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## ARE COURTS RELAXING?

That precedent is of lessening value in the practice of law is recognized only too well by most practitioners. One would hardly be safe in advising a client that the last ruling is squarely in his favor and that he is sure to win his case. What is an established rule of law today may be overturned tomorrow as is instanced by several recent decisions. There is an inclination on the part of appellate courts to heed the popular outcry for so-called progressiveness and to judge individual cases on what seems to be the merits, and should such run against the snag of a fixed rule, an exception may be found or else the rule abrogated without waiting for legislative action. Case law is of an uncertain quality. It may be that the law is passing through a stage of evolution and that we are developing new rules and new maxims which will better fit modern business and modern needs, but if that is so, the lawyers who are practicing through the transition stage are the ones who suffer. It must be exceedingly embarrassing to brief a case, and to cite authorities squarely sustaining a proposition and to have the appellate court agree that such *was* the law, and then state that time has come to change it, and do it, and reverse the case in the face of all preceding authorities.

A striking illustration of this is the case of *Claxton v. Pool*<sup>1</sup>. That was an action by Mrs. Claxton against Mrs. Pool and her husband for the alienation of the affections of Mr. Pool. Following a well-grounded rule of law, that the husband was liable for the torts of his wife, the husband was joined as a party defendant. This was done upon the authority of *Taylor v. Pullen*<sup>2</sup>. The latter was an action against husband and wife for slanderous words spoken by the wife. It

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1. 197 S. W. 349 (Mo. Sp. Ct.).

2. 152 Mo. 434.

was contended, on the part of the husband that since the passage of the *Married Woman's Act*<sup>3</sup>, the husband was no longer responsible for the torts of his wife and should not have been joined. The Supreme Court held that this act did not touch the issue nor absolve the husband. It recognized the rule as existing and said:

“If recent statutes have so changed the rule of the common law touching the interest of the husband in the property of the wife that there seems to be a hardship in holding him responsible for her torts, the legislature can readily furnish the exemption.”

That decision was rendered in 1899. Note that the Court refused to legislate, or itself to change a rule of law.

Such was the state of the law when the Claxton case went up on appeal. It first made its appearance in the Springfield Court of Appeals in 1914<sup>4</sup>. Up to that time the Legislature had not acted upon the suggestion of the Supreme Court. But there was a novelty in this Claxton case. It seemed that Mrs. Pool was charged with having had illicit relations with Mr. Claxton and it did not seem fair to the Court of Appeals to hold Mr. Pool liable for this kind of a tort of his wife, which was as much a wrong to him as to Mrs. Claxton. This was the view taken by that Court and stated in so many words. It confessed that it could find no precedent for the decision. It stated what was the rule of law and cited the case of *Taylor v. Pullen, supra*, but held that this ought to be an exception.

This decision was a pure piece of legislation on the part of the Court. The reasoning, of course, appeals to the average man, but was it not for the Legislature to remedy the evil instead of the Court?

The decision further criticized the rule itself and expressed the thought that an act of the Legislature abrogating it, would

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3. Secs. 6864, 6868, 6869, R. S. Mo. 1899; Secs. 7323, 7327, 7328, R. S. Mo. 1919.

4. 182 Mo. App. 13.

be welcomed. Evidently some senator or representative thought so, too, and in 1915 an act was passed<sup>5</sup> which does relieve the husband of responsibility for the torts of his wife.

However, one of the Judges of the Court of Appeals held that the majority opinion was in conflict with the *Taylor v. Pullen* case and others, and refused to accede to grafting an exception on the rule and ordered the case certified to the Supreme Court, and now the second stage was reached.

Bear in mind that the action arose, was tried and decided by the Court of Appeals, before the act of 1915 was passed, hence that had no application to the case at bar. When it reached the Supreme Court the same questions were presented. But the latter Court, ignoring the exception grafted on the rule by the Court of Appeals, simply tore up the whole rule by the roots and referred to the act of 1915 as having an influence and bearing on the question. In a lengthy opinion it reviews many decisions and refers to the *Taylor v. Pullen* case and then abrogated the rule and refused to follow the prior cases. Of course, this decision would have rendered the act of 1915 unnecessary, for the Court did precisely what the Legislature did—legislated. In doing this the Court said:

“The Legislature of 1915<sup>6</sup>, possibly with a view of settling the doubts which seem to have harassed the judicial mind, enacted a statute which would relieve the husband from liability for injuries committed by a married woman, except in cases where he would be jointly responsible if the marriage did not exist. This, of course, simplifies the matter as to all cases arising in the future. The present case, however, arose before the enactment. We cannot presume from the enactment of the statute that the law was required to be changed, because statutes are often passed which simply declare a rule of law already existing. We are of the opinion that, according to the spirit, purpose and general scope of recent legislation, in addi-

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5. Session Acts, 1915, p. 269.

