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THE EFFECT OF RESTRICTIONS ON THE ALIENABILITY OF MONEY CLAIMS.

It is now clearly established that ordinary choses in action are alienable.[1] Recently a new difficulty has confronted the courts in those cases where the obligor has attempted *ab initio* to deprive the obligee of power to assign. The most recent instance of this limited class of cases is to be found in the very important decision in *Portuguese-American Bank of San Francisco v. Welles*.[2] A contract between the city and a contractor provided that neither the contract nor the right to moneys due thereunder should be assignable without the consent of the board of public

[1] For an exhaustive treatment of this topic see the article of Professor Walter Wheeler Cook, The Alienability of Choses in Action (1916) 29 HARV. L. REV. 816-837.

[2] (1916) 37 Sup. Ct. Rep. 3.

works.[2a] The consent of the board was not obtained, although the city made no objection to the assignment, and paid the money into court. A subcontractor claims that the assignment is invalid and, hence, that he can attach the claim as an asset of the assignor. The court held that the assignment operated to give the bank a complete right to the money due, notwithstanding the restriction.

We venture to submit that the reasoning of Mr. Justice Holmes in the decision is inadequate to justify the result reached. The Justice draws the analogy between the sale of a horse and the assignment of a money claim. He says: "When a man sells a horse what he does from the point of view of the law is to transfer a right." An obligation, however, cannot be reduced to a mere "right" together with a corresponding duty. There are many companion jural relations forming an aggregate, or bundle, of actual and potential rights, privileges, powers, and immunities.[3]

[2a] A clear distinction exists between an assignment that merely substitutes a new creditor, and an assignment that involves also a performance by the assignee in place of performance by the original obligee as the fulfilment of a condition precedent to the enforcement of the claim assigned. The former only is being considered here.

[3] Professor Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16, 28.

The true reason for the inalienability of choses in action at common law was the difficulty early jurists had in conceiving jural relations apart from tangible objects. Pollock & Maitland say in *History of English Law* (2d ed. 1905), Vol. II, p. 226: "Ancient German law, like ancient Roman law, sees great difficulties in the way of an assignment of a debt or other benefit of a contract . . . men do not see how there can be a transfer of a right unless that right is embodied in some corporeal thing." Quoted by Professor Hohfeld, 23 YALE LAW JOURNAL, 16, 21.

Professor Ames in The Disseisin of Chattels (1890) 3 HARV. L. REV. 339, *contra*, quotes and approves Spence's theory as set forth in the latter's work on *Equity Jurisprudence*, 850: "But in regard to choses in action, as the same doctrine has been adopted in every other state in Europe, it may be doubted whether the reason, which has been the foundation of the rule everywhere else was not also the reason for its introduction in this country; namely, that the credit being a *personal right* of the creditor, the debtor being obliged toward that person could not by a transfer of the credit, which was not an act of his, become obliged towards another."

We submit that two weaknesses exist in Spence's theory adopted by Professor Ames. First, negatively, it does not explain the tort case. It is hardly conceivable that ancient law would be so tender of a tort feasor. No adequate reason can be found for holding that a tort gives rise to purely personal jural relations, as where A injures B's land. Secondly and affirmatively, we have an adequate and valid reason set forth by Maitland,

The so-called "transfer" of title to a chose in possession is not a simple, but a complex thing. What really transpires is the extinguishment of certain rights, privileges, powers, and immunities, actual and potential, in the vendor, and the creation of corresponding rights, etc., in the vendee.[4]

In the principal case the money claim which was assigned differs from the ordinary chose in action, for here *ab initio* the obligor attempted to create an obligation which, as an aggregate of jural relations, does not include the power to alienate.

To determine the correct analogy, let us consider three type cases:

(1) A creates a money obligation in favor of B, with no attempt to deprive B of the power to alienate.

(2) A creates a money obligation in favor of B, with no restriction on its alienability. Then B assigns to C with the attempted restriction that C shall have no power to make further assignment.

(3) A creates a money obligation in favor of B, with a stipulation *ab initio* that B shall not have the power to alienate.

The principal case belongs to general type (3), although the disability was not absolute, since the contractor could assign his claim with the consent of the board of public works. To make the restriction on the assignment of a money claim precisely analogous to a restriction on the alienability of a chose in possession, as the horse in Justice Holmes' illustration, B, the owner of the assignable claim, would have to attempt the restriction of the power to assign on the part of *his* assignee, C, as in case (2). We submit that the analogy is not a perfect one for the situation in the principal case.

Turning to a consideration of case number (1), we find that the common law developed a method of evading the rule against assignability. Use was made of the device of "power of attorney," enabling the assignee to obtain relief in common law pro-

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in The Mystery of Seisin (1886) 2 LAW QUART. REV. 495: "There is a contrast more ancient than that between *jus in rem* and *jus in personam;* namely, that between right and thing. Of maintenance there is, I believe, no word in Bracton's book, but that there can be no *donatio* without *traditio* is for him a rule so obvious, so natural that it needs no explanation." See also Pollock & Maitland, *History of English Law* (2d ed. 1905), Vol. II, p. 226, *supra.*

[4] 23 YALE LAW JOURNAL, 16, 24, 45, 50, note 100.

ceedings by suing in the name of the assignor.[5] In the absence of any stipulation to the contrary, the contract to pay money can now be freely assigned by the creditor.[6]

In case (2) it is arguable that the "horse" analogy might control in such a situation. It has been deemed contrary to public policy to allow restraints on the alienation of ordinary chattels.[7]

Case (3) presents a situation where *ab initio*, one of the aggregate of jural relations which usually compose an obligation, namely, the power to alienate, is sought to be excluded. The question whether or not A's intention should prevail should rest fundamentally on considerations of public policy. The courts which have only common law principles to guide them answer this question in the affirmative.[8] But, notwithstanding the fact that some courts will not effectuate B's assignment at law, equity will cause B to hold the claim as constructive trustee for C.[9]

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[5] For this evolution in the common law, see Professor Walter Wheeler Cook, (1916) 29 HARV. L. REV. 816, 842-834.

