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Volume 69 | Issue 2 Article 18

February 1967

Abstracts of Recent Cases

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Recommended Citation

Jerry D. Hogg, *Abstracts of Recent Cases*, 69 W. Va. L. Rev. (1967).
Available at: https://researchrepository.wvu.edu/wvlr/vol69/iss2/18

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ABSTRACTS

Administrative Law—Application of Res Judicata in Administrative Proceedings

The director of financial institutions of Illinois rejected *D's* application to organize a savings and loan association. The rejection order was affirmed by the circuit court. *D* reapplied to the director and, based on new evidence, the application was approved. The circuit court affirmed and the *Ps*, thirteen savings and loan associations, appealed. *Held*, affirmed. A prior decision of the director denying application to organize a savings and loan association is not res judicata on issues raised by the second application. *Citizens Sav. and Loan Ass'n v. Knight*, 219 N.E.2d 355 (Ill. App. 1966).

The applicability of the doctrine of res judicata to administrative determinations has been the basis of some controversy. The traditional view is that the doctrine is completely inapplicable.[1] Generally, however, in more modern times the courts have found the doctrine of res judicata applicable to some administrative proceedings, partially applicable to some, and inapplicable to others.[2] Under this more recent view the applicability of the doctrine depends upon the nature of the administrative tribunal involved, generally being applied where the function of the administrative agency is judicial in nature.[3]

Viewed from this angle, res judicata applies only to a small area in the field of administrative law.[4] It is readily applied to past facts, modified and partially applied to issues of law or policy involving continuing practices, and not applied at all to nonjudicial administrative action.[5] Some administrative agencies are nonjudicial in nature and the cases of such agencies reviewed by the courts following the traditional view in most situations will reach the same result that the courts following the modern view would have reached. In the areas of a continuing course of conduct the

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[1] Waterbury Sav. Bank. v. Danaher, 128 Conn. 78, 29 A. 2d 455 (1941).
[2] 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 18.12 (1958).
[3] People v. Western Air Lines, Inc., 42 Cal.2d 621, 268 P.2d 723 (1954).
[4] 2 AM. JUR. 2d *Administrative Law* § 496 (1962).
[5] 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 18.12 (1958).

courts following the traditional view recognize so many exceptions that here too the outcome is generally the same.

It is often difficult to determine the function of an administrative body. Since most proceedings apply to areas of a continuing course of conduct the problem is often one of partial application of the doctrine. One writer views the problem as a question of "whether an administrative agency should be permitted to change or amend its prior order, where to do so would affect the rights or privileges of one who was a party to the proceedings in which the prior order was entered."[6] The answer in any given case would depend upon a balancing of the public or private interests involved.[7]

The question of whether the doctrine of res judicata will apply to administrative proceedings has never been directly answered by the West Virginia Supreme Court. The question was posed but not answered in *Pritt v. West Virginia No. R. R.*[8] However, the court, in an earlier case, indicated that the doctrine is applicable in some situations.[9] In this earlier case the court, by dictum, declared that, if the Public Service Commission found an existing rate to be reasonable, the Commission would be bound by the previously established rate and could not change it.

The reason for adapting the doctrine of res judicata to the courts was to prevent litigation by the same parties of the same claims or issues.[10] This same reason exists where the function of the administrative agency is judicial in nature or at times involves areas of a continuing course of conduct.[11] If an administrative tribunal is to be effective in these areas, invocation and application of the doctrine of res judicata are the logical responses to reason.

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[6] 2 COOPER, STATE ADMINISTRATIVE LAW 506 (1965).

[7] *Ibid.*

[8] 132 W. Va. 184, 204, 51 S.E.2d 105, 117 (1948).

[9] Anchor Coal Co. v. Public Service Comm'n, 123 W. Va. 439, 450, 15 S.E.2d 406, 411 (1941).

[10] BURKE, PLEADING AND PRACTICE § 357 (4th ed. 1952).

[11] COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 241 (1951); 2 AM. JUR. 2d *Administrative Law* § 497 (1962).

Constitutional Law—State Regulation of Legal Profession—Solicitation

The State Bar Association of Virginia obtained an injunction against the Brotherhood of Railroad Trainmen, a railroad labor union, enjoining the alleged solicitation of legal business and unauthorized practice of law. The United States Supreme Court remanded the case, holding that the union should be able to advise injured workers and recommend specific attorneys. On remand, the Chancery Court of the City of Richmond enjoined the union from soliciting business but permitted its recommendation of attorneys. *Held,* injunction vacated. Under the mandate of the United States Supreme Court a distinction could not be made between solicitation and recommendation. *Brotherhood of Railroad Trainmen v. Virginia,* 149 S.E.2d 265 (Va. 1966).

