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CONTRACTS: APPLICATION OF USAGE WHERE CONTRARY TO THE COMMON LAW

The purpose of this note is to study the application of usage in the law of contracts, especially where the common law is contrary to the application thus made. To accomplish this purpose, it will, of course, be necessary to define usage and custom and distinguish them, to interpret the phrase "a rule of law" which is often applied in connection with the application of custom and usage, and to show the conditions under which usage, contrary to the common law rule on the subject, will be permitted to affect the meaning of a contract.

The problem is brought to mind by a seemingly ambiguous statement in section 249. of *The Restatement of the Law of Contracts*, which states:

"Usage cannot change a rule of law, but usage may so affect the meaning of a contract that a rule of law which would be applicable in the absence of the usage becomes inapplicable."

The explanatory matter on this statement is as follows:

"Long continued usage may develop a rule of law in accordance with the usage; but when this occurs there is more than usage as defined in section 245 (custom?)"

Several examples are given, which may best be understood after a full consideration of subsequent parts of this note, and therefore they will be considered later.

The explanatory statement of the *Restatement*, above, leads one to believe that there is a recognized distinction between "custom" and "usage," and a cursory examination of the authorities and the cases bears out this belief. Turning first to the authorities, we find the following definition in *The Restatement of the Law of Contracts*, section 245:

"Usage is habitual or customary practice. It is not itself a legal rule, but merely a habit or practice in fact. It may prevail in a geographic division or in only a special trade or among a part of the people."

In Williston, *Contracts* (Student ed. 1926), the following distinction is made in section 649:

"The terms, custom and usage, are commonly used interchangeably, though there is a recognized distinction in the meaning of the two words. Custom is such a usage as has by long and uniform practice become the law of the matter to which it relates. Usage derives its efficacy from the assent thereto of parties to the transaction; custom derives its efficacy from its adoption into the law, and when once established is binding irrespective of any manifestation of assent by parties concerned."

In cases involving custom and usage, we find, although there appears to be no uniformity on the subject, that "custom" and "usage" are generally regarded as separable and distinct. However, a few courts fail or refuse to distinguish between custom and usage:

"The courts have for a long time used the term 'custom' as coordinate with 'usage' and we will so regard it in our consideration of this case."¹

"Two questions are suggested by the objection: First, does evidence of usage possess any probative value in cases of this character? and, second, if it does, must the custom be pleaded to justify its admission?"²

"But it will be seen by an examination of the cases and by reference to the elementary works, that the words usage, custom, course of trade are used interchangeably"³

The majority recognize a distinction between custom and usage:

" custom is such usage as has acquired the force of law."⁴

"As has often been said, a lawful custom is itself part of the common law, while a lawful usage, proved and shown to affect both parties, may be described as the law of their case."⁵

"Usage is a repetition of acts, and is distinguished from custom in that usage is a fact, while custom is a law. There may be usage without custom, but there can be no custom without usage to accompany it or precede it Usage, then is the germ, which, by constant repetition, and general use, and great antiquity develops into custom"⁶

"For strictly speaking, custom is that length of usage which has become law. It is a usage which has acquired the force of law, and ignorance of the law will not excuse. A general custom is the common law itself, or a part of it."⁷

The distinction here noted is of great importance in the application of "custom" and "usage." It is also to be noted that this distinction is important in the field of evidence as to the proof necessary for the application to take effect, a phase we shall not consider here.

¹ Aulich et al. v. Craigmyle et al., 248 Ky 676, 681, 59 S.W 2d 560 (1933)

² Brunke v. Missouri & K. Telephone Co., 115 Mo. App. 36, — 90 S.W 753, 754 (1905).

³ Richmond et al. v. The Union Steamboat Co., 87 N.Y. 240, 249 (1881).

⁴ Gerseta v. Silk Ass'n of America, 222 N.Y.S. 11, 13 (1927)

⁵ Nicoll v. Pittsvein Coal Co., 269 Fed. 968, 971 (1920).

⁶ American Lead Pencil Co. v. Nashville, C. & St. L. Ry., 124 Tenn. 57, — 134 S.W 613, 615 (1911).

⁷ Walls v. Bailey 49 N.Y. 464, 471, 10 Am. Rep. 407 (1872).

The phrase, "a rule of law," so often used in connection with custom and usage, and its probable equivalent, "a positive rule of law," might be construed separately from their context in several different ways. But it becomes apparent after an examination of the cases on custom and usage that a rule referred to in connection with such statements is invariably a rule of the common law. There are also sufficient grounds for limiting this expression ("a rule of law") to a rule of the common law. Two other possibilities are apparent: (1) Statutory law and (2) application being itself a "rule of law." The first we reject because of two reasons. Usage must not be contrary to public policy and statutes are recognized as a supreme expression of public policy. Also, the highest goal to which usage may aspire is to become a custom, which we have seen is the common law, or a part thereof. Since the common law is subservient to statutory law, usage must be so. Thus, if the phrase "a rule of law" were interpreted to mean statutory law, it would have little or no meaning and little or no practical use for our purpose. This is not to say that usage may have no effect in regard to statutory law, however, for as we are to see, this is emphatically not true. As to the possibility of the phrase "a rule of law" including application thereof, this must be rejected, as it would make our entire rule meaningless. Under such an interpretation, the section of the *Restatement* would read in effect: "Usage cannot change the application of a rule of law, but may change the application of a rule of law." It is believed that by regarding "a rule of law" to mean "a rule of the common law" the section of the *Restatement* which we are discussing can be made of value.

