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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

RECENT CASES AND TRENDS INVOLVING THE ISSUE OF RACIAL DISCRIMINATION

The governor of a southern state recently threatened dire consequences to the educational system of his state if the United States Supreme Court should declare segregation of the races in public schools an unconstitutional discrimination against the colored race. The United Nations has been the audience for propaganda attacks charging that the Great Democracy is rife with discrimination. In our home state, St. Louis experienced riots when swimming pools were opened to members

of the colored race.¹ Racial discrimination is a live issue in the United States today. Time, it is true, would probably solve the problem, but the cases arise and must be decided today. The Supreme Court, in the forthcoming Segregation Cases,² has reached a threshold from which it seems it must make a significant step. It is the purpose of this article to briefly survey the recent cases and trends in an attempt to discern the direction and the manner of that step.

Certain trends can be seen, both as to what type of action constitutes discrimination and as to what constitutes state action so as to render the act an unconstitutional violation of the Fourteenth or Fifteenth Amendments to the Constitution of the United States. As this article is not intended as an exhaustive study of the entire field of law relating to this subject, it is believed that these trends can be seen in a limited number of fields in which litigation involving racial discrimination has been fairly active.

There has been recent cases of interest concerning restrictive covenants, jury selection, elections, and segregation in public schools and recreational facilities.

I. RESTRICTIVE COVENANTS

Covenants restricting the use or purchase of land by negroes have been fairly common in recent years. Standing alone they would appear to constitute only private discrimination and therefore not infringe the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.³ The litigated question has been the validity of their enforcement, which, aside from the possibility of self help, must be made through a state court. The now famous case of *Shelley v. Kraemer*⁴ held that while restrictive covenants were not of themselves discrimination barred by the Fourteenth Amendment, an attempt to specifically enforce them in a state court would be state action violating the equal protection of the laws clause of the Fourteenth Amendment.

The question then arose whether an action for damage for the breach of such a covenant would also be invalid. On the one hand it could be said a damage action would result in indirect enforcement; on the other it could be argued that no one was discriminated against, since the damage action did not disturb the ownership, use, or possession of the person against whom the covenant was aimed.

1. In June, 1949, the Director of Public Welfare for St. Louis opened the city's public swimming pools to members of all races. On June 21, race riots occurred in north St. Louis which required 200 policemen to quell. Mayor Joseph M. Darst thereupon rescinded the order and restored the traditional policy of segregation. In the later case of *Draper v. City of St. Louis*, 92 F. Supp. 546 (E.D. Mo. 1950), city officials were enjoined from refusing negroes the right to use public swimming pools while facilities furnished the two races remained unequal.

2. Cases now before the United States Supreme Court involving segregation in public schools, cited and discussed in Part IV.

3. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. AMEND. XIV, § 1.

4. 334 U.S. 1 (1948).

Several cases followed each view. In *Weiss v. Leason*⁵ the Supreme Court of Missouri took the view that while an action to enforce such a covenant against negroes would be dismissed, the court would entertain an action for damages occasioned by the breach. It should be noted here, however, that the Supreme Court of Missouri, before reversal by the United States Supreme Court, had upheld specific enforcement in *Shelley v. Kraemer*.⁶ *Correll v. Earley*,⁷ an Oklahoma case, also supported a damage action for breach of a restrictive covenant. The court said that property owners' contractual agreements to exclude negroes were valid as between the parties, notwithstanding the fact that the courts could not specifically enforce them.

Roberts v. Curtis,⁸ a federal case, took the opposite view, holding that a restrictive covenant not to sell realty to members of the colored race could not be enforced by any kind of judicial action. In accord with this case is the Michigan case of *Phillips v. Naff*,⁹ which held that an action for damages could not be maintained since it would result in indirect enforcement of a racial restriction repugnant to the Fourteenth Amendment. State action within the Fourteenth Amendment was deemed to refer to exertion of state power in all forms. The court stated that the Fourteenth Amendment is not rendered ineffective simply because the particular pattern of discrimination which the state enforced was defined initially in terms of a private agreement.

The recent Supreme Court decision in *Barrows v. Jackson*¹⁰ appears to settle the question in accord with the federal and Michigan cases cited. Plaintiff and defendant owned realty in California, and entered into a restrictive covenant whereby each agreed on behalf of himself, his heirs, executors, administrators, successors, and assigns, not to permit the use or occupancy of his premises by any person not wholly of the Caucasian race. The parties further agreed to incorporate the restriction in all future transfers of the land. Plaintiff sued at law for damages claiming that defendant breached the covenant by allowing non-Caucasians to occupy the premises and by conveying her real estate without incorporating the restriction in the deed. The trial court sustained a demurrer, and the court of appeals and the Supreme Court of California denied hearing. The United States Supreme Court granted certiorari because of the importance of the constitutional question involved, and affirmed the judgment of the trial court.

The Supreme Court admitted that voluntary adherence would constitute only individual action, but held that when the parties ceased to rely upon such voluntary adherence and asked the state to step in and sanction the enforcement of the covenant, the situation changed. The awarding of damages for the breach was held to constitute state action under the Fourteenth Amendment, the Court stating:

"If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory

5. 359 Mo. 1054, 225 S.W. 2d 127 (1949).

6. 355 Mo. 814, 198 S.W. 2d 679 (1947).

7. 237 P. 2d 1017 (Okla. 1951).

8. 93 F. Supp. 604 (D.C. 1950).

9. 332 Mich. 389, 52 N.W. 2d 158 (1952).

10. 73 Sup Ct. 1031 (1953).

manner, which in essence is the purpose of the covenant. . . . The action . . . would constitute state action as surely as if it was state action to enforce such covenants in equity, as in *Shelley*, supra."¹¹

Nor was the fact that no non-Caucasian was before the Court claiming a denial of his constitutional rights deemed to bar the defendant's raising of this issue. The Court reaffirmed the general rule, often applied in cases where the constitutionality of statutes is challenged, that one may not normally raise the issue of constitutionality unless he can show some injury by the act which he claims to be unconstitutional. This rule was deemed to be outweighed in the principal case by the need to protect the fundamental rights of the "unidentified but identifiable" non-Caucasians who would otherwise be discriminated against by state action. The late Mr. Chief Justice Vinson dissented.

Barrows v. Jackson seems to end any practical value of a restrictive covenant, since it can not be enforced and no damage action can be maintained for its breach. The decision undoubtedly changes Missouri law as set forth in the *Weiss* case.

II. JURY SELECTION

Strauder v. West Virginia,¹² in 1879, established the proposition that state exclusion of negroes from grand and petit juries denied negro defendants in criminal cases the equal protection of the laws. This principle has been reiterated in many Supreme Court decisions.¹³ Moreover, the Fourteenth Amendment has been codified by federal law to the following extent:

" . . . no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit jurors in any court of the United States, or of any State on account of race, color, or previous condition of servitude."¹⁴

The selection of juries is such, however, that no absolute limits can be drawn between constitutional and unconstitutional conduct. The Supreme Court has definitely stated that proportional representation is not required. In *Akins v. Texas*,¹⁵ action of the jury commissioners in placing but one negro on a grand jury panel of sixteen in an area where negroes constituted about 15 per cent of the population was held insufficient to establish a deliberate violation of equal protection of the laws. Mere variation between proportion of whites and negroes on jury lists and the racial percentage of the population is not considered discrimination, at least if the discrepancy is explained and not continued over a long period of time.

Since there is no requirement that the percentages of colored residents and of colored jurors coincide, each case must be considered individually to determine whether or not the disparity is of a type that constitutes discrimination. There have

11. 73 Sup. Ct. 1031, at 1033-1034.

12. 100 U.S. 303 (1879).

13. *Hill v. State of Texas*, 316 U.S. 400 (1942); *Pierre v. State of Louisiana*, 306 U.S. 354 (1939); *Hollins v. State of Oklahoma*, 295 U.S. 394 (1935); *Norris v. State of Alabama*, 294 U.S. 587 (1935); *Carter v. Texas*, 177 U.S. 442 (1900); *Bush v. Commonwealth of Kentucky*, 107 U.S. 110 (1882); *Neal v. Delaware*, 103 U.S. 370 (1880); *Ex parte Commonwealth of Virginia*, 100 U.S. 339 (1879).

14. 18 STAT. 336-37 (1875); 8 U.S.C. § 44 (1946); 8 U.S.C.A. § 44 (1942).

15. 325 U.S. 393 (1945).

been enough cases on the subject, however, for a person to "sense" the limits and the tendencies of the court. Jury commissioners cannot rely upon a claim that they did not know any qualified negroes. In *Hill v. Texas*¹⁶ the county in question had gone for sixteen years with no negro on the grand jury although there were more than 16,000 negroes in the county over twenty-five years of age who had attended high school. The Court held that the commissioner's statement that he did not know any negroes qualified to serve established a prime facie case of discrimination. A very similar case is *Cassell v. Texas*¹⁷ in which the grand jury which indicted the negro defendant for murder was chosen by jury commissioners who selected only persons with whom they were "personally acquainted." The commissioners claimed not to know any qualified negroes although the negro population was approximately 15 per cent. The conviction was reversed, although the Court remarked that there was no requirement for proportional representation.

