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Civil Procedure -- Federal Rule of Civil Procedure 50(d) -- Disposition of Cases by the Court of Appeals after Granting Judgment Notwithstanding the Verdict

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the final analysis, the *Knoll* court seemed to sense this, as shown by its attempt to distinguish *Burdeau*; in reality it based its decision not on *Gambino* but on the idea that judicial integrity and the concept of an ordered society would be jeopardized were the courts to sanction governmental illegality by permitting the use of unconstitutionally obtained evidence.[22] Though disfavoring *Burdeau*, the court of appeals seemed to realize that there is no present ground for overruling that case. By distinguishing rather than disturbing, the court has avoided direct confrontation with a Supreme Court precedent and, at the same time, has undermined that precedent, for to distinguish a case which seems clearly controlling does little to strengthen it as precedent.

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Civil Procedure—Federal Rule of Civil Procedure 50(d)—Disposition of Cases by the Court of Appeals after Granting Judgment Notwithstanding the Verdict

In the recent case of *Neely v. Martin K. Eby Construction Co.*,[1] the Supreme Court attempted to clarify the procedure involved in using the judgment notwithstanding the verdict[2] at the appellate level in the federal system[3] under Federal Rule of Civil Procedure 50(d).[4] *Neely* was a diversity action in which the jury awarded plaintiff damages in her wrongful death action against defendant. After the verdict was returned, defendant moved under Rule 50(b) for judgment n.o.v., or in the alternative, for a new trial. The trial judge denied both motions and ordered judgment entered for plaintiff on the verdict. On appeal, the court of appeals ruled that the evidence was legally insufficient to go to the jury on the issue of negligence and ordered judgment n.o.v. for defendant. Then, instead of remanding the case to the trial court for new trial

[22] Elkins v. United States, 364 U.S. 206, 223 (1960), notes that the courts ought not to be a party to illegality by permitting the Government to use evidence in violation of the Constitution.

[1] 386 U.S. 317 (1967). This case has also been noted in *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 218 (1967).

[2] Hereinafter referred to as judgment n.o.v.

[3] For a general treatment of the practice and procedure in the federal system under Federal Rule 50, see F. JAMES, CIVIL PROCEDURE § 7.22 (1965); 5 J. MOORE, FEDERAL PRACTICE ¶¶ 50.01-.17 (2d ed. P. Kurland recomp. 1966) [hereinafter cited as MOORE]; Annot., 69 A.L.R.2d 449 (1960).

[4] FED. R. CIV. P. 50(d). See note 22 *infra*.

considerations, the court of appeals ordered the case dismissed.[5] The Supreme Court affirmed the decision of the court of appeals, saying that it was within the power of the court of appeals to order judgment n.o.v. and to dismiss the case without giving the verdict winner an opportunity to move for a new trial in the trial court.

Prior to the decision in *Neely*, the Supreme Court had always limited the use of the judgment n.o.v. in the federal system because of its emphasis on the seventh amendment right to jury trial. So great was the Court's reluctance to allow any infringement upon this right that when the judgment n.o.v. device was first brought before the Court, it was ruled unconstitutional in the federal system.[6] It was not until twenty-two years later that the Court relented and held the device constitutional in a new form,[7] which was incorporated into Rule 50 of the Federal Rules of Civil Procedure in 1938. The Court's grudging acceptance of the judgment n.o.v. continued in later cases in which the Court laid down a definite procedure to be followed at the trial court level if a litigant wished to avail himself of the device.[8]

It was only natural that when the Court first turned its attention to appellate use of the judgment n.o.v., it displayed an even greater reluctance toward allowing a court to deprive a verdict winner of his verdict.[9] The Court actually had two problems to face in this area. The first concerned the conditions under which an appellate court could *grant* judgment n.o.v., while the second problem concerned the proper *disposition* of the case by the appellate court once it had decided a judgment n.o.v. was warranted. Concerning the former problem, the Court made it clear from the beginning that the court of appeals has the power to grant judgment n.o.v. only if a motion to that effect is first made at the trial

[5] 344 F.2d 482 (10th Cir. 1965).