This brings us to the application of custom to factual situations. As we have seen, a fully developed custom is itself a rule of law, and exists as a part of the common law. As such, it is treated like other common law rules and principles. It cannot prevail over statutory law when the two are in conflict. However, where the custom has been enacted into statutory law, the custom may be looked to in cases of doubt, and may be used to decide what the law was meant to include. An example of this is found in *Dale v. Pattison*,⁸ where the court said:

"It is no answer to say that a trade custom or usage should not prevail against clear and unequivocal rules of law. This is a *petitio principii*. The question under consideration is whether certain portions of the written law are to be given by construction an effect different from that expressed in their language, on the ground that by authoritative decisions of the Supreme Court of the State the asserted policy has been found to be implied in them. Since it seems to us that neither the statutes nor the decisions go to the extent that is claimed for them by appellants, we may refer to the established custom as

evidence of what has long been understood as the law; for as this court held such usages (customs) are to be judicially recognized as a part of the law."

Also, where trade words or phrases are used in the statute, the custom of the trade as to the meaning of such words will control. This is best illustrated by the decision in *Pennell v. Philadelphia & Reading Ry.*⁹ where the court said:

" the custom of the railroads could not, of course, justify a violation of the statute, but that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute." (Determining whether locomotives are "cars" within the meaning of the statute.)

Considering the application of usage, we may first consult the authorities on the subject.

"It is also essential that a usage shall be consistent with rules of law, for 'a universal usage cannot be set up against the general law. If it is inconsistent with any rule of the common law, or with any statute, or is contrary to public policy it cannot be recognized. A usage, however, is not contrary to rules of law in his sense, merely because it makes the law applicable to the particular contract different from what it would be if the usage were not imported into the contract. This is generally the object and the natural effect of proving a usage.'"¹⁰

Finding here some food for thought, but certainly much to be desired, we turn to Williston on the subject:

"The belief of individuals or of a community that a rule of law is something different from what it actually is will not change the rule of law. Nor will it make any difference if the members of the community habitually settle disputes in accordance with their erroneous belief. At least, a habit must be general and continue for a long time before the common law will adopt the custom as a part of itself. But if two individuals of such a community make a contract with one another with reference to a matter to which a well known habit or usage applies, and if the common law does not forbid the application of the customary rule if the parties agree thereto, a different problem is presented. The only question now is whether the parties to the contract have agreed impliedly to be bound by the usage. They cannot change the rule of law, but they can change its application to themselves if they agree to do so.

"Broad statements, therefore, which are sometimes made, that usage or custom cannot change a rule of law, must be accepted with some reservation. The rule of law cannot be changed, but its application to the case may be prevented. The facts as they appear to be apart from the usage are altered by the additional agreement

⁹ 231 U.S. 675, 680 (1912)

¹⁰ CLARK, CONTRACTS, sec. 498 (3d ed. 1914).

which is implied because the parties contracted with reference to the usage. The additional facts make a rule of law applicable which would not have been applicable in the absence of the usage. Otherwise it would have been idle to introduce evidence of it. Indeed the very existence or non-existence of a contract may depend upon usage¹¹

This clarifies the rule to a great extent, but does not make clear when and how the rule will be applied. Therefore we shall turn to the cases, and then consider some examples of the application in question. A fairly recent Federal decision, with the cases cited therein, is most helpful for a complete understanding of the statements previously made. In that case the court said:

"It is well settled that a trade usage which is contrary to a statute or which contravenes public policy is invalid and may not be invoked; but where a rule of law is of a character that the parties may make it inapplicable to their contract by express agreement they may likewise render it inapplicable by implied agreement or by usage. Many rules of law apply only in the absence of an agreement to the contrary."¹²

The cases there cited throw further light upon the statements made. Although the law is that wild animals become property only when fully and actually taken into possession, in *Swife v. Gifford*,¹³ it was held that a usage is valid that a whale goes to the boat which sinks the first iron that holds if claim is made by that boat before the other boat cuts the whale. It was there stated: "Principles of law differ in their importance as well as in their origin; and while some of them represent great rules of policy, and are beyond the reach of convention, others may be changed by parties who chose to contract upon a different footing; and some of them may be varied by usage

¹⁴ The judge in his decision cited *Wigglesworth v. Dallison*,¹⁵ in which the law gave the crops of an outgoing tenant to his landlord. Despite this, usage, which made them the property of the tenant, was held to be valid. *Grimman v. Walker*¹⁶ gives another example in point. By common law of that day notice of protest by mail, when the person lives in the same town, was not good. Plaintiff in that case proposed to prove usage of banking houses to give notice by mail, and that the defendants knew the custom. On objection this was rejected. The court on appeal, however, said: "It is objected that this usage, or custom, if proved, would be inconsistent with the rule of law, and would therefore be void. It is indisputably true that parties to a contract may vary or restrain by express stipulation

¹¹ WILLISTON, CONTRACTS, sec. 651 (Stud. ed. 1926)

¹² *Wolfe v. Texas Co.*, 83 F 2d 425, 431 (1936)

¹³ 23 Fed. Cas. 558, No. 13,696 (D.C. Mass. 1872).

