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interstate commerce; just because gas in a particular sale ultimately flows into interstate transportation is no reason to subject the sale to federal regulation. Hence, any rate regulation which is reasonably linked to the administration of such conservation, and which does not interfere with interstate transportation of gas, should remain within the jurisdiction of the states. The regulation of wellhead sales would seem to be reasonable state action where the regulation is necessary for conservation. It would therefore appear that an interpretation of the Natural Gas Act whereby all sales of gas in interstate commerce fall within FPC jurisdiction is an unwarranted extension of jurisdiction.

John B. Hussey, Jr.

TORTS — LIABILITY FOR HARMFUL RELIANCE ON A GRATUITOUS PROMISE

Plaintiff was scratched or bitten by defendant's cat while shopping in defendant's store. Realizing that plaintiff would have to take curative measures if the animal were rabid, the parties agreed on the necessity of observing the cat for a stated period, whereupon the defendant promised to insure such observation by locking up the cat. In the past, the animal had enjoyed considerable freedom; but despite defendant's promise, he made no change in his usual method of keeping the cat and it disappeared a few days later before its condition could be ascertained. The cat subsequently returned and proved not to be diseased; but, during the interim, plaintiff, on the insistence of her doctor, was compelled to submit to the only known cure for rabies, the Pasteur treatment. After several injections, plaintiff sustained injury from a noxious reaction to the vaccine serum. In an action for damages, the trial court ruled for plaintiff, finding that the defendant was under a duty to confine the cat for observation. On appeal, the court of appeal *held*, affirmed. One, under no initial duty to aid another, who undertakes by express promise to act for the safety of the other, causing the other reasonably to rely on performance of the undertaking and refrain from acting for himself or from securing other available help, is liable for bodily harm resulting from the failure to use reasonable care in performing the undertaking. *Marsalis v. LaSalle*, 94 So.2d 120 (La. App. 1957).

The question of liability in tort for harm caused by reliance upon a gratuitous promise originally arose at common law in an action of trespass on the case for *assumpsit*; hence the emphasis was placed on an actual undertaking or entry upon performance, because trespass did not lie where the defendant had not acted affirmatively.[1] This concept, coupled with the requirement of consideration for recovery on a promise,[2] furnishes a historical explanation for the holding in the leading American case of *Thorne v. Deas*,[3] where the plaintiff relied on defendant's gratuitous promise to procure insurance on plaintiff's vessel. The defendant failed to perform as promised and plaintiff sustained damages when the vessel was shipwrecked while uninsured. Noting that nonfeasance did not constitute a tort and that *assumpsit* would not lie for nonperformance of a promise in the absence of consideration, the court concluded[4] that there could be no liability for such nonperformance of a gratuitous promise. Instead, the Chancellor said, there must be an undertaking,which, if performed negligently, would be actionable even though done gratuitously. Although the *Thorne* line of reasoning still remains,[5] it must be viewed in the light of the subsequently developed contractual doctrine of promissory estoppel.[6] Moreover, the original proposition requiring an undertaking has been weakened consid-

1. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 468-71, 637-40 (5th ed. 1956).

2. *Id.* at 649; Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913-14 (1951); Note, 45 HARV. L. REV. 164 (1932).

3. 4 Johns. 84 (N.Y. 1809).

4. "I have no fault to find with the Chancellor. He summarized the older cases truthfully. These held with great uniformity that indebitatus assumpsit would not lie for failure to perform a gratuitous promise." Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951), citing Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 53 (1888).

5. There are a number of cases following the reasoning of the *Thorne* case. A few of them are Newton v. Brook, 134 Ala. 269, 32 So. 722 (1901); Brawn v. Lyford, 103 Me. 362, 69 Atl. 544 (1907); Long v. Patterson, 198 Miss. 554, 22 So.2d 490 (1945); Miller v. Bennett, 237 Mo. App. 1285, 172 S.W.2d 960 (1943); Tomko v. Sharp, 87 N.J.L. 385, 94 Atl. 793 (1915). None of these cases was found to be overruled.

6. RESTATEMENT, CONTRACTS § 90 (1932): "A promise which the promisor should reasonably expect to induce action or forebearance 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."

Note also the expression in RESTATEMENT, AGENCY § 378 (1933): "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."