[6] Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913). For a more comprehensive treatment of this subject, see 5 MOORE ¶ 50.07.

[7] Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935).

[8] For example, Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940), established the rule that the trial court should also rule on any new trial motion presented if the court decides to grant judgment n.o.v. This rule has been codified in FED. R. CIV. P. 50(c)(1). Another example of the importance of following the proper procedure in the trial court is that if the verdict loser fails to move for a directed verdict at the close of all the evidence, the trial court is powerless to grant judgment n.o.v. See 5 MOORE ¶ 50.08. The Court also stressed that the trial judge could, in his discretion, order a new trial, even though a judgment n.o.v. was warranted, where it was likely that the verdict winner could cure his defect in proof in a new trial. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 215-16, 218 (1947).

[9] For a comprehensive treatment of this development, see 5 MOORE ¶ 50.12.

court level.[10] As long as the verdict loser moves properly in the trial court for judgment n.o.v., it is well settled[11] that the court of appeals can review the sufficiency of the evidence and grant judgment n.o.v.[12] In *Neely*, this issue of appellate power to grant judgment n.o.v. was not presented because the verdict loser had followed the correct procedure in the trial court.[13]

Neely does, however, focus on the second problem concerning appellate use of the judgment n.o.v.—the proper disposition of the case once the court of appeals decides a judgment n.o.v. is warranted. Unfortunately, this problem has not received much attention from the Court in the past, although it has arisen many times in the lower courts.[14] When faced with this situation, appellate courts have frequently remanded the case to the trial court without directions,[15] giving the verdict winner an opportunity to invoke the discretion of the trial judge to grant a new trial. Yet other appellate courts have done exactly what the court of appeals did in *Neely* by granting judgment n.o.v. and ordering the trial court to dismiss the action,[16] thus depriving the verdict winner of an opportunity to invoke the discretion of the trial court. Despite earlier dictum,[17] it was not until *Neely*[18] that the Supreme Court specifically addressed itself to this problem of disposition.[19]

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[10] Two leading cases have established this proposition. In Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947), the verdict loser failed altogether to move for judgment n.o.v. at the trial court level. Yet on appeal, the court of appeals granted judgment n.o.v. The Supreme Court reversed, declaring it fundamentally unfair for an appellate court to deprive the verdict winner of his verdict until the trial court had first addressed itself to the question. Later, in Johnson v. New York, N.H. & H.R.R., 344 U.S. 48 (1952), the Court again reversed the court of appeal's entry of judgment n.o.v. for the verdict loser where the verdict loser had moved only to "set aside" the verdict at the trial court level.

[11] Some commentators, however, have criticized appellate review of the sufficiency of the evidence. *E.g.*, C. WRIGHT, FEDERAL COURTS § 95, at 368 (1963).

[12] *E.g.*, Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322 (1967). *Cf.* 28 U.S.C. § 2106 (1964).

[13] 386 U.S. at 325.

[14] For a summary of the cases in this area see 5 MOORE ¶ 50.15.

[15] *E.g.*, Sears, Roebuck & Co. v. Barkdoll, 353 F.2d 101 (8th Cir. 1955).

[16] *E.g.*, United States v. Fenix & Scisson, Inc., 360 F.2d 260 (10th Cir. 1966); Kaminski v. Chicago, R. & I.R.R., 200 F.2d 1 (7th Cir. 1952).

[17] Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 253-54 (1940) (dictum).

[18] When the Court granted certiorari in this case, it also granted certiorari in another case, Utah Pie Co. v. Continental Baking Co., 382 U.S. 914 (1965), and posed similar questions to the parties. However, in Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967), the Supreme Court reversed the decision of the court of appeals and consequently did not reach the questions presented in the writ of certiorari.

