INTERPRETATION OF MISSOURI DAMAGE ACT.

A very interesting question of judicial history in the interpretation of the Missouri statutes occurs in the widely differing and contradictory constructions of the Missouri Damage Act. It shows the laborious struggle of our appellate courts to make a reasonable and enforceable rule as to the measure of damages where the wording of the statute has failed.

The Missouri Statute allowing a recovery for wrongful death or commonly known as section 5425 of the Damage Act, R. S. Mo. 1909, (section 4217 R. S. Mo., 1919.) reads in part as follows: Every such party causing such wrongful death "shall forfeit and pay as a penalty, for every such person, employee or passenger so dying, the sum of not less than $2,000, and not exceeding $10,000, in the discretion of the jury."

The fact that this section of the statute was poorly written by the legislators and things left unsaid which they probably intended should be included in its construction has caused much controversy and conflict of authority in the higher courts of our State.

Is the statute penal, that is, does it give a penalty by way of punishment for the death; or is it compensatory and does it merely award damages for the actual pecuniary loss to the family and dependents of the deceased; or is it both penal and compensatory?

At the common law no action or penalty was to be had against a defendant who had wrongfully caused the death of another person. However, since the middle of the nineteenth century, the different states have enacted statutes which give an action to the family or dependents of a deceased person, when his death is brought about by the negligence or wrongful act of another person. Some of the statutes allow the recovery of a penalty for the death while others allow simply

the recovery of compensatory damages for the pecuniary loss suffered.

The first statute of this kind, the original Missouri Lord Campbell's Act, was enacted in this State as early as 1855. The statute, (General Statutes of 1855, p. 647.) as originally passed by the Legislature, allowed the recovery of a fixed sum of $5,000, as a penalty for death by wrongful act. This statute remained in effect for many years and was not changed, except as to minor details, until 1905 when it was amended by the enactment of the statute which is in effect today, *supra*. The original statute was construed by the courts as a penal statute and any party invoking it was required to sue for the full amount of $5,000, and no recovery could be more nor less than that amount. The courts of our State held that the statute had no compensatory features and allowed merely the recovery of a penalty, prior to the amendment of 1905.[1] Young v. St. Louis, Iron Mountain & Southern Ry. Co.,[2] decided in 1910, held that the statute as amended in 1905 allowed the recovery of a penalty for the death but no compensatory damages for the actual loss suffered. In that case, the court speaks, at length, of the statute before and after the amendment of 1905 and in the course of the opinion, says: "The words 'as a penalty' inserted by the amendment add nothing to the meaning and effect of the section; we have always held it a penal statute, but the placing of a minimum and maximum limit to the amount of the penalty introduces an entirely new feature."

In the recent case of Grier v. Kansas City & Clay County Ry. Co.,[3] decided in March, 1921, the Supreme Court hands down what is probably the most reasonable and correct construction of this section of the statute.

The facts in that case were, briefly, as follows: Ralph W. Grier, a young attorney of St. Joseph, Missouri, was killed

1. Casey v. St. Louis Transit Co., 205 Mo. 721; LeMay v. Mo. Pac. Ry. Co., 105 Mo. 361; Guenther v. St. Louis, Iron Mountain & Southern Ry., 109 Mo. 18; King v. Railroad, 130 Mo. App. 368.

2. 227 Mo. 307.

3. 228 S. W. 454.

in an accident on the Kansas City & St. Joseph Interurban Line, while going from St. Joseph to Kansas City, and while on the outskirts of North Kansas City in November, 1917. His injury which proved fatal was caused by the unskillfulness and negligence of the company's servants. He had no family or dependents whatever. His administrator sued for the maximum penalty of $10,000, given by the statute, and recovered the full amount in the Circuit Court of Buchanan County.

Upon appeal by the company, the Supreme Court through Ragland, C., affirmed the verdict of the lower court, allowing the full $10,000, as a penalty for the death. The court held that section 5425 of the statute was wholly penal and not partly penal and partly compensatory, as was held in the earlier case of Boyd v. Mo. Pac. Rd.[4] It was held that the words of the statute taken in their plain and ordinary meaning, without speculation by the courts as to the intention of the Legislature, meant that the recovery was a penalty between the limits of $2,000 and $10,000, in the discretion of the jury. It was further held that the words, *forfeit and pay* imply a penalty and the words, *as a penalty* expressly say as much, and upon the face of the statute such was plainly the intention of the Legislature.