See, further, Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 919, 925-28 (1951); Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1236-38 (1937).

erably by the readiness of later courts to find an undertaking. This has been done in several cases, indicating that courts are willing to hold a gratuitous promisor liable, but are unwilling to depart from the established legal mold, thus utilizing the undertaking element as a symbol rather than a basis for liability.[7] While tort liability for harmful reliance on a gratuitous promise is apparently *res nova* in Louisiana, the question has arisen in other states, but there is a difference of opinion as to just what the American decisions currently hold. The *Restatement* resolves the matter affirmatively,[8] while an eminent authority states rather unequivocally in his recent hornbook that there is no such liability.[9]

The court in the present case, without mention of the *Thorne* decision, deduced its rule from basic tort principles,[10] beginning with a statement of the well-settled principle that there is no affirmative duty to aid one in peril.[11] An exception to this principle

7. Defendant attended an auction, but did not bid for plaintiff as he had gratuitously promised to do. In holding defendant liable, the court found an undertaking based on defendant's attendance at the auction. Kirby v. Brown, 229 App. Div. 155, 241 N.Y. Supp. 255 (1st Dep't 1930).

Court found duty to maintain fence around canal based on defendant's erection of the fence, although it was stated that defendant was under no duty to build the fence. Taylor v. Roosevelt Irr. Dist., 72 Ariz. 160, 232 P.2d 107 (1951).

See also PROSSER, THE LAW OF TORTS 186 (2d ed. 1955); McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1281 (1949).

8. RESTATEMENT, TORTS § 325 (1934): "One who gratuitously undertakes with another to do an act or to render services which he should recognize as necessary to the other's bodily safety and thereby leads the other in reasonable reliance upon the performance of such undertaking (a) to refrain from himself taking the necessary steps to secure his safety or from securing the then available protective action by third persons, or (b) to enter upon a course of conduct which is dangerous unless the undertaking is carried out, is subject to liability to the other for bodily harm resulting from the actor's failure to exercise reasonable care to carry out his undertaking.

"Comment (a) The actor may undertake to do an act or to render services either by an express promise to do so or by a course of conduct which the actor should realize would lead the other into the reasonable belief that the act would be done or the services rendered."

9. PROSSER, THE LAW OF TORTS 186 (2d ed. 1955): "[I]t seems to be agreed by everyone that a mere gratuitous promise to render assistance, with nothing more, imposes no tort obligation even though the plaintiff may rely on the promise and suffer damage because of his reliance." *Cf.* PROSSER, THE LAW OF TORTS 196 (1941): "[T]here is authority that where the defendant has reason to expect such reliance to the plaintiff's detriment, even a mere gratuitous promise will be enough to create a duty, for the breach of which a tort action will lie."

10. The court stated that the general basis for tort in Louisiana is Article 2315 of the Civil Code, quoting the article in part as follows: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The basic elements of a tort action were presented as defined in several Louisiana cases. However, no specific mention was made as to whether the Civil Code articles provided a basis of liability any different from common law. The court apparently thought they did not, because it quoted liberally from American common law decisions.

11. No Louisiana cases were cited in the opinion and none were found on this proposition. However, consider the language in an old agency case: "No one is

was recognized where one voluntarily undertakes to aid another in distress. In support of this exception, the court cited the *Restatement* and cases from several jurisdictions saying that one who aids another voluntarily is bound to use reasonable care, when he has caused the other reasonably to rely upon the performance of the undertaking.[12] It was then emphasized that plaintiff may have had other means of confining the cat, which she did not utilize because she relied on the defendant's promise. The court concluded that the exception was broad enough to include the defendant's action and that once the defendant promised to lock up the cat, causing plaintiff to rely upon the promise, he was bound to use reasonable care. Finding further that the defendant did not use reasonable care and that the Pasteur treatment proved unnecessary, the court rendered judgment for plaintiff.

