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THE VIRGINIA SUPREME COURT: AUTHORITY VERSUS POWER TO ABOLISH THE COMMON LAW

The question of whether a state supreme court has the authority to abolish or modify a common law rule which is incorporated into the law of that state has been a frequent issue in courts throughout the United States. Every state, except Louisiana, has adopted the common law by statute or constitutional provision.\(^1\) Virginia has employed both methods. The Virginia Constitution provides:

> The common and statute law in force at the time this revised Constitution goes into effect, so far as not in conflict therewith, shall remain in force until they expire by their own limitation or are altered or repealed by the General Assembly.\(^2\)

The Virginia Code expresses the same thought in even more detailed terms:

> The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.\(^3\) (Emphasis added).

Unfortunately such provisions have confused rather than clarified the state supreme court's authority with respect to its power to alter or abolish common law.

Before analyzing the direction taken by the Virginia Supreme Court in relation to Section 1-10 of the Code of Virginia (1950), and Section 3 of the Schedule to the Virginia Constitution, it is necessary to first discuss the two interpretations of such provisions which have developed in the United States. The crux of the problem of interpreting these provisions is the determination of the intent of the legislature in adopting "the common law." One view urges that these provisions adopted a system of common law by which courts may create and mold the law as they deem necessary. Under this interpretation the court's authority to alter specific common law rules is limited only by the principle of stare decisis. In sharp contrast, the other approach holds that these statutes adopted en masse the specific individual rules of the common law then existing in England and thereby made those rules fixed statutory law which could be changed only by the legislature. Under this view courts have no authority to alter such rules.

Although jurisdictions have split over this issue (adoption of a system

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2. VA. CONST. Schedule, § 3 (1971).
3. VA. CODE ANN. § 1-10 (1950).
versus adoption of specific rules), it is difficult to label one view the modern and one the older since both can be traced to the mid-nineteenth century. It has been suggested that courts today show a greater propensity to alter or abolish common law rules. While a modest examination might thereby imply that modern courts have adopted the "systems approach," such a conclusion is unfounded since many courts which have changed common law rules have done so without first interpreting their "common law adoption statutes." Such court action does not directly support the proposition that the modern view interprets these state statutes as adopting the common law system because those courts which have acknowledged that they must first interpret their state statutes before altering a common law rule have remained divided on the issue.

Kentucky typifies the view that these statutes adopt a common law system, thereby allowing courts to alter or abrogate common law rules. In Louisville v. Chapman, the Kentucky Supreme Court stated:

What the statute adopted was not just those doctrines which happened to have already been announced by English courts at the close of the Middle Ages, but rather a system of law whose outstanding characteristic is its adaptability and capacity for growth.

4. Cf. 14 S. Cal. L. Rev. 183 (1941). Although recognizing the split of authority on the meaning of the term "common law of England" in state statutes and rules, the author of this article sees a development along three lines of thought, a "rules" approach and two different "system" approaches.

For a collection of cases stating the different views see R. Pound, Readings on the History and System of the Common Law (2d ed. 1921).


Such action by the courts has elicited the complaint that courts are deciding cases by whim or caprice. In Note, The Common Law As a Bar to Judicial Legislation, 71 W. Va. L. Rev. 341, 346 (1969), the author suggests:

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 even 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.

7. Compare Louisville v. Chapman, 413 S.W.2d 74 (Ky. 1967) with Davis v. Board of County Comm'rs, 495 P.2d 21 (Wyo. 1972).

8. 413 S.W.2d 74 (Ky. 1967).

9. Id. at 77. See also Southwestern Graphite Co. v. Burnett Nat'l Bank, 255 S.W. 676, 678 (Tex. Civ. App. 1923).

Perhaps a more eloquent statement of this view is found in Williams v. Miles, 68 Neb. 463, 470, 94 N.W. 705, 708 (1903):

What is the meaning of the term "common law of England" . . . ? Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common law system,
This view does not give a court absolute power to alter or abrogate common law rules as they see fit since a court is still restrained by the principle of stare decisis, which is an integral part of the common law "system." Although the value and need for the principle of stare decisis is generally recognized, the degree of its flexibility has been a subject of debate. In recent times, the view most often espoused dictates that a

in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions? We cannot think, and we do not believe this court has ever understood, that the Legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require. . . . Such has been the understanding of this court from the beginning. What Sir Frederick Pollock has called "the immemorial and yet freshly growing fabric of the common law" is to be our guide, not the decisions of any particular courts at any particular period. The term "common law of England," as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England. . . .