This is the latest development in a situation which has caused much concern to the legal profession. Traditionally the regulation of the legal profession has been a function of the state.[1] While recognizing this the Supreme Court has held that in regulating the practice of law a state cannot ignore the constitutional rights of individuals.[2]

The actual holding of the United States Supreme Court in this case was that "the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers."[3] A strict reading of this holding leads one to believe that the decree of the Chancery Court allowing the union to recommend attorneys but not to solicit for them was a valid distinction. This narrow interpretation is also supported somewhat by the finding of the majority of the Supreme Court of the United States that no solicitation occured, either by the union or the lawyers, as a result of the union's practice of recommending competent lawyers.[4]

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[1] Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872).
[2] Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).
[3] Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 8 (1964).
[4] *Id.* at 6-7.

However, the Supreme Court of Appeals of Virginia chose to give the mandate of the Supreme Court a broad interpretation and rejected the distinction drawn by the Chancery Court. They stated that the Supreme Court of the United States held that the activities of the union were constitutionally protected and that it did not matter if the activity was characterized as solicitation under Virginia law. Consequently, they could not draw a line between solicitation and recommendation in the case.

On the other hand, the Virginia Court observed that nothing in the Supreme Court mandate prevented the state from applying the Virginia laws and Canons in disciplinary or injunctive proceedings against any lawyers approved by the union who may have solicited or joined in the authorized solicitation of legal employment. This was their view despite Mr. Justice Black's dictum that a lawyer accepting employment under this plan would have the same protection as the union.[5] The Virginia position was also taken by the American Bar Association.[6]

The potential for evil in the Supreme Court decision was pointed out in the dissent of Mr. Justice Clark.[7] He noted that it would encourage further departures from the high standards set by Canons of Ethics as well as work to the disadvantage of the union by subjecting the approved attornys to the control of one man. Some have viewed it as a challenge to the legal profession to change with the times and to meet the demand for legal services where it exists.[9]

It remains for the Supreme Court to decide how far "solicitation" will be authorized and at what point it will become "a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice."[10]

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[5] Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 8 (1964).

[6] 69 COM. L.J. 326.

[7] Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 12 (1964).

[8] 51 VA. L. REV. 1693 (1965); Markus, *Group Representation by Attorneys as Misconduct,* 14 CLEVE.-MAR. L. REV. 1 (1965); 40 NOTRE DAME LAW. 477 (1965).

[9] Schwartz, *Foreword: Group Legal Services In Perspective,* 12 U.C.L.A. L. REV. 279; Note, 79 HARV. L. REV. 416 (1965); 67 W. VA. L. REV. 66 (1964).

[10] Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 6 (1964).

Procedure—Granting Dismissal or Directed Verdict after the Opening Statements

Ps brought a personal injury action against the *Ds* to recover for personal injuries, property damages, and medical expenses. D_1 asserted a counterclaim against the *Ps* for medical expenses and property damage and a cross-claim against D_2. After the opening statements to the jury in behalf of the *Ps* and D_1, the trial court upon motion "dismissed" D_2 from the action and also "dismissed", on its merits, the cross-claim of D_1. *Held,* affirmed. Upon motion the trial court may take a case from the jury and grant a directed verdict or a dismissal when the opening statements combined with the pre-trial stipulation clearly establish that the opposing party has no right to recover. *Alexander v. Jennings,* 149 S.E.2d 213 (W. Va. 1966).

Although the power of the trial court to enter a dismissal or direct a verdict after the opening statement presents a case of first impression in West Virginia, the principle is a well established one.[1] The United States Supreme Court stated in *Best v. District of Columbia*[2] that undoubtedly the federal courts had such power. However, despite the indisputable power to do so, federal courts have been reluctant to grant such a motion at that stage of the trial proceeding.[3] One court reasoned that since the opening statement could be waived, it would be difficult to give an opening statement that would so dilute the cause of action stated in the complaint as to justify granting a directed verdict.[4]

The language in the *Alexander* case seems to indicate a reluctance on the part of the West Virginia court to grant such motions. In the opinion the court stated that such authority "should be exercised cautiously and only in a clear case." Thus, although the power of the trial court to take such action has been confirmed in West Virginia, it is doubtful that this principle will be given a very liberal application.

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[1] See generally Annot., 5 A.L.R.3d 1411 (1966).
[2] 291 U.S. 411 (1934).
[3] Lampka v. Wilson Line of Wash., Inc., 325 F.2d 628 (D.C. Cir. 1963); Illinois Power & Light Corp. v. Hurley, 49 F.2d 681 (8th Cir. 1931).
[4] Lampka v. Wilson Line of Wash., Inc., 325 F.2d 628 (D.C.Cir. 1963).