

CASE NOTES

COMMON LAW—INTERPRETATION OF RULE THAT COMMON LAW IS BINDING UPON AMERICAN JURISDICTION IN SO FAR AS IT IS SUITED TO MODERN CONDITIONS—EXTENT TO WHICH THE RULE OF THELLUSSON'S CASE IS BINDING.—A testator died leaving certain property with a considerable annual income in trust for the period of the lives of two named, living persons and for a period of twenty-one years thereafter. His will contained a provision that the trustees for the period of the trust were to pay stated annual annuities to named persons and were to reinvest the income above such payments for the increase and benefit of the trust fund. A federal statute provided that the common law and all British statutes in force in Maryland on February 28, 1801, should apply in the District of Columbia in so far as suited to conditions within the District. The federal district court for the District of Columbia construed this statute to mean that an English statute¹ enacted in 1800, which would have made the provision for accumulation invalid, did not apply because it had not been in force in Maryland in 1801, it having been enacted after the American Revolution; and, further, to mean that an English case, *Thellusson v. Woodford*,² decided in 1799, holding such a provision valid, did represent the common law of England at the time of its adoption by Maryland. But the court held, that conditions within the District of Columbia were so inconsistent with those of England at the time of *Thellusson's* case that the rule of that case did not apply, and hence that the provision for accumulation was invalid. *Burdick v. Burdick*, 33 Fed.Supp.(2d) 921 (Dist.Ct. D.C. 1940).

In all American States, with the exception of Louisiana, there is a general rule of law, either by court decision or by statute, that the common law of England is in force within the jurisdiction to the extent that it is not inconsistent with conditions within the State.³ In construing such a statute or rule, two problems arise: (1) What is meant by the term "common law of England"; and (2) When is a common law rule so inconsistent with conditions within the State as to be inapplicable?

The first of these issues has resulted in a considerable split of authority.⁴ One view holds that English decisions before a certain date, the founding of the colonies⁵ or the Declaration of Independence,⁶ are binding in so far as they are consistent with the changed conditions of our civilization. Another rule, which has been stated in innumerable ways, is, in general, that such a rule of law does not mean that English decisions are adopted, but, rather, that the common law as a system is made the rule of decision.⁷ Under this theory, court decisions are merely evidence of the common law,⁸ and an American decision in a sister state is held to be of as much value in

¹Thellusson Act, 39 & 40 Geo. III, c.98 (1800).

²4 Ves.Jun. 227, 31 Eng.Rep. 117 (Ch. 1799), affd. in 11 Ves.Jun. 112, 32 Eng. Rep. 1030 (H.L. 1805).

³11 Am.Jur., Common Law (1937), 157 & 160, §§4 & 6.

⁴Gray, *The Nature and Sources of the Law* (2d ed. 1927), 244; Pope, *The English Common Law in the United States*, 24 Harv.L.Rev. 6 (1910).

⁵See: *Haggin v. International Trust Co.*, 69 Colo. 135, 138, 169 Pac. 138, 139, L.R.A.1918B 710, 713 (1917); *Gerber v. Grabel*, 16 Ill. 217, 219 (1854); *Ray v. Sweeney*, 14 Bush. 1, 10, 29 Am.Rep. 388, 392 (Ky. 1878).

⁶See: *Murdock v. Hunter*, Fed.Cas. #9,941 at p. 1015 (D.C. Ohio 1808); *Grimmett v. Barnwell*, 184 Ga. 461, 464, 192 S.E. 191, 194 (1937); *Moss v. State*, 131 Tenn. 94, 103, 173 S.W. 859, 861, L.R.A.1915D 361, 366, Ann.Cas.1916B 1, 3 (1915).

⁷*Williams v. Miles*, 68 Neb. 463, 94 N.W. 705, 62 L.R.A. 383, 110 Am.St.Rep. 431 (1903); cf. *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919 (1886); *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391, 35 L.R.A. 41 (1896); see also, as to effect of English statutes adopted subsequent to the Revolution but prior to the admission of California as a State: *Martin v. Superior Court*, 176 Cal. 289, 293, 168 Pac. 135, 136, L.R.A. 1918B 312, 316 (1917).