10. Stare decisis is that principle by which "a decision by a court of last resort, in a litigated controversy, on a question of law necessarily involved in the judgment, becomes a precedent within that jurisdiction, for subsequent cases involving substantially similar facts." Lile, Some Views on the Rule of Stare Decisis, 4 VA. L. Rev. 95, 97 (1916). It originated along with the earliest Anglo-Saxon legal "traditions."

The common law in its ultimate origin was merely the custom of the King's courts. . . . The growth of such a custom depends to some extent upon the habit of following precedents, although it is more than likely that this development took place quite unconsciously. From earliest time, therefore, the royal courts have always had some sort of regard for previous decisions, although at first, no doubt, this was based upon a desire to save trouble. . . . This does not mean that there was anything in the twelfth century even faintly resembling the modern principle of precedent; there was merely a tendency to establish a procedure, and perhaps to adopt a few substantive principles which, taken together constituted the custom of the court. Plucknett, A Concise History of the Common Law 342 (5th ed. 1956).

11. Under the common law system, however, lacking as it does a scientifically constructed code as a basis, or, indeed, any code in a true sense, we are ex necessitate more dependent on the influence of previous decisions. If we strip these of all mandatory force, our unwritten law would be evidenced by no authoritative declaration, and every court, from the lowest to the highest, would be law unto itself. The rule of stare decisis is, therefore, a rule of necessity and a natural evolution from the very nature of our institutions. Lile, Some Views on the Rule of Stare Decisis, 4 VA. L. Rev. 95, 97 (1916).

For a similar statement see Kelly v. Trehy, 133 Va. 160, 112 S.E. 757 (1922).

12. Blackstone warned against applying the principle of stare decisis flexibly:

It is an established rule to abide by former precedents where the same points come again in litigation; as well as to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion, as also because, the law in that case being
precedent should apply only as long as the reason for the precedent is valid. Thus, in those jurisdictions that construe their statutes as adopting a common law system, there is still some limitation on the power of a state supreme court to alter common law rules.

Under the view that statutes adopting the common law of England embraced only specific rules, the courts have no authority to change them. Such rules acquire the status of statutory law and their alteration is clearly solemnly declared and determined, what before was uncertain and perhaps indifferent is now become a permanent rule, *which it is not in the breast of any subsequent judge to alter or vary from*, according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Pound, *Readings on the History and System of the Common Law* 101 (2d ed. 1921) (emphasis added).

Adhering to Blackstone's view, Crafts *v.* Broadway Nat'l Bank, 142 Va. 702, 710, 128 S.E. 364, 367 (1925), held that once a rule of law has been deliberately adopted and declared, it ought not to be departed from except for the gravest and most convincing reasons and upon a clear manifestation of error.

The proposition that stare decisis should be applied in a less rigid manner has been aptly stated as follows:

> The common law lawyer holds firmly to his faith in the rule of precedent, but it is generally recognized that the rule is not an unyielding one. . . . [J]udicial decisions are but evidence of the law which . . . is sometimes misrepresented by bad precedents which must be corrected. . . . [B]ad precedents must yield to the better reason and . . . this qualification of the rule of *stare decisis* will enable us to reach the golden mean between the extreme of flexibility and the extreme of rigidity and ultimately to achieve a system which, though adaptable to the changing needs of a changing society, is not without symmetry and continuity. Wyckoff, *Our Changing Common Law*, 48 W. Va. L.Q. 24,33 (1941).

For a further discussion see Lile, *Some Views of the Rule of Stare Decisis*, 4 Va. L. Rev. 95 (1916).

13. *Stare decisis* does not mean either following *rationes decidendi* as such or general principles as such. On the contrary, it means following prior decisions only because and as far as the *rationes decidendi* of these decisions would hypothetically be consented to today by conscience and the feeling of justice of the majority of all whose obedience is required by the rule of law on which the *rationes decidendi* of the prior decision was logically based. Laun, *Stare Decisis*, 25 Va. L. Rev. 12, 21-22 (1938).


