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Torts - Prenatal Injury - Right of Action to Variable Fetus Later Born a Mongoloid

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tween the grantor-grantee, all fixtures whether actually or constructively annexed to the property, pass with the conveyance of the realty.[6] Adaption refers to the purpose of the fixture in the use and occupancy of the land.[7]

The intention of the owner is construed to be the controlling element when determining what charter the chattel has assumed.[8] Intent may be inferred from the nature of the article,[9] or the relation and conduct of the party making the annexation, *i. e.*, mortgagor-mortgagee, vendor-vendee, landlord-tenant.[10] The intention of the party does not have to be that the annexation be forever, rather it may be continuous until the article is worn out, or the owners purpose has been accomplished.[11]

The absence of an agreement between the parties will allow a landowner to claim the fixtures in North Dakota.[12] The statute is construed liberally and it appears that anything constructively annexed to the realty will qualify as a fixture unless a different intent can be shown by the parties.

Damages may be recovered for the wrongful removal of a fixture from property. Consideration must be given to the actual damage sustained,[13] the value of the property before and after the removal,[14] the extent of depreciation, and the replacement cost of the fixture.[15] As a general test cannot be applied to every case, an evaluation of these tests will enable the court to determine what a reasonable value should be and aid them in giving judgment accordingly.

ROBERT D. HARTL.

TORTS — PRENATAL INJURY — RIGHT OF ACTION TO VARIABLE FETUS LATER BORN A MONGOLOID.* — An action was brought on behalf of a child, who allegedly was born mongoloid as a result of injuries received in an automobile collision when the child was a fetus of age one month. The Supreme Court of Pennsylvania *held,* one Justice dissenting, that the child did have a right of action against the defendant, those automobile allegedly negligently struck the

6. Slater v. Dowd, 79 Ga. App. 272, 53 S.E.2d 598 (1949) (except trade fixtures).

7. Knell v. Morris, 39 Cal.2d 388, 247 P.2d 352 (1952) stated that where innocent third parties are concerned it is the intent which governs. This however must be reasonably manifested by physical facts and outward appearances, rather than any express or implied intent of those making the annexation. Marty v. Champlin Refining Co., 240 Iowa 325, 36 N.W.2d 360 (1949).

8. Bank of Mulberry v. Hawkins, 178 Ark. 504, 10 S.W.2d 898 (1928); Banner Iron Works v. Aetna Iron Works, 143 Mo. App. 1, 122 S.W. 762 (1909) stating the principle criterion is the intention with which the owner of the land or building put the material into the building or on the land — whether his purpose was to make it permanently a part of the land or tenement. If this was his purpose when he made the annexation, then, though it is fastened to the freehold only slightly, and may be displaced without injury to the freehold, it usually will be treated as a fixture.

9. See *In re* Slum Clearance, City of Detroit, 332 Mich. 485, 52 N.W.2d 195 (1952); Strain v. Green, 25 Wash.2d 692, 172 P.2d 216 (1946).

10. Dermer v. Faunce, 191 Md. 495, 62 A.2d 304, *aff'd* 62 A.2d 582 (1948); see City of Phoenix v. Linsenmeyer, 78 Ariz. 378, 280 P.2d 698 (1955); Nelse Mortensen & Co. v. Treadwell, 217 F.2d 325 (9th Cir. 1954).

11. Pritchard Petroleum Co. v. Farmers Co-op., 117 Mont. 467, 161 P.2d 526 (1945).

12. Gussner v. Mandan Creamery & Produce Co., 78 N.D. 594, 51 N.W.2d 352 (1952).

13. Fine v. Beck, 140 Md. 317, 117 Atl. 754 (1922); McMohon v. City of Dubuque, 107 Iowa 62, 77 N.W. 517 (1898).

14. Dwight v. Elmira, C. & N. R.R., 132 N.Y. 199, 30 N.E. 398 (1892) recognizing two elements of damage: (1) The value of the articles after separation from the freehold; (2) damage to the realty, if any, caused by removal.