[6] *Delaware County v. Diebold Safe Co.* (1889) 133 U. S. 473, 488. See in accord, Smith J., in *Colbourn v. W. W. Rossiter* (1818) 2 Conn. 503, 508: "I speak not of chancery, merely; it is the same law. There is no hostility between different jurisdictions on this subject. It is a well settled principle of the common law of Connecticut that the property in a chose in action, may be assigned, and the courts of law have long since recognized the property in the assignee as fully as courts of chancery."

The situation is covered in the code states by requiring all actions to be brought by the real party in interest. In other states there are usually express statutes. A typical example is the Illinois Practice Act (1913) Rev. St. ch. 110 ¶ 18.

[7] *American and English Encyclopaedia of Law*, Vol. XXIV, pp. 863, 864. To hold that an ordinary chose in action cannot be deprived of its assignability, because of public policy, indicates a vast change from the ancient rule that a chose in action was not assignable at all.

[8] *Tabler v. Sheffield Land, Iron & Coal Co.* (1887) 79 Ala. 377 (Labor tickets marked non-transferable were held not to support an action by the assignee in his own name). See also *Devlin v. Mayor* (1877) 63 N. Y. 8, 17; *Murphy v. City of Plattesmouth* (1900) 78 Neb. 163, (A restriction was held binding); *Staples v. Somerville* (1900) 176 Mass. 237; *Delaware Co. v. Diebold Safe Co.* (1889) 133 U. S. 473, 488. It should be noted that in several of these cases the language of the agreement seemingly affects only the privilege of exercising the power of assignment. The distinction between the case where the obligee has no power at all to assign, and the case where he has power and is merely under an obligation not to exercise it, is nowhere taken in the cases. For a full explanation of this distinction, see (1915) 24 YALE LAW JOURNAL, 590, 591.

[9] *Staples v. Somerville, supra.* Here C was entitled to money as against assignee in insolvency of A. See also *Fortunato v. Patten* (1895) 147 N. Y. 277.

The obvious purpose of statutes would seem to be merely to confirm the change in the rule preventing alienability of choses in action. Upon this theory, several courts hold that the statutory provisions do not invalidate any agreement that the parties may have made in regard to assignment. In such jurisdictions the stipulation in case (3) would be upheld.[10] Some courts, however hold that all attempts to make money claims non-assignable are unavailing.[11] We venture to submit, however, that they are not led to this conclusion through any analogy drawn from the assignment of choses in possession as, for instance, the "horse" analogy in the principal case. The principal case, as already indicated, is of type (3). The analogy of the chose in possession applies only to the type case (2). If, therefore, the decisions which hold restrictions are not binding are to be supported, it would seem to be on special grounds of public policy which enter into the very birth, or creation, of this obligation as distinguished from case (2), which applies only to property already in existence.[12]

G. S., JR.

COPIES OF A PRINTED CRIMINAL LIBEL AS SEPARATE OFFENSES.

An interesting and difficult question is presented when copies of a newspaper containing a criminal libel are circulated in a jurisdiction other than that of the printing. This point was adjudi-

[10] *Barringer v. Bes Line Construction Co.* (1910) 23 Okl. 131; *Butler v. San Francisco Gas and Electric Co.* (1913) 16 Cal. App. Dec. 946. See an interesting note on this case by Professor O. K. McMurray in (1913) 1 CAL. L. REV. 471. The court held that a provision in the contract that it should not be assigned renders an assignment thereof void. Compare, however, s. c. on appeal, 168 Cal. 32, 41. See also *La Rue v. Groezinger* (1890) 84 Cal. 281.

[11] *Bewick Lumber Co. v. Hall* (1894) 94 Ga. 539 (Credit check marked "not-transferable," held to be assignable. Here a code provision regulated the matter). *Bank of United States v. Public Bank of New York City* (1915) 151 N. Y. S. 26. A comment in 24 YALE LAW JOURNAL 590-594 gives a somewhat detailed analysis of the problems in this case. The court held that a rule of the bank requiring the depositor to appear in person to withdraw his account was a reasonable one as regards the depositor; but that it would not justify the refusal of the bank to pay the assignee, for the reason that the bank is a debtor and "cannot make rules and regulations which will limit the right to assign the debt."

[12] The statutes have only added to the extent of the power that the creditor was given at common law. The power of assignment could be

cated in the recent cse of *State v. Moore*.[1] In this case an alleged libellous article appeared in a newspaper edited and printed in parish A, but circulated widely in parish B. The defendant, the proprietor of the paper, was indicted by the grand jury of parish B. The Supreme Court of Louisiana, Chief Justice Monroe dissenting, sustained a plea to the jurisdiction on the ground that if there was any offense committed it was in parish A.