¹⁴ *Ibid.*, p. 559.

¹⁵ 1 Doug. 201, 99 Eng. Rep. 132 (1779)

¹⁶ 9 Iowa 426, 428 (1859).

certain rules of law, so far as they would otherwise apply to, and govern their contract. Usage, when established, affords, the same evidence of intention as the most direct language, and may have the same effect upon the application of legal rules. If, therefore, it would be competent to prove that the parties contracted that notice should be given through the post office, the same may be shown by proving a usage to that effect. " A good summary is also found in *Colket v Ellis*,¹⁷ where the judge said: "Without further reference to the numerous cases on this subject, I think their effect may be summed up to be, that where no statute or principal of public policy intervenes, but a rule of law is a mere privilege which may be waived, there is no reason why the waiver may not be as well by a custom (*usage*) known to and acquiesced in by the parties, as by an express contract." For a further distinction, a portion of the case of *Adams v Pittsburgh Ins. Co.*,¹⁸ may be observed: "In *Vanness v. Pacard*, 2 Pet. U.S. Rep. 148, it was held that evidence was properly received to prove that a custom and usage existed in the city of Washington which authorized a tenant to remove any building erected by him. In *Gordon v. Little*, 8 S. & R. 433, it is held, a usage or custom varying the liability of common carriers by water from that of the common law may be proved. Usage may add a new construction variant from the face of the instrument, as much as if it had been contained in a new clause or by reference to it: *Eyre v. Marne Ins. Co.*, 5 W & S. 116." It might be noted that where usages are not permitted to vary the application of rules of the common law, the court generally declares merely that, "Usage cannot be permitted to change a settled rule of law," and does not specify the reason in the particular case.¹⁹

Can we draw from this discussion a less confusing rule for dealing with usages than that stated in the *Restatement*? At least two efforts have been made to clarify this rule, both of which, in the opinion of this writer, have failed. Chapman, J., in the case of *Dickinson v Gay*,²⁰ reached a conclusion that the only usages sustained, where a different result was reached after application of the usage than would have been reached by the common law in its absence, were usages having reference *solely* to methods of transacting business. This is refuted by many of the cases which are discussed herein, as other usages are shown to have been applied. John D. Lawson, a rather productive writer of the late 19th century and an authority suggested the following in an article on the subject: "Usage and custom control the rules of law applicable to particular

¹⁷ 10 Phila. 375, 378 (1875).

¹⁸ 95 Pa. 348, 355 (1880)

¹⁹ *Pate Lumber Co. v Weathers*, 167 Miss. 228, 146 So. 433 (1933) *Fed. Ins. Co. of Hartford, Conn. v Sydeman*, 82 N.H. 482, 136 Atl. 136 (1927) *Griggs-Paxon Shoe Co. v Friedheim Bros.*, 133 S.C. 458, 131 S.E. 620 (1926).

²⁰ 7 Allen (Mass.) 29, 35-37, 83 Am. Dec. 656 (1863).

circumstances, provided it be known and understood by the parties, and be reasonable. A usage is unreasonable when it conflicts with a rule of public policy, and in many other instances."²¹ This appears to be too broad to serve as a guide in the consideration of factual situations.

In conclusion, it is suggested that the following might serve as a basis for determining a more serviceable guide in dealing with the application of custom and usage.

Neither custom nor usage may prevail in express derogation of statutory law, or the express purpose thereof, but custom or usage may be considered:

- (1) in determining the purpose and extent of a statute, where the statute in question appears to be a codification of such custom or usage, and
- (2) in the interpretation of words common to the industry or trade, where such words are not expressly defined by the statute.

Usage may be given consideration in determining the relationship and intent of the parties, even though such a usage requires a result other than that required by the common law in the absence of such usage, provided such usage

- (1) is reasonable,
- (2) is not contrary to public policy or public morals,
- (3) is not repugnant to the expressed intention of the parties,
- (4) is not forbidden by the common law rule which it avoids by its application, and
- (5) can be presumed to have been in the minds of the parties when the contract was made.

Though this leaves many questions unanswered, it may prove helpful in a fuller consideration of the subject. It is to be hoped that the courts will at a future date give more attention to the question involved, and attempt to clarify their position on it instead of merely reiterating a maxim of dubious utility and questionable application.

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²¹ Lawson, *The Power of Usage and Custom to Control or Alter Rules of Law*, 7 SO. L. REV. (N. S.) 1, 56 (1881). (Conclusion of two articles on the subject. A complete book on Custom and Usage by this writer has been published, which was not available to this writer. See, in particular, Sections 225 and 248).

