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RAILROAD MORTGAGES—PREFERENCE OF MATERIAL MEN.

The present number of the Supreme Court Reporter (20 Sup. Ct., No. 8) contains in the two cases of *Southern Railway Co. v. Carnegie Steel Co., Limited*, p. 347, and *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, p. 363, a valuable exposition of the law as to the preference that claims against the current income of a railroad have over a mortgage debt. In the *Carnegie Steel Co.* case a claim for steel rails furnished eleven months prior to the appointment of a receivership over the railroad, the rails being necessary to keep the road in running order, was given preference over the claims of mortgage creditors. The law as to this was settled in the case of *Fosdick v. Schall*, 99 U. S. 235, on grounds so logical and eminently just that its authority is unquestionable. But in the present case the time limit of six months, the extreme time yet set within which claims must be created in order to acquire this preference, is broken in upon for the first time. *Turner v. Indianapolis*, 8 Biss. (U. S.) 315. The principle of *Fosdick v. Schall* is that certain claims are of such a nature that the creditors look to the current earnings of the road for their payment. Current earnings are matters of at

least yearly compilation. It would seem therefore that the eleven months allowed in the present case is about the limit within which such claims can be created and priority given to them. Debts older than this raise at least the presumption that they rely more upon the general credit of the company for satisfaction than upon the current expenses. When such is the case the principles of *Fosdick v. Schall* hardly apply. *Thomas v. Peoria R. R.*, 36 Fed. 808. The principles to be drawn from the present decisions of the Supreme Court seem to be briefly these: In order to give preference to the claims of material men over mortgage creditors (1) such claims must be created within some limited time to be settled by the circumstances of each case; (2) they must be against the current earnings of the road, not against its general credit; (3) they must not be secured by collateral security; (4) they must be for such repairs to the road as are required to put it in safe condition, and not so extensive as to amount to practical reconstruction; (5) they must be for a special kind of material and labor. These principles should be kept clearly in mind, for some State courts have gone so far as to say that almost every claim of material men against a railroad must be paid before the mortgagee. Such a decision is undoubtedly wrong, not only being unjust to him who has lent the railroad his money, but also giving a greater security to some creditors than they deserve. The principle of *Fosdick v. Schall* is undoubtedly good law within the limits that seemed well established prior to this Carnegie Steel Co. case, and while the change made by this case seems proper and just, a limit has now been reached by this decision which it would seem can not be overstepped with impunity.

ENGAGEMENT TO MARRY, A STATUS—STATUTE OF FRAUDS.

The authorities are united in distinguishing marriage from ordinary civil contracts, declaring it the most prominent of that class of contractual relationships, each of which is termed a status; Schouler Dom. Rel., sec. 13. Nevertheless is not the agreement to enter into this status at a future time in itself simply an executory agreement, the peculiar properties of the marriage relationship not attaching until the executory contract is consummated and the legal status brought into being? There are many authorities to this effect, declaring that an agreement to marry is affected by the various rules and regulations which govern any contract, and if the promise is not to be performed within one year it falls within the fourth section of the Statute of Frauds, requiring such contracts to be in

writing. *Ullman v. Meyer*, 10 Fed. 241; *Nichols v. Weaver*, 7 Kans. 373. Confusion has arisen, in cases which apparently are at variance with these authorities, by a failure to distinguish between an agreement to marry *at a certain time* and a promise to marry *within such time*. In the latter case the agreement may be performed at any time; hence, it does not fall within the provision of the statute respecting agreements which are not to be performed within a certain time. *Lawrence v. Cooke*, 56 Me. 193; *Linscott v. McIntire*, 15 Me. 201.

In the recent case of *Lewis v. Tapman*, 45 Atl. Rep. 459 (Md.), the court recognizes the above distinctions, but still declares that the agreement to marry, not to be performed within a year, is not affected by the fourth section of the Statute of Frauds. Chief Justice McSherry, writing the opinion of the court, associates the nature of an engagement so intimately with that of marriage that he attributes to the former the peculiarities of a status, such as marriage itself possesses. It is difficult to see how the authorities support this position. The leading cases opposing the necessity of a writing to evidence an agreement to marry not to be performed within a year, are, first, the case of *Brick v. Flannigan*, 36 Hun. (N. Y.) 52, which takes such position for the reason that the title to the New York Statute of Frauds clearly indicates that it is to apply only to goods, chattels and things in action; and, second, the case of *Blackman v. Mann*, 85 Ill. 222, which announces the more difficult doctrine of a continuing contract, by which it is considered that so long as the parties exchange the various attentions incident to an engagement, so long do they each continually promise the other to consummate the marriage at the specified time. But if these attentions cease, and if the date of marriage is further removed from such time than a year, the statute applies. This is suggested in the same case which announces the rule.

