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The Common Law as a Bar to Judicial Legislation

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STUDENT NOTES

The Common Law As A Bar To Judicial Legislation

The state of West Virginia, like every other state except Louisiana, is considered to be a common law state.¹ The West Virginia constitution and the state code expressly adopt the common law, unless it has been changed by the Legislature.² The West Virginia constitution provides, “[S]uch parts of the common law, and of

¹ Every state in this country, except Louisiana, has adopted the common law by statute or constitutional provision. In Louisiana, the civil code applies in civil matters. 15 AM. JUR. 2d, *Common Law*, § 11 (1964).

² W. VA. CONST., art. 8, § 21 (Michie 1966); W. VA. CODE, ch. 2, art. 1, § 1 (Michie 1966).

the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the legislature."³ Such statutory or constitutional provisions seemingly indicate that only a state legislature may modify the common law. Nevertheless, the question arises as to whether a state court may make a decision which changes a common law rule which has not been changed by the state legislature.

Early cases in this country almost uniformly held that, unless a common law rule was obviously unsuited to the locality, conditions or institutions in the United States, the legislature, and not the courts should change the rule.⁴ The court in *Denver R. G. R. Co. v. Norgate*⁵ declared that "[a]n old and well-established rule of the common law cannot be lawfully repealed except by the law-making power, and any attempt of the courts to do so is plain usurpation of the legislative function." Other courts at about the same time held that they could modify or disregard a common law rule which was inapplicable to a particular locality in the United States.⁶ Moreover, some held that the common law was adopted only insofar as it was in harmony with existing institutions of this country.⁷

The trend today in the United States is clearly toward allowing the courts to change an old common law rule.⁸ The most common justification for allowing this change is that the common law is flexible and adapts to changing conditions of society. The court in *State v. Culver*⁹ observed that the "nature of the common law

³ W. VA. CONST., art. 8, § 21 (Miche 1966). In addition, the Code provides, "The common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, 1863, or has been, or shall be, altered by the legislature of this State. W. VA. CODE, ch. 2, art. 1, § 1 (Michie 1966).

⁴ E.g., *Hulett v. Carey*, 66 Minn. 327, 69 N.W. 31 (1896); *Meng v. Coffee*, 67 Neb. 500, 93 N.W. 713 (1903).

⁵ 141 F. 247, 253 (8th Cir. 1905), *cert. den'd*, 202 U.S. 616 (1906).

⁶ E.g., *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 21 P. 317 (1889).

⁷ *Kroeger v. Twin Buttes R. R. Co.*, 13 Ariz. 348, 114 P. 553 (1911); *Powell v. Sims*, 5 W. Va. 1 (1871).

⁸ *Funk v. U.S.*, 290 U.S. 371 (1933); *Silesky v. Kelman*, 161 N.W.2d 631 (Minn. 1968); *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968); *State v. Tautges, Rerat & Welch*, 146 Neb. 439, 20 N.W.2d 232 (1945); *Midkiff v. Midkiff*, 201 Va. 829, 113 S.E.2d 875 (1960); *Dupuis v. General Cas. Co. of Wisconsin*, 36 Wis. 2d 42, 152 N.W.2d 884 (1967). See 15 AM. JUR. 2d, *Common Law*, § 14 (1964).

requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice." Some obvious examples of a court's changing an old common law rule due to changed conditions of our society include: *Durham v. United States*,¹⁰ where the court enunciated a new rule for the determination of insanity in a criminal trial; *United States v. Causby*,¹¹ where the court recognized that the advent of airplanes necessitated abandonment of the ancient common law rule that ownership of land extended to the periphery of the universe; and *MacPherson v. Buick Motor Co.*,¹² in which the court recognized a new common law right of a purchaser against a manufacturer for injuries caused by a latent defect in an article purchased at retail. The Court in *Funk v. United States*¹³ went so far as to declare that it is the "duty" of the courts to bring the law into accordance with present day standards.

Many times public policy is given as a justification for changing an outmoded common law rule.¹⁴ The Court in *Funk v. United States*¹⁵ reasoned that the "public policy of one generation may not, under changed conditions, be the public policy of another."

West Virginia has usually upheld the position that a common law rule must prevail unless altered by the Legislature.¹⁶ In *Holt v. Otis Elevator Co.*,¹⁷ the court held that until altered or repealed by the Legislature, the common law shall "continue to operate and bind

⁹ 23 N.J. 495, 505, 129 A.2d 715, 721 (1957), *cert. denied*, 354 U. S. 925 (1957).