15. Slane v. Curtis, 41 Wyo. 402, 286 Pac. 372 (1930).

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automobile driven by the infant's mother. *Sinkler* v. *Kneale,* 164 A.2d 93 (Penn. 1960).

The common law rule[1] which gives no right of action for prenatal injuries had a dual basis: (1) no duty of care owed to a person not in existence; and (2) difficulty of proof in reference to causation could lead to a multitude of fictitious claims.[2] The first basis of the rule has been rightly defeated in several decisions[3] emphasizing the viability theory.[4] The second basis could bring injustices to many plaintiffs and was logically abolished.[5] Total obliteration is now evident with recovery being allowed for prenatal injury inflicted upon the fetus at any time during the period of gestation.[6]

The first reported case on prenatal injury is *Dietrick* v. *Inhabitants of Northhampton,*[7] which refused any recovery on grounds that the unborn child was part of the mother, thus requiring no duty of care to it by the defendant. This case was taken as authority for an Illinois case[8] which held that a surviving child had no cause of action whatsoever for prenatal injuries. In another recent case[9] the court held that in view of varied opinions on causation of Mongolism no recovery could be granted.

It appears that all of the theories[10] not based upon genetics omit the well established difference in chromosome count between the Mongoloid and a

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1. "The rule as supported by the numerical weight of authority, is that a child or its personal representative, in the absence of statute, has no right of action for prenatal injuries." Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 630 (1900); Dietrick v. Northhampton, 138 Mass. 14, 52 Am. Rep. 242 (1884) (Construction of a wrongful death statute.); Berlin v. J. C. Penny Co., 339 Pa. 547, 16 A.2d 28 (1940); also Restatement of the Law of Torts § 869 states that a person who negligently causes harm to an unborn child is not liable to such child for the harm.

2. Prosser, Torts § 36:174 (2d ed. 1955).

3. Cooper v. Blanck, 39 So.2d 352, (La. App. 1923); Kline v. Zuckerman, 4 Pa. D&C 227 (1924); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

4. An unborn viable child is capable of independent existence, hence should be regarded as a separate entity. Cooper v. Blanck, 39 So.2d 352 (La. App. 1923); Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949); Woods v. Lancett, 303 N.Y. Supp. 349, 102 N.E.2d 691 (1951); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

"Viable — Capable of living; especially said of a fetus that has reached such a stage of development that it can live outside of the uterus." Dorland, American Illustrated Medical Dictionary 1528 (23rd ed. 1957). "Viability is generally taken to range between the twenty-sixth and the twenty-eighth week of fetal life." Grandwohl, Legal Medicine 834 (1954); also affirmed by Flaister, Medical Jurisdiction and Toxicology 400 (1953).

5. ". . . the fear that recognition of a right of action in a case of this character will lead to others brought in bad faith and present insuperable difficulties of proof should not influence the decisions of the question. It is to be hoped that the law will keep pace with science. . . ." Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334, 339 (1949).

6. Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 96 (1953); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956)); Bennett v. Hymers, 147 A.2d 108, (N.H. 1958). Logical basis for these decisions: "The embryo is regarded as an entity from the moment of conception." Keith, Human Embryology & Morphology 23 (1921).

7. *Supra* note 1.

8. *Supra* note 1.

9. Puhl v. Milwaukee Automobile Insurance Co., 8 Wis.2d 343, 99 N.W.2d 163 (1960). ". . . . When scientific or medical theories or explanations have not crossed the line and become an accepted medical fact, opinions based thereon are no stronger or convincing than the theories . . . . The opinion is based not on facts but conjecture . . . . We conclude there was not sufficient credible proof of causation to sustain any award to Mary Ann for her condition."

10. "The Journal of Pediatrics", St. Louis, Vol. 56, No. 3, Page 412, Josef Warkany, M.D., Etiology Of Mongolism (1960).

normal person.[11] Since the chromosome count is established at fertilization, the number of chromosomes necessarily remains constant thereafter.[12]

Scientific data suggests that medical proof will ultimately lead to a complete refusal of recovery in the near future for prenatal injury cases allegedly causing Mongolism. Recovery should have been denied in the instant case.