The mere fact that a jury is all-white and the defendant is colored is no ground for reversal in itself, in the absence of any deliberate exclusion. A disparity long continued, however, will raise a presumption of discrimination. In *Patton v. Mississippi*¹⁸ the indictment, trial and conviction of a negro by all white grand and trial juries was held a deprivation of equal protection of the laws where the venires from which the jurors were chosen contained no negroes and over one-third of the county's population of 34,000 was colored. The Supreme Court gave particular weight to a factor which the state court failed to consider—namely that no negro had served on either jury for thirty years. This situation was held to make a strong showing of systematic exclusion, although the Court remarked that the mere disparity in percentages would have been insufficient in itself. The heavy burden of explanation and justification placed upon the state by such finding was not satisfied by an attempt to show that the exclusion was due to failure of the colored population to meet the required test of an elector. The conviction was reversed.

In upholding the constitutionality of New York's special "blue ribbon" panels,¹⁹ the Supreme Court held in *Fay v. People of New York*²⁰ that a state could confine its jurors to males, freeholders, citizens, certain age groups, or to persons with certain educational qualifications, but that no race could be proscribed as incompetent for jury service. Another non-negro case which nevertheless sets a broad pattern for American juries is *Thiel v. Southern Pacific Co.*,²¹ in which the Court stated:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political, and geographic groups in the commu-

16. 316 U.S. 400 (1942).

17. 339 U.S. 282 (1950).

18. 332 U.S. 463 (1947).

19. Special panels sifted from those qualified for general jury service and used at the court's discretion, on motion of either party, in cases of unusual importance or intricacy where it is felt that the special panel would be better qualified to render a verdict.

20. 332 U.S. 261 (1947).

21. 328 U.S. 217 (1946).

nity; . . . But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups."²²

There have been two additional Supreme Court cases within the last year. *Brown v. Allen*²³ demonstrates that a method of selecting jurors which results in an unintentional disproportion is not necessarily fatal to the validity of a jury so chosen. In this case there was a noticeable difference between the 38 per cent colored population and the seven per cent colored jury. The clerk of commissioners offered evidence that he had selected "qualified citizens" of good moral character, but such evidence was not deemed sufficient of itself to explain such a wide discrepancy. In this regard, the Court appears to have followed the thinking of the *Hill* and *Cassell* cases mentioned previously. When further evidence was offered, however, tending to show that the disparity was the result of a "comparative wealth" basis of selection, the disparity was considered sufficiently explained, and the conviction for rape was upheld. It should be noted, however, that no timely objection was raised by defendant as to the discrimination that might possibly result from the use of such an economic basis for the selection of jurors.

In *Avery v. Georgia*,²⁴ sixty names were drawn from the jury box to compose the panel. The prospective white jurors were on white tickets and the prospective colored jurors on yellow tickets. On the failure to select a single negro, it was held that a prima facie case of discrimination was established which the state had the burden of overcoming, and the failure of the state to do so was held sufficient to reverse the conviction no matter how strong the other evidence of guilt. The Court stated that jury commissioners are under a constitutional duty to follow a course of conduct which does not operate to discriminate on racial grounds.

With such a view prevailing, it may well happen that the freeing of a guilty felon would be the high price that a state would have to pay in a particular case for failure to compose its juries in accord with these standards.

III. ELECTIONS

In addition to the equal protection of the laws clause of the Fourteenth Amendment, the Fifteenth Amendment provides that the right of citizens to vote shall not be denied by the United States or by any state on account of race or color.²⁵ Like the Fourteenth Amendment, however, the Fifteenth does not protect one from individual or private abuse.

Texas has been the chief battleground for the litigation necessary to determine the extent of the protection given negroes by the Fourteenth and Fifteenth Amendments in the matter of elections. As the Fifteenth Amendment is too clear to permit direct exclusion of negroes in general elections, the controversy has centered around

22. 328 U.S. 217 at 220.

23. 73 Sup. Ct. 397 (1953).

24. 73 Sup. Ct. 891 (1953).

25. "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by an State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation." U. S. CONST. AMEND. XV.

their exclusion from primaries, conventions, and other pre-election methods of selecting candidates. *Nixon v. Herndon*,²⁶ one of the early cases, held unconstitutional a Texas statute expressly denying negroes the right to vote in Democratic party primaries on the ground that the statute was a denial of equal protection of the laws. Texas accordingly amended its legislation to allow political parties to establish the qualifications for their own members. The Executive Committee of the Democratic party thereupon excluded negroes from participation. In *Nixon v. Condon*²⁷ the action of the committee was held bad on the reasoning that the committee derived its authority from the state, and the rule therefore amounted to state action. There were four dissents.

The Supreme Court reversed its course somewhat in *Grove v. Townsend*,²⁸ and held that political conventions were voluntary associations whose actions were not necessarily dependent upon state authorization. The resolution of the state Democratic convention limiting party membership to white persons was therefore not deemed state action violative of the Fourteenth or Fifteenth Amendments. In view of *Nixon v. Condon*, a close vote would have been expected; it was, however, a unanimous decision.

*United States v. Classic*²⁹ signaled the downfall of *Grove v. Townsend*. In the *Classic* case, the Court held that the primary of Louisiana was an integral part of choosing congressmen, and was therefore subject to congressional control. *Smith v. Allwright*,³⁰ based in part upon *United States v. Classic*, overruled *Grove v. Townsend*, and held that the election system was such that political parties are agencies of the state insofar as their determination of participants is concerned.³¹

Showing an unusual amount of perseverance, the Democratic party of Texas made still another attempt, the so called "three-step" exclusion process. By this system, combinations of white voters' associations held pre-primary elections of candidates which were ratified by the primary before the general election. By this method, the discrimination against the negroes was removed one step and occurred in truly private associations. The circumstances were such, however, that the primary became a purely prefatory ratification of the white voters' choices, and the negro was effectually barred for all practical purposes from participation in the primary.

In the very recent case of *Terry v. Adams*,³² this procedure was declared an unconstitutional deprivation of the right to vote on account of race and color. The Court admitted that the Fifteenth Amendment erects no shield against private conduct, however discriminatory, but held that a state permitting such a duplication of its election processes permits a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. "It violates the Fifteenth Amendment," said the Court,

26. 273 U.S. 536 (1927).

27. 286 U.S. 73 (1932).

28. 295 U.S. 45 (1935).

29. 313 U.S. 299 (1941).

30. 321 U.S. 649 (1944).

31. For a more complete discussion of these cases see an article by Howard, *Constitutional Law Cases in the United States Supreme Court 1941-1946*, 11 Mo. L. Rev. 197, at 296-298 (1946).

32. 73 Sup Ct. 809 (1953).

"for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election."³³

The Supreme Court thus appears finally committed to the idea that the entire election process is sufficiently state action for the purposes of protection of the Fourteenth and Fifteenth Amendments, and it is unlikely that any manipulation of the election machinery which has the practical effect of excluding negroes from the right to participate in primaries or their equivalent will be found valid.

IV. SEGREGATION IN SCHOOLS AND PUBLIC RECREATIONAL AREAS

The early Supreme Court case of *Plessy v. Ferguson*,³⁴ although not a school case, has been the continued authority for the "separate but equal" doctrine applied to segregation in the country's schools. The case involved the interpretation of a Louisiana statute requiring separate intrastate coaches for white and colored persons. The statute was held not to violate the privileges and immunities of United States citizens, nor to violate the due process or equal protection of the laws clauses of the Fourteenth Amendment. The Court remarked that the Fourteenth Amendment was intended to put the races on an equal basis before the law, and not to attempt to achieve social equality; if, therefore, the facilities were equal, segregation by the state was permissible. "The most common instance of this," said the Court, "is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power³⁵ even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."³⁶ The later case of *Gong Lum v. Rice*³⁷ is more directly in point. This case upheld a requirement that Chinese children attend colored schools as a valid exercise of the state's police power.

The "separate but equal" doctrine has not been comprehensive enough, however, to prevent considerable litigation by persons who felt that they could establish a case of discrimination within the limits of *Plessy v. Ferguson*. *State of Missouri ex rel. Gaines v. Canada*³⁸ was one of the pioneer cases involving alleged discrimination by the schools of a state. Missouri has separate universities for white and colored students. Gaines, a negro, was denied admission to the University of Missouri School of Law because of his race. No other legal training was offered by the state to negroes at that time, although a statute provided for the establishment by the curators of a colored law school if it should become necessary, or, in the alternative, attendance by negroes at law schools of adjacent states with the tuition paid by Missouri. The

33. 73 Sup. Ct. 809 at 813.

34. 163 U.S. 537 (1896).

35. The Court cited the following cases in support: *Bertonneau v. Board of Directors of City School*, 3 Fed. Cas. 294, No. 1361 (C.C. La. 1878); *Ward v. Flood*, 48 Cal. 36 (1874); *Cory v. Carter*, 48 Ind. 327 (1874); *Dawson v. Lee*, 83 Ky. 49 (1884); *Robert v. City of Boston*, 5 Cush. 198 (Mass. 1849); *Lehew v. Brummel*, 15 S.W. 765 (Mo. 1891); *People v. Gallagher*, 93 N.Y. 438 (1883); *State v. McCann*, 21 Ohio St. 198 (1871).

