Notre Dame Law Review

Volume 25 | Issue 2 Article 6

2-1-1950

Recent Decisions

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Recommended Citation

John F. Mendoza, William J. Verdonk, William G. Greif & James L. O'Brien, *Recent Decisions*, 25 Notre Dame L. Rev. 353 (1950).
Available at: http://scholarship.law.nd.edu/ndlr/vol25/iss2/6

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must stay within his bounds and not hold himself out as qualified to render legal advice, or act in any manner which would have a tendency to destroy the attorney-client relationship. On the other hand, the normal conduct of a legitimate business incidentally involving matters which, standing alone, would constitute the practice of law, is not of itself sufficient to render such conduct objectionable.

James W. Oberfell

RECENT DECISIONS

ADMINISTRATIVE LAW—PROCEDURAL DUE PROCESS—THE RIGHT OF ORAL ARGUMENT.—*Federal Communications Commission v. WJR, The Goodwill Station, Inc.*, 337 U. S. 265, 69 S. Ct. 1097 (1949). On August 22, 1946, the Federal Communications Commission granted, without notice or hearing, the application of the Coastal Plains Broadcasting Company for a construction permit to erect a new secondary-type broadcasting station in North Carolina. This permit specified that the new station was to broadcast on the same frequency which previously had been used exclusively by Station WJR, which is located in Detroit. WJR then filed a petition with the commission for reconsideration and hearing of the commission's decision of August 22, 1946. Shortly thereafter, Coastal Plains filed with the commission an opposition, legally regarded as a demurrer or a motion to dismiss. This opposition raised the question whether the allegation in the petition stated objectionable interference to WJR's protected zone. The petition of WJR was denied without hearing on the grounds that on the facts alleged, there was no interference within the normally protected contours as specified by commission regulation. On appeal to the Court of Appeals for the District of Columbia, *WJR, The Goodwill Station, Inc. v. Federal Communications Commission*, 174 F. (2d) 226, 233 (D. C. Cir. 1948), it was held:

> . . . due process of law as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like.

Certiorari was granted by the Supreme Court of the United States on the commission's appeal. The Court held that due process of law, as conceived by the Fifth Amendment, does not require oral argument upon every question of law arising in administrative proceedings of every sort.

The important issue, as pointed out by the Court, was the extent to which due process of law, as guaranteed by the Fifth Amendment, requires federal administrative tribunals to accord the right of oral argument to one claiming to be adversely affected by their action, particularly in regard to questions of law. Before an answer can be given to this question, the nature of procedural due process must first be examined.

The test of whether procedural due process has been accorded is whether an administrative agency, in its procedure, as distinguished from the effects of its order upon substantial rights, has succeeded in satisfying the requirements of the Federal Constitution. *Railroad Commission of Calif. et al. v. Pacific Gas & Electric Co.*, 302 U. S 388, 58 S. Ct. 334, 82 L. Ed. 319 (1938). In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937), the Court declared that the right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. The requirements of due process have been deemed satisfied if one has had reasonable notice and reasonable opportunity to be heard and to present one's claim and defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. *Missouri* ex rel. *Hurwitz v. North et al.*, 271 U. S. 40, 60 S. Ct 437, 70 L. Ed. 656 (1926). In *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 351, 58 S. Ct. 904, 82 L. Ed. 1381 (1938), it was stated that: "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights."

The case principally relied upon for upholding the right of oral argument before administrative tribunals is that of *Londoner v. Denver*, 210 U. S. 373, 386, 28 S. Ct. 708, 52 L. Ed. 1103 (1908). In that case the city council assessed a tax for the cost of paving a street upon which the lands of the plaintiff abutted. The plaintiff appealed on the grounds that he was not accorded an opportunity to be heard by the city council before the enactment of the assessment ordinance. The Supreme Court in this case held that even though an opportunity was given to submit in writing all objections:

> . . . something more than that, even in proceedings for taxation, is required by due process of law . . . even here a hearing, in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief. . . .

In *Erie Railroad Co. v. Mayor and Alderman*, 79 N. J. L. 512, 76 Atl. 1065 (1910), the court, following the *Londoner* case, confirmed the plaintiff's right of oral argument. In this case the defendants had instituted proceedings with a view to the construction of a street over the lands of the plaintiff.

The courts have recognized three limitations upon the right of oral argument. These are: (1) the number of persons concerned; (2) cases in which the agency has the alternative of granting oral arguments; (3) agency procedure.

The first limitation, for example, was imposed in *Bi-Metallic Investment Co. v. State Board of Equalization et al.*, 239 U. S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372 (1915). Mr. Justice Holmes in delivering this opinion said:

> Where a rule of conduct applies to more than a few people, it is impractical that everyone should have a direct voice in its adoption . . . There must be a limit to individual argument if government is to go on.

The Court distinguished the *Londoner* case on the ground that the relatively small number of persons concerned were exceptionally affected in that case. The net effect of this decision was to require the trial technique in the *Londoner* case but not to require it in the second case. Other courts, following the "number of persons" doctrine, have applied it as a partial or sole criterion. *Common Council of City of Watertown v. Dep't of Finance*, 59 S. D. 573, 241 N. W. 731 (1932); *Baker v. Paxton*, 29 Wyo. 500, 215 Pac. 257 (1923).

The second limitation was an outgrowth of the *Morgan* cases, *infra.* It has been held that these decisions explicitly granted the right of oral argument, although in actuality they seemed to do no more than make it an alternative for the administrative agency to decide. As Mr. Chief Justice Hughes stated in *Morgan v. United States*, 298 U. S. 468, 481, 56 S. Ct. 906, 80 L. Ed. 1288 (1936): "The one who decides must hear . . . Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense."

Again in *Morgan v. United States*, 304 U. S. 1, 18, 58 S. Ct. 999, 82 L. Ed. 1129 (1938), Hughes said:

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise it is a barren one.

The Supreme Court in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 60 S. Ct. 437, 84 L. Ed. 656 (1939), decided that questions of procedure, in ascertaining the public interest, were explicitly and by implication left by the legislature to the commission's own devising, so long as it observed the fundamental requirements for the protection of private as well as public interests. Following this "alternative rights theory," the Court has held that written statements of revenues and other expenses would meet the requirements of a lawful hearing. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 19 S. Ct. 804, 43 L. Ed. 1154 (1899).

The final limitation is imposed by the agencies of government through their procedural rules. They have wisely established these rules in order to protect individual as well as the public interests. The general rule requires that the plaintiff request oral argument. Under these circumstances, if the party fails to request it, he can not be heard later to complain that the opportunity was denied. *Tri-State Broadcasting Co. v. Federal Communications Commission,* 107 F. (2d) 956 (D. C. Cir. 1939). Under the Federal Rules of Civil Procedure, FED. R. CIV. P. 78, the courts, in order to expedite their business, may make provisions by rule for the submission of motions without oral hearing, upon brief, written statements of reasons in support and opposition. It must be noted that, because of the very nature of administrative agencies, their procedural rules will not conform to common law trial techniques. In *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.,* 295 Fed. 53 (D. C. Cir. 1923), *aff'd.,* 269 U. S. 217, 46 S. Ct. 73, 70 L. Ed. 242 (1925), it was held that since the Interstate Commerce Commission is an administrative body, the validity of its proceedings is not dependent upon compliance with procedural rules of the courts of law. The agency may conduct its proceedings in such a manner as will best be conducive to the proper dispatch of business and to the ends of justice.

The instant case would seem to belong most properly in the category of the third limitation. The Court decided that since no particular form of procedure is required to satisfy due process under the Fifth Amendment, the parties litigant must look to the Communications Act, 48 STAT. 1064 (1934), 47 U. S. C. § 151 *et seq.* (1946), for protection of the right of oral argument. Since the Act provides that oral argument will be accorded in a single situation only, namely, in proceedings heard initially before an examiner under section 409(a), the Court concluded that the commission would have the discretion of allowing it in other instances. It is interesting to note that the Court of Appeals has, since the decision in the *WJR* case, construed sections 312(b) and 154(j) of the Act, which were also relied on by the appellees in the principal case. Sections 312(b) and 154(j), providing for "reasonable opportunity to show cause," and that "Any party may appear before the commission and be heard in person or by attorney," were held to require no more than consideration of written briefs. *American Broadcasting Co. v. Federal Communications Commission,* ....F. (2d).... (D. C. Cir. 1949).

As the preceding cases have shown, the Court of Appeals' broad extension, in its consideration of the instant case, of the right of oral argument, as opposed to the rule announced by the Supreme Court in reversing this decision, has never been given general recognition by the courts. It must be noted that the majority of the cases which recognize a broad right of oral argument are those which interpret the

Fourteenth Amendment in relation to city ordinances and state statutes. The principal question as to state procedure raised in the federal courts is whether procedural due process as guaranteed by the Fourteenth Amendment to the Constitution has been satisfied. See 1 VOM BAUR, ADMINISTRATIVE LAW § 322 (1942).

The principal case has already been cited in *American Broadcasting Co. v. Federal Communications Commission, supra,* which extends the rule in the principal case to apply to questions of fact. This would seem to be a reasonable extension, since the Due Process Clause does not distinguish between questions of law and questions of fact. *L. B. Wilson, Inc., v. Federal Communications Commission,* 170 F. (2d) 793 (D. C. Cir. 1948). In refusing the opportunity of oral argument, however, the court in the *American Broadcasting Co.* case reminded the commission that this does not relieve them from the duty of granting a fair hearing. The court stated, 3 PIKE & FISCHER AD. LAW (Decisions) § 4 Id. 12-101, 109 (1945):

> While the decision of the Supreme Court in the *WJR* case held, as above pointed out, that the Commission may act upon written submission, *i.e.,* without oral argument, we do not understand the ambit of that decision to be so broad as to relieve the Commission from the duty of receiving evidence and of making findings of both the basic or underlying and the ultimate facts before it decides an issue of fact presented by a petition and an opposition thereto.

This decision should give notice to the commission that the vigilance of the courts will disallow injurious experimentation with a party's rights.

The Court in the instant case proceeded on the theory that the right of oral argument should be decided on a case-to-case basis, taking into consideration the differences in the particular interests affected, the circumstances involved, and the procedures prescribed by Congress for dealing with them. In Davis, *The Opportunity to be Heard in the Administrative Process,* 51 YALE L. J. 1093 (1942), the author asserts that the problem can be solved by discovering the best practical means to assure enlightened administrative action. Among the means by which private interests can be protected are: interviews, conferences, collaboration between agency representatives and private representatives in drafting rules, and reception of written evidence and argument. Although the parties must look to the courts for a final determination and protection of their rights, the aforementioned methods will be valuable in achieving this end.

John F. Mendoza

BILLS AND NOTES — NEGOTIABILITY OF NOTE WHEN CONDITIONAL SALES CONTRACT IS ATTACHED BY PERFORATION—KNOWLEDGE OF FAILURE OF CONSIDERATION.—*Commercial Credit Corp. v. Orange County Machine Works et al.*, ...Cal. App....., 208 P. (2d) 780 (1949). The Orange County Machine Works arranged for the purchase of a mechanical press from the General American Precooling Corporation through a dealer, the Ermac Company, by means of a conditional sales contract with the dealer obligating the dealer to transfer title when the purchase price was paid. Attached to the contract, and separated from it only by a perforated line, was a note which the contract recited was to be negotiable "apart from this contract, even though at the time of execution it may be temporarily attached hereto by perforation or otherwise." The dealer assigned this contract and endorsed and delivered the attached note to the appellant, a finance company, and received in payment a check which it deposited to its account. The dealer then drew its own check to the order of the owner which was dishonored upon presentment for payment. Accordingly, the manufacturer retained possession of the press. The finance company severed the note from the conditional sales contract and brought this action on the note as a holder in due course. The trial court held that the finance company was not a holder in due course upon a finding that the finance company was aware at the time of negotiation that the Ermac Company was not the owner of the press which it agreed to deliver, and that no delivery of the press had been made.