The Louisiana constitution[2] guarantees that all criminal trials shall take place in the parish in which the offense was committed, and the revised statutes[3] provide that all crimes, offenses, and

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contracted away at common law, and whether or not the power given by the statutes can be contracted away, must rest upon a true interpretation of the statutes upon grounds of public policy. The arguments in favor of allowing a stipulation similar to the one in the principal case to prevail are briefly: (a) A money claim being an intangible *res* from its creation, the grounds are much weaker for invoking public policy to prevent the restriction of assignability. (b) Freedom of contract is of great importance to society. On the other hand, the reasons for a strict or narrow construction of the statutes are: (a) A money claim being "a courier without luggage," it is strongly urged that no impediment should be placed upon this power of assignment. Subsequent takers should not be put on notice of any secret agreements between assignor and debtor. (b) The law might vest the creditor with a naked power to assign in cases where the assignee had no notice, as in the case of an agent whose agency has been revoked; but the difficulty here arises that the statutes make all money claims either assignable or non-assignable. In the absence of specific language in the statutes invalidating stipulations similar to the one in the principal case, on principle, a money claim can be made non-assignable. Whether the courts will thus contrue the statutes is a matter which will be determined more or less by their views of public policy as above indicated.

The German Civil Code, sec. 399, provides that the power of assignment may be excluded by agreement.

[1] (1916) 72 So. (La.) 965.

[2] Art. 9: "All trials shall take place in the parish in which the offense was committed."

[3] Sec. 804: "Whoever shall maliciously defame any person by making, writing, publishing, or causing to be published, any manner of libel, shall on conviction thereof, suffer fine or imprisonment, or both, at the discretion of the court."

Sec. 976: "All crimes, offenses and misdemeanors shall be taken, intended and construed, according to and in conformity with the common law of England; and the forms of indictment, the method of trial the rules of evidence, and all other proceedings whatsoever in the prosecution of crimes, offenses and misdemeanors . . . shall be according to the common law unless otherwise provided."

misdemeanors shall be taken, intended, and construed, according to, and in conformity with, the common law of England.

It has been generally asserted by the text writers that a criminal prosecution for libel might be instituted in any jurisdiction in which the libellous article was published; that the situs of the offense was the situs of its publication; and that one who printed a libel in a newspaper, which circulated in another jurisdiction, was liable to indictment in either jurisdiction, or both.[4]

It being conceded that the situs of a criminal libel is the situs of its publication, it becomes necessary to understand what constitutes a publication. It is on this point that the court in the principal case departs from the generally accepted doctrine.

In both civil and criminal law the word "publish" is generally accorded the technical meaning of communicating defamatory matter to the mind of another.[5] A few courts, indeed, deem an irrevocable delivery sufficient in criminal cases.[6] Adopting the narrower definition, it follows that proof of the composition of the libellous matter and its mere existence in printed form does not constitute a publication; but that every communication or delivery of the matter to a third party by the principal, or his agent, is a publication, and so results in an additional offense.[7]

On the other hand, a very few courts have repudiated this generally accepted connotation of the word, and adopt the meaning ordinarily intended in referring to the "publishing" of a newspaper, magazine, or book.[8] It is this import that is attached to the word in the principal case. The court regards the printing of an edition of a newspaper as a single composite act and

[4] *State ex rel. Taubman v. Houston* (1905) 19 S. D. 644; *State v. Kountz* (1882) 12 Mo. App. 511; *Commonwealth v. Blanding* (1825) 3 Pick. (Mass.) 304; *Rex v. Watson* (1808) 1 Camp. 215; Odgers, *Libel and Slander* (5th ed., 1911) p. 469; Clark, *Criminal Law* (2d ed.) p. 421; Minor, *Conflict of Laws*, sec. 204.

[5] *Wilcox v. Moon* (1891) 63 Vt. 481; *Staub v. Van Benthuysen* (1884) 36 La. Ann. 467, 468; Odgers, *Libel and Slander*, p. 157, 162.

[6] *Lyle v. Clason* (1804) 1 Cai. (N. Y.) 581; *Rex v. Burdett* (1820) 4 B. & Ald. 95; Wharton, *Criminal Law*, sec. 1618.

[7] *R. v. Carlisle* (1819) 1 Chitty, 451, 453; Odgers, *Libel and Slander*, p. 469; see also *Underwood v. Smith* (1894) 93 Tenn. 687; *Cook v. Connors* (1915) 215 N. Y. 175.

[8] *United States v. Smith et al.* (1909) 173 Fed. 227; *State v. Bass* (1903) 97 Me. 484; *United States v. Press Publishing Co.* (1911) 219 U. S. 1. The last named case turned on a construction of the New York statutes, which were held to authorize only a single prosecution in any libel case.

the offense as completed upon the reading of a single copy, the remaining copies merely increasing its magnitude. From this, the court concludes that there has been an offense only in parish A, the jurisdiction of the printing.

It is indeed difficult to reconcile this decision with either principle or precedent. The fact that the offense of libel may have been completed in parish A would hardly seem to make it less of an offense to circulate the same edition, containing the alleged libellous matter, in parish B. It seems altogether unlikely that the constitutional guaranty provided for in Art. 9[9] was intended to change the rule of the common law which sanctioned a criminal prosecution for libel in any jurisdiction in which the libellous matter was communicated to a third party, irrespective of where it was written or printed.