[19] Several writers, however, have anticipated this problem. See Kaplan, *Amend-*

Since the judgment n.o.v. device was first incorporated into Federal Rule 50 in 1938, the wording of the rule has undergone change to clarify and codify the judicial tightrope that the Court had previously laid down for litigants.[20] When Rule 50 was amended in 1963, subdivision (d) was proposed[21] to handle the cases like *Neely* where the trial court denies the verdict loser's motions for judgment n.o.v. and new trial. The wording of Rule 50(d)[22] reflects the developments in the law until 1963 as laid down by the Supreme Court. For example, the Rule takes for granted that the appellate court has the power to review the sufficiency of the evidence and to reverse the trial court if necessary.[23] Yet the Rule does not explicitly address itself to the ultimate power of the court of appeals in disposing of a case once the court decides a judgment n.o.v. is warranted. The Advisory Committee's Note to Rule 50 admits this omission and gives this explanation:

> Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied [at the trial court level], since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage.[24]

In light of the Court's earlier reluctance in allowing appellate termination of a verdict winner's case,[25] the *Neely* holding seems to represent a significant departure from the attitude of the Court in the previous cases. To reach such a decision, the Court surprisingly relied almost exclusively on an interpretation of Rule 50. Justice White, writing for a majority

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ments of the Federal Rules of Civil Procedure, 1961-1963 (II), 77 HARV. L. REV. 801, 819-20 (1964); Comment, *Judgment Notwithstanding the Verdict—Rule 50(b)*, 51 NW. U.L. REV. 397, 400-02 (1956); Note, *Rule 50(b): Judgment Notwithstanding the Verdict*, 58 COLUM. L. REV. 517, 524-25 (1958).

[20] Three of the leading cases in this area were Johnson v. New York, N.H. & H.R.R., 344 U.S. 48 (1952); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940).

[21] 31 F.R.D. 643 (1962).

[22] FED. R. CIV. P. 50(d):

> If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

[23] "If the appellate court reverses the judgment. . . ." *Id.*

[24] FED. R. CIV. P. 50, Advisory Comm. Note, 31 F.R.D. 646 (1962).

[25] See cases cited note 20 *supra*.

of six justices,[26] rejected the idea of an automatic remand by the appellate court upon reversal of the trial court's rulings under Rule 50(d), saying such a rule would not serve Rule 50's purpose of speeding litigation and avoiding unnecessary retrials.[27] The Court said that any right to a new trial for the verdict winner lay in the hands of the court of appeals: "Jurisdiction over the case then passed to the Court of Appeals and petitioner's right to seek a new trial after her jury verdict was set aside became dependent upon the disposition by the Court of Appeals under Rule 50(d)."[28] Looking at the wording in Rule 50(d), the Court found nothing in it expressly *denying* to the court of appeals the power of reversal and dismissal, and inferred from this an intent to *allow* such power.[29]

Despite the simplicity of this approach, Justice Black in his dissent argued that Rule 50(d) must be interpreted in the restrictive light in which it evolved,[30] and if viewed in this manner, the failure of the Rule expressly to grant the power of reversal and dismissal must mean an intent to *deny* such power to the court of appeals.[31] Whereas the majority interpreted Rule 50(d) to be permissive in the sense that the court of appeals may remand or dismiss a case after entering judgment n.o.v.,

[26] The Court addressed itself solely to the procedural problem involved and did not review the issue of the sufficiency of the evidence, saying the writ of certiorari did not cover this question. Justices Douglas and Fortas entered an opinion concurring in the construction of Rule 50, but thought the evidence was sufficient to go to the jury. Justice Black dissented on the grounds that the evidence was sufficient to go to the jury, and that he disagreed with the construction of Rule 50.

[27] 386 U.S. at 326.

[28] *Id.* at 324.