14. Any . . . jurisdiction . . . which should now adopt the English common law as it is to-day [*sic*] must at least adopt those principles which are now established as the law of England by the decisions of the English courts. There is no English common law which is different from the final decisions of the English courts. To talk, therefore, about adopting the English common law without adopting the decisions of the English courts is to talk about adopting something that does not exist; it is an attempt to adopt the common law, as already stated, with the essential and significant feature of the English common law left out,—the feature which identifies the English common law with the decisions of the English courts. Pope, *The English Common Law in the United States*, 24 Harv. L. Rev. 6, 14 (1910).
seen as a legislative and not a judicial prerogative. Often misunderstood is the point that the "specific rules" approach does not preclude courts from developing their own rules of decision and subsequently altering or even abrogating those rules. The view holds merely that courts cannot change the specific common law rules in force at the time of their statutes' enactment. This does not deny the proposition that the state courts in this country also operate under a common law system which allows them to set and overrule their own judicial precedents.

Virginia's interpretation of its constitutional and statutory adoption of the common law of England seemed clear until the decision in Surratt v. Thompson. In that case, the Virginia Supreme Court abrogated the common law rule of interspousal immunity. This decision was a radical departure from the court's past interpretations of its authority under the Virginia Constitution and Code.

Every prior case which commented on the court's power in this area, indicated that it was not within the authority of the Virginia Supreme Court to alter any English common law doctrine. While most Virginia cases indicated this proposition in dicta, Brown v. Brown, in which a common law rule was attacked, announced that the words of the Virginia Code "... are simple and clear... They apply with full force to all of the courts of this Commonwealth. Law-making by the courts in the face of this language would be an unconstitutional assumption of legislative power."

The court in Surratt, ignoring the past interpretations of its obligation to follow common law rules, announced:

   The failure to distinguish between the adopted and binding common law of England, and those general sources of law and right methods of reasoning which may properly be regarded as of the same force and validity in all the states, has been the cause of much of the confusion regarding the meaning of the common law.
17. VA. CONST. Schedule, § 3 (1971).
18. VA. CODE ANN. § 1-10 (1950).
22. Id. at 358, 32 S.E.2d at 81.
... [W]e have the injunction of Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 243 (1939), dealing with intra family tort immunity, that former rules should give way to rules of reason in the light of changed circumstances.23

By this statement, the court equated abrogating the rule of parent-child immunity with abrogating the doctrine of interspousal immunity. This conclusion is not accurate since the rule of parent-child immunity was unknown at common law. The court in Worrell expressly recognized the difference between that rule and the interspousal immunity doctrine when it partially abrogated the rule of parental immunity:

A careful examination of authority and precedent discloses that there are no English decisions, under the common law, pronouncing a specific rule forbidding a child, to sue its parent for personal tort. . . . We do not find the principle sought to be invoked appearing in any American case prior to 1891. . . . The case of Hewlett v. George, (1891) 68 Miss. 703, 9 So. 885, 13 L.R.A. 682, is the first in this country to declare the doctrine denying an infant the right to sue its parent for a tort.24

* * *

We do not think that the suggested analogy of husband and wife to that of parent and child affords support for the rule. The distinction is clear. The relation of husband and wife is created by law, that of parent and child by nature. While at common law, and except as changed by statute, there is a conception of the legal unity of husband and wife, neither at common law nor under our statute is there a conception of the legal identity of parent and minor child, either in their persons or in their property rights.25 (Emphasis added).

Thus Worrell was not concerned with a firmly entrenched English common law rule, but rather with “a rule of public policy, founded on judicial pronouncement”26 which could be abrogated by judicial decision. When the court in Worrell stated “. . . the effect of the earlier decisions must be considered in relation to the occasion, facts and laws upon which they were based . . . Rules of thumb must give way to rules of reason,”27 it was talking about judicial decisions founded on public policy, and not English common law rules. It is apparent that the Virginia Supreme Court misapplied the reasoning and logic of Worrell to the factual situation in Surratt. Even though the Surratt court may have felt that interspousal immunity was an outmoded concept, nothing in Worrell or any other Virginia case had interpreted the Virginia Code or Constitution as granting the court the authority to abolish a common law rule.