The conclusion of the court was admittedly influenced by the fact that if a prosecution in parish B was permitted, it would lead to the anomalous situation of invoking a separate prosecution not only in each of the sixty-four parishes, but also for each sale of the paper. This result, however, does not necessarily follow; the arbitrary line of expediency might well have been drawn at the latter while still recognizing the former as both reasonable and logical. Furthermore, the greater number of decisions would seem to sustain the view that the sale of every separate copy is a fresh publication which is an indictable offense.[10] While the defendant's own physical act was completed when the papers were mailed, yet the machinery thus set in motion continued to act until they were received; and if the analogy of the law of homicide is followed, the crime must be held to have been committed where the act took effect.

S. F. D.

THE EFFECT, AS AGAINST THE ORIGINAL DEFENDANT AND HIS TRANSFEREES, TO BE GIVEN BY THE COURTS OF THE SITUS TO A FOREIGN DECREE ORDERING THE CONVEYANCE OF REALTY

The recent case of *Mallette v. Carpenter et al.*[1] raises again the interesting and heretofore unsettled question as to the effect

[9] *Supra.* The statutes of other states may well be found to abrogate the common law in this respect, in order to secure a greater freedom of the press. See *United States v. Press Publishing Co., supra.*

[10] See cases cited in note 4.

[1] (1916) 160 N. W. (Wis.) 182.

of a foreign decree ordering the conveyance of land, upon the courts of the situs.[2] An Illinois court gave a decree of divorce, and directed the defendant to convey to the plaintiff land situated in Wisconsin, as alimony. The husband, during the pendency of the suit, fraudulently conveyed his Wisconsin lands to third parties. In an action against the husband and his grantees brought in Wisconsin on the Illinois decree, it was held that the plaintiff was entitled to relief in the courts of Wisconsin against the original defendant, and also against the grantees taking under the alleged fraudulent conveyance.

In our consideration of the question we must examine: (1) the results in Wisconsin if the original defendant had retained ownership of the land; (2) the results in Wisconsin, in view of the fact that the original defendant had transferred the land to third parties. Assuming that the original defendant retained ownership of the land, what effect, according to the general principles of equity, should the Wisconsin law attach to the Illinois decree? What are the additional effects, if any, of the full faith and credit clause[3] of the Federal Constitution? The original defendant having disposed of the land to transferees in Wisconsin we must, furthermore, determine whether the transferees can be bound in Wisconsin: (a) directly by the divorce decree rendered by the Illinois court; (b) by virtue of the full faith and credit clause; (c) by any other means independently of (a) and (b).

It is now well established that an action at law may be maintained on a foreign equitable decree for the payment of money.[4] When the decree is for the doing of an act other than the payment of money, the authorities are divided upon the question: what effects are to be attached to the decree by other jurisdictions? Especially is this true of decrees ordering the conveyance of lands in another jurisdiction. Professor Beale, citing *Bullock v. Bullock*,[5] denies that a foreign decree ordering the conveyance of land can be enforced in the courts of another jurisdiction.[6] This

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[2] *Bullock v. Bullock* (1894) 52 N. J. Eq. 561; *Fall v. Eastin* (1909) 215 U. S. 1.

[3] Art. IV, sec. 1.

[4] *Kunze v. Kunze* (1896) 94 Wis. 54; *Pennington v. Gibson* (1853) 57 U. S. 65.

[5] (1894) 52 N. J. Eq. 561.

[6] Beale, *Cases on Conflict of Laws*, Vol. III, p. 537 (summary): "An equitable decree for the doing of an act, except the mere payment of money, is not by our law enforceable in another court, even of the same

case, resting largely upon the theory that the courts of the situs could not be compelled to enforce the foreign decree for the conveyance of land, when not based upon a consensual relationship between the parties, denied relief in New Jersey upon a New York decree ordering the defendant to execute by way of security for the payment of alimony, a mortgage on New Jersey land, after a decree of divorce had been entered. While the New Jersey court intimated that it would have given full effect to a decree for specific performance of a consensual obligation to convey New Jersey land, it refused to recognize the power of a New York court to create, by the decree, an obligation to convey New Jersey land, as the effect would be to deprive her of her immemorial exclusive sovereignty over immovable property. It is difficult, however, to find authorities squarely in point which adopt the view of the New Jersey court; and the principal case repudiates it. In view of this conflict among the few authorities dealing with the question, we may well examine into the attempted distinction between decrees based upon consensual obligations to convey, and decrees which create for the first time the duty to convey. Apparently the New Jersey courts looked upon the decree of the foreign court as an attempt to create *ex proprio vigore* an interest in land outside its jurisdiction. It failed to recognize that, even in the case of a money decree of a foreign court, it is not the old obligation which it is asked to recognize, but a new obligation created directly by the chancellor's decree.[7] In the principal case, since the decree was rendered by the Illinois court with proper jurisdiction over the person of the defendant, it was a valid decree *in personam,* and one which, under the law of Wisconsin, is regarded as appropriate relief in a divorce action.[8] Moreover, not only has Wisconsin in preceding cases[9] affirmed the validity of a foreign decree in a divorce suit adjudicating the property interests of the parties, including Wisconsin realty, but other jurisdictions have given effect to foreign decrees ordering the conveyance of realty. *Burnley v. Stevenson*[10] held

state; . . . It is therefore impossible to enforce a foreign decree that an act be done by the defendant, such as making a conveyance, either by decreeing the conveyance without judicial investigation, or regarding it as made."