The court in the instant case, in rejecting this argument, construed the conditional sales contract to be nothing more than a promise to convey when the purchase price had been paid. Thus the court held that knowledge of the executory nature of the contract did not prevent the finance company from becoming a holder in due course, if the instrument was negotiable in character.

The appellee also attacked the negotiable character of the instrument, contending that the fact that the contract was attached to the instrument at the time of negotiation rendered the promise to pay conditional. The court, in holding that the negotiability of the note was not impaired by its transfer with the conditional sales contract as part of one transaction, adhered to the prevalent view that assignment of a contract under such circumstances does not render the accompanying note non-negotiable.

While, as the court states, there were no cases in California which had passed on this point directly, there are a few cases on related matters that are of interest in a consideration of this problem. California seems to have held, at least before the adoption of the Negotiable Instruments Law in 1917, CAL. CIV. CODE § 3082 *et seq.* (1949), that the recital in a note that the note is secured by a mortgage renders the note non-negotiable, when the note and the mortgage were

created in the same transaction. *National Hardwood v. Sherwood,* 165 Cal. 1, 130 Pac. 881 (1913); *Helmer v. Parsons et al.,* 18 Cal. App. 450, 123 Pac. 356 (1912). This holding seems, however, to stem from the fact that mere notice of the existence of the mortgage was considered sufficient to destroy negotiability. Thus it was held that a note that did not recite the existence of a mortgage was nonetheless "non-negotiable" in the hands of a purchaser who took with notice, when the note and the mortgage were executed as part of one transaction. *Metropolis Trust & Savings Bank v. Monnier,* 169 Cal. 592, 147 Pac. 265 (1915). However, the fact that the note and mortgage were executed as part of one transaction has been held essential to the impairment of the negotiability of the note, even when the holder of the note was also the assignee of the mortgage. *Pitman v. Walker,* 187 Cal. 667, 203 Pac. 739 (1922). In a more recent case, *Williams v. Silverstein,* 213 Cal. 269, 2 P. (2d) 165 (1931), it was held that the mere fact that a note was executed with an escrow agreement as part of the same transaction did not render the note non-negotiable; but it is perhaps important to note that the terms of the escrow agreement were held not to have conditioned the promise to pay. The confused conception of negotiability in all these cases makes understandable the confession of the court in the instant case of its inability to find ". . . any cases in California helpful in determining this problem."

The rule adopted by the California court in the principal case is, however, in direct contradiction with that laid down by the Supreme Court of Nebraska. Nebraska adopted without alteration the Negotiable Instruments Law rule, NEGOTIABLE INSTRUMENTS LAW § 3, that mere reference to collateral security will not destroy negotiability. NEB. REV. STAT. § 62-103 (1943). Where, however, a conditional sales contract and a note were printed on the same sheet of paper and the paper was later divided into two parts, the Nebraska court held that the purchaser, who did the dividing, was charged with knowledge of the terms of the contract, and thus subject to personal defenses. *Van Nordheim v. Cornelius et al.,* 129 Neb. 719, 262 N. W. 832 (1935).

It is evident from an examination of the Nebraska decision that the court relied heavily on the case of *Roblee et al. v. Union Stockyards Nat. Bank,* 69 Neb. 180, 95 N. W. 61 (1903). An analysis of the *Roblee* case reveals a distinguishing feature in that there, not a conditional sales contract, but a mortgage was involved, the terms of which required payment of uncertain sums at uncertain times before maturity. The uncertainty of payment and the uncertainty of the time of payment were held referable to the note, thus impairing its negotiability.

The *Roblee* case appears to be on no less precarious grounds for the reason that the court there relied on *Lincoln National Bank v. Perry et al.,* 66 Fed. 887 (8th Cir. 1895), which held that a note, which had

an agreement embodied within it rendering the amount payable at maturity uncertain, was non-negotiable. The disparity between the Perry case and the Nebraska case is even greater than that between *Roblee et al. v. Union Stockyards Nat. Bank, supra,* and *Van Nordheim v. Cornelius et al., supra.* In the Perry case, there was no conditional sales contract or note complete on its face, but there was instead a single instrument containing a contract and a promise to pay an uncertain amount. The substantiating effect of the Perry case is further weakened by *Kobey v. Hoffman et al.,* 229 Fed. 486 (8th Cir. 1916), in which it was said that the Perry decision apparently overlooked the rule in *Chicago Railway Equipment Co. v. Merchant's Nat. Bank,* 136 U. S. 268, 10 S. Ct. 999, 34 L. Ed. 349 (1890), holding that a clause affecting the time and amount of payment similar to that found in the Perry case does not destroy the negotiability of a promissory note.

The decision of the Nebraska court is, however, representative of several jurisdictions. *Commercial Credit Co. v. Childs,* 199 Ark. 1073, 137 S.W. (2d) 260, 128 A. L. R. 726 (1940); *Finance Co. of the South v. Jones,* 13 Ga. App. 94, 125 S. E. 510 (1924); *State Nat. Bank v. Cantrell,* 47 N. M. 389, 143 P. (2d) 592, 152 A. L. R. 1216 (1943). A number of other jurisdictions, including Iowa, *McKnight v. Parsons,* 136 Iowa 390, 113 N. W. 858 (1907), and Michigan, *Shattuck et al. v. Reed,* 221 Mich. 155, 190 N. W. 649 (1922), take a contrary view.

In Alabama it has been held that the negotiability of an instrument is not affected by a provision describing the property and reserving title in the seller. As the court stated:

> It is axiomatic, of course, that such paper in the hands of a bona fide purchaser for value before maturity is immune from the defenses which might be available against it when suit is brought by the original holder, unless it be shown that such purchaser had notice of such defenses. [*Commercial Credit Co. v. Seale et al.,* 30 Ala. App. 440, 8 So. (2d) 199, 201 (1942).]

The principal case is in accord with the greater weight of authority, as well as with established mercantile practice. The widespread use of discounted notes in conditional sales transactions requires judicial preservation of their negotiability even at the cost of a certain degree of injustice in individual cases.

William J. Verdonk

CONSTITUTIONAL LAW—CONSERVATION—EXTENT OF THE POLICE POWER.—*State v. Dexter,* ....Wash....., 202 P. (2d) 906 (1949). This was an action by the State of Washington against Avery Dexter for an injunction to prohibit illegal timber-cutting operations. The state appealed from a trial court judgment in favor of Dexter. Dexter had held title in fee simple, since September, 1945, to three hundred and

twenty acres of marketable second growth timber. From November, 1945, until October, 1947, he had cut considerable quantities of fir, larch, white pine and hemlock without complying with Wash. Laws 1945, c. 193, as amended by Wash. Laws 1947, c. 218. In 1947, the state forester became aware of Dexter's illegal operations and directed him to desist until he obtained a permit. Such a permit would only be given upon assurance that operations would be conducted in accordance with the state statutes. Dexter refused to comply and proceedings were instituted by the state. The trial court sustained the demurrer interposed by Dexter on the ground that the statutes referred to above were unconstitutional. The Supreme Court of Washington reversed the trial court, and this decision was affirmed without opinion by the Supreme Court of the United States. *Dexter v. State*, ...U. S....., 70 S. Ct. 147 (1949).

In the past, the Federal Government has instituted many programs for the purpose of conserving the soil and natural resources, but the impossibility of centralizing control over six million farmers, operating under extremely diverse physical conditions, has made supplementary state land-use legislation an administrative as well as a legal necessity. See Note, 50 YALE L. J. 1056 (1941).

The rule is well settled that not only adjoining landowners, but the public at large, have an interest in the preservation of the natural resources of the country, sufficient to justify appropriate legislation designed to prevent exploitation or waste thereof by the owners of the land on which they are found. *Bandini Petroleum Co. v. Superior Court, Los Angeles County, California*, 284 U. S. 8, 52 S. Ct. 103, 76 L. Ed. 136 (1931). It is a well settled principle that the secondary purpose of forest conservation is the prevention of soil erosion. Huge quantities of water must be absorbed by the standing timber if millions of tons of soil are to be prevented from washing into the ocean every year. It can hardly be doubted that the general welfare is in serious jeopardy when "recent government studies indicate that more than half the total land area of the United States has already been damaged, with 50,000,000 acres rendered unfit for any future cultivation. The direct cost to individual farmers in terms of reduced fertility alone is estimated at more than $400,000,000 a year." See Note, 50 YALE L. J. 1056 (1941).

Dexter, and others who had argued against state conservation legislation, contended that any legislation which limited his alleged right to the unqualified use and enjoyment of property was a denial of due process, an infringement of his right to property, and an impairment of the obligation of contracts in violation of the Constitution of the United States. Recent decisions dealing with related questions would not seem to bear out Dexter's contentions. It has been held, however, that any law abridging rights to a use of property (which use

does not infringe the rights of others) or limiting the use of property beyond what is necessary to provide for the welfare and general security of the public, is not a valid exercise of the police power. The owner of land has the right to use his property for such legitimate purposes as he may see fit, utilizing such portions of it as he pleases, as long as in so doing he in no way injuriously affects the public health, safety, and general welfare of the state. *Curran Bill Posting and Distributing Co. v. Denver,* 47 Colo. 221, 107 Pac. 261 (1910).

The Supreme Court of the United States, on the other hand, has held that, even though a member of a class which is regulated may suffer an economic loss not shared by others, and his property may lose utility and depreciate in value as a consequence of the regulation, this does not constitute a barrier to the exercise of the police power. *Bowles v. Willingham,* 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944); *L'Hote v. New Orleans,* 177 U. S. 587, 20 S. Ct. 788, 44 L. Ed. 899 (1900). A Maine court has asserted that, under the police power of the state, the legislature may regulate and restrict the use and enjoyment by landowners of the natural resources of the state, so as to protect the state from waste, and prevent the infringement of the rights of others.. Such legislation, it seems, does not infringe the constitutional inhibitions against the taking of property without due process of law, or deny the equal protection of the laws, impair the obligation of contracts, or take property without just compensation. In re *Opinion of the Justices,* 103 Me. 506, 69 Atl. 627 (1908). In a Washington case decided prior to the principal case, *State v. Sears,* 4 Wash. (2d) 200, 103 P. (2d) 337 (1940), it was held that the police power of the state extends not only to the preservation of the public health, safety and morals, but also to the preservation and promotion of the general welfare. In a recent Illinois case, the supreme court declared that an owner of property has the right to use it as he desires, limited only by the proper exercise of the police power. *Lee v. City of Chicago,* 390 Ill. 306, 61 N. E. (2d) 367 (1945). An essential element of the right of private property is the right to use or dispose of such property in any lawful manner which does not, however, infringe upon the rights of others. Property rights are held subject to the reasonable exercise of the state police powers.

Some states have provided in their constitutions that the natural resources of the state shall be protected, conserved and replenished, and that the legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the state. *State v. Thrift Oil & Gas Co.,* 162 La. 165, 110 So. 188 (1926).

It was stated in In re *Opinion of the Justices,* 103 Me. 506, 69 Atl. 627, 628 (1908), that:

> It is for the Legislature to determine from time to time the occasion and what laws and regulations are necessary or expedient for the de-

> fense and benefit of the people; and however inconvenienced, restricted, or even damaged particular persons and corporations may be, such general laws and regulations are to be held valid, unless there can be pointed out some provision in the state or United States Constitution which clearly prohibits them.

It is, as the justices further asserted:

> . . . a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.

The trend of recent legislation and decisions mirrors the growth of the law concerning property rights. The Washington legislature had recognized the need for state land-use legislation, and the court in the instant case upheld this legislation on the basis of public policy and as a valid exercise of the police power.

The Supreme Court of the United States has declared that a regulation which is reasonable in relation to its subject and is adopted in the interests of the community satisfies due process. Freedom of contract and property rights are not absolute. They are qualified and limited by the rights of others. The legislature is the primary judge of the necessity of an enactment, and the courts are not authorized to deal with the wisdom of the legislative policy or the adequacy of the enactment. *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937).