⁸*Robert v. West*, 15 Ga. 122 (1854); *Boyer v. Sweet*, 3 Scam. 120 (Ill. 1841).

evidencing what the common law rule is, as an English decision.⁹ Also under this view, English decisions subsequent to the American Revolution are held to be of great weight in showing what was the English common law rule in 1776.¹⁰ The end result of this theory has been indicated to be that the English common law as a system prevails, but that the American court is bound only by those English decisions which it determines to be correct expositions of the common law.¹¹ A third rule, somewhat a combination of the first two, has been indicated by a Maryland court. This theory, after reiterating the second rule stated, adds that if no other adjudications on the subject are to be found, English judicial decisions since the colonization furnish conclusive evidence not only of what is now understood to be the common law of England, but what were always the principles on which that law rests.¹²

The court in the principal case apparently adopted this last interpretation of the term "common law." It indicated that, while *Thellusson's case*¹³ was decided subsequent to the Revolution it represented the common law at the time it was adopted by Maryland, and hence by the District of Columbia. The court, however, went on to hold that modern conditions in the District of Columbia were so different from those in England in 1799 as to make the rule of *Thellusson's case* decided at that date inapplicable.

It then becomes necessary to consider the meaning of "inconsistent with modern conditions" as that term is used in the general rule. The theory that an English case may be rejected as precedent because conditions in England at the time it was decided are inconsistent with those in the American jurisdiction in which the same problem arises, gives the American judge a wide latitude,¹⁴ and a convenient method of avoiding the argument of counsel who presents the English case as authority for his point. It is conceivable, then, that the rule has been much applied, with no great amount of consistency. However, the decisions do indicate some general classification. The first distinction that must be made is between substantive and adjective law. Procedure having gone through a considerable streamlining process since 1776, it is apparent that the rules of cases decided before the Revolution on points of procedure are quite likely to be disregarded.¹⁵ In the field of substantive law, there are certain general classes of differences between America and pre-Revolutionary England which are held to make the rules of English cases inapplicable. Probably the greatest number of cases where the English rule is held inconsistent arise in situations where the English rule is rendered unsuitable by differences of geography and climate between England and the American State in which the case arises.¹⁶ The application of this rule of distinction will be especially noted in changed doctrines of riparian

⁹*Fletcher v. Los Angeles Trust & Savings Bank*, 182 Cal. 177, 187 Pac. 425 (1920); *Callet v. Allio*, 210 Cal. 65, 290 Pac. 438 (1930); *Herrin v. Sutherland*, 74 Mont. 587, 241 Pac. 328, 42 A.L.R. 937 (1925).

¹⁰*Williams v. Miles*, 68 Neb. 463, 94 N.W. 705, 62 L.R.A. 383, 110 Am.St.Rep. 431 (1903), rehearing den. 68 Neb. 479, 96 N.W. 151 (1903).

¹¹See *Murray v. Chicago & N. W. Ry.*, 92 Fed. 868, 870 (C.C.A. 8th 1899), where the court stated: "A case of first impression *rightly* decided today, centuries hence will be common law."

¹²*State v. Buchanan*, 5 Har. & J. 317, 9 Am.Dec. 534 (Md. 1821).

¹³1 Ves. Jun. 227, 31 Eng.Rep. 117 (Ch. 1799), *affd.* in 11 Ves. Jun. 112, 32 Eng. Rep. 1030 (H.L. 1805).

¹⁴See: Note, 22 L.R.A. 501 (1893).

¹⁵*Pranko v. Endicott Johnson Corp.*, 24 Fed.Supp. 678 (D.C. N.Y. 1938) (Convict has right to sue); *Mitchell v. State*, 176 So. 743 (Miss. 1937) (Writ of coram novis held not to exist in Mississippi); *State v. Superior Court of Pierce County*, 104 Wash. 268, 176 Pac. 352 (1918) (A municipal corporation held subject to suit with no special restrictions as to venue).

¹⁶*Kansas City, Memphis and Birmingham Ry. v. Smith*, 72 Miss. 677, 17 So. 78, 27 L.R.A. 762, 48 Am.St.Rep. 579 (1895); *Kingman v. Sparrow*, 12 Barb. 201 (N.Y. 1851); *Champlain Straight Line Ry. v. Valentine*, 19 Barb. 484 (N.Y. 1853); *Martin v. Bigelow*, 2 Aik. 184, 16 Am.Dec. 696 (Vt. 1827).

rights as applied in our Western States.¹⁷ The second class of cases where English decisions are held to be without authority concerns the situations where there are substantial differences in social condition between the England of 1776 and the United States.¹⁸ Included in this general class are changes in rules of descent or inheritance,¹⁹ the rules of apprenticeship,²⁰ and finally changes in rules where the institution covered by the rule was not in existence at the time the common law was formulated.²¹ Another classification may be created of those cases which hold the common law of England inapplicable because of differences in our governmental structure from that of England.²² Still another group of cases hold common law rules involving interpretation of some standard, reasonableness, for example, to be not binding.²³ Finally, common law rules may be made obsolete by changes in basic statutory policy. This last may arise in one of two ways. Either the statute from which the line of common law cases developed was not held to be in force in the colonies²⁴ or some statute in the State refusing to adopt the rule removes the reason for it.²⁵

In light of the classification into which the cases on the subject fall, it is difficult to reconcile the decision of the court in the principal case.²⁶ Its holding that con-

¹⁷*Reno Smelting, Milling and Reduction Works v. Stevenson*, 20 Nev. 269, 21 Pac. 317, 4 L.R.A. 60, 19 Am.St.Rep. 364 (1889). The court stated that common law rules as to riparian rights are not suited to conditions in Nevada, and hence that the doctrine of prior appropriation rather than the common law rule would be applied. To the same effect: *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926), revg. *Boyd v. Motl*, 236 S.W. 487 (Tex.Civ.App. 1922).