[7] See Professor Wesley N. Hohfeld, Relations between Equity and Law (1913) 11 MICH. L. REV. 551.

[8] *Cole v. Cole* (1892) 142 Ill. 19.

[9] *Zentzis v. Zentzis* (1916) 163 Wis. 342.

[10] (1873) 24 Oh. St. 474.

that a decree in Kentucky as to lands situated in Ohio had the effect of determining the equities of the parties to lands in Ohio, and the Kentucky decree was allowed as an equitable defense to an action of ejectment in Ohio. A Michigan case[11] has even gone farther by allowing an affirmative action to be maintained on an Ohio decree affecting Michigan land.

We have already seen that, even apart from any support given by the full faith and credit clause of the Constitution, Wisconsin may, and does, recognize the validity of a foreign decree affecting Wisconsin lands. We must now examine the effect of that clause to determine to what extent it strengthens the obligation of the Wisconsin court to recognize such a decree in so far as it concerns the defendant Carpenter. It is contended in *Fall v. Eastin*[12] in reasoning similar to *Bullock v. Bullock*,[13] that the full faith and credit clause does not extend the jurisdiction of one state to lands situated in another, but makes the judgment conslusive on the merits of the claim. The dissenting opinion of Van Syckel, J., in *Bullock v. Bullock*[14] points out, however, that the failure to give effect to the foreign decree is really a denial of the conclusive proof of the rights adjudicated. Justice Holmes in *Fall v. Eastin*[15] clearly intimates that by the full faith and credit clause a foreign decree, even though not based on a precedent specific obligation, should have the same effect on the equitable obligations of the parties as a foreign decree for specific performance of a contract.[16]

In the principal case, Carpenter, the defendant in the divorce proceedings, had conveyed his Wisconsin lands fraudulently to third parties. Did the Wisconsin court have the power to adjudicate the rights of the transferees in an action brought on the Illinois decree? It is manifest that the transferees were not bound by the Illinois decree *per se;* the Illinois court not having obtained jurisdiction *in personam* over the third parties, the decree did not bind them. Neither were the transferees bound by the full faith and credit clause of the Constitution, which

[11] *Dunlop v. Byers* (1896) 110 Mich. 109; see a similar holding in *McCune v. Goodswillie* (1907) 204 Mo. 306.

[12] (1909) 215 U. S. 1.

[13] (1894) 52 N. J. Eq. 561.

[14] (1894) 52 N. J. Eq. 561, 568.

[15] (1909) 215 U. S. 1, 14.

[16] See in this connection *Sistare v. Sistare* (1909) 218 U. S. 1, which modifies the decision in *Lynde v. Lynde* (1900) 181 U. S. 187.

requires that the judgment of one state shall serve as conclusive proof of the adjudication of the merits of the case in another state. Thereby the equities between the parties appearing in the original suit are determined, but not the rights of third parties *in absentia.* Whether the transferees are bound must be determined, not by the full faith and credit clause, nor by the *lex fori* of the divorce decree, but by the *lex situs* of the land affected. The determining reason for Justice Holmes' concurring in *Fall v. Eastin,*[17] was the express recognition of the controlling effect of the Nebraska law, the *lex situs,* as to the effect to be given to the Washington decree as against third parties who were not before the Washington court. English cases furnish strong authority for the principle that the duties and liabilities of transferees having notice of equitable claims are to be determined according to the *lex situs.*[18] Since by the law of Wisconsin—quite independently of the full faith and credit clause—the transferees taking with notice come under the equitable duties and liabilities which attach to the transferor, it was within the power of the Wisconsin court to adjudicate the rights of such transferees in giving relief to the plaintiff.[19]

B. L.

RIGHTS OF AN UNBORN INFANT IN A TORT ACTION FOR PRENATAL INJURIES.

The rights of a child *en ventre sa mere* are in many ways jealously protected by the law. It has frequently been stated that such a child if later delivered alive is, for all purposes beneficial to it, a person in being, its life commencing, in so far as its civil rghts are concerned, with the date of its conception.[1] A

[17] (1909) 215 U. S. 1, 15.

[18] Westlake, *Conflict of Laws* (5th ed.) pp. 233, 234; *Martin v. Martin* (1831) 2 Russ. & My. 507 (contract on marriage); *Hicks v. Powell* (1869) L. R. 4 Ch. 741 (an unregistered conveyance held not to be enforceable against third parties because not enforceable against them by the *lex situs*).

[19] See The Powers of Courts of Equity, by Professor Walter W. Cook (1915) 15 COL. L. REV. 37, 106, 228.