[29] *Id.* The Court also rejected the applicability of FED. R. CIV. P. 50(c)(2), which provides: "The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict." The Court said this provision was applicable only in those cases where the trial court had *granted* the motion for judgment n.o.v., whereas in this case, the trial court had denied the motion. Justice Black, however, argued in his dissent that Rule 50(c)(2) should apply. Utilizing the logic of the majority in their interpretation of Rule 50(d), Justice Black argued that nothing in Rule 50(c)(2) expressly indicates that a verdict winner loses his right to move for a new trial in the trial court if that court's entry of judgment n.o.v. against him is on the direction of an appellate court rather than on its own initiative. 386 U.S. at 340.

[30] One writer has described the Supreme Court's treatment of Rule 50 as follows: "At the hands of the present Supreme Court, with its great—perhaps exaggerated—reverence for the supposed benefits of jury trial, this rule has been narrowly interpreted so that he who would have its benefit must indeed walk a tightrope." F. JAMES, CIVIL PROCEDURE § 7.22 at 334 (1965) (footnote omitted).

[31] 386 U.S. at 340-41.

Justice Black pointed out that the rule is really permissive toward the verdict winner, not toward the court of appeals. It says that the verdict winner "*may*, as appellee, assert" his grounds for a new trial to the court of appeals.[32] Nowhere does it say he *must* do so to protect his right to a new trial. Therefore, Justice Black concluded that the case could not be dismissed until the verdict winner had been given an opportunity to move in the trial court for a new trial.

This conflict between Justice Black and the majority on the proper interpretation of Rule 50, especially Rule 50(d), reveals what should have been apparent from the beginning—the Rule simply does not explicitly answer the disposition problem.[33] Whatever the basis of the Court's opinion in *Neely*, however, its effort to deal with this question requires interpretation. The most obvious interpretation of the case is a literal one; any right to a new trial for the verdict winner now lies within the discretion of the court of appeals. In this light, *Neely* represents a radical departure from the Court's previously displayed reluctant attitude[34] and deals the verdict winner in the federal system a damaging blow. The Court is now willing for any appellate court not only to review the sufficiency of the evidence, but also to terminate the case.

This literal interpretation of *Neely* raises the fundamental question of whether the court of appeals is actually the proper forum in which the verdict winner should have to seek his new trial. A long line of state and federal cases require that the trial court, not an appellate court, decide a new trial issue.[35] *Cone v. West Virginia Pulp & Paper Co.*[36] is illustrative:

> Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. . . .
> . . . [A] litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question.[37]

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[32] See note 22 *supra*.
[33] See note 24 *supra* and accompanying text.
[34] See cases cited note 20 *supra*.
[35] "But the grant or denial of a new trial is primarily addressed to the sound discretion of the trial court, which normally has a feel for the case that an appellate court usually does not have. . . ." 6A MOORE ¶ 59.05, at 3735 (footnote omitted). This point has been recently re-emphasized in Iacurci v. Lummus Co., 387 U.S. 86 (1967). See note 44 *infra* and accompanying text.
[36] 330 U.S. 212 (1947).
[37] *Id.* at 216-17.

Although the facts differed in *Neely* and *Cone* in that *Cone* dealt with the *power* of the court of appeals to grant judgment n.o.v. where the verdict loser failed to make the proper motion in the trial court,[38] the Court did indicate in dictum that the court of appeals would have been powerless to dismiss the case even if the verdict loser had moved properly in the trial court for judgment n.o.v.[39] The Court rejected a suggestion, adopted now in *Neely*, that the verdict winner should have to claim his right to a new trial in the court of appeals.[40]

There is one crucial fact in *Neely* that indicates, when considered in conjunction with some of the Court's language, another possible interpretation of the case more in line with precedent: at no time did Miss Neely try to state to the court of appeals the grounds entitling her to a new trial.[41] This fact, plus the Court's statement in *Neely* that the court of appeals should remand some cases,[42] could be taken to mean that the verdict winner must present his grounds for a new trial in his appellate brief or face dismissal. If he does state his grounds, however, or if they readily appear in the record,[43] then the trial court may still be the proper forum to decide most questions.