¹⁸*Poultney v. Ross*, 1 Dall. 238, 1 L.Ed. 117 (Pa. 1788), where the court held that a shop book of a tradesman was admissible as evidence of a debt, unsupported by an assistant oath of a clerk who made the entry, since in Pennsylvania, at this time, most shopkeepers kept their own books and did not employ clerks to do that job; *Commonwealth v. Lehigh Valley R. R.*, 165 Pa.St.Rep. 162, 30 Atl. 836, 27 L.R.A. 231 (1895), holding that, since the devices of outlawry and distress had been discarded, a judgment could be entered by default against a corporation in a misdemeanor proceeding.

¹⁹*Bates v. Brown*, 72 U.S. 710, 18 L.Ed. 535 (1867); *Cox v. Matthews*, 17 Ind. 367 (1851).

²⁰*Cf. Commonwealth v. Hunt*, 45 Mass. 111, 38 Am.Dec. 346 (1842).

²¹*Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234, 86 A.L.R. 466 (1933). Here the court declared that the common law rules of libel could not be applied without variation to a newspaper printing news sent by a wire service.

²²*Grimes v. Harmon*, 35 Ind. 198, 9 Am.Rep. 690 (1871), where the court stated that the power of the English Chancellor over charitable trusts, in so far as it differed from his powers over ordinary trusts, was a branch of the King's prerogative power exercised through the chancellor, and hence that such special power was not possessed by the court of equity of Indiana; *State v. Verage*, 177 Wis. 295, 187 N.W. 830, 23 A.L.R. 491 (1922), where the court held that, because of our system of separation of powers, the Governor of the State did not have the power of the King of England to pardon a contempt of court.

²³*Kennedy v. Burnap*, 120 Cal. 488, 52 Pac. 843, 40 L.R.A. 478 (1898), where the court held that an easement for light and air did not meet the element of reasonable necessity so as to be implied from a grant of land; *City of Jackson v. McFadden*, 177 So. 755 (Miss. 1937), where the court held that the mere fact of a juror's being a taxpayer of the city involved in the litigation before him did not disqualify him as a juror on the ground of bias and prejudice; see *State v. Jacksonville Terminal Co.*, 90 Fla. 721, 744, 106 So. 576, 585 (1925) (Court discusses effect of common law cases as setting standard of unjust discrimination by a common carrier).

²⁴*Lynch v. Hill*, 6 Atl.(2d) 614 (Del.Ch. 1939). The court held that the Statute of 21 James I was not in force in the colonies so that an easement for light and air could not be acquired by prescription as it could under the common law rule based upon that statute.

²⁵*In re Smith's Estate*, 97 Pac.(2d) 677 (Wyo. 1940); *Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932) (Showing effect of married women's statutes).

²⁶The weight of authority in the United States today is, apparently, that provisions in trusts for the accumulation of income are valid if they are to vest within

ditions in the United States are so different from those of England in 1799 as to make an English case decided at that time inapplicable does not appear to fall into any one of the classifications. Certainly the trust provision held invalid does not depend in its effect upon geographical conditions, nor does it involve the application of a standard. There appears to be no basic difference in the general statutory policy involved. The court appears to base its decision upon changes of governmental and social conditions. It argues that a provision for accumulation of income is inconsistent with our system of democracy. This argument appears to have little validity. In the first place, the trust provision involved in the case would have much the same effect in tying up property whatever the form of government. Secondly, all arguments as to the deleterious effect of accumulations upon the processes of government could have been, and were, made at the time *Thellusson's case*²⁷ was decided. The other basis of the court's decision in the principal case is change in social conditions. This too seems weak. Since social conditions, even in the same city, are not precisely the same from day to day, an intelligent application of the rule, and the only one which gives it any force whatsoever, would require some *substantial* difference if the English common law rule is to be held inapplicable because of changes in social conditions.²⁸ This theory has been expressed by an Iowa court, which stated the test to be not whether the common law rule was better suited to our conditions than any other, but whether differences between conditions in the United States and in England render such common law rule inadequate.²⁹ Under this test it does not seem that the facts of the principal case fall within the classification of social differences so as to justify the decision of the court.—ROBERT S. THOMPSON.