The present case offers a salutary rule which is consistent with tort principles. If it is sound to allow recovery where one has detrimentally relied upon an undertaking which was manifested by performance or part performance, then relief should also be afforded where the undertaking is manifested by an express promise. There may be a separate basis for liability in cases similar to the instant one where an innocent creator of danger is under a duty to aid another who is helpless in face of that danger.[13] The present situation was different because the plaintiff became helpless only when she relied on defendant's

bound to attend to the concerns of another, even when a compensation for the trouble attends it; yet he who undertakes it, even gratuitously, is bound to indemnify the person whose business is undertaken from the consequences of the agent's negligence." Montillet v. Bank of United States, 1 Mart. (N.S.) 365, 367 (La. 1823). There are many cases from other jurisdictions. The court cited Plutner v. Silver Associates, Inc., 186 Misc. 1025, 61 N.Y.S.2d 594 (Mun. Ct. 1946); Buch v. Amory Mfg. Co., 69 N.H. 257, 44 Atl. 809 (1898). See further PROSSER, LAW OF TORTS 184, nn. 57-61 (2d ed. 1955).

12. Again, no Louisiana cases were cited and none were found. The court quoted from decisions of several states at 94 So.2d 125. A few of the cases found there are Owl Drug Co. v. Crandall, 52 Ariz. 322, 80 P.2d 952 (1938); Gates v. Chesapeake & O. Ry., 185 Ky. 24, 213 S.W. 564 (1919); Yazoo & M.V.R.R. v. Leflar, 168 Miss. 255, 150 So. 220 (1933). See further PROSSER, LAW OF TORTS 184-86 (2d ed. 1955).

13. RESTATEMENT, TORTS § 321 (1934): "If the actor does an act, which at the time he has no reason to believe will involve an unreasonable risk of causing bodily harm to another, but which, because of a change of circumstances or fuller knowledge acquired by the actor, he subsequently realizes or should realize as involving such a risk, the actor is under a duty to use reasonable care to prevent the risk from taking effect." *Cf. id.* § 322 and Caveat.

"Where the original danger is created by innocent conduct, involving no fault on the part of the defendant, it was formerly the rule that no such duty arose; but this appears to have given way, in recent decisions, to a recognition of the obligation where there was no original fault." PROSSER, LAW OF TORTS 185 (2d ed. 1955).

promise. Suppose, however, that the plaintiff had been a child who was rendered helpless by his obvious ignorance concerning rabies. In such a situation the court might well find that the defendant, who has had an innocent part in creating the danger of rabies, is under a duty to aid another who is helpless is face of danger so created. Two Louisiana decisions involving railroads indicate some support for such a basis of liability. In both cases the plaintiff was an inebriate in danger of eventually being struck by defendant's train, and each victim had been seen in his predicament by employees of the railroad. Both cases held that defendant was bound to take precautions to secure plaintiff from danger.[14]

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TORTS — MANUFACTURER'S LIABILITY — DUTY TO WARN

Plaintiff was struck in the eye by a rubber exerciser that accidentally slipped off her foot while she was following instructions furnished by defendant manufacturer. Plaintiff sued in tort, contending that the manufacturer failed to warn her of the danger which caused her injury. In reviewing a summary judgment for defendant, the Court of Appeals for the District of Columbia, in a five to four decision, *held,* affirmed. A manufacturer is not under a duty to warn users of particular dangers in prescribed uses of the product if the reasonably foreseeable injuries from the use of the product are minor and the general danger in using the product is obvious. The dissent maintained that the manufacturer was liable for marketing a product accompanied by directions that contained no warning of danger and which, when followed, resulted in injury to the user. The dissent reasoned further that, although the propensity of rubber to contract might be obvious, the danger in using a rubber exerciser as directed by the manufacturer is not so obvious as to take the question away from the jury. *Jamieson v. Woodward & Lothrop,* 247 F.2d 23 (D.C. Cir. 1957).[1]

14. Kramer v. New Orleans City & L.R.R., 51 La. Ann. 1690, 26 So. 411 (1899); Grennon v. New Orleans Public Service, Inc., 120 So. 801 (La. App. 1929). Consider further the language in a more recent decision: "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, either because of active or passive negligence, and *whenever property in one's control becomes dangerous to third persons, there is a duty to act affirmatively.*" (Emphasis added.) Washington v. T. Smith & Son, 68 So.2d 337, 346 (La. App. 1953).

1. The suit was brought against the retailer and the manufacturer. The judgment in favor of the retailer was unanimously affirmed. A portion of both the