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## Stare Decisis and the Dead Hand of the Common Law

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STUDENT NOTE

STARE DECISIS AND THE DEAD HAND OF THE  
COMMON LAW

Petitioner was convicted of conspiracy to violate the National Prohibition Act. The trial court excluded his wife as a witness in his behalf upon the ground of incompetency, and upon appeal the Circuit Court of Appeals sustained this ruling.<sup>1</sup> On certiorari to the United States Supreme Court, limited to the question as to what law is applicable to the determination of the competency of the wife of petitioner as a witness, *held*, reversed: the old common law rule as to the incompetency of the wife as a witness in her husband's behalf is changed in view of changed conditions.<sup>2</sup>

The problem confronting the Supreme Court in deciding this question of the competency of the witness was two-fold. The Judiciary Act of 1789,<sup>3</sup> declaring that the laws of the respective states should govern the courts of the United States sitting in such states, except where the constitution, treaties, or statutes of the United States otherwise provide, had been held to refer only to civil cases, and did not apply in the trial of criminal offenses against the United States.<sup>4</sup> Thus the Court decided that since there was no act of Congress prescribing the rule by which the federal courts would be governed in the admission of testimony in criminal cases, the Court was bound by the rules of the common law on the point. Having determined this, however, there remained the main problem of enunciating what that common law rule was on the question of a wife's competency to testify for her husband in a criminal case. Therefore Mr. Justice Sutherland, speaking for the majority of the Court, reviewed all the important precedents of the Supreme Court on analogous points of evidence still governed by the common law,<sup>5</sup> and finally arrived

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<sup>1</sup> Funk v. United States, 66 F. (2d) 70 (C. C. A. 4th, 1933).

<sup>2</sup> Funk v. United States, 54 S. Ct. 212 (1933).

<sup>3</sup> 28 U. S. C. A. § 725.

<sup>4</sup> United States v. Reid, 12 How. 361, 13 L. Ed. 1023 (1851).

<sup>5</sup> The court discusses at length the holding and the reasoning in the cases of: United States v. Reid, *supra* n. 4; Logan v. United States, 144 U. S. 263, 12 S. Ct. 617 (1892); Benson v. United States, 146 U. S. 325, 13 S. Ct. 60 (1892); Rosen v. United States, 245 U. S. 467, 38 S. Ct. 148 (1918); Hendrix v. United States, 219 U. S. 79, 31 S. Ct. 193 (1911); Jin Fuey Moy v. United States, 254 U. S. 189, 41 S. Ct. 98 (1920). It approves the doctrines of the first four named cases, and says of the last two, Hendrix v. United States and Jin Fuey Moy v. United States, that they "are out of harmony with the Rosen and Benson Cases and with the views which we have here expressed. In respect of the question here under review, both are now overruled." See page 217 of the opinion, *supra* n. 2.

at the conclusion that the Supreme Court would declare the present common law rule to be that the wife's incompetency as a witness was removed. The process of reasoning was that the reason back of the old common law rule of incompetency no longer existed, since, generally speaking, statutes have now removed the party-in-interest disqualification, therefore the rule itself had also ceased to exist, according to the well-known maxim "*cessante ratione legis, cessat ipsa lex.*" Further, practically all the state courts have statutes which specifically abrogate the old common law rule of the wife's incompetency; therefore the Court asked, why should it decide the question, when it came before it in an actual case, in accordance with the "outworn and antiquated rule of the past" simply because Congress had thus far failed to act in respect of the particular matter. Hence Mr. Justice Sutherland quotes as the Court's view in the present case that expressed by it in the *Rosen* case fifteen years before: "We conclude that the dead hand of the common law rule of 1789 should no longer be applied to such cases as we have here."<sup>5</sup>

This decision is a very significant one as indicating the modern liberal trend,<sup>6</sup> especially in view of the fact that the man who writes the opinion has always been considered one of the most conservative members of a court which is definitely becoming increasingly liberal in its decisions. True, Mr. Justice Sutherland in some parts of the opinion uses the language of the conservative;

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<sup>5</sup> See page 216 of the opinion.

<sup>7</sup> *Funk v. United States*, *supra* n. 2, at 215.

<sup>8</sup> *Rosen v. United States*, *supra* n. 5, at 471.

