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

good faith, and within the scope of the authority conferred by this limited jurisdiction, and not falsely or colorably making such proceedings a pretense for covering an intended scandal, are protected by the law of qualified privilege. *Farnsworth v. Storrs* (1850) 5 Cush. (Mass.) 412. Moreover, the privilege is not necessarily lost by the publication of the libel or slander to persons not members of the church, or to the public generally. *Farnsworth v. Storrs*, supra; *Landis v. Campbell* (1883) 79 Mo. 433. A resolution of censure by a church council, charging a member with violation of the laws of the church, and with actions injuring its welfare, is privileged, if published in good faith, without malice. *Over v. Hildebrand* (1883) 92 Ind. 19.

Fair comment is the drawing of inferences or of conclusions from true facts, and it is a defense when the subject matter discussed is of public interest. *Burt v. Newspaper Co.* (1891) 154 Mass. 238; 28 N. E. 1; *Post Pub. Co. v. Hallam* (C. C. A. 6, 1893) 59 Fed. 530. Literary works are subject to comment. *Dowling v. Livingstone* (1896) 108 Mich. 321, 66 N. W. 225. The press has the right to comment upon the conduct of a coroner. *Diener v. Chronicle Pub. Co.*, (1910) 230 Mo. 613, 132 S. W. 1143. Candidates for public office are subject to comment. *Epps v. Duckett* (1920) 284 Mo. 132, 223 S. W. 572. Comment on persons prominent in the business, social, and professional life of the community may be fair. *Flanagan v. Nicholson Pub. Co.* (1915) 137 La. 588, 68 So. 964. *Burt v. Newspaper Co.*, supra.

Whether fair comment is essentially different from qualified privilege as a defence in an action of libel is the subject of some confusion in the cases. According to an early English view, which has been followed by some courts in the United States, privilege means that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libelous by anyone else; but everyone has a right to make fair and proper comment, in good faith, and so long as it is within that limit, it is no libel. *Campbell v. Spottiswood* (1863) 3 B. and S. 769, 122 Eng. Rep. 288; *Morasca v. Item Co.* (1910) 126 La. 426, 52 So. 565; *Merrey v. Guardian Printing Co.* (1909) 79 N. J. L. 177, 74 Atl. 464. Other cases have held that fair comment comes within the scope of libel, but that it is a privilege which is a good defence, in the absence of actual malice. The distinction between fair comment and qualified privilege is not sharply drawn in these cases. This view, which has found more favor within American courts, is approved in the instant case. *Thomas v. Bradbury* (1906) 2 K. B. 627; *Diener v. Chronicle Pub. Co.*, supra; *State v. Cox* (1927) 318 Mo. 112, 298 S. W. 837; *Gott v. Pulsifer* (1877) 122 Mass. 235.

Whether fair comment is regarded as being entirely outside the scope of libel, or whether it is a qualified privilege is unimportant for practical purposes, since, under either rationale, the defence is defeated by proof of actual malice. Therefore commnt to be "fair" must be made without malice. It is arguable that this interpretation by the courts is not cogent, since it would seem that a comment could be made maliciously, and yet be a "fair" inference from true facts if judged by objective criteria.

J. L. F. '37.