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STARE DECISIS -THE RETROACTIVE EFFECT OF AN OVERRULING DECISION

STARE DECISIS — THE RETROACTIVE EFFECT OF AN OVERRULING DECISION — In 1923 the Supreme Court of Michigan ruled, in *Kavanaugh v. Rabior*,[1] that property lying between the meander line and the waterline of the Great Lakes belonged to the State. The defendant, after this decision and upon the advice of the State Conservation Department, refused to pay rent to the plaintiff, the littoral proprietor. In 1930 the court, overruling the *Kavanaugh* case, held, in *Hilt v. Weber*,[2] that such property belonged to the littoral proprietor. On the basis of this decision the plaintiff brought suit for use and occupation. *Held*, in the principal case, that the overruling *Hilt* decision being retroactive, the plaintiff must be considered as having been the owner during the entire period of defendant's occupation, and is therefore entitled to rent. *Donohue v. Russell*, 264 Mich. 217, 249 N. W. 830 (1933).

In legal theory a decision of a court of last resort is not itself law but only evidence of law.[3] Thus, when a court overrules itself it does not make new law but only declares what has always been the law.[4] From this it follows that all cases coming before a court subsequent to an overruling decision will be decided as though the original erroneous decision had never been made, and this is true even though the case involves transactions which occurred while the erroneous decision was accepted as and appeared to be the law.[5] Some writers take the position that the individual is justified in considering a decision of a court of last resort as the law itself and not merely evidence of the law. They prefer to apply the rule announced in the erroneous decision in cases involving transactions made before the overruling decision was rendered and in reliance on the erroneous decision.[6] Some courts have in part agreed with this position, and the trend from the traditional view that an overruling decision is retrospective in its operation may be summarized as follows:[7] (*a*) in cases arising in the federal courts the

[1] 222 Mich. 68, 192 N. W. 623 (1923).

[2] 252 Mich. 198, 233 N. W. 159 (1930).

[3] 1 BLACKSTONE COMMENTARIES 68-71.

[4] Falconer v. Simmons, 51 W. Va. 172, 41 S. E. 193 (1902).

[5] Allen v. Allen, 95 Cal. 184, 30 Pac. 213 (1892).

[6] GRAY, NATURE AND SOURCES OF THE LAW, c's. 9, 10 (1909); Holmes, J., dissenting in Kuhn v. Fairmont Coal Co., 215 U. S. 349 at 371, 30 Sup. Ct. 140 at 148 (1910).

[7] For a collection and discussion of cases see Freeman, "The Protection Afforded

overruling decision of a state court will not be followed where it would interfere with rights acquired in reliance on an erroneous decision;[8] (*b*) in criminal cases the state courts will apply the law as declared at the time of the act;[9] (*c*) the state courts will protect property rights acquired in reliance upon a judicial interpretation of a statute or a constitutional provision;[10] (*d*) many state courts will protect property or contract rights acquired in reliance upon the judicial interpretation of the common law.[11] In the instant case the court, apparently approving rule (*d*) above, stated that it would not follow the overruling decision where to do so would impair the obligations of contract or injuriously affect vested interests, thereby tacitly admitting that if the defendant had bought or rented the land from the State it would have ruled otherwise. Without attempting to discuss the soundness of rule (*d*), as above stated or as interpreted by the Michigan court,[12] it would seem that if such a rule is admitted as a valid exception to the general proposition that an overruling decision is retroactive, it should cover this case. The equities in the defendant's favor are equally great whether he bought the land from the State, the owner according to the law as then declared, or whether he settled there with its permission. The reliance is equally present in both cases. The only difference is that in the former the defendant would expect to acquire a property right or interest in the land, in the latter an immunity from suit for use and occupation. If the court is willing to protect rights it ought to be equally willing to preserve immunities.

P. V. H.

Against the Retroactive Operation of an Overruling Decision," 18 COL. L. REV. 230 (1918).

[8] Gelpke v. Dubuque, 68 U. S. 175, 17 L. ed. 520 (1863), criticized in 9 AM. L. REV. 381 (1875); Railroad Co. v. McClure, 77 U. S. 511, 19 L. ed. 997 (1870); Bacon v. Texas, 163 U. S. 207, 16 Sup. Ct. 1023 (1896).

[9] State v. O'Neil, 147 Iowa 513, 126 N. W. 454 (1910); State v. Longino, 109 Miss. 125, 67 So. 902 (1915).

[10] Farrior v. New England Mortgage Co., 92 Ala. 176, 9 So. 532 (1891); City of Sidney v. Cummins, 93 Ohio St. 328, 113 N. E. 218 (1916); Harris v. Jex, 55 N. Y. 421 (1874) (but see Stockton v. Dundee Mfg. Co., 22 N. J. Eq. 56 (1871), for the opposite result on the identical facts); and Falconer v. Simmons, 51 W. Va. 172, 41 S. E. 193 (1902), where after a citation of many authorities, the rule is justified by saying that the judicial construction of a statute is part of the statute itself, that since the legislature cannot make a statute retroactive, the court cannot make its interpretation of the statute retroactive.

[11] Threadgill v. Town of Wadesboro, 170 N. C. 641, 87 S. E. 521 (1916); Hill v. Brown, 144 N. C. 117, 56 S. E. 693 (1907); Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1892); Allen v. Allen, 95 Cal. 184, 30 Pac. 213 (1892); Ray v. Western Pa. Natural Gas Co., 138 Pa. 576, 20 Atl. 1065 (1891).

[12] For a discussion of the soundness of this rule and the others mentioned hereinabove, see Moschzisker, "Stare Decisis in Courts of Last Resort," 37 HARV. L. REV. 409 at 424 (1924); see also Freeman, "The Protection Afforded Against the Retroactive Operation of an Overruling Decision," 18 COL. L. REV. 230 (1918). It has sometimes been suggested that the court in overruling itself apply the erroneous rule to the case in hand and declare the new rule for the future. See Kocourek, "Retrospective Decisions and Stare Decisis and a Proposal," 17 A. B. A. J. 180 (1931). Such a double-barrelled decision was rendered in Montana Horse Products Co. v. Great Northern Ry., 91 Mont. 194, 7 Pac. (2d) 919 (1932), commented on by Burke Shartel in "Stare Decisis — A Practical View," 17 J. AM. JUD. SOC. 6 (1933).