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LEGISLATION-STATUTORY CONSTRUCTION-VALIDITY OF CANON THAT STATUTES IN DEROGATION OF THE COMMON LAW SHOULD BE STRICTLY CONSTRUED

Alan Reeve Hunt S.Ed.
University of Michigan Law School

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LEGISLATION — STATUTORY CONSTRUCTION — VALIDITY OF CANON THAT STATUTES IN DEROGATION OF THE COMMON LAW SHOULD BE STRICTLY CONSTRUED—Plaintiffs brought suit to recover damages for the death of their adopted son under the Mississippi wrongful death act, which provides that an action may be brought by “the parent for the death of the child.”¹ The defendants incorporated in their answer a special plea that the statute does not vest a cause of action in adoptive parents. On appeal from a judgment sustaining this plea, without prejudice to the rights of the deceased’s natural parents to bring another action, *held*, affirmed. The Mississippi wrongful death statute gives a right of action to natural parents only. *Boroughs v. Oliver*, (Miss. 1953) 64 S. (2d) 338.

The precise issue confronting the court in the principal case was whether the word “parent” in the wrongful death act should be construed to include adoptive parents. In resolving this question the court relied on the so-called

¹ Miss. Code Ann. (1942) §1453.

canon of construction that statutes "in derogation of the common law" are to be strictly construed.² While it would not be fair to say that this canon formed the sole basis of the decision,³ the mere fact of its use provides an opportunity to inquire into its validity in such a context. There is no question that this was a situation in which the canon is typically applied. The Mississippi statute provides a right of action where none existed at common law and in that sense derogates from the common law.⁴ The inquiry must be whether it is sound to apply the canon at all. The canon of strict construction is a corollary of the broader principle that statutes are to be construed against the background of the common law.⁵ It springs from the attitude taken by Lord Coke and other early English jurists toward the relation between common and statutory law.⁶ Critics of the canon assail it as a thinly veiled judicial rebellion against the intrusion of statutes upon the sacred domain of the common law,⁷ and there

² "Where it is claimed that a statute imposes a duty or burden, or establishes a right or benefit which was not recognized by the common law, the statute will be given a strict interpretation to avoid the change asserted." 3 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., §6201, p. 164 (1943).

³ Of the other grounds for decision the principal one was the status of adoptive parents as defined by the adoption statute, Miss. Code Ann. (1942) §1269, which "does not provide in terms that the child on being adopted ceases to be regarded as the child of its natural parents." *Sledge v. Floyd*, 139 Miss. 398 at 407, 104 S. 163 (1925). Warrant for consideration of the adoption statute in determining whether a wrongful death action may be maintained for the benefit of the adoptive parent was found by the court in the principal case in 16 AM. JUR., Death §100 (1938). That the right is granted to the natural parent only, see *Jackson's Admx. v. Alexiou*, 223 Ky. 95, 3 S.W. (2d) 177 (1928); *Mount v. Tremont Lumber Co.*, 121 La. 64, 46 S. 103 (1908). *Contra*, *Ransom v. New York, C. & St. L. R. Co.*, 93 Ohio St. 223, 112 N.E. 586 (1915). It is apparently significant whether or not the adoption statute provides a right of inheritance from the adopted child to the adoptive parents. The Mississippi statute does not so provide. Other interpretive aids employed in the principal case were the dictionary definition of the word "parent," and the fact that at the time of the passage of the original wrongful death act the word "parent" could only have meant natural parent, since the adoption statute was not passed until fourteen years later. The latter argument proceeds on the dubious assumption that the original legislative classification is static and cannot be enlarged by subsequent legislation. See 2 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., §5102, p. 509 (1943). This point is made only to show that the canon of strict construction may have had more weight in the decision than at first might appear.

⁴ 3 LABATT, MASTER AND SERVANT 2629, 2635 (1913); PROSSER, TORTS 949 (1941). Every American state now has a statutory remedy for wrongful death, most of them modelled on the original English Fatal Accidents Act, 9-10 Vict., c. 93 (1846), better known as Lord Campbell's Act.

⁵ 3 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., 1-17 (1943).

⁶ See PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 4th ed., 315 (1948). In *Dr. Bonham's Case*, 8 Coke Rep. 113b, 77 Eng. Rep. 646 (1610), Lord Coke made the classic statement: "It appears in our books that in many cases the common law will controul acts of parliament and sometimes adjudge them to be utterly void: for when an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law will controul it and adjudge such acts to be void." See Pound, "Common Law and Legislation," 21 HARV. L. REV. 383 (1908); Plucknett, "Bonham's Case and Judicial Review," 40 HARV. L. REV. 30 (1926); MacKay, "Coke—Parliamentary Sovereignty or the Supremacy of the Law," 22 MICH. L. REV. 215 (1924).

