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treats income of a partnership as income of the individual partners and taxes them on their share whether distributed or not [7] does not appear in the Insular Act.

The Puerto Rican legislature, by the 1941 Amendment,[8] and the court in the instant case would seem to disrupt the basic scheme for taxing partners on the same basis as corporate shareholders. The immediate practical effects of the decision could result in the extinguishment of the partnership as a form of business association in the Island. A possible motive for such change in legislative trend may be found in the recent program for industrialization of Island resources.[9] Again, the basic motive may be the channeling of business associations into the corporated form. Whatever the political-social objective may be, legal problems remain. Is such a tax violative of due process? Is it discriminatory in that it is imposed on partners, but not members of a similar civil law entity, the corporation? [10] These important questions can be answered only by definite legislative clarification or by subsequent judicial interpretation. The holding in the instant case casts serious doubt on the present taxable status of undistributed partnership earnings and places the partnership form of association in Puerto Rico at a distinct tax disadvantage.[11]

TORTS—INFANTS—UNBORN CHILDREN—LIABILITY FOR INJURIES NEGLIGENTLY INFLICTED ON VIABLE UNBORN CHILD

Plaintiff, prior to birth, received personal injuries when her mother fell while attempting to alight from defendant's bus. The fall brought on plaintiff's birth prematurely, and this together with the injuries resulted in plaintiff's permanent disabilities for which she sues to recover damages, claiming that as "an existing, viable child" at the time of the fall she is not without remedy.[1] A demurrer to plaintiff's complaint was overruled. *Held,* on appeal, plaintiff, viable at the time of the injury, capable of living and having demonstrated such capacity to survive by surviving, was a "person"

7. INT. REV. CODE § 182.

8. See note 2 *supra.*

9. LAWS OF PUERTO RICO Art. 346 (1947). See also Baker and Curry, *Taxpayer's Paradise in the Caribbean,* 1 VAND. L. REV. 194 (1948)

10. The legislature has great freedom in classifying subjects for purposes of taxation, but the classification must be reasonable and must rest upon some ground having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike. F. S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412 (1920).

11. It should be noted that "To warrant reversal of a decision of the Supreme Court of Puerto Rico on construction of local statutes the error must be manifest; the interpretation must be inescapably wrong, the decision must be patently erroneous." Bonet, Treasurer v. Texas Co. (P.R.) Inc., 308 U.S. 463 (1939). *Accord,* DeCastro v. Board of Commissioners of San Juan, 322 U.S. 45 (1944).

1. A "viable foetus" is one, normally seven months or older, which has reached such a stage of development that it can live outside the uterus. AMERICAN ILLUSTRATED MEDICAL DICTIONARY 483, 1605 (19th ed., Dorland).

within the meaning of a provision of the state constitution guaranteeing "remedy by due course of law" for personal injuries.[2] Judgment affirmed. *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949).

It has long been considered a well-established rule of tort liability that courts will not permit recovery in the absence of legislation,[3] by a child[4] or its estate[5] for prenatal injuries.[6] The principal reasons urged to defeat recovery are: 1. Lack of precedent; 2. no duty of care since there is no separate entity; 3. no person *in esse* at the time of the alleged negligence.[7] Some courts have rested their decisions on inconvenience,[8] while two cases have denied recovery on the basis of the want of a contract.[9] The latter argument has been frequently criticized.[10]

Since the rule was first pronounced,[11] a trend toward permitting recovery has become easily distinguishable. The minority opinions evidencing this trend have leaned heavily upon the presence of two factors in a case; a viable foetus and a living child.[12] Some jurists have indicated a willingness to go farther and permit recovery regardless of the presence or absence of viability at the time of the negligent act,[13] but this view does not seem to be gaining wide acceptance. Courts in jurisdictions outside the common law have never denied recovery.[14] Yet, all the attempts of lower courts in common law jurisdictions have been successfully thwarted until the case noted here.[15]

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2. OHIO CONST. Art. I, § 16. "All courts shall be open, and every person, for an injury done him in his land, goods, *person*, or reputation, shall have justice administered without denial or delay." (Italics added).

3. See Scott v. McPheetters, 33 Cal. App.2d 629, 92 P.2d 678 (1939) (recovery allowed under statute reading "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth." CAL. CIV. CODE, § 29 [1949]).

4. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

5. Dietrich v. Northampton, 138 Mass. 14 (1884).

6. In connection with property rights, a legal fiction has long made possible the imputation of a juridical personality to an unborn child for all purposes beneficial to the infant after birth. See, *e.g.*, The George & Richard, L.R. 3 Adm. & Eccl. 466 (1871). Similarly, by the criminal law, one who injures an infant *en ventre sa mere* is held accountable. Clarke v. State, 117 Ala. 1, 23 So. 671 (1898).

7. Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); *accord*, Nugent v. Brooklyn Heights R. Co., 154 App. Div. 667, 139 N.Y. Supp. 367 (2d Dept. 1913) (recovery denied on the basis of no contract).

8. Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (Tex. Civ. App. 1935).

9. Nugent v. Brooklyn Heights R. Co., *supra*; Walker v. Great Northern Ry., 28 L.R. Ir. 69 (1891).

10. Lamont, J. in Montreal Tramways v. Leveille, [1933] 4 D.L.R. 337 (Can. Sup. Ct.).

11. Dietrich v. Northampton, *supra*.

12. See Boggs, J. in Allaire v. St. Luke's Hospital, *supra* at 368, 56 N.E. at 640 (dissenting opinion).

13. Stemmer v. Kline, 19 N.J. Misc. 15, 17 A.2d 58 (Cir. Ct. 1940), *rev'd*, 128 N.J.L. 455, 26 A.2d 489, 684 (1942) (a 9-6 decision).

14. Cooper v. Blanck, 39 So.2d 352 (La. 1923); Montreal Tramways v. Leveille, *supra*.

15. Stemmer v. Kline, *supra*; Magnolia Coca Cola Bottling Co. v. Jordan, 47 S.W.2d 901 (Tex. 1932), *rev'd*, 124 Tex. 347, 78 S.W.2d 944 (Tex. Civ. App. 1935);

The decision in the principal case logically follows the viability theory. The factors which have been considered necessary by followers of the minority view were all present, and the court, in a well reasoned opinion reviewed all the leading cases, careful to distinguish those in which the child was not viable at the time the injuries were inflicted and those where the child died. This case sets a much needed precedent in the field of torts. Following close upon it is still another decision permitting recovery,[16] perhaps even more far reaching, in which viability was present but the child died. It is difficult to reconcile recovery in such a case with denial of recovery where the negligence is committed before viability and the child lives.[17]

Drobner v. Peters, 194 App. Div. 696, 186 N.Y. Supp. 278 (1st Dep't), *rev'd*, 232 N.Y. 220, 133 N.E. 567 (1921) (J. Cardozo dissenting).

16. Verkennes v. Corniea, 38 N.W.2d 838 (Minn. 1949) (an action by a deceased infant's estate under a wrongful-death statute).

17. *Such a case was* Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916) (recovery denied, the court indicating the rule might well be otherwise where the infant is viable).