It is arguable that one recent Supreme Court case supports this analysis. In *Iacurci v. Lummus Co.*,[44] the procedural setting was similar to that in *Neely*. After a special verdict by the jury for plaintiff, defendant moved for judgment n.o.v. and a new trial. The trial judge denied both motions. On appeal, the court of appeals reversed the trial court, ordering judgment n.o.v. and a dismissal of the case. Contrary to the result in *Neely*, however, the Supreme Court reversed the court of appeals, saying *Iacurci* was one of those cases which should be remanded to the trial court for consideration of a new trial.[45] In a tone distinctly pre-

[38] See note 10 *supra*.

[39] 330 U.S. at 218.

[40] *Id.* Justice Black emphasized this point in his dissent. See 386 U.S. at 341.

[41] Implicit in this course of action was an assumption that the case would be remanded to the trial court for consideration of the new trial issue should the court of appeals reverse. Reply Brief for Petitioner at 12-13, Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967).

[42] 386 U.S. at 325, 329.

[43] The Court said that it was incumbent upon the court of appeals to consider the new trial question in light of its own experience with the case although the verdict winner never presented grounds for a new trial in her appellate brief. *Id.* at 329-30.

[44] 387 U.S. 86 (1967).

[45] The Court did not, however, go so far as to say that every time possible grounds for a new trial were evident on appeal the verdict winner automatically would be entitled to a remand to the trial court. Instead, the Court limited the decision to the particular facts involved.

Neely, the Court said that the trial judge was in the best position to rule on the issue of a new trial.[46] Justice Harlan vigorously dissented, adopting the literal interpretation of *Neely*, and stated that the decision placed the possibility of remand within the informed discretion of the court of appeals.[47] Finding no manifest abuse of this discretion, Justice Harlan saw no reason to reverse.

Only later cases can clarify the true meaning of *Neely* and *Iacurci*. At this point, however, several observations can be made. First, *Neely* has at least effectively changed the wording of Rule 50(d) from a permissive indication to the verdict winner that he *may*, as appellee, assert his grounds for a new trial in his appellate brief, to a strong warning that he *had better* do so or risk dismissal. Secondly, if the Court meant in *Neely* to give the power of dismissal to the court of appeals only when no new trial grounds were presented or were evident from the record, then the choice of words in *Neely* leaves this point in need of clarification. Thirdly, whatever the rule in *Neely* may be, its application to the particular facts in the case seems unfortunate, because the record revealed no independent consideration by the court of appeals of possible grounds for a new trial for the verdict winner.[48]

One possibly critical effect of *Neely* will be its interpretation by the courts of appeal. It seems likely that most appellate courts facing a heavy backlog of cases will construe *Neely* literally, as did Justice Harlan in *Iacurci*, to vest ultimate disposition of a case in their hands.[49] Thus, until the Court clarifies its meaning, the prudent practitioner also should take *Neely* literally. To do so leaves two courses of action open to the verdict winner who finds himself in Neely's position. First, he can do exactly what the Court suggests: state his grounds for a new trial in his appellate brief. In light of the uncertain value of this alternative, a second and perhaps wiser course of action would be for the verdict winner to ask the trial judge for a conditional grant of a

[46] 387 U.S. at 88.

[47] *Id.* at 88-89.

[48] The Court assumed that the court of appeals had not ignored its duty in this area, though it did say it would have been better if the court of appeals had included this consideration in the record. 386 U.S. at 330. Also, Justice Black raised the point in his dissent that since the Court held for the first time that the verdict winner had to raise his grounds for a new trial in his appellate brief or risk dismissal, it would have been fairer to have given Neely a chance to go back to the court of appeals and present her grounds. 386 U.S. at 342-43.

[49] *E.g.*, O'Hare v. Merck & Co., 381 F.2d 286 (8th Cir. 1967); Prudential Ins. Co. of America v. Schreffler, 376 F.2d 397 (5th Cir. 1967).

new trial before going to the appellate court.[50] This procedure is awkward, however, since the verdict winner must argue on the one hand that the verdict be upheld and a new trial be denied the verdict loser, yet must also show errors committed entitling himself to a new trial should the appellate court reverse. Assuming a literal interpretation of *Neely*, this complex procedure may be the only way left to insure that the verdict winner will receive the benefit of the trial court's discretion in new trial considerations.