This "dead hand of the common law" which is so aptly phrased in the *Rosen* case is the subject of a very pertinent comment by Professor Corbin in (1918) 27 *YALE L. J.* 668. He says of this statement of the *Rosen* case: "It may be surprising to some to see the common law referred to as a 'dead hand' and to see it deliberately disregarded by our highest court; but the fact is that the living hand of the present judge does not write like the dead hand of the judges of 1789 or 1851." And his approval of the court's approach is shown by the last paragraph in the comment: "The change and growth of law by such judicial action can never be avoided. In this respect it is immaterial to what sort of tribunal the judicial function is delegated. It may be called a court of law or of equity or of admiralty, a merchants' court or a board of arbitration. In all alike the judicial function is legislative as well, and with nothing less would we be content."

<sup>9</sup> The bases and the scope of this new school of legal thought, the sociological school, which is the exponent of the modern liberal and realistic trend, are comprehensively discussed in Pound, *The Scope and Purpose of Sociological Jurisprudence* (1911) 24 *HARV. L. REV.* 591, and (1911-1912) 25 *HARV. L. REV.* 140, 489. Other discussions showing the trend of modern jurisprudence are: Holmes, *The Path of the Law* (1896) 10 *HARV. L. REV.* 457; Pound, *Mechanical Jurisprudence* (1908) 8 *COL. L. REV.* 605; Pound, *Law in Books and Law in Action* (1910) 44 *AM. L. REV.* 12; Pound, *The Ideal Element in American Judicial Decision* (1931) 45 *HARV. L. REV.* 136.

he speaks of the Court as *finding* the rule of law to have changed of its own accord rather than openly admitting that the courts themselves *make* the law.<sup>10</sup> But the result of the case is liberal, and the modern idea is that the importance of a case lies in what the court in fact *does* in the case rather than what it *says*. The wisdom of reaching this result on this particular question of evidence rather than in insisting upon clinging to the out-of-date rule which is "found to serve another generation badly,"<sup>11</sup> can hardly be questioned by modern jurists. Some may think, however, that it should have been left to the legislature to accomplish this result. Nevertheless, the case is but another of the ever-increasing number which reflect the modern trend away from a blind adherence to the doctrine of *stare decisis*.<sup>12</sup> That trend is in the direction of subordinating precedent to justice, to the extent at least of finding Cardozo's "path of safety" between the two chief objectives of modern jurists, namely, stability and progress.<sup>13</sup> This path of safety is to be reached by a court's determining to adhere to or depart from a precedent in accordance with which of the two processes will seem to secure the maximum of interests

<sup>10</sup> Mr. Justice Holmes was willing to make the admission as early as 1917, in the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221, 37 S. Ct. 524, 531: "I recognize without hesitation that judges do and must legislate".

<sup>11</sup> See Hardman, *Stare Decisis and the Modern Trend* (1926) 32 W. VA. L. Q. 163, 167, quoting from Mr. Justice Wheeler in *Dwy v. Connecticut*, 89 Conn. 74, 99, 92 Atl. 883, 891 (1915). The whole of the quotation is as follows: "That court best serves the law which recognizes that the rules of law which grew up in a remote generation may in the fullness of experience be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth have found its health and life. It is not and it should not be stationary. Change of this character should not be left to the Legislature."

<sup>12</sup> See Hardman, *supra* n. 11, at 191: "And under this modernization of law and of the interpretation and application of law, the rigid rule of *stare decisis* of a generation ago is, in many jurisdictions, changing into a flexible workable doctrine, thus satisfying a great objective of the modern jurists by becoming an efficient means 'to make effort more effective in achieving the purposes of law'."

<sup>13</sup> See CARDOZO, *THE GROWTH OF THE LAW*, 1 (1924): "How to reconcile that tendency [the tendency to subordinate precedent to justice], which is a growing, and in the main a wholesome one, with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day. We shall have to feel our way here as elsewhere in the law. Somewhere between worship of the past and exaltation of the present, the path of safety will be found."

with a sacrifice of the minimum of interests.<sup>14</sup> And the determination of this point will depend upon whether the proposed rule will work better in practice than did the rule previously sanctioned. Thus the new legal approach is chiefly one of pragmatism, a jurisprudence of results, the first question being, how will a rule or a decision operate in practice.<sup>15</sup> Hence it seems that this was the question that the Supreme Court of the United States asked itself in arriving at its decision in the principal case,<sup>16</sup> with the consequence that it reached the salutary result of pronouncing the present rule to be one that would accomplish a more desirable result in practice than the former out-grown one which Congress had apparently simply failed to change.

—TRIXY M. PETERS.

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<sup>14</sup> See Pound, *A Theory of Social Interests* (1920) 15 PUB. AM. SOCIOLOGICAL SOCIETY, 16, 28.

<sup>15</sup> See Pound, *Mechanical Jurisprudence*, *supra* n. 9, at 609, 610.

<sup>16</sup> *Funk v. United States*, *supra* n. 2.