36. 163 U.S. 537, at 544.

37. 275 U.S. 78 (1927).

38. 305 U.S. 337 (1938).

Missouri Supreme Court upheld the University,³⁹ but was reversed by the United States Supreme Court which held that the situation was a denial of equal protection of the law, and the discrimination not excused by the alternatives of the statute. The court stated,

"The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of a duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the state; the negro resident having the same qualifications is refused it there and must go outside the state to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the state has set up, and the provision for the payment of tuition fees in another state does not remove the discrimination."⁴⁰

Missouri then set up a Law School as part of Lincoln University for colored persons, and further litigation was instituted based upon a claim that the legal education provided there was not equal to that provided at the University of Missouri. The case was never carried through, but similar cases developed elsewhere as shown below.

In *Sipuel v. Board of Regents of University of Oklahoma*,⁴¹ the United States Supreme Court reversed the Supreme Court of Oklahoma⁴² and upheld an action in mandamus requiring the state of Oklahoma to provide negroes with legal education comparable to that provided white persons. The Court cited *Missouri ex rel. Gaines v. Canada*, but added the significant requirement that the facilities must be provided *as soon* as for any other group. In the related case of *Fisher v. Hurst*⁴³ it was held that the order of the Oklahoma district court ordering the University to admit the colored applicant to the University Law School, or not to enroll any other applicants for the same class until a separate negro law school was established, was in conformity with the Supreme Court order in the *Sipuel* case.

In *Sweatt v. Painter*⁴⁴ the Court examined the facilities offered to see whether they were equal. The Law School of the University of Texas, from which the negro applicant had been excluded, is a leading law school in the country which had at that time a faculty of sixteen professors and a library of 65,000 volumes, as well as opportunities for moot court, Law Review, and Coif affiliation. A proposed law school for negroes had no independent library or faculty; the law school later opened for negroes at the University had five professors and a 16,500 volume library, although it was not yet accredited. Under these conditions, it was held that the educational opportunities offered by the state were not equal. The Texas court of civil appeals which had found the facilities "substantially equivalent"⁴⁵ was

39. 342 Mo. 121, 113 S.W. 2d 783 (1937).

40. 305 U.S. 337, at 349-350.

41. 332 U.S. 631 (1948).

42. 199 Okla. 36, 180 P. 2d 135 (1947).

43. 333 U.S. 147 (1948).

44. 339 U.S. 629 (1950).

45. 210 S.W. 2d 442 (Texas App. 1948).

reversed. Significant perhaps in view of the present segregation cases were these words of the Court, "We cannot therefore, agree with respondents that the doctrine of *Plessy v. Ferguson* . . . requires affirmance of the judgment below. Nor need we reach petitioner's conclusion that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation."⁴⁶ Certainly the court was right in so stating since the issue could be decided on the question of equality alone, but the claim that segregation is discrimination has become so forceful that it has culminated in the present Segregation Cases.

*McLaurin v. Oklahoma*⁴⁷ involved the question of discrimination against the negro after he had secured admission. The Supreme Court found that assignment of the negro to a special classroom seat, a special table in the library, and a special place to eat in the cafeteria deprived him of equal protection of the laws, even though the negro was allowed the same purely educational advantages of the other students.

The possible trend suggested by these cases has led to a number of cases in which relief was sought on the ground that educational facilities provided were unequal or upon the ground that segregation amounted to discrimination no matter how equal the physical facilities.⁴⁸ The Supreme Court is now considering the important Segregation Cases which may be decided before publication of this comment, and which include cases from South Carolina, Delaware, Kansas, Virginia, and the District of Columbia.

Briggs v. Elliott,⁴⁹ the South Carolina case, began as a suit for a declaratory judgment and injunctive relief based upon a claim that there was an inequality of facilities offered, and also that segregation in public schools under South Carolina's Constitution and laws was discrimination in and of itself. The defendants admitted, and the evidence sustained, the fact that the facilities were unequal. It was claimed, however, that the situation resulted from limited resources and was to be remedied

46. 339 U.S. 629, at 636.

47. 339 U.S. 637 (1950).

48. Recent cases of this type include *Winborne v. Taylor*, 195 F. 2d 649 (4th Cir. 1952); *McKissick v. Carmichael*, 187 F. 2d 949 (4th Cir. 1951); *Carter v. School Board of Arlington County, Virginia*, 182 F. 2d 531 (4th Cir. 1950); *Carr v. Corning*, 182 F. 2d 14 (App. D.C. 1950); *Corbin v. County School Board of Pulaski County, Virginia*, 177 F. 2d 924 (4th Cir. 1949); *McSwain v. County Board of Education of Anderson County, Tennessee*, 104 F. Supp. 861 (E.D. Tenn. 1952); *Moses v. Corning*, 104 F. Supp. 651 (D.C. 1952); *Blue v. Durham Public School District*, 95 F. Supp. 441 (M.D. N.C. 1951); *Wilson v. Board of Supervisors of Louisiana State University*, 92 F. Supp. 986 (E.D. La. 1950); *Johnson v. Board of Trustees of University of Kentucky*, 83 F. Supp. 707 (E.D. Ky. 1949); *Freeman v. County School Board of Chesterfield County*, 82 F. Supp. 167 (E.D. Va. 1948); *Davis v. Cook*, 80 F. Supp. 443 (N.D. Ga. 1948); *Wrighten v. Board of Trustees of University of South Carolina*, 72 F. Supp. 948 (E.D. S.C. 1947); *McCready v. Byrd*, 195 Md. 131, 73 A. 2d 8 (1950); *Parker v. University of Delaware*, 75 A. 2d 225 (1950). At least two cases are now before the Supreme Court in addition to the Segregation Cases: *Battle v. Wichita Falls Junior College District*, 101 F. Supp. 82 (N.D. Texas 1951) and *State ex rel. Hawkins v. Board of Control of Florida*, 47 So. 2d 608 (Fla. 1950). Missouri cases include *State ex rel. Hobby v. Disman*, 250 S.W. 2d 137 (Mo. 1952); *State ex rel. Brewton v. Board of Education of City of St. Louis*, 361 Mo. 86, 233 S.W. 2d 697 (1950); and *State ex rel. Toliver v. Board of Education of St. Louis*, 360 Mo. 671, 230 S.W. 2d 724 (1950).

49. 98 F. Supp. 529 (E.D. S.C. 1951).

by a \$75,000,000 bond issue for the purpose of equalizing educational opportunities throughout the state. Plaintiff was awarded a declaratory judgment to the effect that the facilities were unequal and an injunction requiring equal facilities to be afforded to all. The case was retained on the docket with a requirement that the defendants report within six months upon the progress made. Segregation was not held to be discrimination per se in the light of *Plessy v. Ferguson*. There was a strenuous dissent by Waring, J, maintaining that segregation is per se inequality and is opposed to the meaning and spirit of the federal Constitution. The dissent contended that *Plessy v. Ferguson*, having dealt with separate accommodations on railway coaches, need not bind the court on the problem of segregation in schools. This case is now before the Supreme Court, but could, of course, be disposed of on the finding of inequality alone.

Gebhart v. Belton,⁵⁰ a Delaware case, is another of the Segregation Cases. The case originated as a suit to enjoin school officials from denying plaintiff's admittance to certain schools because of color, and also for a declaratory judgment to the effect that segregation in public schools under the Delaware Constitution and laws violates the equal protection of laws guaranteed by the Fourteenth Amendment. The Chancery Court⁵¹ decreed immediate admittance, and the Supreme Court of Delaware affirmed the decree holding that the evidence established unequal facilities for white and colored pupils. The finding was based upon a comparative study of public funds, buildings and sites, equipment, faculty and instruction, transportation, and curriculum. The case differed from the *Briggs* case in that the plaintiffs were here held entitled to immediate cessation of the unlawful discrimination. The holding was not altered by the fact that steps were being taken to improve the negro facilities and make them equal, a project which was expected to be completed within a year. This case, like the *Briggs* case, being based upon a finding of inequality, does not necessarily require reconsideration of *Plessy v. Ferguson* since the inequality alone provides grounds for relief.

The Kansas case of *Brown v. Board of Education of Topeka, Shawnee County, Kansas*⁵² may be more significant. The General Statutes of Kansas authorize cities of the first class to maintain separate schools for white and negro pupils, and under this authority the city of Topeka has established such a system. Plaintiffs asked a declaratory judgment to the effect that the statute and action thereunder were unconstitutional. Although admitting the obvious fact that absolute equality was impossible, the court found that the facilities offered each race were comparable and that there was no wilful or substantial discrimination. The nearest item to discrimination was the fact that negro children had to travel much farther to school than did white children, but this was balanced by the fact that Negro children were provided with free transportation to and from school, a service which was not provided white children. The court admitted a trend away from *Plessy v. Ferguson* and *Gong Lum v. Rice*, and said, in effect, that it was difficult to see how segregation was not discrimination. Since, however, the Supreme Court had expressly refused to overrule those cases, the district court felt bound by

50. 91 A. 2d 137 (Del. 1952).

51. 87 A. 2d 862 (Del. 1952).