In addition to possible judicial errors committed at trial, it is also possible for a trial judge to grant a new trial as a matter of grace when there is a good reason why the verdict winner should be given another chance to prove his case. For this reason, it is common for a verdict winner to argue to the trial judge in response to the verdict loser's motion for judgment n.o.v. and new trial that the verdict ought to be upheld and the new trial denied the verdict loser; but that if the trial judge is contemplating giving a judgment n.o.v., then the verdict winner at least deserves a new trial to cure his defect. As in the case of prejudicial error, a verdict winner who wants to make certain that the trial judge has an opportunity to rule on this question must also argue these grounds to the trial judge for a conditional grant of a new trial before going to the court of appeals. Yet it is even more awkward than in the case of prejudical error for the verdict winner to argue conditionally for a new trial to cure a possible defect in his proof before any court has said there was a defect. Of course, the verdict winner could make his argument to the court of appeals, but there would seem to be a fundamental difference between asking an appellate court staring at a cold transcript for a new trial as a matter of grace and making this request to the judge who saw and heard the case and who thought the verdict should stand in the first place.

Clarification of the meaning of *Neely* and *Iacurci* is needed. As the history of drafting, amending, and interpreting Rule 50 indicates, this will be a difficult task because many conflicting considerations are involved in attempting to formulate precisely a rule of practice in this critical context. But it is suggested that this clarification should be made with two points in mind. First, it is probably not possible for a litigant to make a meaningful argument for a new trial when he is a *verdict winner* at the time of framing and presenting this argument. Secondly, the new trial argument becomes even more tenuous at the appellate level

[50] See sources cited in note 19 *supra* for a discussion of this alternative.

than at the trial court level. Allowing the verdict winner the right to argue conditionally for a new trial either at the trial court level or the appellate level seems to ignore the practicalities of advocacy, and indeed of human nature. Only a verdict winner who has been deprived of his verdict can argue meaningfully for a new trial, and he should have the right to argue his case to the trial judge who saw and heard the case.

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Constitutional Law—Public School Authorities Regulating the Style of a Student's Hair

The availability of public education is often subject to compliance with school regulations governing student appearance and conduct. Courts have jurisdiction by way of mandamus or otherwise to review the legality of such regulations and may order reinstatement or enrollment when the exclusion is made pursuant to regulations that are unreasonable, arbitrary, or discriminatory, or when the exclusion infringes upon some constitutional right.[1] Following this standard, courts have upheld expulsion for using cosmetics, wearing objectionable clothing,[2] smoking,[3] serving liquor to other students,[4] marriage,[5] creating school bus disturbances,[6] and even writing a letter to a newspaper in which the student was "fanatical in his [favorable] views as to atheism."[7]

In *Ferrell v. Dallas Independent School District*,[8] a public high school principal refused to enroll three students—members of a musical group known as "Sounds Unlimited"[9]—because the length and style of their hair could "cause commotion, trouble, distraction, and a disturbance in school."[10] The students claimed that the regulations prescribing appearance constituted an arbitrary and unreasonable violation of their consti-

[1] *The Legal Status of the Public School Pupil*, 26 N.E.A. RESEARCH BULL. 28 (1948).
[2] Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).
[3] Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924).
[4] State v. Clapp, 81 Mont. 200, 263 P. 433, *cert. denied*, 277 U.S. 591 (1928).
[5] State v. Board of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957).
[6] *In re* Neal, 164 N.Y.S.2d 549 (Child. Ct. 1957).
[7] Robinson v. University of Miami, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958).
[8] 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 37 U.S.L.W. 3127 (U.S. Oct. 15, 1968).
[9] *Id.* at 698.
[10] *Id.* at 699.