By so holding, the Supreme Court overruled its decisions in Boyd v. Mo. Pac. Rd., *supra*, a case decided in 1913 and one which has caused much dissatisfaction, especially to the Courts of Appeal of the State. This was the second appeal of that case and is commonly known as the Second Boyd case. In that case, the court, in construing section 5425, held that the statute was partly penal and partly compensatory. That it was penal as to the minimum limitation of $2,000, and compensatory as to all recovery above that amount up to the maximum limit of $10,000. The decision of the case affords

4. 249 Mo. 118.

an illustration of the attempt to make judicial legislation supply an omission, and to contravene the express words of the statute because the court did not believe that the statute, as it read upon its face, could be put into practical operation. It seems to me that there was no real reason given for the decision in that case. The principal reason for the decision seems to be that the Legislature did not specifically prescribe the limits within which juries could exercise their discretion, except in a very broad manner and gave no rules for the exercise of such a wide discretion. Therefore, the Supreme Court undertook to prescribe the limits of such discretion and what facts it should act upon. And finally, in attempting to read something into the statute which was omitted and in the face of the express words of the section, they infer that it was the intention of the Legislature to limit the penal feature of the statute to the minimum of $2,000, and all recovery above that amount and up to $10,000, to compensatory damages or the actual pecuniary loss to the family or dependents, brought about by the death. But Ragland, C., in the Grier case says: "And if the omission in respect to the facts that the jury may consider as a guide to their discretion is to be supplied by construction, such construction must also be not inconsistent with the express language declaring that the sum fixed by them shall be forfeited and paid as a penalty." So the Supreme Court impliedly overruled the Second Boyd case in the recent decision.

There have been quite a number of decisions handed down since the Second Boyd case was decided which seem to doubt the soundness of the law laid down therein. In the case of Johnson v. Chi., Mil. & St. Paul Ry. Co.,[5] decided in 1917, Judge Faris's opinion seems to question the propriety of that ruling. There are numerous decisions in the Courts of Appeal which have reluctantly followed the ruling

5. 270 Mo. 418.

of the Second Boyd case.[6] Sturjis, Judge, in a concurring opinion in Harshaw v. Railroad,[7] says: "It seems to me nothing but judicial legislation to suppress the penal feature of the statute after passing the minimum amount allowed to be recovered and not only to read into the statute a compensatory feature after reaching that amount, based largely, if not entirely on the discretion given to the jury in fixing the amount, but to make the statute purely and solely compensatory with a measure of damages borrowed from the next and radically different section." In Lasater v. St. Louis & Iron Mountain Ry. Co.,[8] following the Second Boyd case, the Court says: "Under the Constitution, we are bound by the last controlling decision of the Supreme Court. This ruling is conclusive upon us and it is not for us to indicate what our views may be as to the propriety thereof."

It may plausibly be contended that the rule in the Second Boyd case is a better one than that now declared in the Grier case, holding that the statute is wholly penal. The Legislature probably intended that the statute should have both penal and compensatory features, but they wrote into the law only the penal feature. Nowhere in the section is the word, "damages" used, or any other words to indicate that it is to give compensation for any pecuniary loss. But it is for the courts, regardless of what they think is the better rule, to construe the statute as written and not to speculate as to the legislative intent. They may carry construction a long way, but they must not go to the extent of disregarding the express words of a statute in favor of what they think is a better or more reasonable rule that the one expressed. The courts can only interpret statutes, not write them. In this case, the remedy seems to be an amendment or revision of the statute and not a roundabout construction by the courts.

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6. Johnson v. Railroad, 174 Mo. App. 16; Lasater v. Railroad, 177 Mo. App. 535; Harshaw v. Railroad, 173 Mo. App. 459.
7. 173 Mo. App. 45.
8. 177 Mo. App. 535.

Probably the best rule of all is that set forth in the first appeal of the Boyd case,[9] commonly known as the First Boyd case. In that decision, the court held that section 5425 was penal as to the minimum amount of $2,000, and that above that amount and up to $10,000, both compensatory and penal features inhered in the statute. But the courts cannot put such a construction on the section as it now stands, for athough the Legislature might have intended something else, it certainly gave us a purely penal statute in plain and unambiguous terms and this our tribunals must follow.

ROBERT W. BARROW, JR., '22.

9. 236 Mo. 54.