D. M. DELABARRE.

TRUSTS — SALE AND CONVEYANCE — CONFIRMATION BY COURT OF SALE BY TRUSTEE. — The defendant trustee received an offer from plaintiff to purchase certain trust property which trustee was empowered to sell. The trustee accepted the offer, making the sale subject to the approval of the court. Subsequently the trustee received a larger offer and asked the court to set aside his acceptance and permit him to accept the more substantial offer. The Supreme Court of Wisconsin, two justices dissenting, *held* that an offer or bid upon trust property accepted subject to the approval of the court will not be disapproved merely because more money has been offered. The dissenting justice stated that the courts should have the power to disapprove the sale because of the inadequacy of price whether such price exceeds the appraised value or not, if at that time a better offer or purchase exists. *In Re Strauss' Trust Estate,* 105 N.W.2d 553 (Wis. 1960).

A trustee authorized to sell trust property is under a duty to exercise the care and skill of a reasonable and prudent man in procuring a purchaser price.[1] The general requirements of such a trustee in procuring a purchaser for trust property are that he act in good faith, with ordinary and prudent care to obtain the best terms possible.[2] There are a wide range of views taken by various jurisdictions concerning judicial discretion and approval by courts of sales of trust property by the trustee. It has been held fundamental that fraud or improper dealing will be sufficient grounds to set aside a contract for sale of trust property,[3] as will a sale to a trustee for a sum substantially less than market value.[4] On the other hand, courts have also said that mere inadequacy of price will not ordinarily warrant setting aside a sale,[5] nor will the fact that someone else is later willing to pay more.[6] California has held that where a trustee makes a contract to sell land under a decree subjecting it

11. "It is now well established that the normal chromosome number in humans is 46 and that Mongoloid children have 47 chromosomes." *Supra* note 10, at 413.

12. This necessarily follows from the entire fertilization process presented in medical science. *Supra* note 10.

1. Restatement, Trusts (2d ed.) § 190, comment *I*, Duty of Care and Skill "Although the trustee is authorized to sell trust property, he is under a duty to the beneficiary to exercise such care and skill in making the sale as a person of ordinary prudence would exercise." N.D. Cent. Code § 59-02-06.

2. Thompson v. Hays, 65 N.M. 255, 11 F.2d 244 (8th Cir. 1926); Cooper v. Ensor, 270 Ky. 670, 110 S.W.2d 461 (1937); Security Trust Co. v. Appleton, 303 Ky. 328, 197 S.W.2d 70 (1946).

3. *In re* Reichert's Estate, 356 Pa. 269, 51 A.2d 615 (1947); *In re* Minch's Will, 71 N.W.2d 144 (Ohio 1946); Gaver v. Gaver, 176 Md. 171, 4 A.2d 132 (1939).

4. Waterbury v. Nicol, 207 Ore. 595, 296 P.2d 487 (1956).

5. Boyd v. Smith, 127 Md. 359, 96 Atl. 526 (1916); Straus v. Anderson, 366 Ill. 426, 9 N.E.2d 205 (1937); American Trading & Production Corp. v. Connor, 109 F.2d 205 (4th Cir. 1940); *Cf.* Ist Nat. Bank of Waseca v. Paulson, 69 N.D. 512, 288 N.W. 465 (1939) ". . . it must be unreasonable and unfairly inadequate."

6. Gilden v. Harris, 196 Md. 32, 78 A.2d 167 (1951); Cook v. Safe Deposit and Trust Co. of Baltimore, 172 Md. 398, 191 Atl. 713 (1937); *Cf.* Lancaster County v. Schwartz, 152 Neb. 15, 39 N.W.2d 921 (1949) "Due respect must be given to the right of the successful bidder and the stability of judicial sales generally."