52. 98 F. Supp. 797 (D.C. Kan. 1951).

them. In the present Segregation Cases, this case presents the issue squarely to the Supreme Court since there was no discrimination except segregation and the segregation sustained solely on the *Plessy* and *Gong Lum* cases.

Davis v. County School Board of Prince Edward County, Virginia,⁵³ is the Virginia Segregation Case. Petitioners asked that school segregation, as provided for under the Virginia Constitution and Code, be declared invalid, with an alternative prayer for the correction of alleged inequalities. Plaintiffs presented testimony by eminent educators, anthropologists, psychologists, and psychiatrists to support the contention that the separation distorted the negro child's natural attitude, arrested his mental and educational development, and had the general effect of stigmatizing him as unwanted. The court refused to invalidate segregation, but did find inequalities in buildings, curricula, and transportation entitling the colored plaintiffs to an injunction ordering that the inequalities be corrected. Like the *Briggs* case, the injunction called for correction and not for the immediate entrance allowed in the *Gebhart* case.⁵⁴

Segregation of the races has given rise to similar cases involving discrimination in public recreational facilities, restaurants and inns, and public conveyances. Recent cases of this type are cited below.⁵⁵ As in the school cases, the emphasis has shifted from a claim of unequal facilities to a claim that segregation is discrimination per se. As in the school cases, the latter contention has never been established because of the separate but equal doctrine of *Plessy v. Ferguson*. The issues are, in fact, so similar that it would be repetitious to consider many of these cases. There are, however, several representative cases which have been decided within the last year and which are currently before the United States Supreme Court.

In *Muir v. Louisville Park Theatrical Association*,⁵⁶ a private organization leased an amphitheater from the city of Louisiana and refused to admit members of the colored race. The city, however, did not participate in the management or operation

53. 103 F. Supp. 337 (E.D. Va. 1952).

54. The final case, *Bolling v. Sharpe*, a 1951 decision in the U. S. Court of Appeals for the District of Columbia, has for some reason not been reported.

55. *Henderson v. United States*, 339 U.S. 816 (1950) (public conveyances); *Mitchel v. United States*, 313 U.S. 80 (1941) (public conveyances); *Boyer v. Garrett*, 183 F. 2d 582 (4th Cir. 1950) (athletic activities at public parks); *Easterly v. Dempster*, 112 F. Supp. 214 (E.D. Tenn. 1953) (golf course); *Hayes v. Crutcher*, 108 F. Supp. 582 (M.D. Tenn. 1952) (golf courses); *Camp v. Recreation Board for District of Columbia*, 104 F. Supp. 10 (D.C. 1952) (playgrounds); *Draper v. City of St. Louis*, 92 F. Supp. 546 (E.D. Mo. 1950) (swimming pools); *Powell v. Utz*, 87 F. Supp. 811 (E.D. Wash. 1949) (inn); *Law v. Mayor and City Council of Baltimore*, 78 F. Supp. 346 (D. Md. 1948) (golf course); *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D. W. Va. 1948) (swimming pool lease); *Lopez v. Seccombe*, 71 F. Supp. 769 (S.D. Calif. 1948) (Mexicans excluded from playground and parks); *Rice v. Arnold*, 54 So. 2d 114 (Fla. 1951) (golf course); *Modern Amusements v. New Orleans Public Service*, 183 La. 898, 165 So. 137 (1936) (leasing of ball park); *Durkee v. Murphy*, 181 Md. 259, 29 A. 2d 253 (1942) (golf course); *Harris v. City of St. Louis*, 233 Mo. App. 911, 111 S. W. 2d 995 (1938) (leasing of city auditorium); *Pridgen v. Carolina Coach Company*, 229 N.C. 46, 47 S.E. 2d 609 (1948) (public conveyances); *Culver v. City of Warren*, 84 Ohio App. 373, 83 N.E. 2d 82 (1948) (swimming pools); *Commonwealth ex rel. v. Carolina Coach Company of Virginia*, 192 Va. 745, 66 S.E. 2d 572 (1951) (public conveyances).

56. 202 F. 2d 275 (6th Cir. 1953).

of the theater. The district court found colored plaintiffs entitled to have the use of the golf courses and fishing lake in the same park, or to have separate facilities of equal quality provided, but found the theatrical association guilty of no unlawful discrimination under the Fourteenth Amendment.⁵⁷ Whatever discrimination existed amounted to only individual action. The court of appeals, in a per curiam opinion, affirmed this holding.

In another recent case, *Beal v. Holcombe*,⁵⁸ the City of Houston provided separate parks for whites and negroes, with golfing facilities offered only at the parks for white persons. The situation was held discrimination violative of equal protection of the laws.

The third case, *Kansas City, Missouri v. Williams*,⁵⁹ arose in the federal courts of Missouri. Kansas City offers a very complete recreational program at Swope Park including golfing, boating, swimming, a "starlight" theater, and a zoo. Negroes were admitted to the park, but denied admission to the swimming pool. Those wishing to swim were required to do so at a park for colored persons several miles away. Three colored residents of Kansas City were denied admission to the Swope Park pool and sought injunctive relief individually and as representatives of their class. The district court⁶⁰ awarded plaintiffs a decree personally, but refused to grant class relief on the ground that such an adjudication would serve no useful purpose and that there was no showing that any other colored persons had requested and been denied the use of the pool. The decision was affirmed by the court of appeals, and the Supreme Court, at the writing of this article had just denied certiorari. Although there was a finding that the swimming facilities of the races were not equal, the facts suggest that the segregation was more in issue than the inequality. Had there been class relief granted in this case and certiorari refused, it might have been viewed as a barometer of the Supreme Court's inclinations toward the Segregation Cases; however, since only individual relief was granted, the Constitutional effect of the decision seems somewhat less decisive. In any event, the relief granted can always be explained on the basis of the inequality.

Segregation of races at public recreational areas and on public conveyances will undoubtedly fall with segregation in schools if the present Segregation Cases result in a reversal of *Plessy v. Ferguson*. What then is the outlook for the Segregation Cases?

Generally speaking, the Supreme Court has three choices—it may reaffirm *Plessy v. Ferguson* and thus dispose of all questions except the factual determination of equality of facilities; it may dispose of the case on other grounds—as, for example, a finding that the facilities offered are in fact presently unequal; or it may overrule *Plessy v. Ferguson* and thereby mark any state action separating white and colored persons as a form of discrimination. Any course of action involves considerable practical obstacles somewhat outside the field of Constitutional Law. The many briefs already submitted to the Court by interested organizations and persons have pres-

57. 102 F. Supp. 525 (W.D. Ky. 1951).

58. 193 F. 2d 384 (5th Cir. 1952).

59. 205 F. 2d 47 (8th Cir. 1953).

60. 104 F. Supp. 848 (W.D. Mo. 1952).

ented considerations ranging all the way from the impact upon the South, which would be occasioned by a reversal of this sixty-three year old formula, to the cold war propaganda value of any American discrimination against the colored race.

If segregation is to go, there also arises the manner of its exit. Undoubtedly it could not be done over night. The brief filed on behalf of the United States by the then Attorney-General McGranery suggested a gradual transition over a long period of time similar to the procedure used in attempting to destroy the Standard Oil monopoly.

The trend of the cases suggests that *Plessy v. Ferguson* will some day be overruled. It therefore appears somewhat unlikely that the Supreme Court will staunchly reaffirm it in toto. A disposal on other grounds will result in a continuation of the effort to find the boundary between equality and inequality, discrimination and equal treatment. A reversal of *Plessy v. Ferguson* and a declaration that segregation is discrimination per se will have an enormous effect upon the social and economic life of a great part of the United States. Even under such a holding, it would be expected that a number of cases would remain in which the question would be whether the discrimination complained of amounted to individual or state action. In any event, Constitutional Law in general, and interpretation of the Fourteenth Amendment in particular, will be profoundly affected for many years to come by whatever decision is made in the Segregation Cases.

RAYMOND C. LEWIS, JR.

MISSOURI RULES OF CRIMINAL PROCEDURE: THEIR EFFECT ON STATUTES

The adoption of the Rules of Criminal Procedure by the Supreme Court of Missouri which became effective January 1, 1953 is the greatest exercise, thus far, of the rule making power vested in the Supreme Court by the Constitution of 1945.¹

The creation of this rule making power in the court marked a return to the practices of an earlier, and according to many writers,² a better age. At first, practice and procedure was governed solely by the customs of the tribunal, but gradually came to be regulated by rules of the court. Legislative codes were the next development, and in recent years, the trend is to replace such codes with court-made rules. This is the development that has been traced both in England³ and the United States.⁴

The rule making power in a state supreme court was first provided for in the constitution of Michigan, adopted in 1851.⁵ The power was not recognized extensively by the other states until after the turn of the century, when a number of states began to provide for such power by legislative acts.⁶ The trend was intensified by the promulgation by the United States Supreme Court, under Congressional authority, of

1. Mo. CONST. Art. V, § 5.

2. Hyde, *From Common Law Rules to Rules of Court*, 22 WASH. U. L. Q. 187 (1937); Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926).