William G. Greif

CONSTITUTIONAL LAW—CONTEMPT BY PUBLICATION AS A "CLEAR AND PRESENT DANGER" TO THE ADMINISTRATION OF JUSTICE.—*Baltimore Radio Show, Inc. v. State,* .... Md. ...., 67 A. (2d) 497, *cert. denied,* .... U. S. ...., 18 L. W. 4090 (1949). In applying the "clear and present danger" test as set forth by the United States Supreme Court, the Court of Appeals of Maryland has held that the broadcast during the pendency of a trial of the fact that an accused has confessed and was convicted of similar crimes does not constitute such a "clear and present danger" to his right to a fair trial as to justify an abridgment of the right of free expression guaranteed by the First and Fourteenth Amendments to the Federal Constitution.

The appellants had been found guilty of contempt by the Criminal Court of Baltimore City for the broadcast of certain news dispatches relating to the arrest of one James, who at that time was in custody on a charge of murder. James was arrested and held for investigation in regard to the stabbing of an eleven year old girl. Two days later,

James made a written confession and was formally charged. On the basis of information received from the United Press, the appellant radio stations broadcast news items regarding a prior conviction of the accused for a similar crime, as well as other facts relating to the circumstances of his arrest and confession. This information was obtained from the Police Commissioner of Baltimore, or at least verified by him. James subsequently submitted to a trial by the court without a jury and was found guilty of first degree murder. James' counsel elected a trial by the court because, as he testified later at the contempt proceedings, he "could not have picked a jury that had not been infected . . . by the knowledge of this man's confession and his criminal background." At the trial, both his confession and the fact of his previous criminal record were admitted.

The citations for contempt were based upon Rule 904 of the Rules of the Supreme Bench of Baltimore City, as well as upon the inherent power of the courts to issue citations for contempt for the protection of a prisoner's right to a fair trial. The applicable provisions of Rule 904, as set forth in the instant case, state:

> In connection with any case which may be pending in the Criminal Court of Baltimore, or in connection with any person charged with crime and in the custody of the Police Department of Baltimore City, or other constituted authorities, upon a charge of crime over which the Criminal Court of Baltimore has jurisdiction, whether before or after indictment, any of the following acts shall be subject to punishment for contempt: . . .
>
> C. The issuance by the police authorities . . . of any statement relative to the conduct of the accused, statements or admissions made by the accused or other matter bearing upon the issues to be tried. . . .
>
> E. The publication of any matter which may prevent a fair trial, improperly influence the court or the jury, or tend in any manner to interfere with the administration of justice.
>
> F. The publication of any matter obtained as a result of a violation of this rule.

While the lower court held that paragraph E was invalid and rested its finding upon paragraph F, the court in the instant case declared both paragraphs invalid and concluded that the conviction, to be upheld, would have to be within the inherent power of the courts to punish for contempt, insofar as that power is not restricted by the protections afforded by our constitutional system. In holding further that the exercise of this inherent power in this case violated the First and Fourteenth Amendments, the court relied on *Bridges v. California,* 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941); *Pennekamp v. Florida,* 328 U. S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946); and *Craig v. Harney,* 331 U. S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947).

Courts in a majority of the states have ruled that they possess the power to punish summarily contempt by publication, even though

there seems to be no valid basis for this assumption at common law. See Nelles and King, *Contempt by Publication,* 28 COL. L. REV. 401-31, 525-62 (1928). Without questioning the basis of the power as a matter of common law, it is certain that the scope of the power possessed by American courts is restricted by our constitutional system and is thus much narrower than the power possessed by the English courts, which have no such restrictions. See the opinion of Mr. Justice Black in *Bridges v. California,* 314 U. S. 252, 264, 62 S. Ct. 190, 86 L. Ed. 192 (1941). It is now certain that "Freedom of speech is among the fundamental rights protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Near v. Minnesota,* 283 U. S. 697, 707, 51 S. Ct. 625, 75 L. Ed. 1357 (1930). State power to punish for contempt by publication is therefore limited by the First and Fourteenth Amendments. See *Pennekamp v. Florida, supra.*

The "clear and present danger" test was first introduced by Mr. Justice Holmes in *Schenck v. United States,* 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1918), where he stated:

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Although Mr. Justice Frankfurter declared in *Pennekamp v. Florida* that "clear and present danger" was used by Mr. Justice Holmes only as a literary phrase and not as a technical legal formula, it has, with some expansion, been consistently used by the court.

In previous attempts to determine the "balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes," *Pennekamp v. Florida,* 328 U. S. 331, 336, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946), the Court has made it clear that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges v. California,* 314 U. S. 252, 263, 62 S. Ct. 193, 86 L. Ed. 192 (1941). As was stated in the most recent case dealing with a conviction for contempt by publication: "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney,* 331 U. S. 367, 376, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947).

The dissent in the instant case attacked the holding on the ground that the cases relied on by the majority have as their *ratio decidendi* that all judges have more "fortitude, firmness, wisdom, and honor than can be expected from everyone in private life," and that therefore an

act, to constitute a "clear and present danger" which a judge is involved, would have to be of greater magnitude than would an act calculated to affect one not a member of the judiciary. The dissenting judge was therefore of the opinion that the tests for determining the existence of a "clear and present danger" which have previously been applied do not apply to cases involving jurors, and thus that the conviction should have been affirmed. This distinction seems questionable. While it is true that the cases considered by the Supreme Court were all cases involving publications which reflected on the integrity of the judiciary or which were calculated to influence the conduct of a judge, it is difficult to say, on the authority of those cases, that the Court will be any less mindful of the right of free expression when a case involving a juror is presented to it. But assuming that judges wear heavier coats of armor against influence from publications, the test is rendered no less workable; for, the determining of the degree of influence and its effect on justice is no more difficult in the case of a judge than in the case of a juror.

The mere fact that a juror knows of a confession and a conviction for a similar crime does not disqualify him, even though such evidence is inadmissible. All that is required is that the juror has not formed an opinion which would prevent him from reaching a verdict on the law and facts as presented at the trial. Ex parte *Spies et al.*, 123 U. S. 131, 31 L. Ed. 80 (1887); *Garlitz v. State*, 71 Md. 293, 18 Atl. 39 (1889).

Concededly, any resolution of the conflicting demands of the right to a fair trial and the right of free expression will not be entirely satisfactory. It is submitted, however, that the result in the instant case represents at least a workable balance between them that is in accord with modern constitutional theory.

James L. O'Brien

CONSTITUTIONAL LAW—PUBLIC TRANSPORTATION FOR RELIGIOUS SCHOOL STUDENTS.—*Visser et ux. v. Nooksack Valley School District No. 506*, ...Wash....., 207 P. (2d) 198 (1949). A Washington statute, extending transportation at public expense to children attending religious schools, has been held to be a violation of the constitution of that state. The plaintiffs in this case were seeking a writ of mandamus to compel the defendant school district to provide transportation for the plaintiff's children, who attended a religious school in that district. The supreme court of the state, in affirming a judgment dismissing the cause, ruled that the statute was repugnant to certain provisions of the state constitution, WASH. CONST. Art. 1, § 11, and Art. 9, § 4,

which provide that: "No public money or property shall be appropriated for . . . the support of any religious establishment"; and that, "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Thus it was found that the statute in question was, in effect, an appropriation of public money for the support of a religious cause.

The court, in arriving at this conclusion, premised its argument on the proposition that religious schools would inevitably derive direct and substantial benefits from the service authorized by the statute. Because the state is prohibited from appropriating public moneys for a religious cause, it was concluded that the statute was unconstitutional.

In determining the validity of this conclusion, the manner in which the court regarded the benefits which accrued to the religious school under the statute in issue should be noted. The court stated that:

> Any private, religious, or sectarian schools which are founded upon, or fostered by, assurances that free public transportation facilities will be made available to the prospective pupils thereof, occupy the position of receiving, or expecting to receive, a direct, substantial, and continuing public subsidy to the schools, *as such,* thus encouraging their construction and maintenance, and enhancing their attendance, at public expense.

Proceeding from this point, the court directs itself to a well established principle, ". . . the police power—broad and comprehensive as it is—may not be exercised in contravention of plain and unambiguous constitutional inhibitions." *Mitchell v. Consolidated School Dist. No. 201,* 17 Wash. (2d) 61, 135 P. (2d) 79, 80 (1943). From this it is inferred that the statute in question was invalid because of certain benefits effected thereby, even though its primary purpose was in accord with the compulsory educational policy of the state and in furtherance of public interests. A distinction was made, however, between the benefits conferred by the statute in this case, which are said to be without the realm of the police power, and other undefined, incidental benefits. The court stated:

> Transportation to or from school differs, in both degree and nature, from those indirect, incipient, and incidental benefits which accrue to schools, as buildings, or to its pupils, as citizens, under normal health, welfare, and safety laws of the state.

The court thereby reasons that although the state may indirectly benefit religion or religious institutions, it had in this instance exceeded its limits. The justification for this position may be seriously questioned when the above distinction, as made by the court, is closely examined. For example, the police officer stationed at a dangerous intersection, so that religious school students may cross safely, performs a service to the school as well as to the public, for it may be supposed that many parents would not patronize that school if there were no police officer at the intersection, and their children were thus subjected to unnecessary dangers. The function of the police

officer, with regard to the urban student, is analogous to the function of the school bus, with regard to the rural student. Both provide for the safety and welfare of the student, and incidently encourage the maintenance and enhance the attendance of the school. If the principle announced in this case is valid, it must necessarily extend to many other similar benefits which accrue to religion and religious institutions; thus it might not be unreasonable to invalidate the tax exemptions which have so long been enjoyed by religious institutions in general.

A number of other jurisdictions have, during recent years, been called upon to judge similar statutes with regard to like constitutional provisions. A California court, in upholding the constitutionality of one of these statutes, *Bowker v. Baker et al.,* 73 Cal. App. (2d) 653, 167 P. (2d) 256, 258 (1946), gave substance to public interest without ignoring the California constitution. In this case the court said:

> And in considering the constitutionality of the statute, the question presented is not whether it is possible to condemn it, but whether it is possible to uphold it. It is not to be declared invalid, because incidental to the main purpose, there results an advantage to individuals . . . The legislature is vested with a large discretion in determining what is for the public good and what are public purposes for which public moneys can be rightfully expended, and that discretion cannot be controlled by the courts except when its action is clearly evasive.

This view is shared by other states: *Nichols et al v. Henry,* 301 Ky. 434, 191 S. W. (2d) 930 (1945); *Board of Education v. Wheat,* 174 Md. 314, 199 Atl. 628 (1938); *Chance et al. v. Mississippi State Textbook Board,* 190 Miss. 453, 200 So. 706 (1941). The courts of these states have recognized the vital and profound interest which the state has in children—that interest which has been evidenced by the institution of extensive public school systems, compulsory education laws and other related benefits. Acknowledging the earnest desire of the states to provide for the welfare of children, the courts have progressed in the belief that this policy extends to *all* children and that *all* should, therefore, partake of those services which are designed to aid them in fulfilling their legal duty.

The duty, imposed by compulsory education laws, may be discharged by attendance at a non-public school, for it has been stated that the American parent has the uncontroverted right to choose any school which has been accredited by the state. *Pierce v. Society of the Sisters,* 268 U. S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). The state may not, as stated by the court in the principal case, "obstruct or discourage the existence of schools established for religious purposes." While admitting the negative duty of the state toward the religious school, the court, by its decision, proceeds to place that school at a distinct disadvantage, so that its very existence may not

only be discouraged but also seriously threatened. The parent of the religious school student has the financial burden of supporting two school systems, i.e., the one provided by the state and the one to which he has chosen to send his children. It would seem that benefits of the type conferred in the instant case could well be supplied at the expense of the state, indiscriminately and without violation of constitutional provisions, since such benefits must, realistically, be termed incidental rather than direct and substantial. And the parent, meanwhile, who chooses to send his children to a religious school, would not be obliged to bear expenses over and above the direct and substantial support of such schools. The right which was advocated in *Pierce v. Society of the Sisters, supra,* could easily become more of a fiction than a fact. The court does not consider this possibility when it dispassionately states: ". . . it must ever be remembered that . . . all children . . . have a perfect right to attend the public schools and thus avail themselves of the opportunity and benefit of transportation to such schools."