[1] *Hall v. Hancock* (1834) 15 Pick (Mass.) 255; *Harper v. Archer* (1842) 4 Sm. & M. (Miss.) 99. But if it is delivered dead, or so prematurely as to be incapable of living, it is treated as though it had never been born. *Marsellis v. Thalhimmer* (1830) 2 Paige Ch. (N. Y.) 35; *Martin's Estate* (1887) 3 Pa. Co. Ct. 212.

posthumous child will take under a will although it is not expressly mentioned, and it is included under the term child,[2] or even "children living at the time of the testator's decease."[3] It is entitled to take under the laws of descent,[4] and cannot be divested of inheritance or property without being made a party to the suit.[5] It may take a contingent remainder, and equity has permitted it, as *cestui que trust,* to hold a trustee liable, although it was not conceived at the time the trust was created.[6] The rule is designed for the benefit of the child and will not operate to its prejudice.[7] No distinction is made here on the ground that the infant could or could not be born viable, the sole test being conception, and an infant born eight months and twenty-one days after the death of his sister was declared to be *in esse* at the time of her death.[8]

The principle that a child *en ventre sa mere* is alive for all purposes beneficial to it includes the statutory right to sue for loss of support when the relative has been killed by the act or neglect of the defendant. The only English case, concerning a child *en ventre sa mere,* under Lord Campbell's Act,[9] which gives an action for the benefit of "the wife, husband, parent, and child," was in admiralty,[10] but the effort to confine the effect of this decision to admiralty has no justification. Children *en ventre sa mere* are "surviving children" within the meaning of the Texas statute and may recover for death of the parent due to the gross carelessness of another.[11] A recovery by the mother is no bar to an action by a child born after this recovery according to the better opinion,[12] although a California decision,[13] by a divided court.

[2] *Biggs v. McCarty* (1882) 86 Ind. 352.

[3] In *Doe v. Clarke* (1799) 2 H. Bl. 400, Eyre, C. J., said: "Independent of intention, I hold that an infant *en ventre sa mere,* who by the course and order of nature is then living, comes clearly within the description of children living at the time of his decease."

[4] *Smith v. McConnell* (1860) 23 Ill. 611; *Deal v. Sexton* (1907) 144 N. C. 157.

[5] *Massie v. Hiatt* (1884) 82 Ky. 314; see also *Deal v. Sexton, supra.*

[6] *Mansell v. Mansell* (1732) 2 P. Wms. 676.

[7] Swinborne, *Wills,* Vol. II. p. 562.

[8] *Hall v. Archer, supra.*

[9] (1846) 9 & 10 Vict. c. 93.

[10] *The George and Richard* (1871) 24 L. T. 717.

[11] *Nelson v. Galveston, Harrisburg & San Antonio R. Co.* (1890) 78 Tex. 621; *Texas & Pacific R. Co. v. Robertson* (1891) 82 Tex. 657.

[12] *Nelson v. Galveston, Harrisburg & San Antonio R. Co., supra; Roach v. Wolff* (1914) 96 Neb. 50.

[13] *Daubert v. Western Meat Co.* (1893) 139 Cal. 480.

declared that it was a bar, provided the defendant was ignorant of the pregnancy of the woman when the first judgment was secured, and that the child's only remedy is against its mother. A most strict construction has been given to statutes which hold the seller of intoxicating liquors liable for injury to person, property, or loss of support. It was a simple matter to permit a recovery by an infant born the day after the father's death,[14] and it was only a step to extend recovery to a child born two months later,[15] for in both of these cases the child had been conceived and furthermore was capable of being born viable. But this rule was extended under the following circumstances: A man purchased a glass of whiskey and while the bartender's attention was taken elsewhere, drained the bottle. In an intoxicated condition he assaulted his wife, then pregnant, and a kick in the side caused a miscarriage. From then on swellings recurred in her side every three or four weeks, causing her considerable trouble, but she was able to give birth to a healthy child more than two years later. This, however, left the woman in such a weakened condition that she died in a few months. Under a statute which stated: "The person so licensed shall pay all damages that individuals . . . . . may sustain," this child was permitted to recover for loss of support.[16]

However careful the law may be of the property rights of a child *en ventre sa mere,* its personal rights have never been recognized in a civil case. No court has permitted a child to maintain suit for injuries received before birth.[17] The child is not regarded as an entity, but as part of the mother, and all injuries not too remote are supposedly recoverable by her. The doctrine of the civil law that a child is to be considered *in esse* for all beneficial purposes is called a pure legal fiction which the courts will not extend.

In spite of the unanimity of these decisions there is considerable force in the objection to the rule. The medical authorities agree that a child which has reached such a stage that it could live apart from its mother is alive, and that even the embryo has

[14] *Quinlen v. Welch* (1893) 69 Hun (N. Y.) 584.

[15] *State ex rel. Niece v. Soale* (1905) 36 Ind. App. 73.

[16] *Phair v. Dumond* (1916) 99 Neb. 310.