Hence, the case under consideration is clearly a new step in the direction of elevating the importance of an engagement to marry, giving it such attributes of a status that under no circumstances does the fourth section of the Statute of Frauds apply. The court founds its conclusion also on the doctrine that there was no civil action for the breach of a promise to marry when the Statute of Frauds was passed, hence the statute does not apply to such agreements. But in this connection it must be remembered that numerous contractual remedies have been granted since the passage of that statute, which then were denied; and that each has been brought to the test of the statute's provisions. *Derby v. Phelps*, 2 N. H. 515.

INJURY TO UNBORN CHILD—ITS RIGHT TO SUE.

In the fall term of the Superior Court of Hartford County, Conn., Roraback, J., decided that an infant could not maintain an action for injuries received while in "ventre sa mere." We find the same point decided in the same way in *Allaire v. St. Luke's Hospital*, 56 N. E. Rep. 638, Boggs, J., dissenting. We infer that the court makes no distinction between injuries arising from negligence or intention, by the mother or third parties; or resulting from wrongful act of one having notice of its existence and paid for its care, and one who has no knowledge of its existence whatever. The reasons given are that the infant in its prenatal stage is "pars viscerum matris;" and that no precedent can be shown to support this unheard-of action.

The two prior cases against the infant's right to sue are differentiated from the present one, in that, *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (decided in 1884), was an action by the administrator for a child prematurely born and dying immediately, while the infant here survived; and that in *Walker v. Railway Co.*, 28 L. R. A. (decided in 1891), the ground of the decision was the lack of notice on the part of the railway company of the child's existence; the defendants here knowing the mother to be enceinte and receiving pay for care of mother and child.

At the earliest common law the infant was "pars viscerum matris" merely. But the rule of the civil law considering it as in esse for all beneficial purposes soon softened the rigor of the common law. The infant could take by devise and under the statute of distributions; could be vouched on a recovery, be an execution, and have an injunction lie in its favor. *Hellerson v. Woodford*, 4 Ves. 227. In this case Bullor, J., asked: "Why should not children in ventre sa mere be considered as generally in existence? They are entitled to all the privileges of other persons." As to property rights this principle is undisputed. Is there sufficient reason to keep it from including actions of tort?

In *Walker v. Railway Co.*, cited supra, which contains the learning on this subject, the chief justice was non-committal, the others against this right. In arguing against it, O'Brien, Asst. J., puts very forcibly the impossibility of proof, and the danger of making "lusus scientiæ" out of "lusus naturæ" in a court of law. There is force in this, but not enough, we submit, to justify depriving an infant of his action, where he can show the causal connection, merely because of the difficulty of proof in general. Were a

doctor deliberately and with malice, to put out the eyes of an unborn infant, should not the infant, if it survives, have its action? Its injury is the mother's only by a fiction of the law—perhaps the mother could only sue for loss of services; a loss insignificant compared to the infant's loss of his eyes. The loss is peculiarly his, and will have to be born by him while he lives, so there seems no good reason why in such a case it should not recover from the wrong doer.

It is true there is no precedent. As such occurrences are not infrequent, as observed by O'Brien, Asst. J., in *Walker v. Railway Co.*; this bears against the right, but not, we think, conclusively. "Precedents," says Mansfield, J., "were to illustrate principles and give them fixed certainty." While there is no precedent, the civil law rule considering the infant as "in esse" when it was for its benefit to do so, is a living principle in our law to-day, and there seems to be no such distinction between rights of property and rights to actions of tort, to admit the infant to one and exclude it from the other. Under Lord Campbell's and similar acts, an infant "in ventre sa mere" can sue for the death of its relative that took place while it was yet unborn. *The George v. Richard*, L. R. 3 Adm. & Ecc. 466; *Nelson v. Galveston R. R.*, 78 Tex. 62.

Although the Illinois court did not consider the argument by analogy of O'Brien, C. J., in *Walker v. Railway*, cited supra, and although the learned chief justice left it "an open question," his reasoning seems very convincing. It is undisputed that the State can punish as murder or manslaughter a wilful injury to an unborn infant, that results in death after parturition has taken place and its independent existence has begun. Now, if all crimes are also private wrongs, affecting the individual and also the State, 4 Black. 6, the infant has suffered a private wrong. Is it any less a private wrong if instead of being killed the infant was crippled for life? There seems no cogent reason for giving to an infant for purposes of righting public wrongs a status that is to be denied it when seeking redress for its private wrongs.

If this right is given, it is clear that it should be restricted. In the early period of gestation, as remarked by Boggs, J., in the present case, the infant may well be considered as "pars viscerum matris." But when the foetus reaches a stage, where, if the mother should die, it might live, as was the case in *Allaire v. St. Luke's Hospital*, justice might best be subserved by giving the infant his action.