¹⁰ 214 F.2d 862 (D.C. Cir. 1954).

¹¹ 328 U.S. 256 (1946).

¹² 217 N.Y. 382, 111 N.E. 1050 (1916).

¹³ 290 U.S. 371, 382 (1933).

¹⁴ *Funk v. United States*, 290 U.S. 371 (1933); *Patton v. United States*, 281 U.S. 276 (1930); *State v. Hand*, 101 N.J. Super. 43, 242 A.2d 888 (1968).

¹⁵ 290 U.S. 371, 381 (1933).

¹⁶ *Williams v. Chrysler Corp.*, 148 W. Va. 655, 137 S.E.2d 225 (1964); *Summerfield v. Maxwell*, 148 W. Va. 535, 135 S.E.2d 741 (1964); *Seagraves v. Legg*, 147 W. Va. 331, 127 S.E.2d 605 (1962); *In re Estate of Nicholas*, 144 W. Va. 116, 107 S.E.2d 53 (1959); *Wright v. Davis*, 132 W. Va. 722, 53 S.E.2d 335 (1949); *Poling v. Poling*, 116 W. Va. 187, 179 S.E. 604 (1935); *Emery v. Monongahela West Penn Public Service Co.*, 111 W. Va. 699, 163 S.E. 620 (1932); *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 512 (1922); *Woodyard v. Sayre*, 90 W. Va. 295, 110 S.E. 689 (1922). *Contra*, *Currence v. Ralph Snyder*, 108 W. Va. 194, 151 S.E. 700 (1929), in which the court declared that when the reason for a common law rule ceases to exist, the rule itself should cease.

¹⁷ 78 W. Va. 785, 788, 90 S.E. 333, 335 (1916).

the courts of this state." Accordingly, West Virginia cases have held that only the Legislature has the power to change common law, and the court cannot change a common law rule even if the reasons for the rule no longer exist.¹⁸ In *Cunningham v. Wood County Court*,¹⁹ in which the West Virginia Supreme Court of Appeals refused to abolish governmental immunity, the court said, "[T]his Court should not undertake, by judicial pronouncement, to abrogate a legal principle which has through a long period of years been so basic in the laws of this state." The court in an earlier case²⁰ had held that when a common law rule has not been repealed or amended by the Legislature, both the circuit court and the state Supreme Court of Appeals are bound by the common law rule.

There have been a few cases in which the West Virginia Supreme Court of Appeals has modified a common law rule, but these cases did not directly hold that a court can change common law because the decision in each was based on some other ground. In the 1871 case of *Powell v. Sims*,²¹ the court decided that the English law of an easement of light was not applicable to the existing institutions of this country, so the court refused to uphold the old common law doctrine. This case is nearly 100 years old and is unlikely to be given much weight since many later West Virginia cases decided that courts have no power to change a common law rule. In *Currence v. Ralphsnyder*,²² the court stated that when the reason for a common law rule ceases to exist, then the rule itself should cease. This is the only state case advocating this position, and later West Virginia decisions have ignored this decision.

¹⁸ *Seagraves v. Legg*, 147 W. Va. 331, 127 S.E.2d 605 (1962), in which the court decided that since the old common law rule that a wife had no right to sue for loss of consortium had not been changed by the Legislature, the common law was still in effect; *State v. Arbogast*, 133 W. Va. 672, 57 S.E.2d 715 (1950), in which the court upheld the old common law rule that a dog could not be the subject of larceny, even though the court agreed that the usefulness of the dog now makes it one of man's most valuable assets.

¹⁹ 148 W. Va. 303, 308, 134 S.E.2d 725, 728 (1964).

²⁰ *Holt v. Otis Elevator Co.*, 78 W. Va. 785, 90 S.E. 333 (1916).

²¹ 5 W. Va. 1 (1871). At the time of this case, most states had already declared that easement of light did not apply to conditions in the United States, and the West Virginia Supreme Court of Appeals seemed to be influenced by this fact.

²² 108 W. Va. 194, 151 S.E. 700 (1929). Although the common law forbade champerty, most of the states at the time of this case allowed the assigning of a right of action. Thus, the court in this case held that the common law rule could be modified by the court.