[17] The cases on this subject are: *Dietrich v. Northampton* (1884) 138 Mass. 14; *Walker v. Great Northern Ry. Co.* (1890) 28 L. R. (Ir.) 69; *Allaire v. St. Luke's Hospital* (1900) 184 Ill. 359; *Gorman v. Budlong* (1901) 23 R. I. 169; *Buel v. United Railways Co.* (1913) 248 Mo. 126; *Nugent v. Brooklyn Heights R. Co.* (1913) 139 N. Y. S. 367; *Lipps v. Milwaukee Electric Ry. & Light Co.* (1916) 159 N. W. (Wis.) 916.

life. It is not true that the recovery permitted by law to the mother covers the injury to the child. The mother secures damages for her own injury, pain, and suffering involved, but in many cases these are entirely distinct from the injuries to the child. On principle why should not an infant be allowed recovery for injuries received *en ventre sa mere*? While at common law it was not homicide to kill a child in the mother's womb, yet, if the child is born alive, and dies from injuries inflicted before birth, the killing constitutes murder,[18] and a death due to the negligent treatment of doctor or nurse is manslaughter.[19] It is objected that injuries before birth are so remote and so speculative, that no reasonable estimate of the injury could be made. When the left side of a woman was crushed by the elevator in a hospital, where she had gone to await childbirth, and the child was born four days later with its left side withered and atrophied,[20] there was no insurmountable difficulty in tracing the connection. On the other hand there are cases where the embryo is so little developed that it would be practically impossible to tell. To meet this objection we suggest that the time at which a child could be born viable be taken as the dividing line. It is true that the exact time at which it could be born viable is not so clearly defined and settled a stage as conception, but a court would be able substantially to determine it. The case of *Lipps v. Milwaukee Electric Ry. & Light Co.*,[21] in denying a cause of action to a child that could not be born viable, and in refusing to commit itself on the alternative proposition, is certainly not in conflict with this opinion.

In a comparatively recent case,[22] in which a child was injured thirty-six days before birth by the negligence of the railroad, the court recognized the entity of the infant, but denied relief on the ground that there was no contractual relation between the unborn child and the railroad. The railroad would be compelled to carry a babe in the arms of its mother without charge and would be liable to it for injury by negligence. The defendant is chargeable with the common knowledge of mankind that a

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[18] *Clark v. State* (1897) 117 Ala. 1.

[19] *Rex v. Senior*, 1 Moody C. Cas. 346.

[20] *Allaire v. St. Luke's Hospital, supra.*

[21] (1916) 159 N. W. (Wis.) 916.

[22] *Nugent v. Brooklyn Heights Co., supra;* see also *Walker v. Great Northern Ry. Co., supra.*

woman may be pregnant,[23] and it seems but a logical sequence to make him liable for acts or neglect which might reasonably be expected to injure a child *en ventre sa mere.*

In view of the recognition in other branches of the law of the rights of the unborn child, it is surely logical as well as practical to hold that an infant, injured when it could have been born viable, may, after birth, have an action for injuries to itself as well as to its property.

J. E. H.

JURISDICTION IN DIVORCE—FULL FAITH AND CREDIT AS REGARDS A PRIOR SUIT.

A man who with his wife had been domiciled in Massachusetts left her, moved to Georgia, and there having obtained a domicil secured a divorce. The wife had no actual notice of the suit instituted by the husband, though there was publication of notice as required by the Georgia law. Later the wife brought suit for divorce in Massachusetts and a decree was given in her favor.[1] The court held that the husband had unjustifiably deserted his wife, that the matrimonial domicil remained in Massachusetts, and that the Georgia decree would not be recognized.

The court refused to recognize the Georgia decision since it was not compelled to, for the case of *Haddock v. Haddock*[2] had decided that a decree of divorce not given in the actual domicil of the parties was not protected by the full faith and credit clause of the Federal Constitution unless both parties were before the court and the court had jurisdiction of the subject-matter. The Massachusetts court also refused even on the ground of comity to respect the Georgia decree.

Having rejected the decision of the Georgia court, the Massachusetts tribunal, citing the case of *Atherton v. Atherton*[3] as an authority, held that it had power to grant a divorce in a suit by the wife in the matrimonial domicil. In fact neither one of the cases cited by the court is conclusive authority upon this point, for in both of them[4] it was the husband who sued in the matri-

[23] *West v. Railroad* (1904) 187 Md. 363.

[1] *Perkins v. Perkins* (1916) 113 N. E. (Mass.) 841.

[2] (1905) 201 U. S. 526. Brown, Brewer, Harlan, and Holmes, JJ., *dissenting.*

[3] (1900) 181 U. S. 155. Fuller and Peckham, JJ., *dissenting.*

[4] *Atherton v. Atherton, supra; Thompson v. Thompson* (1912) 226 U. S. 551.

monial domicil for a divorce. The present case has not the benefit of the rule that a wife's domicil follows that of her husband. The principal case is not one in which the *lex fori* is that of the domicil of both parties, as was the situation in both of the cases cited above.

A divorce proceeding is not one *in personam,* nor yet one *in rem.* It is *sui generis*—very much like an attachment proceeding, which latter has aptly been called a proceeding *quasi in rem.*[5] The *res,* if we may speak of it as such in a divorce case, is the marriage status.[6] As, in general, a decree *in personam* is not valid unless the defendant is before the court or has been actually served with process,[7] so a decree *in rem* is likewise of no effect if the court has no jurisdiction of the *res.*

The Massachusetts court in refusing to admit that Georgia had jurisdiction of the cause, laid great stress upon the fact that the wife was not actually served with process and could not be present at the proceeding. The court in the principal case seeks to reconcile its decision with *Gildersleeve v. Gildersleeve*[8] and with *Joyner v. Joyner*[9] on the ground that in those cases the defendant had knowledge of the proceedings whereas in the present case this was not so.

If, however, Georgia had jurisdiction of the marriage status, it would seem that in the present case the court should have respected the findings of the former court on the merits of the case, namely as to which party was in fault.