⁷ 3 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., 165 (1943). Pound, "Common Law and Legislation," 21 HARV. L. REV. 383 at 402 (1908), emphasizes the scant sympathy of many of America's earliest and greatest jurists for the legislative process.

are indications that it is now falling into judicial disfavor.⁸ However, it is undeniable that the canon has profoundly influenced the course of statutory construction in the United States.⁹ The court in the principal case, for example, was able to point to ample evidence of its prior use in Mississippi.¹⁰ But the validity of the canon must ultimately be judged against the broad purpose of statutory interpretation, namely, ascertainment by the court of the intent of the legislature.¹¹ Instances may be supposed where it is clear that the legislature intends to make only the most narrowly circumscribed changes in the common law; equally clear are instances in which the legislature acts with the fullest intent to make broad changes in the common law. A frequent example of the latter type of legislation is the so-called remedial statute.¹² Recognition of the probabilities of legislative intent in such instances has produced the canon that remedial statutes are to be liberally construed. In the principal case it would have been perfectly possible for the court to declare that the wrongful death act was a remedial statute and so should receive a liberal construction. There is authority for such a position in the interpretation of similar statutes.¹³ Logically, it appears that if the legislature has introduced into the law a new remedy it must have intended that the remedy be construed by the courts so as to realize its full effect. The fact that it derogates from¹⁴ the common law is in many cases the central reason for its enactment. One conclusion which can thus be drawn from the principal case is that where canons of construction leading to diametrically opposite results can be cited with equal appropriateness in a given case, the use of either one becomes highly artificial. The court in this case had

⁸ A statement typical of the more recent attitude is found in *Teders v. Rothermel*, 205 Minn. 470 at 472, 286 N.W. 353 (1939): "At the outset, we do not consider ourselves at liberty to apply any rule of 'strict construction' to this or any other statute, simply because it happens to be in derogation of the common law. . . . Too much judicial indulgence in 'strict construction' of statutes has heretofore disguised 'extraconstitutional obstacles to, or hindrances of, legislative purpose.'" Cases expressing opposition to or refusing to apply the canon are collected in 3 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., 171-176 (1943).

⁹ Pound, "Common Law and Legislation," 21 HARV. L. REV. 383 at 402 (1908), advances the thesis that the canon is in fact an American product of the nineteenth century. There are literally hundreds of American cases in which the canon has been applied.

¹⁰ E.g., *City of Jackson v. Wallace*, 189 Miss. 252, 196 S. 223 (1940); *Hollman v. Bennett*, 44 Miss. 322 (1870).

¹¹ It has been shown that this was not always viewed as the primary purpose of statutory interpretation. See Radin, "Early Statutory Interpretation in England," 38 ILL. L. REV. 16 (1944).

¹² While in a sense any statute may be considered "remedial" in filling what was deemed a gap or defect in existing law, the term has been restricted to include only legislation that (1) is not penal or criminal in nature, and (2) is basically procedural rather than substantive. See collection of cases in 3 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., 68-75 (1943).

¹³ *Nolan v. Moore*, 81 Fla. 594, 88 S. 601 (1920); *White v. Atchison*, T. & S. F. R. Co., 125 Kan. 537, 265 P. 73 (1928); *Merkle v. Township of Bennington*, 58 Mich. 156, 24 N.W. 776 (1885).

¹⁴ The phrase "derogates from" may convey the impression, desirable from the point of view of a judge who wishes to apply the canon, that the legislature is doing something which it ought not to do. Preferable from the point of view of objective thinking is the use of the words "alters" or "modifies."

at hand, and employed, other means of ascertaining legislative intent.¹⁵ It could not legitimately have used any canon of construction to overcome conclusions based on more realistic and objective manifestations of that intent, but even the selection of a canon which accorded with such conclusions was at least unnecessary and at most the perpetuation of an outworn expression of judicial hostility to statute law.¹⁶

Alan Reeve Hunt, S.Ed.

¹⁵ See note 3 *supra*.

¹⁶ Bruncken, "The Common Law and Statutes," 29 *YALE L.J.* 516 (1920), goes so far as to suggest that with the tremendously increased amounts of legislation, interpretation with reference to common law principles may have to be abandoned.