A recent West Virginia case changing a previously recognized common law rule was *Adkins v. St. Francis Hospital*.²³ In this case, the court overruled many prior West Virginia cases by holding that a charitable hospital does not have immunity for liability for the negligence of an employee. However, the court did not declare that it was changing a common law rule; instead, the court said that charitable immunity was not really a part of the English common law as of the time the common law was adopted in West Virginia. Therefore, the court reasoned that it was merely overruling prior case law which had upheld charitable immunity, rather than overruling the common law as it stood prior to the State Constitution.²⁴

The most recent West Virginia decision which apparently changed a common law rule was *Fanti v. Welsh*.²⁵ In this case, the West Virginia Supreme Court of Appeals held that a party alleging a prior easement by prescription did not have valid title as against a subsequent purchaser from the owner of record. It is to be noted, however, that the recording statutes of West Virginia do not

²³ 149 W. Va. 705, 143 S.E.2d 154 (1965).

²⁴ *Adkins v. St. Francis Hospital*, 149 W. Va. 705, 143 S.E.2d 154 (1965). In this case, the defendant hospital argued that the doctrine of charitable immunity was part of the common law of West Virginia, as evidenced by a long line of prior decisions, and that a common law rule should be changed only by the Legislature. The court rejected this argument, saying that it was based on "an erroneous premise" that charitable immunity was part of the common law. The court explained that the doctrine of charitable immunity was established in England in 1846 in the case of *The Peoffees of Heriot's Hospital v. Ross*, 12 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846), and was quickly overruled in the cases of *Mersey Docks Trustees v. Gibbs*, L.R. 1, H.L. 93, 11 Eng. Rep. 500 (1866) and *Foreman v. Mayor of Canterbury*, L.R. 6, Q.B. 214 (1871).

The West Virginia Supreme Court of Appeals concluded, therefore, that the doctrine of charitable immunity was not common law in 1872 when the West Virginia constitution was adopted, that the 1846 *Heriot* case never became part of Virginia's law by way of common law, and that the doctrine of charitable immunity was mere prior case law in West Virginia and therefore subject to being overruled.

The court seemed to be taking a self-contradictory position in this case. If the 1872 pre-Constitution common law did not contain the doctrine of charitable immunity, as the court asserted, it would follow that subsequent West Virginia cases which upheld charitable immunity must have changed the common law as it stood in 1872 when the Constitution was adopted. Thus, in these subsequent cases, the West Virginia Supreme Court of Appeals must have changed the common law as it stood in 1872. Yet, in *Adkins v. St. Francis Hospital*, the same court said that it could not change the pre-1872 common law.

The only way the court could get around this contradiction would be to assert the theory that the common law is immutable and had remained the same since 1872 even though cases had held contrary to the immutable 1872 common law. Such a theory is contrary to generally recognized principles of common law. See text at footnote 8.

²⁵ 161 S.E.2d 501 (W. Va. 1968).

include easements acquired by operation of law;²⁶ thus, easements by prescription should still have been protected by the common law rule that prior in time is prior in right. The court observed that the facts of this case showed that the prescriptive right claimed by the plaintiff in the case was unobservable to the public and had not been held out as a notorious claim of right.

It is difficult to predict the future course of the West Virginia Supreme Court of Appeals on the issue of the court's abolishing or changing a principle of common law. The strict adherence of nearly all West Virginia cases to the idea that the Legislature, and not the courts, should change a common law rule would lead one to conclude that it is doubtful that the West Virginia Supreme Court of Appeals will be inclined to expressly modify a common law rule.

Yet, recent decisions²⁷ have in effect changed a common law rule without expressly declaring that the court had changed common law. In *Adkins v. St. Francis Hospital*,²⁸ the court hinted that it may try to avoid a common law rule which it does not like, even though the court was very careful to point out that it was not changing a pre-West Virginia Constitution common law rule, but was instead overruling subsequent case law. Then, in *Fanti v. Welsh*,²⁹ the court apparently overruled the common law rule that prior in time is prior in right.

It would appear that the West Virginia Supreme Court of Appeals will refuse to change a common law rule with which it agrees; but at the same time, it would seem that the court will be more inclined to change a common law rule with which it disagrees, even though the court will be reluctant to expressly admit that it has changed such a common law principle.

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²⁶ W. VA. CODE, ch. 40, art. 1, §§ 8 and 9 (Michie 1966).

²⁷ *Fanti v. Welsh*, 161 S.E.2d 501 (W. Va. 1968); *Adkins v. St. Francis Hospital*, 149 W. Va. 705, 143 S.E.2d 154 (1965).

²⁸ 149 W. Va. 705, 143 S.E.2d 154 (1965).

²⁹ 161 S.E.2d 501 (W. Va. 1968).