24. 174 Va. 11, 17, 4 S.E.2d 343, 345 (1939).
25. Id. at 20, 4 S.E.2d at 346.
26. Id. at 28, 4 S.E.2d at 350.
27. Id. at 20, 4 S.E.2d at 347.
The Virginia Supreme Court either did not understand or did not face the underlying problem that Surratt posed.28 Neither the Section 3 of the Schedule of the Virginia Constitution nor Section 1-10 of the Code of Virginia was mentioned in the Surratt opinion, much less the fact that these provisions had always been interpreted to mean that Virginia had adopted specific common law rules which could only be altered by the General Assembly. Had the court been faced with a rule of its own creation, it would have been warranted in modifying or abrogating that rule as it deemed appropriate. However, the court did not appreciate the fact that as interpreted by its predecessors, the common law of England which was in force at the time of the enactment of the Virginia Constitution and Section 1-10 of the Code of Virginia was made statutory. Thus only the legislature could alter or abrogate it.

Since the Surratt decision, the Virginia Supreme Court has had a second opportunity to address the issue of its authority to abrogate a common law rule in light of the Code of Virginia and the Virginia Constitution. In Johnson v. Commonwealth,29 the defendant contended that the English common law rule of Semayne's Case30 forbade a “no-knock” entry by police. Although the court admitted that “the absence of statutory authority mandate[d] an examination of common law principle,” it avoided a direct confrontation with the applicable provisions of the Code of Virginia and the Virginia Constitution. Instead the court merely declared that “the common law should be evaluated in the light of modern technology.”32 This statement reveals that the court again chose to abrogate a common law rule without first examining its authority to take such action.33

Although the Virginia Supreme Court has not expressly repudiated its

28. At the time of the Surratt decision, the Virginia court had several guidelines to follow: Schedule of the Virginia Constitution § 3 (1971), and § 1-10 of the Code of Virginia stated that the common law was not to be altered except by the General Assembly; past decisions had always interpreted these provisions to mean that Virginia had adopted specific rules of the common law; and the Worrell decision allowed overruling of judicial decisions only if based on public policy.

Placed in similar circumstances, the Wyoming Supreme Court in Davis v. Board of County Comm’rs, 495 P.2d 21 (Wyo. 1972), refused to abrogate the common law rule of governmental immunity. This decision by the Wyoming court demonstrates how a state court which considers itself to have adopted specific rules of common law through constitutional and statutory provisions reacts when faced with a contention that it should abrogate a common law rule.

29. 213 Va. 102, 189 S.E.2d 678 (1972).
31. 213 Va. 102, 103, 189 S.E.2d 678, 679 (1972).
32. Id. at 105, 189 S.E.2d at 680.
33. An aspect of Johnson which could possibly legitimate the court’s result is the fact that there has been a question as to whether Semayne’s Case actually forbade no knock entry or merely advised against it. Id. at 104, 189 S.E.2d at 679.
traditional position that the Virginia Code and Constitution adopted the specific rules of common law, its recent decisions imply that the court has shifted to a "systems" approach. However, the court in these decisions has abrogated common law rules without first interpreting the appropriate statutory and constitutional provisions, thus the threshold question of whether the court has authority to take such action has not been answered. In effect the court has exercised a new power without providing a legal justification for its possession of that power, thereby enlarging its own authority and creating an era of judicial legislation. It is reasonable to assume that the court will continue to exercise its new "authority" without the needed clarification of Virginia's constitutional and statutory provisions. The court itself should provide clarification; however, it may be preferable to have the General Assembly take the initiative to codify in more exact terms the legislative intent behind the provisions. This would avoid the delicacies which arise with court interpretation of provisions which define court authority.*

A. W. W.

* Editor's Note—After this article went to print it was argued to the Virginia Supreme Court in Jackson v. Jackson, ––– Va. –––, 200 S.E.2d 515 (1973) (which limited Surratt to prospective operation) that the Court had gone beyond its authority when it abolished interspousal immunity in Surratt. However, the court chose not to comment on this contention, and the printed opinion of Jackson gives no indication that this argument was raised.