F. L. McC.

AVOIDANCE OF THE FORFEITURE OF AN INSURANCE POLICY CONTAINING THE "VACANCY CLAUSE" BY REOCCUPATION BEFORE LOSS.

In the case of *Beecher v. Vermont Mut. Fire Ins. Co.*[1] the policy contained a provision that it should be *void,* if the property insured should be unoccupied for a period of ten days without the

[5] Minor, *Conflict of Laws,* 194; *Doughty v. Doughty* (1876) 27 N. J. Eq. 315.

[6] *Status* in its final analysis seems to consist merely of a complex set of jural relations (a) as between the spouses, and (b) as between either spouse and all other persons.

[7] *Pennoyer v. Neff* (1877) 95 U. S. 714.

[8] (1914) 88 Conn. 689.

[9] (1908) 131 Ga. 217.

[1] (1916) 98 Atl. (Vt.) 917.

consent of the company. The buildings were unoccupied for the specified period on one or more occasions, but at the time of the fire they were occupied by the assured. The court was unanimous in holding that the provision merely suspended the insurance during the time the premises were not occupied, and that the policy was revived by the reoccupancy before the fire.

The decisions on this point are in hopeless conflict. Until recently the majority adhered to a literal interpretation of such a provision, and denied recovery, although the premises were reoccupied before the fire.[2] At the present time, however, it seems that the tendency of the courts is in harmony with the conclusion reached in the principal case.[3]

In some instances, at least, this conclusion is based upon an earlier case arising under a different form of policy in which the temporary suspension was expressly provided for.[4] This distinction, though vital, is either not noted, or if noted is not given its true weight.

In other cases, the courts place their decision squarely on the proposition that the non-fulfilment of the condition in no way contributed to the loss.[5] It is here held to be of no consequence whether or not the specific conditions have in the meantime been broken, provided the situation has been restored without increased risk existing at the actual time of the fire.[6] In each class of cases, the principle that substantial justice must be secured at all hazards seems to control the action of the court, and is held to justify the disregard of an express provision in a contract which the parties were competent to make.

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[2] *East Texas Ins. Co. v. Kempner* (1894) 87 Tex. 229; *German Ins. Co. v. Russell* (1902) 65 Kan. 373; *Moore v. Ins. Co.* (1882) 62 N. H. 240; *Hoover v. Ins. Co.* (1902) 93 Mo. App. 111; *Hardiman v. Fire Ass'n.* (1905) 61 Atl. (Pa.) 990.

[3] *Silver v. London Assur. Corp.* (1911) 61 Wash. 593; *Ins. Co. of No. Am. v. Pitts* (1907) 88 Miss. 587; *Borne v. Home Ins. Co.* (1900) 110 Ia. 379.

[4] *Cf. New England F. & M. Ins. Co. v. Wetmore* (1865) 32 Ill. 221; *Phoenix Ins. Co. v. Lawrence* (1862) 4 Met. (Ky.) 9; *U. S. F. & M. Ins. Co. v. Kimberly* (1870) 34 Md. 224.

[5] *Athens Mutual Ins. Co. v. Toney* (1907) 57 S. E. (Ga.) 1013; *Born v. Home Ins. Co., supra; Ins. Co. of No. Am. v. Pitts, supra; Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co.* (1907) 76 S. C. 76.

[6] *Traders Ins. Co. v. Catlin* (1896) 163 Ill. 256; *Germania Fire Ins. Co. v. Klewer* (1889) 129 Ill. 599; *Ins. Co. of No. Am. v. Pitts, supra; Born v. Home Ins. Co., supra.*

On the other hand, it is admitted that the insurance company would not be liable on a policy similar to the one in the principal case, if the premises were unoccupied at the time of the fire without the consent of the company.[7] Yet such a decision can be correctly sustained only upon the ground that occupancy was an express condition and its non-fulfilment rendered the contract unenforceable.[8] If the provision is to be given any significance, therefore, of what consequence is it that before the loss in the principal case the property was reoccupied? The rule is well settled that contracts of insurance like other contracts must be construed according to the sense and meaning of the terms employed.[9] Where the language is plain and unambiguous, courts must enforce the contract as made by the parties and cannot make a new one for them under the guise of construction.[10]

The language of the contract in question is seemingly clear and unambiguous and, unless the insured can show fulfilment of its conditions, he is not entitled to recover for the loss. The construction given by the courts in agreement with the principal case would seem to be a perversion of the terms of the contract, and a creation rather than an interpretation.

S. F. D.

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[7] *Ins. Co. of No. Am. v. Coombs* (1898) 19 Ind. App. 331; *Robinson v. Aetna Ins. Co.* (1897) 18 Ky. L. Rep. 865; *Hartford Fire Ins. Co. v. Webster* (1873) 69 Ill. 392.

[8] *German Ins. Co. v. Russell, supra; Girard F. & M. Ins. Co. v. Hebard* (1880) 95 Pa. St. 45; *Insurance Co. v. Gibbons* (1890) 43 Kan. 15.

[9] *Imperial Fire ns. Co. v. Coos Co.* (1893) 151 U. S. 452; *Mack v. Rochester Ins. Co.* (1887) 106 N. Y. 560.

[10] *Imperial Fire Ins. Co. v. Coos Co., supra; Dolliver v. Granite State Fire Ins. Co.* (1913) 111 Me. 275.