the municipality has run its utility profitably and availed itself of the profit it cannot improve the plant without violating the constitutional debt limitation. It is questionable whether the interests urging this position are particularly sincere in their concern for the welfare of the municipality.

N. P., '34.

WITNESSES—COMPETENCE—MARITAL RELATION.—The defendant was convicted of conspiracy to violate the prohibition law. He called his wife to testify in his behalf but she was excluded upon the ground of incompetency. *Held:* Changed conditions have removed the reason for the old common law rule disqualifying a wife from testifying on behalf of her husband in a criminal trial. *Funk v. United States* (1933) 54 S. Ct. 212.

Various reasons have been advanced for the common law incapacity of the one spouse to testify for the other. Among these the most important are marital identity of interest, *Jin Fuey Moy v. United States* (1920) 254 U. S. 189, bias of affection, *Johnston v. Slater* (1854) 11 Gratt. (Va.) 321, disturbance of the marital peace, *Mary Griggs' Case* (K. B. 1660) T. Raym. 1; *Kelley v. Proctor* (1860) 41 N. H. 139. Certain exceptions were recognized, generally on the basis of necessity. *Turner v. Overall* (1903) 172 Mo. 271, 72 S. W. 644; *Tucker v. State* (1882) 71 Ala. 342; *McGill v. Rowand* (1846) 3 Pa. St. 451.

Statutes, in one form or another, have been enacted qualifying the spouse. The status of the rule in each jurisdiction depends largely upon the wording of the particular statute. 5 Jones, Evidence (2d ed. 1926) 4010; 1 Wigmore, Evidence (2d ed. 1923) sec. 488. Statutory removal of the interest disqualification not expressly extending to husband and wife does not remove their disability to testify for or against each other. *Lucas v. Brooks* (1873) 18 Wall. 436; *Fishback v. Harrison* (1909) 137 Mo. App. 664, 119 S. W. 465. The preservation of the marital peace remains as sufficient reason for the retention of the rule. The clear tendency of the statutes, however, is to relax the common law rule. See 5 Jones, Evidence (2d ed. 1926) 4010.

The previous words of the Supreme Court were exactly contrary to the rule of the principal case. *Hendrix v. United States* (1911) 219 U. S. 79; *Jin Fuey Moy v. United States* (1920) 254 U. S. 189. In overruling these cases the Court justified itself by quoting that it was not precluded "from examining this question in the light of general authority and sound reason." *Benson v. United States* (1892) 146 U. S. 325; *Rosen v. United States* (1918) 245 U. S. 467.

Too often legislation has been the only source of legal advance. The basic philosophy of the common law requires the judge to take consideration of greatly changed conditions. Otherwise why the maxim *cessante ratione cessat lex?* The "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." *Hurtado v. California* (1884) 110 U. S. 516. See *Benson v. United States* (1892) 146 U. S. 325; *Rosen v. United States* (1918) 245 U. S. 467. The tendency of judges, however, has been too frequently to adhere strictly to the letter of the principle of *stare decisis.* When a court assumes the broader and more sociological outlook some courage is shown even though the particular legal rule involved is not of the greatest importance in itself and even though reliance is placed upon past judicial utterances in an attempt to justify the position. If a

frank recognition of the frequent legislative function of the judge could prevail the legal system would profit at least to the extent of ridding itself of meaningless and technical fictions and presumptions which more often than not serve merely as a rationalization of the judicial intuition. See Cohen, Law and the Social Order (1933). The position of the court in the principal case signifies a more liberal tendency on its part; this is emphasized by the fact that McReynolds and Butler, JJ., dissented. N. P., '34.