Justice Black, in rendering the majority opinion in *Everson v. Board of Education,* 330 U. S. 1, 18, 67 S. Ct. 504, 91 L. Ed. 711 (1947), found that a New Jersey statute, akin to the one in the present case, did not violate the First Amendment to the Federal Constitution. Subtle and vague distinctions were not used as a means of invalidating the statute which was laudable in its purpose; the expenditure of public funds for transportation of children attending non-public schools was viewed in the proper perspective, as was the true relation of Church and State:

> Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

The Supreme Court, in the *Everson* case, did not attempt to reset the wall of separation which stands between the Church and the State so as to penalize adherents of certain religious beliefs, nor did it seek to establish a rule which would favor individuals or groups of individuals, for the Court was in accord with the earlier view of the Court in *Cochran v. Louisiana State Board of Education,* 281 U. S. 370, 375, 50 S. Ct. 335, 74 L. Ed. 913 (1930), that "Individual interests are aided *only* as the common interest is safeguarded." (Emphasis supplied.)

The Washington court, in the instant case, has agreed that "transportation is in furtherance of compulsory education policy" and "represents . . . the legislative concern for the safety of children who must use the highways in attending school in accordance with the law," but

has unfortunately concluded that this "is beside the question." If this reasoning were to be given universal application, it would certainly cause the policy of the state, in providing for the public welfare, to suffer some embarrassment in the extension of aid to non-profit hospitals which are open to the general public but operated by religious groups, *Kentucky Bldg. Comm. et al. v. Effron,* 310 Ky. 355, 220 S. W. (2d) 836, 25 NOTRE DAME LAWYER 155 (1949); and in furnishing secular books to religious school students, *Chance et al. v. Mississippi State Textbook Board, supra*; and in giving aid to war veterans returning to schools, public, private and religious, *State* ex rel. *Atwood v. Johnson,* 170 Wis. 251, 176 N. W. 224 (1920).

The doctrinaire application in the instant case of the principle of separation of Church and State can hardly be commended. It would seem that the rationale of the court proceeds with a view to freedom *from* religion rather than freedom *of* religion.

F. Richard Kramer

CONTRACTS—FEDERAL EMPLOYERS' LIABILITY ACT—VALIDITY OF CONTRACTS WAIVING VENUE RIGHTS.—*Boyd v. Grand Trunk Western R. Co.,* ....U. S....., 70 S. Ct. 26 (1949). The defendant, Boyd, was injured in Battle Creek, Michigan, while employed by the plaintiff, Grand Trunk Western Railroad Company. At the request of the defendant, the plaintiff railroad company had, on two occasions, advanced him fifty dollars. In consideration of the said advancements, the defendant signed agreements which stipulated that if his claim could not be settled and he wished to commence an action for damages against the railroad, such suit should "be commenced within the county or district where I resided at the time my injuries were sustained, or in the county or district where my injuries were sustained and not elsewhere." Although the defendant signed this agreement limiting the trial forums to either the Circuit Court of Calhoun County, Michigan, or the United States District Court of the Eastern District of Michigan, he nevertheless commenced an action in the Superior Court of Cook County, Illinois. The plaintiff railroad, relying upon the aforementioned agreements, instituted this action in a circuit court of Michigan to enjoin the defendant from prosecuting that suit. The Michigan Circuit Court held that the agreements were void and dismissed the suit. The Supreme Court of Michigan on appeal of this case held that the contracts were valid on the grounds that venue relates to the convenience of the parties, and as such, the right may be waived by either party. *Grand Trunk Western R. Co. v. Boyd,* 321 Mich. 693, 33 N. W. (2d) 120 (1948). On appeal to the Supreme

Court of the United States, the latter ruling was reversed and the Court held that the employee's right to the choice of venue could not be waived. The Court stated that any agreement between the employer and employee in which a waiver was attempted was void, since it constituted a method by which the carrier could limit its liability and was a direct contradiction of the congressional intent as set out in the broad provisions of the Federal Employers' Liability Act, 35 STAT. 65 (1908), 45 U. S. C. § 51 *et seq.* (1946).

Contracts which unreasonably restrict the choice of venue have often been vitiated because they are considered contrary to public policy. See RESTATEMENT, CONTRACTS § 558 (1932); 6 WILLISTON, CONTRACTS § 1725 (Rev. ed. 1938). Yet there has been a great conflict in the results reached by various lower tribunals when such contracts come within the scope of the Federal Employers' Liability Act. In view of this diversity in the interpretation of the Act, the Supreme Court of the United States granted certiorari, *Boyd v. Grand Trunk Western R. Co.*, 337 U. S. 923, 69 S. Ct. 1172, 93 L. Ed. 1039 (1949), in order that the Court might rule on this matter for the first time. The precise question presented in this case was whether the agreement by the defendant waiving the privilege of venue afforded him by section 6 of the Federal Employers' Liability Act, was such a "contract, rule, regulation or device" as would enable the carrier to exempt itself from liability in frustration of the intent of Congress as expressed in section 5 of the Act.

The provisions of section 5 state that "any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void. . . ." 35 STAT. 66 (1908), 45 U. S. C. § 55 (1946). Section 6, relating to the privilege of venue in a suit by an employee, states that "an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 35 STAT. 66 (1908), as amended, 62 STAT. 989 (1948), 45 U. S. C. § 56 (Supp. 1948).

The obvious intent of Congress in the enactment of certain amending provisions in 1911 was to enable an injured employee to bring a suit at any place specified in section 6 which would be most convenient to him. The legislative history of the Act shows that the venue provisions were chosen to remedy the gross injustices resulting from the superior economic bargaining position of the carriers and the restrictive venue provisions of the original Liability Act, 34 STAT. 232 (1906), which in many cases compelled the employee to travel great distances and expend unreasonable sums to litigate his claim. The occurrence of this practice was frequent at the time of the passage of this section. In the

words of Senator Borah, who submitted the report of the bill, section 6 was to enable the employees "to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." 45 CONG. REC. 4034 (1910).

The interpretation of section 5 of the Federal Employers' Liability Act is set forth in *Duncan v. Thompson,* 315 U. S. 1, 62 S. Ct. 422, 86 L. Ed. 575 (1941), which differs from the principal case in that a condition precedent of returning the advancement was placed on the employee before he could commence an action against the carrier. In that case, the Supreme Court of the United States viewed the legislative history of section 5 and said that "Congress wanted section 5 to have the full effect that its comprehensive phraseology implies." *Duncan v. Thompson,* 315 U. S. 1, 6, 62 S. Ct. 422, 86 L. Ed. 575 (1941). The purpose of Congress was to broaden the scope of section 5 and make it more comprehensive by a generic description, thereby bringing within its purview any contract, rule, regulation or device to exempt a carrier from liability. *Philadelphia B. & W. R. Co. v. Schubert,* 224 U. S. 603, 32 S. Ct. 589, 56 L. Ed. 911 (1912). From these two decisions, it is evident that the intent of Congress in enacting section 5 of the Liability Act was to stamp out the many and various attempts of employers to limit their liability in suits by their employees. See also H. R. REP. No. 1386, 60th Cong., 1st Sess. 30 (1908).

What interpretation have the courts given provisions respecting venue in suits arising under the Federal Employers' Liability Act? Generally, venue provisions of the Judiciary Act, 28 U. S. C. § 1391 *et seq.* (Supp. 1948), may be waived as they are mere expressions of a personal privilege respecting the venue, *Neirbo Co. et al. v. Bethlehem Shipbuilding Corp., Ltd.,* 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167 (1939). But such has not been the case when the venue provisions of the Liability Act have been construed. Courts have not looked with favor on attempts to waive these provisions, as these provisions have been considered a matter of right. These are statutory rights conferred on a private person, but which affect the public interest, and generally such rights cannot be waived. *Akerly v. New York Central R. Co.,* 168 F. (2d) 812 (6th Cir. 1948); cf. *Brooklyn Savings Bank v. O'Neil,* 324 U. S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945).

In the principal case, the Court adopted the doctrine of *forum non conveniens* in approving its holding in Ex parte *Collette,* 337 U. S. 55, 69 S. Ct. 944 (1949), that nothing in the revised Judiciary Code, 28 U. S. C. §§ 1391-1406 (Supp. 1948), affects the initial choice of venue afforded employees under section 6 of the Federal Employers' Liability Act. The revised code allows for the transference of any civil action to any other district for the convenience of the parties and witnesses, in the interests of justice, 28 U. S. C. § 1404(a) (Supp. 1948). This, however, does not limit or otherwise modify any

right in section 6 of the Liability Act, and an action may still be brought in any court, state or federal, in which it might have been brought previously. Ex parte *Collette, supra;* cf. *Kilpatrick v. Texas and P. Ry. Co.,* 337 U. S. 75, 69 S. Ct. 953 (1949). Prior to the revision of the Judiciary Code, the application of the doctrine of *forum non conveniens* was not available in Liability Act suits. *Baltimore and Ohio Railroad Co. v. Kepner,* 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28 (1941); *Miles et al. v. Illinois Central Railroad Co.,* 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129 (1942); see *McKnett v. St. Louis and San Francisco Railway Co.,* 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227 (1934).

With regard to the venue provisions of the Liability Act as a burden on interstate commerce, in *Denver and Rio Grande Western Railroad Co. et al. v. Terte,* 284 U. S. 284, 52 S. Ct. 152, 76 L. Ed. 295 (1932), it was said that the disadvantage of litigation far from the scene of the accident was not substantial enough to justify a state court in forbidding the continuation of litigation in a district where the lines of the carrier were located. A carrier must submit to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened. *Hoffman v. Missouri* ex rel. *Foraker,* 274 U. S. 21, 47 S. Ct. 485, 71 L. Ed. 247 (1927). Congress has the power to regulate interstate commerce, and thereby it may place incidental burdens on it. *Chesapeake and Ohio Ry. Co. v. Vigor,* 90 F. (2d) 7 (6th Cir. 1937). The privilege of venue is an absolute one and an alleged burden on interstate commerce is not sufficient to extinguish this right. *Sacco v. Baltimore and O. R. Co.,* 56 F. Supp. 959 (E. D. N. Y. 1944).

Distinguished from the principal case is *Callen v. Pennsylvania Railroad Co.,* 332 U. S. 625, 68 S. Ct. 296, 92 L. Ed. 24 (1948). In that case, an injured employee executed a general release of "all claims and demands which I have, or can, or may have" against the Pennsylvania Railroad Company for the personal injuries sustained. The Supreme Court of the United States held that this "release" of claims against the railroad was not a violation of the provisions of the Federal Employers' Liability Act, since a release of claims does not exempt it from liability, but is a means of compromising a claimed liability.

The cases in the lower courts which hold contra to the Court's opinion in the instant case make a sharp distinction between liability and venue or substantive rights and procedural rights. They also hold that the contracts which limit venue are not opposed to public policy, because there exists a right to waive such venue provisions. By maintaining this proposition, these courts would seem to have disregarded congressional intent and the reasoning of *Duncan v. Thompson, supra.* See *Herrington v. Thompson,* 61 F. Supp. 903 (W. D. Mo. 1945);

Clark v. Lowden et al., 48 F. Supp. 261 (Minn. 1942); *Ditwiler v. Lowden,* 198 Minn. 185, 269 N. W. 367 (1936).

