estate where the negotiations have not passed the offer stage.

3. The celebrated case of Thorne v. Deas, 4 Johns. 84 (N.Y. 1809) appears to be the leading case holding that no liability is incurred for a failure to act. There the defendant, owner of a 1/2 interest in a ship at sea, promised gratuitously to take out insurance on the vessel. He failed to do so and the ship was wrecked. Noting that there was no consideration for the promise, the court held that one undertaking gratuitously to do an act for another is not liable for failing to do the act and is only responsible when he attempts to do it and does it in a faulty manner.

4. Samonset v. Mesnager, 108 Cal. 354, 41 Pac. 337 (1895); Joslyn v. King, 27 Neb. 38, 42 N.W. 756 (1889); Hammond v. Hussey, 51 N.H. 40 (1871); Jones v. Parish, 1 Pinney 494 (Wis. 1845).

was held to have violated a legal duty by failing to send certain papers to the Interstate Commerce Commission after having promised gratuitously to do so.⁵ The court held that the action sounded in tort for negligence. It would seem that the instant case presents an analogous situation and it might well be argued that defendant in receiving plaintiff's offer for the purpose of communicating it and then failing to do so was guilty of negligence for which he should be held liable.⁶ On the other hand, it has been suggested that such a case properly falls into the ambit of contract law on the theory that by promising to do something defendant had caused plaintiff to rely thereon to his detriment.⁷ This concept has become known as the doctrine of "promissory estoppel"⁸ and is based on the principle that if a party who promises to do something gratuitously has reason to know that the other party will rely thereon to his detriment, he will be estopped to deny that his promise was supported by consideration. Applied to the facts of the instant case, the view might be taken that defendant, by receiving the offer, impliedly promised to communicate it to his principal and, having thereby led plaintiff to refrain from communicating it directly to the owner, the doctrine of "promissory estoppel" should be applicable to him and his employer. Whatever the proper basis for the action should be in the case of detrimental reliance on a gratuitous undertaking, whether tort or contract, the modern view at common law appears to be that recovery should be allowed.

Under civilian principles, recovery in the instant case might

5. *Carr v. Maine Cent. R.R.*, 78 N.H. 502, 102 Atl. 532 (1917).

6. RESTATEMENT, AGENCY § 378 (1933) deals with the problem of gratuitous undertakings, as limited to the agency situation, in terms of tort liability. It provides: "One who, by a gratuitous promise or other conduct which he should realize will cause another reasonably to rely upon the performance of definite acts of service by him as the other's agent, causes the other to refrain from having such acts done by other available means is subject to a duty to use care to perform such service or, while other means are available, to give notice that he will not perform." Illustration I of comment *a* thereunder appears to be substantially in point with the instant case: "A, a real estate broker, knowing that P is desirous of making a bid for Blackacre, tells P that he will make the bid for him. P gives A a writing containing P's offer. At the time for the submission of bids, A fails to present P's bid but presents the bids of others. P does not discover this until too late to make another bid and thereby loses the chance of purchasing the land. P's bid would have been successful. A is subject to liability to P for the loss thereby caused."

7. 1 CORBIN, CONTRACTS § 207 (1950).

8. RESTATEMENT, CONTRACTS § 90 (1932): "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

conceivably have been allowed under either a contract or tort theory. There should be no objection to enforcing a gratuitous promise under Louisiana law if the requisites for a valid contract are otherwise present.⁹ Assuming that a promise by defendant to submit the offer could be raised by implication from the facts of the instant case, it would seem that such promise was supported by a lawful cause and should therefore be enforceable against the promisor. Surely no question of form would arise. Whatever cause or motive may have led the broker to agree to communicate the offer, a donation was not intended. Alternatively, it could be argued that defendants were liable in tort under article 2315 of the Louisiana Civil Code which provides: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it. . . ." This provision was taken directly from article 1382 of the Code Napoleon. Under French theory, fault consists in not conducting oneself as one should; if a person contravenes this general obligation of acting properly he is at fault.¹⁰ Fault has been characterized as the breach of a pre-existing obligation specified by law or by contract or founded on general precepts of right and morality,¹¹ and may consist in a positive act or a failure to perform an act which should be performed.¹² All faults oblige a reparation; that is, no one has the right to act with imprudence without suffering the consequences of his act.¹³ The actor's conduct is to be compared with that of another who would have acted correctly under the circumstances, *le bon père de famille*; and if he does not act as this ideal man would, he is to be held at fault.¹⁴ Applying these principles to the instant case defendant could very easily be considered at fault by failing to submit plaintiff's offer to the vendor, and thus might be held liable for the resulting injury to plaintiff.

The statute regulating real estate brokerage,¹⁵ on which the

9. The requisites are set out in LA. CIVIL CODE art. 1779 (1870).

10. 2 PLANTIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 913 (3d ed. 1949).

11. *Ibid.*

12. *Id.* n° 951.

13. *Id.* nos 898, 904, 914.

14. *Id.* n° 913.

15. LA. R.S. 37:1431-1459 (1950). Section 1447 provides that bond shall be furnished with security in favor of the Governor by any person dealing in real estate or rent collecting as agent or broker. This bond "shall be conditioned that the agent or broker shall carry out the objects and purposes for which his agency, office, or business has been established, and that the agent or broker shall honestly conduct his business and pay all damages which may result from his actions as a real estate agent or broker."

court based its decision in the instant case, seems to be consistent with civilian principles of tort liability by providing, in part, that "anyone who is injured or damaged by the agent or broker by any wrongful act done in the furtherance of such business or by any fraud or misrepresentation by the agent or broker may sue for the recovery of the damage before any court of competent jurisdiction."¹⁶ The court found that the statute placed real estate brokerage in the status of a public business, vested with a public interest and subject to police regulation. This being true, it reasoned that the defendant owed a duty to the public and since the plaintiff was a member of the public, he was entitled to have his offer communicated by the defendants to the vendor.¹⁷ Although the court's action could perhaps be sustained under other theories, both at common law and under civilian principles, it is submitted that the ground on which the decision was based, that of giving effect to the legislative policy of requiring high standards of conduct by real estate agents, is sound.

Charles W. Howard, Jr.

WORKMEN'S COMPENSATION — HAZARDOUS NATURE OF EMPLOYER'S BUSINESS

Plaintiff, a saleslady and beauty operator employed by a retail concessionaire aboard a steamship, was injured¹ and brought suit under the Louisiana Workmen's Compensation Act,² alleging total and permanent disability. She contended that the presence of the employer's concession aboard a steam-powered vessel rendered it a hazardous business within the coverage of the act, despite the fact that her employer neither owned nor

16. LA. R.S. 37:1447 (1950).

17. *Cf. Zichlin v. Dill*, 157 Fla. 96, 25 So.2d 4 (1946), cited by the majority in the instant case. The court there found that the Florida statutes regulating real estate brokerage created a duty of fair dealing to the plaintiff by the defendant broker, inasmuch as the statutes granted a virtual monopoly to engage in a lucrative business and required that applicants for brokerage licenses be trustworthy, honest, and bear a reputation for fair dealing.

1. The sequence of events surrounding the accident were as follows: Plaintiff was sunbathing on the ship's deck when, upon attempting to arise, a sudden roll of the ship caused her to slip and fall. Such circumstances present very unusual and somewhat difficult problems as to whether the injury was one "arising out of" and "in the course of" the employment. The manner in which the court disposes of these problems in granting recovery is very interesting, although unfortunately beyond the scope of this Note.

2. LA. R.S. 23:1021 *et seq.* (1950). For complete discussion of hazardous businesses, see MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE c. 5 (1951).