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Torts--Prenatal Injuries--Child's Right to Recover

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Contracts § 299 (1938). In viewing the *Hill* case and the principal case together and recognizing that in the latter there was a specified date of performance, that being the happening of an uncertain event, then by analogy, it may be said that the *Hill* case would stand for the proposition that if a date for performance is specified, there is no ground to interpret the contract as calling for performance "within a reasonable time," and if the other requisites are present, the rule against perpetuities should be applicable.

The conclusion in the principal case that the covenant was not within the rule against perpetuities can be justified if the covenant can be construed as extending only to the immediate grantee. However, from the record of the case it seems clear that as the interest was "conveyable," "vendable," and "alienable," the heirs and assigns of the parties were bound. If the covenant was personal as between the parties then the rule against perpetuities would clearly be inapplicable but as the point is thus presented this contention would hardly be tenable.

Perhaps when the question is again presented to the court, it will once more declare the contract valid as not being obnoxious to the rule. But, it seems that to have a right to have specific performance of a contract to convey an interest in land on the happening of an uncertain event, is to have a property interest in the land, which is remote and thus subject to the rule against perpetuities, and if such contract is to be upheld as not being obnoxious to the rule, it must be upheld on such a basis as previously suggested and not on the ground that the interest created is "conveyable," "vendable," and "alienable," and hence not in violation of the rule against perpetuities.

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As a result of an automobile collision, a passenger in vehicle *A* gave birth prematurely to a child, who lived only four hours. The child's representative brought actions against the driver of vehicle *B* to recover damages for pain and agony suffered by the child, who was assumed to be viable, and for her allegedly wrongful death. *Held,* affirmed. A foetus which has reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person. If such a child is injured, it is entitled, after its birth,

to receive damages for pain and agony suffered, and if death ensues, its personal representative is entitled to damages for its wrongful death. *Hall v. Murphy,* 113 S.E. 2d 790 (S.C. 1960).

The holding in the principal case is consistent with the more liberal and realistic approach that many courts have recently taken with regard to recovery for prenatal injuries. This decision tends to promote further the departure from the rigidity of the more orthodox view which denied recovery. It now appears that the view allowing recovery for prenatal injuries to a viable infant is supported by the numerical weight of authority in the United States. *Wendt v. Lillo,* 182 F. Supp. 56 (N.D. Iowa 1960). However, prior to the last decade, the majority of jurisdictions denied recovery in an action for prenatal injuries. The principal reasons advanced in support of the rule denying recovery were as follows: (1) lack of precedent in that no case permitted recovery, *Alhaire v. St. Luke's Hosp.,* 184 Ill. 359, 56 N.E. 638 (1900); (2) the difficulty in determining whether the prenatal injury actually caused the death or deformed condition of the child, *Stanford v. St. Louis-San Francisco Ry. Co.,* 214 Ala. 611, 108 So. 566 (1926); (3) the unborn child is a part of its mother: hence no separate duty is owing to it, *Dietrich v. Northampton,* 138 Mass. 14 (1884); and (4) permitting recovery might give rise to fictitious claims, *Magnolia Coca Cola Bottling Co. v. Jordan,* 124 Tex. 347, 78 S.W.2d 944 (1935).

The case most commonly cited as authority for the rule denying recovery for prenatal injuries is *Dietrich v. Northampton, supra,* which appears to be the first case wherein the question was considered. In that case a woman four or five months advanced in pregnancy, by reason of a fall upon a defective highway, prematurely gave birth to a child. The child was unable to survive more than ten or fifteen minutes. It was held that the child was not a "person," and recovery was denied.

In the case of *Alhaire v. St. Luke's Hosp., supra,* it was held that an infant has not before birth such an independent existence to enable him to sustain an action for prenatal injuries. In *Drobner v. Peters,* 232 N.Y. 220, 133 N.E. 567 (1921), *D* negligently permitted a coalhole in the sidewalk in front of his premises to remain uncovered. *P's* mother fell into it. *P,* as yet unborn, sustained injuries. Born eleven days after the accident, an action was brought by *P's* guardian ad litem. The court held that a child has no right of action for injury negligently inflicted upon it while it was in its mother's

womb. Subsequent cases following the view denying recovery for prenatal injuries are annotated in 10 A.L.R.2d 1059 (1950) and 27 A.L.R.2d 1256 (1953).