6. Session Acts, 1915, p. 269.

tion to specific statutory provisions, as well as freedom of conduct accorded to married women of later years, all indicating a complete absence of the reason which supported the old rule relating to a husband's common law liability for his wife's torts, the rule should no longer be recognized as in existence.' "

Query: When did the rule cease to exist? It was in existence in 1899<sup>7</sup>. The Claxton case was decided in 1914 in the Court of Appeals and that Court recognized it. The Legislature repealed it in 1915 and the Supreme Court repealed it in 1917. Is there, then, any stability in precedent?

In Mississippi, the Supreme Court of that State abrogated the centuries old rule that the payment of a lesser sum will not discharge an obligation for a greater, even if accepted as such, for the reason that there is no consideration for the discharge of the difference. In an opinion, which is full of almost intemperate language, that Court, while recognizing that the rule of law has been in force for over 300 years, overrules three former Mississippi cases and abolishes it<sup>8</sup>. Following are quotations:

"And in the United States, blindly following what was supposed to be settled law in England for nearly 300 years our courts have uniformly announced adherence to this rule. \* \* \*

"Turning now to the holdings of the American courts on this question, we are profoundly and painfully impressed with the slavish adherence of the legal and judicial mind to precedent, or in many cases, to what seems to be precedent only."

If the doctrine there announced be the correct one then it would seem to be idle work to brief cases at all and that the proper course would be to present simply the record and facts to an appellate court for its determination according to the

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7. Taylor v. Pullen, 152 Mo. 434.

8. Clayton v. Clark, 74 Miss. 499.

temperament of the judges who happen to be upon the bench at the time.

Another instance of the uncertainty of the law in our own State is the variant views concerning the amount of damage recoverable for wrongful death occasioned by a public carrier. Under our statute the amount recoverable is "not less than two thousand and not exceeding ten thousand dollars in the discretion of the jury."<sup>9</sup>

In the *Second Boyd Case*,<sup>10</sup> this statute was interpreted as meaning that two thousand dollars was a penalty and the amount between that and ten thousand dollars was compensatory. This case was followed by those of *Johnson v. R. R.*,<sup>11</sup> *State ex rel. v. Ellison*<sup>12</sup> and *Cooley v. Durham*,<sup>13</sup> in all of which such interpretation was stated in clear and unmistakable English.

Then came the case of *Grier v. K. C. Ry. Co.*,<sup>14</sup> in which the four above named were overruled and a new interpretation placed upon the statute and this was that the entire sum is penal, that the jury might, in its discretion, assess as a penalty any sum from two to ten thousand dollars. That is plain English, too. Perhaps many members of the bar will agree that the latter interpretation is correct and that there was really no rational basis for the distinction made in the *Second Boyd case* and those following it.

The Kansas City Court of Appeals, in two cases<sup>15</sup> has followed the Grier case and, in equally plain English, held the entire sum penal.

Now comes the rub. In *McDaniel v. Hines, D. G.*,<sup>16</sup> decided March 14, 1922, the Director General of Railroads was

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9. Sec. 4217, R. S. Mo. 1919.

10. 249 Mo. 110.

11. 270 Mo. 418.

12. 278 Mo. 649.

13. 196 Mo. App. 399.

14. 286 Mo. 523.

15. *Miller v. K. C. Rys.*, 238 S. W. 1066; *Faulk v. K. C. Rys.*, 247 S. W. 253.

16. 239 S. W. 471 (Sp. Ct. Div. No. 1).

sued. Of course, all suits against the Director General are suits against the United States. The Government of the United States cannot be sued unless it consents. It has consented to be sued in cases in which the carrier, being operated by the Railroad Administration, could have been sued, had it been operated by the owners. But the Government had not consented to be sued for penalties. What then became of cases arising under *Sec. 4217*, for injuries resulting in death if the statute were penal? If the construction announced in the Grier case, that the words "forfeit and pay," meant a penalty, there could be no recovery from the Government for this penalty. But now, in the McDaniel case, we have a third interpretation. It is here held that the statute is not exclusively penal, that damages may be awarded for compensation or penalty whichever the jury may choose.

This condition is reflected in the trial courts for evidence is casually admitted, almost in the face of well-established rules, that would have been instantly excluded a few years back.

One wonders if the tendency away from established rules and precedents is a result of the World War. That upset all kinds of business and other enterprises and has made the paths of progress uncertain. Mayhap it had effect on judges, lawyers and the law, too.

In any event it is certain and sure that our courts have relaxed.

DOUGLAS W. ROBERT.