3. Pound, *supra* note 2.

4. Cummings, *New Federal Rules of Criminal Procedure*, 5 F.R. D. 20 (1946).

5. MICH. CONST. Art. VII, § 5.

6. Harris, *The Rule-Making Power*, 2 F. R.D. 67 (1943).

the Federal Rules of Civil Procedure⁷ and the Federal Rules of Criminal Procedure.⁸ At the present time, most of the states as well as the federal government provide, in varying degrees, for the regulation of practice and procedure by rules established by the highest tribunal.⁹

The situation in Missouri has been similar to the pattern traced elsewhere. Missouri was the second state to adopt a legislative code regulating practice and procedure.¹⁰ The opinion was held by some in the state that the Constitution of 1875, in stating that "The Supreme Court shall have a general superintending control over all inferior courts"¹¹ granted an inherent power to regulate practice and procedure by court rules.¹² The Supreme Court of Missouri, however, has not found such inherent power in itself. Several attempts were made to secure the rule making power by legislative enactment, the course chosen by many states, but none of the attempts were successful.¹³ It was not until the Constitutional Convention of 1943-1944 that the regulation of practice and procedure was added to the rule making powers of the supreme court. The Constitution adopted in 1945 contains the following provisions:

The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose.¹⁴

The Missouri constitutional provision, worded as it is, raises the problem of what effect the court-adopted rules will have on the already existing statute relating to the same subject.

This problem is peculiarly a local one, for the federal government, and most of the other states, in the legislative creation of the rule making power, have specifically provided for the effect of the rules on the statutes.

The Congressional acts giving the Supreme Court the power to promulgate the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure stated that "all laws in conflict therewith shall be of no further force or effect."¹⁵

The state legislatures that have given rule making power to their supreme courts

7. 48 STAT. 1064. (1934), 28 U.S.C. 2072 (Supp., 1950).

8. 54 STAT. 688 (1941), 18 U.S.C. § 3771 (Supp. III, 1950).

9. The extent of the adoption of the rule making power by the states is shown in VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* p. 97 (1949).

10. Hyde, *supra* note 2, at 192.

11. Mo. CONST. Art. V, § 3 (1875), Mo. CONST. Art. V, § 4 (1945).

12. 12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943-1944 p. 3008 (1944). Like constitutional provisions exist in other states and probably have caused controversy there, but states finding an inherent power in the courts to regulate procedure do not seem to have relied on such constitutional statements. VANDERBILT, *op. cit. supra* note 9, at 132, 135-136.

13. 12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943-1944 pp. 3008, 3018 (1944).

14. Mo. CONST. Art. V, § 5.

15. See notes 7 and 8 *supra*.

have expressly indicated the effect that statutes would have after the rules were in operation. Several of the states have declared that all existing statutes relating to the subject of the rule making power shall have effect only as rules of court, and may be modified, or suspended by the court.¹⁶ Many states, as did Congress, provide simply that all statutes in conflict with rules shall be of no further force or effect.¹⁷ The Texas legislature, in conferring the rule making power, repealed all statutes governing practice and procedure in civil actions, but the legislature was given the power to disapprove any rule.¹⁸ The Florida Supreme Court, in enacting rules, must expressly designate any statute that should be repealed or suspended, and unless the legislature acts to the contrary, such statute is repealed.¹⁹ In Georgia, the legislature has to approve or confirm all rules prescribed by the court, which would give the rules the force or effect of statutes.²⁰ In Kansas, the rule making power as to criminal procedure is limited to what is consistent with the statutes relating thereto.²¹

A few states, in addition to Missouri, grant the rule making power to the supreme court in the state constitutions.²² None of the constitutional provisions explicitly prescribes the effect the rules are to have on existing statutes, but as Judge Vanderbilt indicated, "since power to make rules of court regulating procedure is constitutionally contained, it would seem that in those states such rules would prevail over prior statutory enactments."²³ The Maryland Constitution seems to be clearer than Missouri's in regard to this problem, as it gives the rules the "force of law until rescinded, changed, or modified by the Court of Appeals or otherwise by law."²⁴ The New Jersey Constitution left a question as to the effect of the rules on the statutes, but a recent decision of the New Jersey Supreme Court has held that the rules prevailed over the statute relating to the same subject.²⁵ Rules made under the Michigan constitution seem to have superseded statutes on the same subject.²⁶

16. ARIZ. CODE ANN. § 19-204 (1939); N. DAK. REV. CODE § 27-0209 (1943); S. DAK. CODE § 32-0902 (1939); W. VA. CODE § 5183 (1943); WISC. STAT. § 251.18 (1949).

17. COLO. LAWS Ch. 80, p. 264 (1939); DEL. REV. CODE § 4643 (1935); IDAHO CODE § 1-215 (1948); IND. STAT. ANN. § 2-4718 (Burns, 1946 Repl. Vol.); IOWA CODE § 684-10 (1950); PENNA. LAWS No. 13, p. 14-15 (1939); R. I. GEN. LAWS, Ch. 497 § 7 (1936); Utah LAWS § 20-2.410 (1943); WASH. REV. STAT. § 13-2 (Remington, 1932); Wyo. LAWS 1948, Ch. 53 § 3, p. 51.

18. Texas Gen. Laws 1939, Ch. 25, § 1, p. 201.

19. Fla. LAWS 1943, Ch. 21995, p. 688.

20. Ga. LAWS 1945, No. 106, p. 145.

21. KAN. GEN. STAT. § 62-2601 (Supp. 1941). A similar provision is made in the Nebraska Constitution. NEB. CONST. Art. V, § 25.

22. MICH. CONST. Art. VII, § 5, MD. CONST. Art. IV, § 18A; N. J. CONST. Art. VI, § 2, par. 3; NEB. CONST., Art. V, § 25, subject to the limitation noted above, note 21, *supra*.

23. VANDERBILT, *op. cit. supra* note 9, at 139.

24. MD. CONST. Art. IV, § 18A.

25. *Winberry v. Salisbury*, 5 N.J. 240, 74 A. 2d 406 (1950), which also held that the rule making power was not subject to overriding legislation, despite the words "subject to law" in the provision in question. The case has been criticized in Kaplan and Green, *The Legislature's Relation to Judicial Rule Making: An Appraisal of Winberry v. Salisbury*, 56 HARV. L. REV. 234 (1951); and in Notes, 31 B.U.L. REV. 97 (1951); 25 N.Y.U.L. REV. 903 (1950); 90 U. OF PA. L. REV. 418 (1950).

26. VANDERBILT, *op. cit. supra* note 9, at 114.

The constitutions of these states, however, vary materially in the wording they employ and from the wording adopted by Missouri in 1945. The only decision construing one of the constitutions in the light of the problem discussed here is based so completely on the wording of the particular constitution involved as to be of little specific aid in construing the Constitution of Missouri.²⁷

In states where authority for the rule making power comes from neither statute nor constitution, there is little agreement as to the greater force of statute or rule.²⁸

Thus an answer to the question of whether court rule or statute shall prevail where there is a conflict must be based not on the decisions in other states, where the authority for the rules come from statute, inherent power, or differing constitutions, but from an interpretation of the provision in the Missouri Constitution.

The Missouri Supreme Court has often stated that in construing the Constitution, primary stress will be placed on the natural and ordinary meaning of the words.²⁹ The plain meaning of the language, however, furnishes only doubtful assistance in determining the effect of the rules on the statutes. It would seem, however, that the restrictions placed on the rule making power indicate that where the court may make rules, the statutes will be superseded. The Constitution carefully excepts substantive rights, evidence law, oral examination of witnesses, juries, the right to trial by jury and the right of appeal from the authority of the court to change in any way, and any changes relating thereto must come from the legislature, where there is no other conflicting Constitutional provision. The subject matter of the rule making power is thus closely confined, and the inference would be that the court has full authority in the restricted sphere in which it can operate. This view is further strengthened by the power vested in the legislature to annul or amend any rule by law. It would seem that the reservation of the veto power must mean that, until the legislature acts, the rules of the court will be of controlling force, even though they are in conflict with existing statutes. Thus the inference is strong, from the restricted grant of the rule making power that the plain meaning of the Constitutional provision intended that the rules would replace the statutes.³⁰

The court may turn to extrinsic facts to determine whether the rule or the

27. See note 25 *supra*.

28. VANDERBILT, *op. cit. supra* note 9, at 136-139.

29. State *ex rel.* Heimberger v. Board of Curators of the University of Missouri, 268 Mo. 598 at 608, 188 S.W. 128 at 132 (1916); State *ex rel.* City of Marshall v. Hackman, 274 Mo. 551 at 561, 203 S.W. 960 at 962 (1918); State *ex rel.* Randolph County v. Walden, 357 Mo. 167 at 172, 206 S.W. 2d 979 at 983 (1947).

30. VANDERBILT, *op. cit. supra* note 9, at 139 states: "Thus, while in Missouri later statutory action may modify a court made rule, the later may inferentially alter a prior statutory rule of practice and procedure so long as such rules do not, contrary to the constitutional grant, extend to changes of substantive rights, the law relating to evidence, oral examination of witnesses, juries, the right to trial by jury, or the right of appeal."

statute has precedence, if it finds the Constitutional provision unclear as to this matter.³¹ Some Missouri cases have examined reports of debates in the Constitutional Conventions to find the intention of the framers,³² but later decisions adopt the view that the intent of the framers is to be accorded little weight, as the intention of the people adopting the Constitution is the foremost concern.³³ On such a fine point as is here presented, it is not likely that the voters were sufficiently aware of the problem to form an intention. The only extrinsic evidence available, therefore, would be found in the debates before the Constitutional Convention. Furthermore, *American Jurisprudence*, cited in *Household Finance Corporation v. Shaffner*.³⁴ states: ". . . The debates are not without importance, however, where they tend to support a construction indicated by the language of the instrument. . . ." ³⁵ The debates, as will be demonstrated, show a clear understanding by the participants that the rules may replace the statutes, which conforms to the inference from the plain meaning of the language.