From the standpoint of the principal case, it appears that the intent of Congress was to afford an injured employee an unrestricted choice of the forums authorized in section 6 of the Liability Act and to confer a substantial right which was not to be subject to waiver in any manner whatsoever. The Supreme Court, in the instant case, by holding that the contract was invalid on the grounds that it was a limitation of liability on the part of the carrier, has given effect to the clear intent of Congress.

The abuse to which the broad provisions of section 6 have been put in the past seems, however, a matter of proper concern for Congress. The increasing use of these provisions in furthering schemes to coerce settlements by threats of litigation far from the place of the injury is well known. See *Atcheson, T. & S. F. Ry. v. Andrews et al.,* ....Ill. App....., 88 N. E. (2d) 364 (1949). Legislative re-examination of the venue provisions of the Federal Employers' Liability Act could do much to achieve a proper balance in effectuating the purpose for which it was originally enacted.

Louis Albert Hafner

CRIMINAL LAW—CONSTITUTIONAL LAW—HABITUAL CRIMINAL STATUTES.—*Smith v. State,* ....Ind....., 87 N. E. (2d) 881 (1949). The state, in a two-count indictment, charged the defendant with vehicle taking under IND. ANN. STAT. § 10-3011 (Burns 1933), and further alleged that the defendant was an habitual criminal under the Indiana Habitual Criminal Act. IND. ANN. STAT. § 9-2207 (Burns 1933). The Indiana Habitual Criminal Act provides that any defendant who has previously been convicted of two felonies, shall upon conviction of a third felony, be imprisoned for life. Defendant was tried by a jury, found guilty of both counts, and was given a life sentence. In his appeal the defendant attacked the Habitual Criminal Act on three grounds: first, that it was unconstitutional; second, that the conduct of the trial had resulted in prejudicial error; and third, that vehicle taking did not come within the scope of the habitual criminal statute.

In questioning the constitutionality of the statute, it was contended that the accused was subjected to double jeopardy, that the punishment inflicted was cruel and unusual, and that the law was ex post facto in its effect. The court upheld the validity of the statute, and in doing so, maintained that the accused was not put in jeopardy twice for the same crime, since the Habitual Criminal Act does not charge a crime per se, but merely increases the punishment for the third

offense. The opinion of the court did not consider the question of cruel and unusual punishment, but in other jurisdictions the argument has been refuted on the grounds that the words, "cruel and unusual" apply to medieval methods of punishment and not merely to an increase in the duration of time to be spent in confinement. *McDonald v. Commonwealth*, 173 Mass. 322, 53 N. E. 874 (1899); *State v. Moore*, 121 Mo. 514, 26 S. W. 345 (1894); *State* ex rel. *Larabee v. Barnes*, 3 N. D. 319, 55 N. W. 883 (1893); see *Davis v. Berry*, 216 Fed. 413 (S. D. Iowa 1914), where sterilization of criminals was held to be a cruel and unusual punishment.

The defendant contended that the statute was ex post facto on the theory that the prior offense occurred before the act became effective, but the court rejected this argument on the ground that the punishment imposed was not for, nor did it relate back to the first offense, but that the punishment was for the third offense only, and was made greater because of the situation in which the defendant by his previous crimes had placed himself.

A search of the authorities reveals that the constitutionality of such statutes increasing the punishment for a second or subsequent offense has been repeatedly attacked, but the courts have consistently upheld them. *Iowa* ex rel. *Gregory v. Jones*, 128 Fed. 626 (S. D. Iowa 1904); *People v. Smith*, 36 Cal. App. 88, 171 Pac. 696 (1918); *State v. Dowden*, 137 Iowa 573, 115 N. W. 211 (1908); *Armstrong v. Commonwealth*, 177 Ky. 690, 198 S. W. 24 (1917); *Commonwealth v. Graves*, 155 Mass. 163, 29 N. E. 579 (1891); In re *Miller*, 110 Mich. 676, 68 N. W. 990 (1896); *Taylor v. State*, 114 Neb. 257, 207 N. W. 207 (1926); *People v. Dean*, 94 Misc. 502, 159 N. Y. S. 601 (1916); *Blackburn v. State*, 50 Ohio St. 428, 36 N. E. 18 (1893); *Tucker v. State*, 14 Okla. Crim. Rep. 54, 167 Pac. 637 (1917); *State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27 (1909). The courts in upholding habitual criminal statutes, base their reasoning on the premise that the offense is against the state, and that it does no violence to any constitutional guaranty for the state to rid itself of depravity when its reform efforts have failed. The true ground upon which these statutes are sustained would seem to be that the punishment is imposed for the subsequent offense only, and that in determining the amount or nature of the penalty to be inflicted, the legislature may require the courts to take into consideration the persistence of the defendant in his criminal course. When a person has proved immune to correction by the ordinary modes of punishment inflicted upon first offenders, it then becomes the duty of the government not only to seek some other method to curb his criminal propensities, that he might not continue further to inflict himself upon law abiding members of society, but as well, by example, to deter others similarly inclined from

repeated, felonious acts. See *People v. Rose,* 26 Cal. App. (2d) 513, 79 P. (2d) 737 (1938).

The defendant in his second line of attack claimed prejudicial error resulted from informing the jury of the prior convictions, upon the theory that in reading the allegations in the indictment, the minds of the jurors were prejudiced at the outset of the trial. The court, in overcoming this argument, held that the allegation of the previous crimes was for the single purpose of classifying the defendant as an habitual criminal, and for no other purpose. Moreover, the Indiana tribunal concluded that, although the jury had been informed of the prior convictions, they had no *right* to consider such proof as bearing upon the charge for which the defendant was on trial. Thus, the court reasoned, the defendant had not suffered prejudicial error. Considering the impracticality of eliminating such an impression from the human mind, and the storms of protest over these matters in sister jurisdictions, it would seem that such a rationalization is conjectural. The problem has been clearly set forth by Pennsylvania's former Chief Justice Paxon, who criticized the practice thusly:

> To allege in a bill of indictment charging a man with a high felony that he had previously been convicted of a similar offense, would be an anomaly in the administration of the criminal law. It would go very far to secure his conviction. It would settle every question of doubt decisively against him. It would render his evidence of good character of no practical value. That which in other cases is jealously excluded by all the rules of evidence, would be here thrown in with most disastrous consequences to the defendant, at a time too, when, of all others, he should have a fair trial. . . .[*Commonwealth v. Morrow,* 9 Phila. 583 (1872), as quoted in 14 TEMP. L. Q. 386, 392 (1940).]

Under enlightened modern legislation for habitual criminals, the spirit of the rule which recognizes a defendant's right to a fair trial has been protected by statute in several states and in England. Their procedure divides the indictment into two parts. The entire indictment is read to the accused, and his plea taken in the absence of jurors. When the jury has been impaneled and sworn, the clerk reads only that part of the indictment which sets forth the crime for which the defendant is to be tried. The trial then proceeds in every respect as if there were no allegations of former convictions; no mention of such convictions is made in the evidence, in the remarks of counsel, or in the charge of the court. When the jurors retire to consider their verdict, only the first part of the indictment, on which the crime charged is set out, is given to them. If the jurors return a verdict of guilty, the second part of the indictment, in which former convictions are alleged, is read to them without re-swearing them, and they are then charged to inquire on that issue. CAL. PEN. CODE § 1093 (1949); NEB. REV. STAT. § 29-2221 (1943); OHIO CODE ANN. § 13744-3 (1938); PA. STAT. ANN., tit. 19, § 924 (1930); The Prevention of Crime Act, 1908, 8 EDW. VII, c. 59, § 10.

The latter procedure seems highly desirable, since it prevents the jury from, on the one hand, convicting because of past crimes, and on the other, acquitting because of the severity of the punishment. Such a procedure, weighing the utility of justice on the one extreme and the pound of flesh on the other, seems both just and expedient.

The third question presented in the instant case arose on the extension given to the term "felony." The court held that the habitual criminal statute covers all felonies, including vehicle taking.

The Indiana Criminal Code defines a felony as any crime punishable by death or imprisonment in the state prison. IND. ANN. STAT. § 9-101 (Burns 1933). Petit larceny, the unlawful taking of goods valued at twenty-five dollars or less, is punishable by confinement in the state prison, and is a felony. IND. ANN. STAT. § 10-3002 (Burns 1933). Nonsupport is a felony. IND. ANN. STAT. § 10-1402 (Burns 1933).

In the light of the wide potential given to the definition of a felony, it would appear that a person might be sent to prison for life for committing a series of offenses which do not render him a serious social menace. Conversely, it is conceivable that where the prior offense was on a federal charge, no matter how grave, the offender would not be punishable under the Indiana Habitual Criminal Act since the confinement would be in a "federal penitentiary" and hence not within the purview of the statutory definition which limits "felony" to incarceration in a "state prison." Both Texas and Georgia have encountered such difficulties where those charged with being habitual criminals had been previously imprisoned in federal penitentiaries. *Garcia v. State,* 140 Tex. Crim. Rep. 340, 145 S. W. (2d) 180 (1940); *Lowe v. State,* 50 Ga. App. 369, 178 S. E. 203 (1935). California has provided against such an occurrence by including the words "State prison and/or Federal penal institution," in its statute. CAL. PEN. CODE § 644 (1949).

Bearing in mind that many minor offenses have come within the scope of the term "felony," several states have, in their habitual criminal statutes, enumerated the crimes which are punishable by an increased penalty. CAL. PEN. CODE § 644 (1949); ILL. ANN. STAT. § 37.563 (1936); OHIO CODE ANN. § 13744-1 (1938); PA. STAT. ANN., tit. 18, § 5108 (1945). The enumerated crimes are limited to the more serious felonies involving moral turpitude, serious bodily harm, armed violence, grand theft and the like.

It is submitted that the existing Indiana statute may lead to an extremely harsh and disproportionate result in many instances. It would seem that unless some qualification is given to the term "felony," by the legislature, a growing opposition to this and similar laws may be expected.

Peter F. Flaherty

EVIDENCE—WITNESSES—PRIVILEGE AGAINST DISGRACE.—*In re Vince*, ...N. J....., 67 A. (2d) 141 (1949). This case came before the Supreme Court of New Jersey on an appeal from a dismissal of an order to show cause why respondent should not answer a question propounded to her while testifying before the grand jury. Respondent had admitted to the county prosecutor, in his office, that a criminal abortion had been performed on her, but upon her appearance before the grand jury, she had refused to testify because the answers might tend to incriminate or disgrace her. The court decided that an expectant mother could not be guilty of the statutory crime of abortion, because the statute, in terms, applies only to those performing the act upon the woman. N. J. STAT. ANN. § 2:105-1 (1937). The common law offense of abortion had, as its essential element, the requirement that the child had quickened. As the abortion in this case had been performed within the first eight weeks of pregnancy, the respondent obviously was not guilty of either the common law or, because of its language, the statutory crime. Consequently, because the respondent's testimony in the investigation would not expose her to criminal prosecution, she had no privilege to refuse to answer on the theory of self-incrimination.

The court further stated that there was not, nor had there ever been, a privilege against self-disgrace in New Jersey; therefore, her refusal was unjustified. The decision of the lower court was reversed and the cause was remanded. The court buttressed its opinion by pointing out that in a treatise on evidence published only seven years before the American Revolution, GILBERT, THE LAW OF EVIDENCE (3d ed. 1769), there had been no mention of any such privilege; that neither the Constitution of the United States nor that of New Jersey contains any provision that a witness need not testify if the answer would tend to disgrace or degrade; the court further observed that statutes protecting witnesses against self-incriminating answers limit the immunity to answers which would expose such persons to criminal prosecution or penalty, or to forfeiture of estate. This statutory limitation was construed by the court to mean that the privilege contended for in the instant case is not recognized by the legislature.

American courts, for the most part, deny a witness the privilege of refusing to testify when the answer would result in disgrace. The Supreme Court of the United States stated in *Brown v. Walker*, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896), that a witness cannot claim a privilege against an answer that would tend to disgrace him or bring public disfavor upon him, unless the question relates not to the main issue, but to the credibility of the witness.

