INFANTS—PRE-NATAL INJURIES—LEGAL ENTITY.—Plaintiff sustained injuries in an accident caused by a collision between her automobile and that driven by an employee of the defendants. Plaintiff, who was then in a pregnant condition, was crushed against parts of the automobile, bruising her and causing her to give premature birth to twins, one of which was born badly bruised and died 19 days later, as a result of the injuries suffered in the accident. The jury's award of $5000 as compensation for injuries to plaintiff was uncontested, but an award of $1250 for loss of services of the child was the cause at issue. *Held*, reversing the Court of Civil Appeals (1932) 47 S. W. (2d) 901, that damages for loss of services cannot be recovered for pre-natal injuries. *Magnolia Coca Cola Bottling Co. v. Jordan et ux* (1935), 78 S. W. (2d) 944.

The *Death by Wrongful Act* statutes create a "substituted" right which is dependent upon the decedent's right to recovery immediately before he died. *Michigan Central R. Co. v. Vreeland* (1912), 227 U. S. 59.

In the first case to adjudicate the instant situation, *Dietrich v. Northampton* (1884) 138 Mass. 14, 52 Am. Rep. 242, it was said by Holmes, J., "no case, so far as we know, has ever decided that if the infant survived, it could maintain an action for pre-natal injuries." Since that time the following adjudicated cases have affirmed the doctrine that there can be no recovery for pre-natal injuries resulting from the negligence of another. *Walker v. Great Northern Ry. Co.* (1891) Ir. L. R. 28 C. L. 69; *Allaire v. St. Luke's Hospital* (1900) 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225; *Gorman v. Budlong* (1901) 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118; *Buel v. United Ry. Co.* (1913) 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625; *Nugent v. Brooklyn Heights R. Co.* (1913) 139 N. Y. Supp. 367; *Lipps v. Milwaukee Electric Co.* (1916) 164 Wis. 272, 159 N. W. 916, L. R. A. 1917 B. 334; *Drobner v. Peters* (1921) 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503; *Stanford v. St. Louis, etc. Ry. Co.* (1926) 214 Ala. 611, 108 So. 566.

The rule is based primarily upon the ground that the child before birth is in fact a part of the mother, and therefore there is no duty owing to the unborn child, apart from the duty to avoid injuring the mother. Frey, *Injuries to Infants En Ventre Sa Mere* (1926) 12 St. Louis L. R. 85. The legal rule that a child en ventre sa mere is a nonentity was expressed in *Thellusson v. Woodford* (1798) 4 Ves. Jr. 227, 335, 31 Eng. Reprt. 118,170. This rule is now restricted and the more modern view is that a child born after the accident is given a legal existence for purposes beneficial to it. *Cooper v. Heatherton* (1901) 73 N. Y. Supp. 14. Yet, despite the fact that it is beneficial to be born uninjured, the above stated doctrine has not been applied in actions to recover for pre-natal injuries. A search of the cases reveals that the rule has been limited to where property interests are involved. In view of this, posthumous children are deemed in *esse* for the purpose of taking property granted to them by will. Co. Litt. 36; *Aubuchon v. Bender* (1869) 44 Mo. 560; *Kimbro v. Harper* (1925) 133 Okla. 46, 238 Pac. 840. The law which protects the property rights of an unborn child might easily afford relief for the more serious wrongs inflicted upon him affecting his life, limb, and health. Boggs, J., dissenting in *Allaire v. St. Luke's Hos-*

pital, supra. An unborn child is granted a legal existence for purposes other than for taking property devised to it. In criminal law, see *Lee v. State* (1921), 124 Miss. 398, 86 So. 856; 37 C. J. 347. That afterborn children are provided for in divorce decrees see *Laumeier v. Laumeier* (1924), 237 N. Y. 357, 143 N. E. 219. The furthest extension of the doctrine has been in permitting a posthumous child to recover damages for the death of his father caused by the negligence of another. *Nelson v. Ry. Co.* (1890), 78 Tex. 621, 14 S. W. 1021; *Bonnarens v. Ry. Co.* (1925), 309 Mo. 65, 273 S. W. 1043. But the courts have been stubbornly giving weight to precedent and refuse to allow recovery for pre-natal injuries.

Some justification for the denying of recovery is found in the practical, as distinguished from the technical, reasoning. To permit recovery would undoubtedly give rise to fraudulent litigation, with false and speculative testimony, which the defendant would find difficult to refute. *Drobner v. Peters, supra.* The principal case asserts that even to deny recovery for loss of services will make no material difference, since the jury in awarding damages to the mother will be sympathetic to her cause. Also consideration must be given to the problem that damages for loss of services is highly speculative. This being so the decision can be reconciled with the law of damages which provides that compensation cannot be based upon a mere conjectural probability of *future loss. Houston Land & Loan Co. v. Texas Co.* (1911), 140 S. W. 818; *Wilson v. Weil* (1878), 67 Mo. 339.

There can be no quarrel with those decisions which are influenced by the practical considerations, but those decisions which deny recovery solely on the technical "nonentity" theory cannot be approved. It is to be hoped that the problem will be settled on the basis of logic and principle rather than on *stare decisis.*

W. F. '37.

LIBEL—QUALIFIED PRIVILEGE—FAIR COMMENT—ACTION FOR LIBEL.—A newspaper, in its Sunday magazine section, published an article which commented both on the protagonists and the findings in an ecclesiastical trial in which the plaintiff, a minister, was expelled from the church for alleged immoral conduct with a woman parishioner. *Held,* that defendant newspaper had a qualified privilege to publish an account of the charges, trial, and findings before the church tribunal; and that it had a right to comment upon true facts, when they were matters of public concern, by stating inferences and conclusions about them, provided that such statements were made in good faith and without malice. *Warren v. Pulitzer Pub. Co.* (Mo. 1934) 78 S. W. (2nd.) 404.

Qualified privilege is available as a defence when the defamatory communication is made in the discharge of some duty, moral or social, and the inference of malice is nullified by the occasion, depending upon the absence of actual malice. *Shurtleff v. Stevens* (1879) 51 Vt. 501; *Mo. Pac. Ry. Co. v. Richmond* (1889) 73 Tex. 568, 11 S. W. 555. The proceedings of the church are quasi-judicial, and therefore those who complain, or give testimony, or act or vote, or pronounce the result orally or in writing, acting in