A broad provision granting rule making power to the supreme court was rejected by the Committee on the Judicial Department in the constitutional convention, and the present restricted section was introduced on the floor,³⁶ freely debated and finally adopted.³⁷ During the debate, the question was put to the proponent of the section, former Governor Guy B. Park, as to the effect of the rules on the newly adopted code of civil procedure, and the answer was that the court would have power to make changes, subject to the veto power of the legislature.³⁸ A similar question was put and a similar answer received, by two different members of the convention

31. *State ex rel. Aquamsi Land Company v. Hostetter*, 336 Mo. 391 at 404, 79 S.W. 2d 463 at 469 (1934); *State ex rel. Heimberger v. Board of Curators of the University of Missouri*, 268 Mo. 598 at 608, 188 S.W. 128 at 132 (1916); *Hamilton v. St. Louis County Court*, 15 Mo. 3 at 20 (1851).

32. *State ex rel. Lashly v. Becker*, 290 Mo. 560 at 579, 235 S.W. 1017 at 1020 (1921); *State ex inf. Norman v. Ellis*, 325 Mo. 154 at 161, 28 S.W. 2d 363 at 366 (1930).

33. *Household Finance Corp. v. Shaffner*, 356 Mo. 808 at 815, 203 S.W. 2d 734 at 737 (1947).

34. See note 33 *supra*.

35. 11 AM. JUR., *Const. Law* § 84. See also 16 C.J.S., *Const. Law*, § 31, and the authorities cited in *State ex rel. Aquamis Land Company v. Hostetter*, 336 Mo. 391, 79 S.W. 2d 463 (1939).

36. 12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943-1944 p. 2975 (1944); JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943-1944, 155th Day, June 6 1944, p. 6 (1944).

37. 12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943-1944 p. 3037 (1944); JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943-1944, 156th Day, June 7, 1944, p. 5. The Vote was 36 in favor, 26 opposed.

38. 12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943-1944 p. 2996 (1944):

"Mr. Park: (the code) . . . will stand as it is until the court by its experience has determined that such a change is necessary. Then the court may take such change, but if the Legislature thinks that the court was wrong in making it, it still has a right to restore the original provision. . . .

Mr. Brown (of Christian): Now, it is your idea that the Supreme Court should have the power to change any of these statutory provisions as set forth in the statutes?

Mr. Park: Yes sir."

at a later stage in the debate.³⁹ In the closing argument by the opponents to the grant of rule making power, stress was placed on the argument that the rules could be made to wipe out the new code of civil procedure.⁴⁰ These references indicate that there was a clear understanding by those active in the debate, on both sides, that the rules could supersede the statutes. The inferences drawn from the plain meaning of the language of the provision are thus bolstered by the understanding displayed in the debates, and the debates should thus be validly considered in the determination that the rules enacted by the court supersede the statutes, passed by the legislature, subject of course, to the power of the legislature to override such rules.

Whatever the effect of the rules on the statutes, confusion will result from having a code for criminal procedure in the statutes and rules adopted by the court covering the same general subject matter. Some rules and still others result in a major change in procedure. Many of the statutes relating to criminal procedure are apparently not affected by the rules, either because they provide for procedures not covered in the rules or because they are outside the scope of the rule making power. Whenever the situation, to avoid uncertainty and confusion, the statutes for criminal procedure which are intended to be replaced by the newly promulgated rules should be repealed.

Various methods of repeal have already been indicated in other jurisdictions. A legislative declaration that statutes relating to criminal procedure shall be treated as rules of court, and changed or repealed by the court⁴¹ would go far to eliminate the restrictions placed on the rule making power in the Constitution, and would probably meet with disfavor. A simple declaration that statutes in conflict with the rules are of no further force or effect⁴² would still require a judicial determination in each specific instance before certainty could be achieved. It is the opinion of the writers that the legislature should repeal, specifically, those statutes that have been replaced by the rules, whether the rule be identical with the existing statute, or introduces a radically new procedure. Only in this way can the degree of certainty necessary for effective court procedures be established.

Another problem presented is the effect these rules will have on cases already commenced at the time the rules became effective. It is the opinion of the writers

39. 12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943-1944 p. 3021 (1944):

"Mr. Williams: If Governor Park's amendment is adopted, will the Supreme Court, under the amendment have the power to eliminate and supersede the new civil code of Missouri. . . .

Mr. Righter: Yes in my judgment it will."

Mr. Righter went on to explain that if the court did not have the power to replace statutes the code would become as archaic as the procedure it replaced, and that no advantage would be gained so far as the ease of modification of procedure was concerned.

40. 12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943-1944 p. 3028 (1944):

"Mr. Brown: It has the power to wipe it out. "(Speaking of the code of civil procedure). . . .

"Now I see no reason that we should turn over to the Supreme Court the right to change the rules in criminal procedure or to change the rule in civil procedure. . . ."

41. See note 16 *supra*.

42. See note 17 *supra*.

that the rules apply to all actions commenced or pending at the time the rules became effective unless the usage of the rules would materially prejudice the substantial rights of the defendant. Such was true when the present Code of Civil Procedure was adopted in Missouri.⁴³ Since the Constitution grants the supreme court power to formulate rules affecting procedure only,⁴⁴ usage of the rules in cases commenced prior to the effective date of the rules will not violate constitutional provisions pertaining to *ex post facto* laws.⁴⁵

For the convenience of the practicing lawyer the writers have prepared three tables. These tables are intended as a ready reference to show: first, those sections in Title XXXVII, *Revised Statutes of Missouri*, 1949, entitled "Criminal Procedure," (Chapters 540 through 551) which, in the opinion of the writers, have been superseded and replaced by the Rules; second, those sections which either because the procedures prescribed therein are not covered by the Rules one way or another, or because the procedure was deemed to be beyond the scope of the court's rule making power, are still in effect; third, a group of sections which are outside Title XXXVII, but which have been affected by the new Rules.

TABLE I
SECTIONS REPLACED BY RULES

The following sections of the statutes have been replaced by the Rules of Criminal Procedure. After each section number,⁴⁶ the Rules which treat the procedure in question are indicated. The first figures following the section numbers are the Rules which modify, completely change, or incorporate provisions similar to the present statutes. In parenthesis the writers have indicated other Rules which touch upon the matter found in the statutory sections, and also have the effect of modifying the statutory sections.

542.020	(21.06), (21.08)	542.270	(33.01)
542.260	(33.01)	542.290	(33.01), (33.02)
542.310	(33.04)	543.370	(32.12)
542.320	33.04	543.380	32.12
542.330	33.04	543.390	32.12
542.340	33.04	543.400	22.17
542.350	33.04		
542.360	33.04	544.010	23.01
542.370	33.04	544.020	21.08, 21.09
		544.030	21.06, 21.08
542.390	(33.02), (33.03)	544.040	21.12, 23.06, (21.13)
542.400	33.05	544.050	32.04
542.410	33.05	544.060	24.19

43. Mo. Laws 1943, p. 353, § 3, "This code (referring to the Civil Code) will take effect on January 1, 1945. It governs all proceedings in actions brought after it takes effect and also further proceedings in all actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the code takes effect would not be feasible or would work injustice in which event the former procedure applies." See also FED. RULE 86 (a).

44. See note 14 *supra*.

45. *Kring v. Missouri*, 107 U.S. 221 at 231 (1883); *State v. Fourchny*, 106 La. 749, 31 So. 325 (1902).