New York courts have consistently held, since *People v. Mather*, 4 Wend. 229, 250 (N. Y. 1830), that it is not enough for a witness to show that the answer to the question propounded would tend to dis-

grace him or expose him to public infamy; he must show that it would subject him to prosecution before he can be excused from answering. The court said:

> If a witness is allowed to decline answering when examined for one purpose, because the answer may show him infamous, perhaps it may be a refinement to hold that he is debarred the same privilege when exposed to the same result because the question is material to the merits of the cause. If the objection to answer be placed . . . on the ground that the witness may be disgraced thereby, his privilege attaches when that result would be produced by the answer . . . it is not enough for the witness to allege that the answer will have a tendency to expose him to infamy or disgrace. The question must be such that the answer to it . . . will directly show the infamy, and the court must see that such will be the case before they will allow the excuse to prevail.

This position, however, has been modified by *People* ex rel. *Hackley v. Kelly,* 24 N. Y. (10 Smith) 75 (1861), and *People v. Sharp,* 107 N. Y. 427, 14 N. E. 319 (1887), so that now neither disgrace, opprobrium, nor infamy is sufficient to enable the witness to escape answering, especially where the answer is material to the issue.

The Virginia Supreme Court of Appeals, in *Kendrick v. The Commonwealth,* 78 Va. 490, 496 (1884), supports the same doctrine as enunciated in the later New York opinions. The Virginia court refused to recognize the "Spartan morality which deprecates not the *perpetration* but only the *exposure* of crime." Unless the witness claims the privilege because his answer would incriminate and expose him to criminal prosecution, he must answer. The Supreme Court of California followed the same reasoning in holding that the only ground for refusal to testify is self-incrimination, and that the tendency of a question to disgrace the witness to whom it is propounded is insufficient to create a privilege. Ex Parte *Rowe,* 7 Cal. 184 (1857).

The New Jersey court, in its opinion in the instant case, cites a number of cases which recognized the doctrine of privilege against disgrace. The leading case is *Rex v. Lewis,* 4 Esp. 225, 170 Eng. Rep. 700 (1802), where Lord Ellenborough refused to allow the counsel for the defense to ask the prosecuting witness whether or not he had been in a house of correction, on the grounds that the object of the question was to degrade. Lord Ellenborough made the ruling on his own motion, holding it as settled law. Another case pointed out by the New Jersey court was that of *MacBride v. MacBride,* 4 Esp. 242, 170 Eng. Rep. 706 (1802), in which Lord Alvaney refused to allow a question to be put to a witness because its purpose was to disgrace. In both the *Lewis* and the *MacBride* cases, however, the question did not relate to the issues, but only to the credibility of the witnesses.

At least one English case has not followed the reasoning of the *Lewis* and *MacBride* cases. See *Cundell v. Pratt,* M. & M. 108, 173 Eng. Rep. 1098 (1827), where an objection to a question was

urged on the ground that it would disgrace the witness. The judge refused to allow the question, but only because the answer would subject the witness to prosecution. The judge stated that he did not recognize the privilege against disgrace as having any standing in English law.

Where the privilege has been recognized, because the answer would disgrace, degrade, or make infamous, the vast majority of cases have allowed it only where the question was directed to the character of the witness for impeachment purposes, or to attack credibility. See *Rex v. Lewis, supra; MacBride v. MacBride, supra.* It seems seldom to have been permitted where the matter concerned the issues or went to the merits of the cause. The privilege could only be claimed if the answer would subject the witness to criminal prosecution. Neither the English courts, which allowed the privilege, nor the Supreme Court of the United States, in giving passing recognition to the privilege against disgrace in attacks on credibility, has intimated otherwise.

Possibly the best discussion of the privilege against disgrace is by Mr. Justice Field in his dissent to *Brown v. Walker,* 161 U. S. 591, 632, 16 S. Ct. 644, 40 L. Ed. 819 (1896). He states that the intent of the framers of the Constitution was not alone to protect a witness from self-incrimination, but to ". . . at the same time, save him in *all cases* from the shame and infamy of confessing disgraceful crimes, and thus preserve to him such measure of self respect." Justice Field admitted that there was no common law privilege against self-disgrace, but insisted that it was a constitutional prerogative which altered the common law and gave additional protection to a witness. Justice Field seems to have extended the doctrine to cover questions relating to the issues and merits of the case as well as to those asked for purposes of impeachment. Another American case which approves this view is *United States v. James,* 60 Fed. 257, 265 (N. D. Ill. 1894). In that case, District Judge Grossup pointed out that a man cannot be compelled to give testimony that would subject him to criminal prosecution or to ostracism by his neighbors. The opinion reads in part:

> Exposure, self confessed exposure, would lose him his place in society, his good name in the world, and, like a bill of attainder, taint his blood and that of all who inherit it. It is not difficult to suppose a case where the inquiry of the government was not directed to his crime, but to something immeasurably less important and inconsequential. The benefit to society might be a trifle, compared with the catastrophe to him and his descendents. I am not impressed with the belief that he has no right to stand upon the constitutional privilege of silence. . . .

The witness had refused to testify, although granted statutory immunity for any crime that might be disclosed thereby, because of the disgrace and public opprobrium attaching to his testimony.

In his treatise on evidence, WIGMORE, EVIDENCE § 2255 (2d ed. 1923), Wigmore attacks the theory of the privilege against disgrace and the supporting reasoning of Justice Field and District Judge Grossup. Wigmore points out that there is a vast difference between allowing a refusal to answer because the reply might result in criminal prosecution, and allowing it because of possible disgrace. He states that the constitutional privilege against self-disgrace, "discovered" by Justice Field, is a mere assumption on the part of the Justice and nothing more. The majority opinion in *Brown v. Walker, supra,* is given favorable mention.

The principal case fortifies Wigmore's contention that there is a vast difference between privilege against disgrace, and privilege against self-incrimination. In the instant case, the witness could not be subjected to criminal prosecution; only the possibility of disgrace remained. Her testimony was material to the case. Even if the privilege, allowed elsewhere, of refusing to testify where the question relates to no material issue had been available in New Jersey, she could not have taken advantage of it, because the questions related to the very heart of the issue in the case. The New Jersey court here reaffirmed the principle that a person can keep silent only when, by speaking, criminal action against the witness can result. Where the effect of the question would be only to unveil the witness' past indiscretions, the court will not permit the witness' pride or reputation to block the administration of justice.

In a similar case in New York, where the privilege against disgrace was given some recognition, the person upon whom an abortion had been performed was asked a series of questions, none of which were material to the case or to her credibility as a witness. The trial court refused to order the witness to answer because the sole purpose of the questions was to disgrace and embarrass. The right of the witness to refuse to answer was affirmed, the appellate court stating that a question requiring a disgracing answer, in order to be allowed, must be material to the case, and where it is not, the witness need not reply. *Lohman v. People,* 1 N. Y. (1 Comst.) 379 (1848); see also, *People* ex rel. *Hackley v. Kelly, supra; People v. Sharp, supra.*

The conclusion then seems to be that the privilege against self-disgrace, even where recognized by the courts, generally only protects a witness from revealing facts which would not materially affect the case. In some of these cases, the courts have allowed the privilege where the questions were for impeachment purposes; others have allowed it if the answer would have embarrassed and shamed the witness; still others have refused to allow it at all. The broadest privilege, that of refusing to answer a question even though it is relative to the issues of the case, was allowed, as previously noted, in one

federal case, *United States v. James, supra,* and vigorously advocated by Mr. Justice Field in his dissent in *Brown v. Walker, supra.* This theory has found little, if any, acceptance elsewhere. The majority and best view, as evidenced by cases collected in 3 WHARTON, CRIMINAL EVIDENCE § 1119 (11th ed. 1935), supports the privilege against disgrace only where material issues or the veracity of witnesses are not in question.

Wilmer L. McLaughlin

EVIDENCE—WITNESSES—PRIVILEGED COMMUNICATIONS BETWEEN HUSBAND AND WIFE.—*United States v. Walker,* 176 F. (2d) 564 (2d Cir. 1949). The defendant, Walker, appealed from a verdict in which he was found guilty of carrying, in interstate commerce, money which he had feloniously taken by fraud with intent to steal. Walker had obtained by fraud from Mary Ashe the sum of $49,500. The first count alleged that he had transported $26,000 on February 17, 1947; the second count alleged that $23,500 was transported on June 1, 1947. Mary Ashe was the last of three victims to be defrauded by the defendant. Walker's first victim was Clara Duerr Walker, who was followed by Sally Grehan. The former was defrauded of over $15,000, while the latter suffered a loss of over $20,000. Walker married all three. The first marriage to Clara Duerr Walker, however, was the only valid one.

Defendant's main contention on appeal was that the testimony of his wife Clara Duerr Walker had been improperly admitted in the lower court. His wife had testified to certain conversations with her husband during their courtship and after their marriage. The only communication considered confidential in her testimony was a letter which the defendant had written to her. The letter proved to be extremely damaging to the defendant's case. The Court of Appeals in the instant case held that no part of the testimony of Clara Walker was admissible and therefore reversed the judgment and remanded the cause.

The court admitted that a wife may testify against her husband when the crime charged was an offense against her person. This is an exception to the common law rule which prohibits testimony by either spouse in behalf of or against the other. However, the instant case, as the court pointed out, does not fall within this exception, for the reason that the wife was not the victim of the frauds for which the husband was being tried. Necessity is usually the basis for the exception; for without the wife's testimony in such a case, the prosecution must often fail. *Calloway v. State,* 92 Tex. 506, 244 S. W. 549 (1922); 8 WIGMORE, EVIDENCE § 2338 (3d ed. 1940). There

is no such necessity when the wife testifies to an offense against another person and her testimony is merely corroboratory or confirmatory.

Logan v. United States, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429 (1892), and *Hendrix v. United States,* 219 U. S. 79, 31 S. Ct. 193, 59 L. Ed. 102 (1910), were early cases which stated that the common law rule is to govern the competency of witnesses in criminal trials in the courts of the United States. In 1887, another exception to the common law rule was sanctioned by statute, 24 STAT. 635 (1887), but the law was subsequently repealed. This statute permitted a wife, with her consent, to testify against her husband (except as to confidential communications), in a prosecution for bigamy or unlawful cohabitation under any statute of the United States.

A number of decisions have strictly interpreted the common law rule and have held incompetent a wife's testimony on behalf of her husband. *Jin Fuey Moy v. United States,* 254 U. S. 189, 41 S. Ct. 98, 65 L. Ed. 214 (1920); *Hendrix v. United States, supra; Liberato v. United States,* 13 F. (2d) 564 (9th Cir. 1926); *Fasculo v. United States,* 7 F. (2d) 961 (9th Cir. 1925); *Slick v. United States,* 1 F. (2d) 897 (7th Cir. 1924); *Krashowitz v. United States,* 282 Fed. 599 (4th Cir. 1922).

However, in *Funk v. United States,* 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369 (1933), the Court stated that the fundamental basis for all rules of evidence should be founded upon their adaptation to the successful development of the truth. The Court allowed the wife of a man on trial for a criminal offense in a federal court to testify in her husband's behalf, despite the common law rule under which such testimony is incompetent. The Court justified this action by stating that the Supreme Court of the United States and other federal courts may decline to enforce the ancient common law rule where conditions have changed and experience has shown the fallacy or unwisdom of the old rule. The procedural rule adopting the common law principles as to the admissibility of evidence, FED. R. CRIM. P. 26, was a direct outgrowth of the *Funk* case. This rule states:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

In *Yoder v. United States,* 80 F. (2d) 665 (10th Cir. 1935), there is a dictum to the effect that, like a wife's incompetence to testify in her husband's behalf, a wife's incompetence to testify against him should be abolished. However, in *Paul v. United States,* 79 F. (2d) 561 (3d Cir. 1936), the court stated that it was error to allow a

husband to testify against his wife, and that the common law rule is not so relaxed as to permit testimony against the wife. The same rule was followed in *Brunner v. United States*, 168 F. (2d) 281 (6th Cir. 1948), where a wife's testimony against her husband was held to be incompetent.