The first American court of last resort to hold, in the absence of statute, that a child who survives birth can bring an action for injuries incurred before birth was the Supreme Court of Ohio in *Williams v. Marion Rapid Transit, Inc.,* 152 Ohio St. 114, 87 N.E.2d 334 (1949). The child's mother fell from the steps of *D's* vehicle as a result of *D's* negligence. At the time of the fall, the child was unborn and viable. The court held that an unborn viable child is a "person" within the constitutional provision granting every person a remedy for injury to his person. The court said that to hold otherwise would deprive the infant of the right conferred by the state constitution upon all persons. The decision in the *Williams* case apparently overruled *Mays v. Weingarten,* 82 N.E.2d 421 (Ohio App. 1943).

The arguments generally advanced in favor of allowing recovery, at least where the alleged injuries occurred when the child was viable, are as follows: (1) an unborn viable child is capable of independent existence: hence it should be regarded as a separate entity, *Williams v. Marion Rapid Transit, Inc., supra;* (2) the law recognizes an unborn child sufficiently to protect its property rights and rights of inheritance, and protects it against the crimes of others: therefore it should recognize its separate existence for the purpose of redressing torts, *Berlin v. J. C. Penney Co.,* 339 Pa. 547, 16 A.2d 28 (1940); (3) if no right of action is allowed, there is a wrong inflicted for which there is no remedy, *Bonbrest v. Kotz,* 65 F. Supp. 138 (D.D.C. 1946); (4) absence of precedent is no ground for denying recovery where a wrong has been committed, *Bonbrest v. Kotz, supra.*

Since the holding by the Ohio court in the *Williams* case, numerous jurisdictions, including New York, Missouri, and Illinois, all of which reversed prior decisions, have favored the view allowing the child's right of recovery. See Annot., 27 A.L.R.2d 1256 (1953) and supplement citations. Even Massachusetts, in its most recent case on the question, permitted recovery to a viable child. *Keyes v. Construction Serv., Inc.,* 165 N.E.2d 912 (Mass. 1960). The court said that there is no need to reverse the *Dietrich* decision, *supra,* which doubtless was right when rendered, but in view of modern precedent, its application should be limited to cases where the facts are essentially the same.

In most of the jurisdictions in which recovery has been granted for prenatal injuries, two conditions appear to be essential: (1) the infant must have been viable at the time of the negligent act; and (2) it must have been born alive. *Tursi v. New England Windsor Co.,* 19 Conn. Supp. 242, 111 A.2d 14 (1955); *Amann v. Faidy,* 415 Ill. 422, 114 N.E.2d 412 (1953). However, the New Hampshire court in two recent cases, *Bennett v. Hymers,* 101 N.H. 483, 147 A.2d 108 (1958) and *Poliquin v. Macdonald,* 101 N.H. 104, 135 A.2d 249 (1957), seems to take the view that if either of the two above conditions is present, recovery will be granted. In the *Bennett* case the court held that an infant born alive can maintain an action to recover for prenatal injuries inflicted upon it by the tort of another, even if it had not reached the state of a viable foetus at the time of the injury. *Accord, Smith v. Brennan,* 31 N.J. 353, 157 A.2d 497 (1960). On the other hand, in the *Poliquin* case the court said that a foetus having reached that period of prenatal maturity where it is capable of independent life is a person, and if such child dies in the womb as a result of another's negligence, an action of recovery may be maintained in its behalf. *Accord, Mitchell v. Couch,* 285 S.W.2d 901 (Ky. 1955).

Thus, the courts are taking the more liberal view, and are allowing recovery for prenatal injuries. Most courts hold that the child must have been viable and born alive before recovery can be granted. Some courts hold that the child need not have been viable so long as it was born alive. A few courts permit recovery even where the child is born dead, provided it was viable when the injury occurred. The only other possibility, for which no authority has been found, is where the child was neither viable at the time of injury nor born alive.

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Wills—Subsequent Will Containing Express Clause of Revocation—Time Revocation Takes Effect

Testatrix executed two wills, the first in 1954 and the second in 1955. The later will contained a revocation clause which expressly revoked all wills previously made. Both wills were left in the custody of a bank. In 1956 testatrix withdrew the 1955 will stating that she wished to make a new will. The new will was never made and the 1955 will was never found, and so was presumptively destroyed