46. All references are to Mo. REV. STAT. (1949).

542.420	33.05	544.070	24.19
542.430	33.05	544.080	(21.09)
		544.090	21.09
543.020	21.02, 21.03	544.100	(21.09)
543.030	21.03, 21.04	544.110	21.09
543.040	24.02, 24.15, 24.18	544.170	21.14, 29.05
543.050	21.03, 21.04, 21.05	544.250	23.02
543.070	(21.14)	544.260	21.11
543.080	21.15	544.270	23.03
543.110	25.17	544.280	23.03
543.120	22.02	544.290	23.04
543.130	22.03	544.300	23.05 ⁴⁷
543.140	22.04	544.320	23.06
543.160	22.05	544.330	(32.12)
543.170	22.06	544.340	23.06
543.180	22.07	544.350	23.03
543.190	22.08	544.360	23.07
543.220	22.09	544.370	23.12
543.290	22.10, 22.11, 22.13, 27.24	544.380	(23.03)
543.300	22.11, 22.15	544.390	23.11
543.310	22.11	544.410	23.08
543.320	22.16	544.420	23.08
543.330	22.16	544.440	23.09
544.450	23.10	545.220	25.06
544.470	23.10, 24.23	545.230	24.10
544.480	23.10, 24.23	545.240	24.16, 24.17
544.500	32.09	545.250	21.04
544.510	(32.09)	545.260	24.18
544.530	32.01	545.290	24.02
544.540	32.02	545.300	24.15, (24.02)
544.550	32.09	545.310	24.19
544.560	32.03	545.320	25.14
544.570	32.09	545.330	25.15
544.580	32.14, 32.16, 32.15	545.340	25.20
544.590	(32.15)	545.350	25.21
544.600	32.11	545.360	26.03
544.610	32.11	545.370	25.18
544.620	32.11	545.380	25.11, 25.12
544.630	32.11	545.390	25.11
		545.400	25.11, (25.10)
545.010	21.01	545.430	30.01
545.030	24.11, 26.06	545.440	30.01
545.040	24.01	545.440	30.01
545.040	24.01	545.450	30.01
545.070	24.17	545.460	30.02
545.080	24.12	545.470	30.03
545.090	24.13	545.480	30.03
545.100	24.13	545.490	30.04
545.110	24.14	545.500	30.05
545.120	24.04	545.510	30.06
545.130	24.04	545.520	30.07

47. Rule 23.05 supersedes only that part of Mo. Rev. Stat. § 544.300 (1949), as pertains to disqualification and calling in another Magistrate. Rule 23.05 is thought by the writers not to effect the travel and subsistence pay, which the Magistrate would normally receive, that being a substantive right.

545.140	24.05	545.530	30.07
545.150	24.06	545.540	30.07
545.160	24.07	545.550	30.08
545.180	24.08	545.560	30.08
545.190	24.08	545.570	30.09
545.200	24.08	545.580	30.09
545.210	24.09	545.590	30.09
545.600	30.10	546.410	27.02
545.610	30.10	546.420	27.02, 27.04
545.640	30.11	546.430	(27.01)
545.650	30.16	546.440	27.03
545.660	30.12	546.450	27.05
545.670	30.12, 30.13, 30.15	546.460	27.06
545.680	30.12, 30.13	546.550	27.08
545.690	30.14 ⁴⁸	546.560	27.08
545.710	25.08	546.570	27.09
545.720	25.08	546.580	27.10
545.730	25.08	546.590	27.11
545.780	25.01	546.600	27.12
545.790	25.08	546.610	27.13
545.800	25.02	546.630	33.06
545.810	25.03	546.640	33.06
545.820	29.01	546.680	27.14
545.830	25.05	546.690	27.15
545.880	(25.07)	546.700	27.16
		546.710	27.17
		546.900	27.24
546.020	25.04		
546.030	29.02, 29.03, 29.04		
546.040	26.01	547.010	27.18
546.050	26.01	547.020	27.19
546.070	26.02	547.030	27.20
546.080	26.04	547.040	27.21
546.090	26.05	547.050	27.22
546.270	26.08	547.060	27.23
546.280	26.07	547.070	28.03
546.360	25.05	547.080	28.02
546.370	(28.01), (28.08)	547.090	28.09
546.380	26.09	547.100	28.09
546.390	27.01	547.130	28.10
546.400	27.01	547.140	28.10
547.150	28.10	547.300	28.14
547.160	28.10	547.310	28.16
547.170	28.11, 28.12	547.320	28.17
547.180	28.11	547.330	28.14
547.190	28.11	547.340	28.14
547.200	28.04	547.350	28.14
547.210	28.04		
547.230	28.13	548.060	(34.01)
547.260	28.03	548.070	34.02
547.270	28.02	548.090	(34.03)

48. Rule 30.14 supersedes only that part of Mo. Rev. Stat. § 545.690 (1949) as pertains to disqualification and obtaining another circuit judge. Rule 30.14 is thought by the writers not to effect the travel and subsistence pay which the circuit judge would normally receive, that being a substantive right.

547.280	28.15	548.150	34.05
547.290	28.14	549.190	27.07

TABLE II
SECTIONS STILL IN EFFECT

The following statutes have not been affected by the Rules of Criminal Procedure. In some instances, references are made to Rules that touch upon the subject of the statutes.

Chapter 540.		542.110	
540.280	21.02	542.120	
540.290	21.02	542.130	
		542.140	
Chapter 541		542.150	
		542.160	
542.010		542.170	
542.030		542.180	
542.040		542.190	
542.050		542.200	
542.060		542.210	
542.070		542.220	
542.080		542.230	
542.090		542.240	
542.100		542.250	
542.280		544.210	
542.300		544.220	
542.380	(33.01)	544.230	
542.380		544.240	
		544.310	
543.010		544.400	
543.060		544.430	
543.090		544.460	
543.100		544.490	
543.150		544.520	
543.200		544.640	(32.12)
543.210		544.650	(32.12)
543.230		544.660	
543.240			
543.250		545.020	
543.260		545.050	
543.270		545.560	
543.280		545.170	
543.340		545.270	
543.350		545.280	
543.360		545.410	
543.410		545.420	
543.420		545.620	
543.430		545.630	
		545.700	
544.120		545.740	
544.130		545.750	
544.140		545.760	
544.150		545.770	
544.160		545.840	

544.180	(21.09)	545.850
544.190		545.860
544.200		545.870
545.890		546.480
545.900		546.490
545.910		546.500
545.920		546.510
		546.520
546.010		546.530
546.060		546.540
546.100		546.620
546.110		546.650
546.120		546.660
546.130		546.670
546.140		546.720
546.150		546.730
546.160		546.740
546.170		546.750
546.180		546.760
546.190		546.770
546.200		546.780
546.210		546.790
546.220		546.800
546.230		546.810
546.240		546.820
546.250		546.830
546.260		546.840
546.290		546.850
546.300		546.860
546.310		546.870
546.320		546.880
546.330		546.890
546.340		
546.350		547.110
546.470		547.120
547.220		Chapter 549 excepting
547.240		
		549.190
547.250		
		Chapter 550
Chapter 548 excepting:		
548.060		Chapter 551
548.070		
548.090		
548.150		

TABLE III

MISCELLANEOUS SECTIONS AFFECTED BY RULES

The following sections of the statute, though not a part of Title XXXVII of the *Missouri Revised Statutes, 1949*, have been affected by the Rules of Criminal Procedure. These sections deal with various provisions as to searches and seizures, treated by rules 33.01—33.06.

84.270	109.070
84.300	311.810
84.310	417.330
84.660	420.280
84.670	422.220
109.040	564.160

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WRONGFUL DEATH ACTION FOR INJURY TO AN UNBORN CHILD

The recent case of *Steggall v. Morris*,¹ decided by the court *en banc*, is a landmark decision in Missouri tort law.² The court in overruling an old Missouri case³ held that an action for wrongful death may be maintained where an unborn, viable child is injured, born alive, and subsequently dies.

The action in this case, brought by a husband and wife, was based on Section 537.080, *Missouri Revised Statutes* (1949), commonly known as the "wrongful death statute."⁴ The petition alleged negligence on the part of the defendant resulting in injuries to the wife and her unborn child, who was alleged to be, at the time of the accident, a viable fetus. The petition stated further that the child was born alive three days after the accident, but died some 18 days later from the injuries received. The trial court dismissed the petition on the ground that no cause of action had been stated, and plaintiffs appealed.

In the opinion, the court examined in some detail a number of the reasons which are usually advanced to justify the old common law rule that an unborn child, injured while *en ventre sa mere*, has no cause of action after birth for such injuries. Among these reasons is the fact that until recently there was no precedent for allowing an infant to recover for injuries received while yet unborn. It is refreshing to find a court plainly declaring, as Judge Westhues does here, the lack of precedent is not an adequate reason to deny an injured person a remedy. Lord Mansfield is quoted as saying, "The law of England would be an absurd science if it were founded upon precedent only."⁵

The court very logically disposed of other objections, such as the difficulty of proof of causation, and the contention that the unborn child is but a part of its mother. The court then held, with regard to the facts before it, ". . . a viable child, injured

1. 258 S.W. 2d 577 (Mo. 1953).

2. The problem presented by this case is discussed in detail in Cason and Collins, *May Parents Maintain an Action for the Wrongful Death of an Unborn Child in Missouri*, 15 Mo. L. Rev. 211 (1950).

3. *Buel v. United Rys. Co.*, 248 Mo. 126, 154 S.W. 71 (1913).

4. Section 537.080 reads: "Liability for wrongful death generally—Whenever the death of a person shall be caused by a wrongful act, neglect, or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

5. 258 S.W. 2d at 579.

while en ventre sa mere, born alive, may after its birth maintain a tort action against the tort-feasor, for the injury inflicted."⁶ Inasmuch as the wrongful death statute (set out in footnote 4) is dependent upon a cause of action for injuries existing in decedent had death not occurred, this holding disposes of the present case. In deciding that an action for injury could be maintained, the court necessarily also determined that an action for wrongful death caused by such injury lies on the facts presented.

The court's decision on this question follows a comparatively recent trend among courts presented with this particular question to re-examine the bases for the older common law rule denying a right of recovery, and brings to eight the number of jurisdictions which have to date allowed such an action.⁷ To be sure, a change in the old law produces a number of unanswered questions which must await cases presenting them to the court. A few of these will be considered.