It is obvious that the question now confronting the federal courts in criminal proceedings is how strictly the common law rule regarding testimony by either spouse for or against the other is to be followed. In answer to this query the court in the principal case stated:

> It is always a debatable question how far any relevant evidence should be privileged. It deprives the party against whom the privilege is invoked of access to the truth; and a disclosure of the whole truth should be the prime concern of a court of justice. Whether in a given situation the interest of the privileged party in suppressing the truth, ought to outweigh that concern would seem to be a matter for Congress, and not for the courts. Moreover, unlike the spouse's disqualification as such this conflict of interest is by no means one-sided, because, although it is not very usual for it to arise unless the spouses are estranged, not all estrangements are final, and nothing could more dispose the privileged spouse to treasure enmity and to repulse any overtures of reconciliation than the memory of what will ordinarily rankle as treachery. Nor is it either practicable or desirable to make the decision dependent upon the judge's conclusion that in the instance before him the marriage has already been so far wrecked that there is nothing to save.

Certainly a most important consideration in this matter should be the promotion of marital peace. It is surprising that there has not been a more pronounced trend away from the common law rule regarding privileged communications between husband and wife considering the present-day secularist attitude toward marriage. If communications between attorney and client, physician and patient, priest and penitent, are still inviolable, as they should be, then communications between husband and wife should likewise continue to be protected, even though in some instances justice may not be expediently administered.

Louis F. DiGiovanni

PRACTICE AND PROCEDURE—FEDERAL RULES OF CIVIL PROCEDURE—IGNORANCE OF CONTENTS OF WRITTEN ADMISSION AS "GOOD CAUSE" UNDER RULE 34.—*Safeway Stores, Inc. v. Reynolds*, 176 F. (2d) 476 (D. C. Cir. 1949). The fact that the plaintiff has forgotten the contents of a statement signed by him and delivered to the defendant before the plaintiff was represented by an attorney is not "good cause," justifying an order to produce under procedural Rule 34, FED. R. CIV. P. 34, which provides in part:

> Upon motion of any party showing good cause therefor and upon notice to all other parties . . . the court . . . may (1) order any party to produce and permit the inspection and copying . . . of any designated documents . . . which constitute or contain evidence relating to any of the matters . . . permitted by Rule 26 (b) and which are in his possession, custody, or control. . . .

The plaintiff sued for injuries sustained when he slipped on the floor of the Safeway Stores, Incorporated. Two weeks after the accident, an investigator for the defendant's insurer procured from the plaintiff a signed statement of the circumstances. To the chagrin of the plaintiff's attorneys, their client could recall neither the content nor the import of the statement. Anticipating possible embarrassment, the plaintiff moved, through his attorneys, that the court order the document produced for inspection, stating the grounds as follows:

> Plaintiff says that said statement was signed by him before he was represented by counsel . . . that it was not obtained by any attorney for the defendant; and that said statement contains evidence material and relevant to the pending action.

The court also considered the following contention urged by the plaintiff in the course of argument in the court below, although not made a part of the formal allegations:

> We need to know what our man said . . . This statement is needed to help us prepare for trial, to give us some advance warning of any material change in his statement made to the defendant's investigator, different than what he gave us as to the claim.

The order of the district court granting the motion was reversed, on the authority of *Martin v. Capital Transit Co.*, 170 F. (2d) 811 (D. C. Cir. 1948), and *Hickman v. Taylor et al.*, 329 U. S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). The extent to which these decisions can be applied to the facts of the instant case is open to question.

While an impressive array of cases substantiate the view that the rules governing depositions and discovery, FED. R. CIV. P. 26-34, are to be liberally construed and applied, *June v. George C. Peterson Co.*, 155 F. (2d) 963 (7th Cir. 1946); *Quemos Theatre Co. v. Warner Bros. Pictures, Inc. et al.*, 35 F. Supp. 949 (N. J. 1940); *Welty v. Clute*, 29 F. Supp. 2 (W. D. N. Y. 1939); *Brunn v. Hanson*, 30 F. Supp. 602 (Idaho 1939), it is generally accepted, as the court pointed out in the instant case, that "... the requirement for ordering production only 'upon motion of any party showing good cause therefor,' was not an idle phrase without significance. . . ." As was stated in the *Capital Transit* case, on which the court in the instant case principally relied:

> The rule contemplates an exercise of judgment by the court, not a mere automatic granting of a motion. The court's judgment is to be moved by a demonstration by the moving party of its need, for the purposes of the trial, of the document or paper sought.

The problem is, then, how far the petitioning party need go to establish good cause.

It is difficult to see how the requisite need was not established in the instant case. It was not an attempt on the plaintiff's part to indulge in a "fishing" expedition. The plaintiff sought to discover the nature and extent of the admissions he made to the investigator for the defendant's insurer, and since a cause of action had already been stated in the pleadings, that could hardly be called a blind casting for evidence. In the *Capital Transit* case, on the other hand, no reason or necessity for production was advanced which the court could weigh in determining whether good cause had been shown. In the instant case, the plaintiff voiced his need in his claim that the statement was signed before he was aided by counsel, and that he was not certain of the nature of what he had signed. In the *Capital Transit* case, the plaintiff, in asking for discovery of a motorman's accident report, stated the following grounds:

> In a deposition taken of said Mr. Davis [the motorman] . . . he testified that he made a written report to the Capital Transit Company immediately following the accident, pursuant to its standing rule that accident reports be filed . . . that at said deposition demand was made on behalf of the plaintiff for production . . . and that plaintiff gave notice to the defendant at that time that appropriate steps by motion would be taken to require its production. . . . [*Martin v. Capital* Transit Co., 170 F. (2d) 811, 812 (D. C. Cir. 1948).]

This is a bare demand for discovery, and is not parallel to the petition and argument considered by the court in the instant case.

The question here decided confronted a Supreme Court of New York in *La Maida v. Miledna Realty Corp.*, 182 Misc. 690, 49 N. Y. S. (2d) 650, 651 (1944). There the court, in applying a similar provision, N. Y. CIV. PRAC. ACT § 234, denied the motion for the reason that the substance of the statement signed, if true, could be repeated by the plaintiff in his testimony without fear of impeachment. But, as the court reasoned, if the right to inspection were granted, "the parties would thus be afforded an opportunity to so fashion their testimony in advance as to make cross-examination a meaningless proceeding." This decision was followed in *Scavone v. Bush,* 193 Misc. 268, 84 N. Y. S. (2d) 40 (1948).

Although the result reached in the instant case agrees with that of the *La Maida* case, it is based, not upon the reasoning of the New York court, but upon a supposed parallel with the facts of the *Capital Transit* case. There was only one indication in the court's opinion in the instant case that its decision might have been based on other grounds. This was the answer given to the plaintiff's plea that he needed discovery to ascertain any material difference in his present conception of the facts and those he admitted in the statement. The court parried this contention with the statement that this

argument is "implicit" in every motion to produce. This does not face the problem squarely as did the New York court. Stated concisely, the question is, as the New York court approached it, whether a plaintiff who has admitted facts in a signed statement (before he was represented by counsel), and who cannot recall what he has admitted, can succeed in a motion to produce for inspection before trial. The New York court answered in the negative, one judge dissenting.

We have already seen that the federal rules are to be liberally construed and applied. The only argument advanced against permitting discovery is that of the New York court, i.e., if the plaintiff signed to the truth, he will remember it. But does not this view assume that the plaintiff may be an opportunist who cannot untangle the maze of his own fabrications? Why not as readily assume that his forgetfulness is honest? The advantage to the defendant in preserving the contents of the document in secrecy is in its impeachment value. To forbid discovery before trial arms the defendant with strategy, not truth. The plaintiff must support his case with proof. This burden will not be lessened by discovery. In fact, by refusal to grant the motion, the synchronized movement of justice may be retarded through surprise, necessity for new motions, and truth-concealing strategy. The purpose of the federal rules has been concisely stated, "The new rules were designed to eliminate surprise and decisions which result from strategy." *Olson Transportation Co. v. Socony-Vacuum Oil Co.*, 7 F. R. D. 134, 136 (E. D. Wis. 1944). It is doubtful whether the strict construction placed upon Rule 34 in the instant case furthers that purpose.

Vincent C. A. Scully

PRACTICE OF LAW—UNAUTHORIZED PRACTICE BY REAL ESTATE BROKERS AND AGENTS.—*People* ex rel. *Illinois State Bar Ass'n. et al. v. Schafer*, ...Ill....., 87 N. E. (2d) 773 (1949). The Supreme Court of Illinois has held that the preparation of blank forms by a real estate broker, when it involves some discretion and advice, constitutes the unauthorized practice of law, even when incidental to the legitimate functions of a licensed real estate broker, and particularly when such services involve advice on the disposition of a client's estate.

The respondent was a licensed real estate and insurance broker but had no license to practice law in the State of Illinois. As a part of his regular business, he prepared deeds, contracts and mortgages in real estate transactions in which he was the procuring agent and for which he received a broker's commission. He also, as a regular practice, prepared similar instruments in cases where he was not the

procuring agent, and in such instances he made a charge for the service. The respondent, upon being consulted by a client as to the disposition of her estate, advised her that it was not necessary for her to have a will, but that he could handle the disposition of her real estate by execution of deeds, one of which would convey the property to a "dummy" who would then convey the same property by a separate deed to her and her daughter. The respondent prepared the necessary deeds and they were executed by the respective grantors. He held these instruments and a promissory note in accordance with his client's instructions until after her death. A dispute arose about the estate of the deceased client and the various deeds, which brought the matter to the attention of an attorney.

In adjudging the respondent guilty of contempt for the unauthorized practice of law, the court pointed out that while the mere completion of a printed form did not of itself constitute the practice of law, the rendering of any additional services was objectionable. As the court stated:

> When filling in blanks as directed he may not by that simple act be practicing law, but if he elicits the proper information and considers it and advises and acts thereon he would in all probability be practicing law. In other words, if his service does not amount to the practice of law it is without material value; but if it is of material value it would likely amount to the practice of law.

The court in the instant case in reaching its decision drew upon the case of *People* ex rel. *Chicago Bar Ass'n. v. Tinkoff,* 399 Ill. 282, 77 N. E. (2d) 693 (1948), in which the respondent, a disbarred attorney, while counseling two clients regarding their income tax, discovered that they had formerly owned some real estate which was handled by an agent who represented the purchaser and the seller. He prepared a notice of rescission of an oral contract and warranty deed, signing the papers for the parties as a real estate agent. He was assuming the control of a matter for the grantors that involved their legal and equitable rights in a piece of property. The respondent counseled and advised the clients as to the course that they should follow. The court, in holding that the respondent had engaged in unauthorized practice, stated that the practice of law was not limited to practice in courts of record, but included the giving of advice, counseling, drafting of legal documents, and the participation in transactions which were outside the scope of the actual litigation in the courts.

There is a considerable amount of conflict as to whether the completing of forms, some of which may be contracts, deeds, etc., constitutes the practice of law. In In re *Eastern Idaho Loan & T. Co.,* 49 Idaho 280, 288 Pac. 157 (1930), the court said that the clerical labor of filling in blanks and stereotyped forms, when it involves no legal determination, does not constitute the practice of law. In *Gus-*

tafson v. V. C. Taylor & Sons, Inc., 138 Ohio St. 392, 35 N.E. (2d) 435 (1941), the court indicated some of the items that may properly be supplied in various instruments by a real estate broker. The supplying of simple, factual material, such as the date, the name of the purchaser, the location of the property, the date of giving possession, and the duration of the offer, requires ordinary ability rather than skill peculiar to one trained and experienced in the law.