1. *Could the unborn infant maintain his action before birth?* If the infant is to be allowed a cause of action for prenatal injuries, logic would seem to direct that it arise at the moment of the injury. And if this is admitted, the cause of action ought to be enforceable at that time, even though its owner has not yet been born. The principal argument against such a rule is that in an action brought before the child is born, proof of damages and causation would be virtually impossible. However, this should, logically, go only to make up a difficult case for the plaintiff, and should not affect the enforceability of the cause of action.

On the other hand, it may be argued that, regardless of when the cause of action is said to accrue, no suit should be allowed by the infant until it is born, in order to avoid any failure of justice brought on by the virtual impossibility of proof of injury. There seems to be no practical necessity of bringing suit before the infant's birth.

Apparently only one court has ever considered this problem and that was in Canada.⁸ It was there held that an action would not lie before the infant's birth; the court said that the child might possibly have an action after its birth for the injuries. The opinion was concerned with the problem discussed above: difficulty of proof in an action before birth.

2. *Would a wrongful death action lie for the instantaneous killing of an unborn, viable child?*⁹ It is submitted that such an action logically should exist. For one thing, killing of the child outright would probably be considered a greater wrong than merely injuring it. If no action is allowed, an anomalous common law situation would

6. 258 S.W. 2d at 581.

7. N.Y.—*Woods v. Lancet*, 303 N.Y. 349, 102 N.E. 2d 691, 27 A.L.R. 2d 1250 (1951). Md.—*Damasiewicz v. Gorsuch*, 79 A. 2d 550 (1951). Ga.—*Tucker v. Carmichael & Sons, Inc.*, 208 Ga. 201, 65 S.E. 2d 909 (1951). Minn.—*Verkennes v. Corniea*, 229 Minn. 365, 38 N.W. 2d 838, 10 A.L.R. 2d 634 (1949). Ohio—*Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 87 N.E. 2d 334, 10 A.L.R. 2d 1051 (1949). D. of C.—*Bonbrest v. Kotz*, 65 F. Supp. 138 (Dist. Col. 1946). La.—*Cooper v. Blanck*, 39 So. 2d 352 (La. App. 1923). The case of *Montreal Tramways v. Leveille* (1933) Can. S.C. 456, (1933) 4 D.L.R. 337 allowed the action for injuries, but based on an interpretation of the civil law. See also Notes, 10 A.L.R. 2d 1059 and 27 A.L.R. 2d 1256—"Prenatal Injury as Ground of Action."

8. *Smith v. Fox*, 53 Ont. L. 54, (1923) 3 D.L.R. 785.

9. See Note, 10 A.L.R. 2d 639—"Action for Death of Unborn Child."

be re-established, namely that an action would lie for tortiously inflicted injuries, but none for death; this situation had to be remedied by the original wrongful death statute, Lord Campbell's Act.¹⁰

If the infant would have had an action for his injuries had he only been injured instead of killed outright, then by the terms of the wrongful death statute an action ought to exist; i.e., the tortious killing would have been an ". . . act, neglect or default . . . such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. . . ." ¹¹ The mere fact that the infant might be required to wait until birth in order to maintain his action for injuries, a requirement of the practicalities of the situation, should not affect the action for instantaneous wrongful death.

However, a problem in this regard arises from the wording of the wrongful death statute itself. The statute provides the cause of action ". . . whenever the death of a person shall be caused. . . ." If a viable fetus is killed outright, in order that a death action exist, it must be considered a "person" at the time of death. The problem did not exist in the facts of the principal case, as the child had been born alive prior to its death. Should the court think an action for wrongful death of a fetus killed outright to be socially undesirable, this result could be reached by specifically construing "person" in the statute as not including unborn infants. Considerable argument for and against such a construction of "person" can be found in 15 *Missouri Law Review* 211.¹²

Apparently only two cases have thus far considered this question. In *Verkennies v. Corniea*,¹³ the Minnesota court recently held that an action would lie for the wrongful death of a viable unborn child, killed instantly while still *en ventre sa mere*. The action was based on a wrongful death statute similar to Missouri's.¹⁴ The court first held that the infant would have had an action for injuries, had it survived. It then reasoned, as above, that under the terms of the wrongful death statute an action for the wrongful killing existed.

The only other case on the subject, *Drabbels v. Skelly Oil Co.*,¹⁵ also a recent decision, held such an action would not lie. However, the Nebraska court in this case specifically said it would not decide whether, if the child had been born alive, it might have maintained an action for prenatal injuries. This would seem to be the crucial question, inasmuch as that state has a wrongful death statute almost identical with our own.¹⁶ The court reasoned that the child at the *instant* of death had no cause of action for injuries, being then unborn, and that therefore the wrongful death statute would not apply. The logic of this reasoning is open to question. The wrongful death statute provides for a cause of action where the person killed would have had an action for the injuries inflicted, had he only been injured instead of killed. If

10. 9 & 10 Vict., c. XCIII (1846).

11. *Supra*, footnote 4.

12. Cason and Collins, *May Parents Maintain an Action for the Wrongful Death of an Unborn Child in Missouri*, 15 Mo. L. Rev. 211 (1950).

13. 229 Minn. 365, 38 N.W. 2d 838, 10 A.L.R. 2d 634 (1949).

14. MINN. STAT. ANN. § 573.02.

15. 155 Neb. 17, 50 N.W. 2d 229 (1951).

16. NEB. REV. STAT. § 30-809 (1943).

the unborn child had only been injured, presumably it would have later been born alive. The whole question would seem to be, would the child have a cause of action for the injuries after birth, even though it might not be allowed to sue before birth? The Nebraska court apparently interpreted the wrongful death statute as applying only when the decedent would have had an action for injuries at the instant of the injury; and the court did not recognize such an action in the unborn child.

3. *Must the unborn child be "viable" at the time of the injury in order that there be a cause of action for either injury or death?* "Viability" in this regard is usually defined as the capability of living outside the mother's womb if removed. The fetus does not usually become "viable" before the sixth or seventh month of pregnancy.¹⁷ No court which has allowed an action in the case of a viable child has directly passed on this question. This is understandable inasmuch as it has only been recently by a change in the old law that a cause of action for injuries has been established in the case of viable infants. The case of *Bonbrest v. Kotz*,¹⁸ quoted approvingly by our court, was decided on facts substantially the same as those in the principal case. However, that court hints that there is little necessity for the distinction between "viable" and "unviable" infants. The court quoted from another authority, "By the eighth week the embryo or fetus, as we now call it, is an unmistakable human being, even though it is still only three-quarters of an inch long."¹⁹

In *Damasiewicz v. Gorsuch*,²⁰ the court allowed an action by a child for prenatal injuries to it. The opinion does not state whether the child in question was injured while viable or not. But the court does say that an action would lie for injuries which occur before the child reached the stage of "viability," as it is defined above. The court said:²¹

"Some of the later cases attempt a distinction between a child which is viable and one which is not. . . . At some period in their growth, they reach a stage where they can live apart from their mother. But, from a medical point of view, a child is alive within the mother before the time arrives when it can live apart from her. If it is injured at a time when, according to Blackstone, it is 'able to stir in the mother's womb' there would seem to be just as logical basis for allowing it to recover as if it were injured after it had reached the period in its growth when it could be removed from its mother and live. In both cases, it is alive, and in both cases there has occurred an injury to a living human being for which the responsible party should be made liable . . . it must follow that as soon as it becomes alive, it has rights which it can exercise."

The writer is not prepared to explain exactly what this court meant by "alive." However, it does not seem to consider the fact of "viability" essential in order that a cause of action accrue.

The able opinion in our principal case reviews a number of authorities from the civil law and the common law of property, considering the unborn child as a human

17. BOUVIER'S L.D., p. 3399.

18. 65 F. Supp. 138 (Dist. Col. 1946).

19. CORNER, OURSELVES UNBORN, p. 69 (1944).

20. 79 A. 2d 550 (Md. App. 1951).

21. 79 A. 2d at 559.

being from the moment of conception.²² This might be considered as dictum in favor of dispensing with the "viability" requirement; however, the court specifically restricts itself to the facts before it.

If an unviable fetus is injured, later born, and must go through life carrying the mark of this injury, it would seem as much entitled to a cause of action as the infant injured when viable and later born. The injury inflicted is just as great, and the tortious act is the same. It is difficult to see any logical reason why "viability" or lack of same should enter into the picture.

If a cause of action is found to exist in favor of the infant, injured while yet unviable, the same factors considered above will have to be reconsidered as concerns a cause of action for the outright killing of an unviable fetus.

One other analogous problem might be mentioned. Ordinarily when a child is injured, and has a cause of action against the wrongdoer for the injuries, the child's parents have a separate cause of action against the tort-feasor for the loss of the child's services; this usually includes loss of the child's earnings, other services, companionship, etc., occasioned by the injury, and until the child reaches 21.²³ This cause of action in the parents is conditioned on the child itself having a cause of action for the injuries. It would seem, therefore, any time an unborn child is injured and has a cause of action for those injuries, that in addition the child's parents would have an action for loss of services.

These are some of the problems which will undoubtedly arise, perhaps in the very near future, and require decision by our supreme court. In any event, the initial problem has been settled.

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22. 258 S.W. 2d at 579.

23. 67 C.J.S., *parent and child*, § 41.