A similar view was taken in In re *Matthews*, 58 Idaho 772, 79 P. (2d) 535 (1938), in which the defendant, a public stenographer and notary public, who was engaged in the abstract, insurance and real estate business, was held to be not guilty of the practice of law when he filled out forms of deeds, mortgages, contracts, leases and bills of sale at the request of others, even though he had advertised "correct legal conveyances." In an earlier case, In re *Matthews*, 57 Idaho 75, 62 P. (2d) 578 (1936), the defendant was held to be guilty of the practice of law when he represented himself as qualified and learned in the practice of law, particularly in matters connected with all types of conveyancing and in the preparation of bills of sale, deeds, real estate mortgages, chattel mortgages and the papers necessary in probate proceedings.

The fact that the papers are simple and not complex, and that the blanks might be filled in by one not skilled in legal work has no bearing on the determination of whether the accused is guilty of the practice of law. This idea was enunciated in *People v. Lawyers Title Corporation*, 282 N. Y. 513, 27 N. E. (2d) 30 (1940). As Judge Pound said in *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366, 125 N. E. 666, 670 (1919): "I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inexperienced."

In other cases the courts have held that the completion of blank forms amounted to the practice of law. In *Childs v. Smeltzer*, 315 Pa. 9, 171 Atl. 883 (1934), the defendant, a stenographer and notary public, was found guilty of the practice of law because she had filled out certain blank forms. She had drawn a great variety of legal instruments, including wills, deeds of trusts, bills of sale, leases, partnership agreements, deeds and mortgages. In a few instances the defendant had placed in typewritten form instruments brought to her already in writing, but in most instances she had used forms containing blanks which she filled out with appropriate language. Occasionally she drafted the papers without relying on printed forms. This method of doing business was held to be the practice of law; however, the court stated that it did not mean that real estate brokers could not prepare the necessary papers pertaining to and growing out of their business transactions and intimately connected therewith.

There is some authority to the effect that the drawing of documents pertaining to real estate should constitute the practice of law regardless of the fact that the drawing and preparation of such instruments are incidental to the various real estate transactions. The fact that a real estate broker or a notary public makes a separate charge for the drawing of such instruments or gives advice in relation to these documents is an important reason for holding that such acts constitute the practice of law. For instance, in *Paul et al. v. Stanley*, 168 Wash. 371, 12 P. (2d) 401 (1932), the defendant, a notary public, real estate agent and broker, was prohibited from drawing simple deeds, mortgages, and other simple instruments. It was also held to be the practice of law when legal advice was given in connection with the preparation of a legal instrument.

A similar conclusion was reached in *People v. Sipper*, 61 Cal. App. (2d) 844, 142 P. (2d) 960 (1943), in which the defendant, a real estate broker, was charged with giving advice on purchase money mortgages to prospective purchasers. The court concluded that he had been guilty of the unauthorized practice of law, but it did not pass upon the right of a licensed real estate broker or salesman to make out a deed as an incident to completion of a sale.

In the case of In re *Gore*, 58 Ohio App. 79, 15 N. E. (2d) 968 (1937), the defendant, a licensed real estate broker who drew up contracts between the seller and the purchaser, but only when he acted as a broker for one or the other, was held guilty of the unauthorized practice of law. He selected the appropriate printed form for the transaction, and also prepared other instruments essential to the consummation of the transaction, such as deeds, mortgages, land contracts and leases. He filled in what he conceived to be the proper substance to carry out the transaction, but made no direct charge for the drafting, apart from the compensation he received as a broker for closing the transaction.

It has been held, however, that the occasional drafting of simple instruments does not constitute the unauthorized practice of law, even when not strictly incidental to the real estate business. *People* ex rel. *Atty. Gen. v. Jersin*, 101 Colo. 406, 74 P. (2d) 668 (1937); In re *Opinion of the Justices*, 289 Mass. 607, 194 N. E. 313 (1935); *People v. Weil*, 237 App. Div. 118, 260 N. Y. S. 658 (1932).

The problem of drawing legal instruments has plagued many types of companies, particularly banks, title insurance companies and credit collection agencies. There are several cases which hold that persons or concerns may draft various legal instruments as an incident to their regular business and yet not be guilty of the practice of law if no legal advice is given. *Atlanta Title & Trust Co. v. Boykin*, 172 Ga. 437, 157 S. E. 455 (1931); *Depew v. Wichita Ass'n. of Credit Men, Inc.*, 142 Kan. 403, 49 P. (2d) 1041 (1935); *Cowern v. Nelson*,

207 Minn. 642, 290 N. W. 795 (1940); *Cain v. Merchants National Bank & Trust Co.*, 66 N. D. 746, 268 N. W. 719 (1936); *La Brum v. Commonwealth Title Co. of Philadelphia*, 368 Pa. 239, 56 A. (2d) 246 (1948). Contra: *Clark et al. v. Reardon*, 231 Mo. App. 666, 104 S. W. (2d) 407 (1937); *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N. E. 650 (1934); *Hexter Title & Abstract Co. v. Grievance Committee*, 142 Tex. 506, 179 S. W. (2d) 946 (1944); *Stewart Abstract Co. v. Judicial Commission of Jefferson County*, 131 S. W. (2d) 686 (Tex. Civ. App. 1939).

There is no doubt that the majority of the various decisions indicate that the real estate agent or broker is practicing law when he draws various legal instruments concerning the conveyancing of real estate. The function of a real estate agent is to act as an intermediary between a buyer and a seller, and that is the basis of his compensation. The necessary legal documents, regardless of whether they are blank forms or complex instruments, should be prepared by an attorney. The purpose of restricting the field of operations of the real estate broker or agent is to protect the public. If a real estate broker should give improper counsel concerning real estate, he would not expose himself to the professional discipline to which an attorney is subject. The state statutes which require real estate brokers and agents to be licensed by the state do not give the licensee authority to give advice concerning matters that require legal knowledge or skill.

Bernard L. Weddel

TORTS—RIGHT OF RECOVERY UNDER WRONGFUL DEATH STATUTE FOR FATAL PRENATAL INJURIES TO VIABLE INFANT.—*Verkennes v. Corniea et al.*, ...Minn....., 38 N. W. (2d) 838 (1949). In an action by the special administrator of the estate of a deceased child against a defendant doctor and hospital for wrongful death, the plaintiff alleged that the mother of the deceased child was taken to the defendant hospital for confinement and delivery, and that as a result of the negligence of the defendants, both mother and child died. A demurrer to the complaint was sustained. The question of first impression in Minnesota was:

> . . . whether the special administrator of the estate of an unborn infant, which dies prior to birth as the result of another's negligence, has a cause of action on behalf of the next of kin of said unborn infant under the wrongful death statute.

The court held that an action may be maintained by the personal representative of an unborn, viable child capable of separate and independent existence. The court said:

> It seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act, a cause of action arises under the statutes cited.

Until 1933, there was an almost unbroken line of both English and American cases denying a right, apart from statute, to sue for injuries received prior to birth resulting in physical disability: *Walker v. Great Northern Railroad of Ireland,* 28 L. R. Ir. 69 (1890); *Allaire v. St. Luke's Hospital,* 184 Ill. 359, 56 N. E. 638 (1900); *Smith v. Luckhardt,* 299 Ill. App. 100, 19 N. E. (2d) 446 (1939); *Nugent v. Brooklyn Heights Ry. Co.,* 209 N. Y. 515, 102 N. E. 1107 (1913); *Drobner v. Peters,* 232 N. Y. 220, 133 N. E. 567 (1921); *Lipps v. Milwaukee Electric Ry. & Light Co.,* 164 Wis. 272, 159 N. W. 916 (1916); and wrongful death: *Stanford v. St. Louis-San Francisco Railway Co.,* 214 Ala. 611, 108 So. 566 (1926); *Dietrich v. Northampton,* 138 Mass. 14 (1884); *Newman v. City of Detroit,* 281 Mich. 60, 274 N. W. 710 (1937); *Buel v. United Railways Co.,* 248 Mo. 126, 154 S. W. 71 (1913); *Gorman v. Budlong,* 23 R. I. 169, 49 Atl. 704 (1901); *Magnolia Coca Cola Bottling Co. v. Jordan,* 124 Tex. 347, 78 S. W. (2d) 944 (1935). The courts had justified their decisions chiefly upon two grounds. First, the courts reasoned, an unborn infant is not a person within the contemplation of the law. Hence there could be no violation of a duty to exercise due care when that duty never existed with regard to the child. This was Justice Holmes' basic reasoning in the leading case of *Dietrich v. Northampton, supra.* Second, it would be impractical and difficult to show proximate causation and to handle the flood of lawsuits based on fictitious and fraudulent claims which would follow in the wake of such a decision.

It is, therefore, worthy of note that many of the authorities cited in the principal case seem to be based on the civil law, or on statutory enactments of civil law concepts. Thus in a Louisiana case, *Cooper et al. v. Blanck,* ....La. App....., 39 So. (2d) 352 (1923), in which recovery was granted, the court based its decision on the provisions of the Louisiana code, LA. CIV. CODE ANN. Art. 2315 (1945), which gives a right of action to parents for the loss of their child when due to another's negligent conduct. The court held that a viable unborn infant was a "child" within the meaning of the code provision.

A Canadian case upon which the court heavily relied, *Montreal Tramways Co. v. Leveille,* [1933] 4 D. L. R. 337, 344, came to the Supreme Court of Canada from Quebec, a civil law province. The court in that case, in allowing a child to recover from injuries received prior to birth, stated:

> . . . it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the Courts for injuries wrongfully committed upon its person while in the womb of its mother.

In California, a similar result was reached in a construction of the California code, CAL. CIV. CODE § 29 (1946), which provides that a child conceived but not yet born is to be deemed an existing person so far as may be necessary for its interests. In so construing the statute, the court expressly approved the dissenting opinion of Justice Boggs in *Alliare v. St. Luke's Hospital, supra.* The court intimated, nevertheless, that apart from statute the action would not lie.

The only federal decision upon the problem, *Bonbrest et al. v. Kotz et al,* 65 F. Supp. 138, 140, 141, 142 (W. D. Pa. 1946), viewed the imposing line of decisions refusing to grant a cause of action, but adopted the minority view (the question being a novel one in that jurisdiction), saying:

> . . . here we find a willingness to face the facts of life rather than a myopic and specious resort to precedent to avoid attachment of responsibility where it ought to *attach* and to permit idiocy, imbecility, paralysis, loss of function, and like residuals of another's negligence to be locked up in the limbo of uncompensable wrong, because of a legal fiction, long outmoded.

And the court further stated:

> From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception—which it is in fact. Why a "part" of the mother under the law of negligence and a separate entity and person in that of property and crime? . . . Why a human being, under the civil law, and a non-entity under the Common Law?

In another recent decision, *Williams v. Marion Rapid Transit, Inc.,* ....Ohio...., 87 N. E. (2d) 334, 340, 24 NOTRE DAME LAWYER 409 (1949), the Supreme Court of Ohio held that an existing viable child, although unborn, is a person within a constitutional provision, OHIO CONST. Art. I, § 16, giving every "person" a remedy for injury done him in his person, so as to permit the child after birth to bring an action for personal injuries. The court stated that to hold that an infant is not a living "person" until birth would:

> . . . in our view . . . deprive the infant of the right conferred by the Constitution upon all persons, by the application of a time-worn fiction not founded on fact and within common knowledge untrue and unjustified.

Thus in every case where relief has been granted, the injury was inflicted upon a viable foetus, and it is worth noting that in the early case of *Dietrich v. Northampton, supra,* where Justice Holmes denied recovery—setting the precedent which the other courts were quite willing to follow—the child was non-viable. A 1916 case which denied recovery, *Lipps v. Milwaukee Electric Ry. & Light Co.,* 164 Wis. 272, 159 N. W. 916, 917 (1916), where a non-viable foetus was concerned, specifically distinguished its ruling from the case where the wrong was to a viable child, saying:

> Very cogent reasons may be urged for a contrary rule where the infant is viable and especially where the defendant, being a doctor or midwife,