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JURISPRUDENCE-STARE DECISIS - VARYING FORCE OF PRECEDENT

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JURISPRUDENCE—STARE DECISIS—VARYING FORCE OF PRECEDENT—Plaintiff passenger brought an action against defendant driver to recover for injuries arising from the latter's negligence in operating an automobile while the parties were engaged in a joint enterprise. Defendant contended that his own negligence should be imputed to the plaintiff to bar recovery. Defendant offered as authority a previous decision by the same court[1] in which a passenger, a joint enterpriser with the driver, sued both the driver and the absentee owner of the automobile. There the court dismissed the action against *both* defendants on the ground of imputed negligence. But the reasoning and authority offered by the court were

[1] Frisorger v. Shepse, 251 Mich. 121, 230 N.W. 926 (1930).

appropriate only to the cause of action against the absentee owner. Without any indication that the issue had been considered, this prior case had decided that the negligence of a driver is imputable to a passenger, where the two were engaged in a joint enterprise, so as to bar recovery by the passenger against the driver. On appeal from a dismissal of the plaintiff's declaration, *held*, reversed. When a question necessarily involved in a case was neither considered by the court nor discussed in the opinion, the case is not binding as a precedent. *Bostrom v. Jennings*, 326 Mich. 146, 40 N.W. (2d) 97 (1949).

In the opinion of foreign observers, the doctrine of stare decisis is the most striking characteristic of Anglo-American law.[2] Our judges recognize a more or less compelling obligation to follow precedents. All precedents, however, are not of equal weight.[3] Accordingly, a lawyer who wishes to invoke a prior decision as a rule of law must examine numerous factors inhering in the previous case in order to assay its forcefulness. If the case was decided in a supreme court, it will be regarded as binding in the inferior courts of that jurisdiction until overruled by the supreme court or changed by the legislature.[4] In cases of first impression, the views taken in other jurisdictions are considered merely persuasive.[5] Where, as in the principal case, a court is asked to overrule a prior decision, it will be less hesitant in doing so if that decision is contrary to the rule universally accepted elsewhere,[6] or if the decision is not harmonious with analogous doctrines accepted by the deciding court.[7] A prior decision rendered by a unanimous court is less likely to be overruled than one in which there had been a vigorous and convincing dissent.[8] Recently decided cases do not speak with the same degree of authority as older, subsequently confirmed cases, for a recent decision may have led to unfortunate results calling for speedy correction.[9] As illustrated by the principal case, courts do not feel bound by a holding where the particular point, necessarily decided, was neither argued by counsel nor considered by the court.[10] Understandably, judges frequently attach added weight to the opinions delivered by certain of their predecessors who were acknowledged authorities in the area of law in question. One of the primary policy factors underlying stare decisis—stability in law—finds its most urgent application where property titles and commercial transactions are involved.[11] On the other hand, certain rules of law

[2] RADIN, ANGLO-AMERICAN LEGAL HISTORY 343 (1936).

[3] SHARTEL, OUR LEGAL SYSTEM AND HOW IT OPERATES, §7-15 (1947).

[4] Cannon v. Cannon, 259 App. Div. 1055, 20 N.Y.S. (2d) 605 (1940).

[5] State ex rel. Todd v. Yelle, 7 Wash. (2d) 443, 110 P. (2d) 162 (1941).

[6] See Bricker v. Green, 313 Mich. 218, 21 N.W. (2d) 105 (1946), where the Michigan court overruled a tort doctrine which had been repudiated everywhere except in Michigan.

[7] The principal case, in recognizing that recovery might be had by a passenger against a driver in a joint enterprise, made its position consistent with Grusiecki v. Jaglay, 260 Mich. 9, 244 N.W. 211 (1932), where an agent was held liable to his principal for damages resulting to the principal from the agent's negligent performance of his duties as such.

[8] Von Moschzisker, "Stare Decisis in Courts of Last Resort," 37 HARV. L. REV. 409, 415 (1924).

[9] WAMBAUGH, THE STUDY OF CASES, 2d ed., 56 (1894).

[10] *Accord:* SALMOND, JURISPRUDENCE, 10th ed., 180 (1947).

[11] New York Life Ins. Co. v. Boling, 177 Miss. 172, 169 S. 882 (1936); Liberty Nat.

(in the field of torts, for example) may be changed without disappointing expectations based on prior decisions. This is true where the rule covers a situation in which the ordinary person does not consult the law beforehand as a guide to his actions, the chief operation of the rule being to determine liability after the happening.[12] In constitutional law it is felt that, since the court is dealing with the organic law "intended to endure for ages to come," interpretations of that instrument must vary as the dynamics of a changing society require.[13] In this field, too, the court is not able to refer needed changes to the legislature for action, and the amending process is considered altogether too cumbersome for effective accommodation. As a result, the solution of constitutional questions cannot be forecast dependably on the basis of stare decisis.[14] In the criminal law the judiciary is strongly inclined not to depart from settled principles to the jeopardy of the accused, since overruling a decision may be equivalent to an ex post facto law.[15] Conversely, precedents are especially weak when they pertain to matters of evidence and procedure, since courts commonly feel that to overrule such decisions will not detract from substantial rights.[16]

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Bank & Trust Co. v. Loomis, 275 Ky. 445, 121 S.W. (2d) 947 (1938); Dunn v. Micco, 106 F. (2d) 356 (1939).

[12] Supra, note 6.

[13] See Douglas, "Stare Decisis," 49 COL. L. REV. 735 (1949), for a comprehensive survey of overruled decisions in the United States Supreme Court. Justice Douglas feels that certainty and confidence are more nearly achieved in constitutional law by expressly overruling outmoded principles than by astutely attempting to qualify and distinguish cases.

[14] "The United States Supreme Court has rejected it [stare decisis] as a rule of decision." RADIN, ANGLO-AMERICAN LEGAL HISTORY 357 (1936).

[15] People v. Tompkins, 186 N.Y. 413 (1906). Some writers would draw a distinction on the basis of whether the crime was malum prohibitum or malum in se, reasoning that in the latter case the accused was conscious of his wrongdoing. Cf. von Moschzisker, "Stare Decisis in Courts of Last Appeal," 37 HARV. L. REV. 409 at 419 (1924). The very sensible suggestion has been made, and followed in some jurisdictions, that courts might achieve a needed flexibility and at the same time mitigate the harshness of an overruling by giving the decision only prospective effect, similar to a legislative enactment. See Shartel, "Stare Decisis: A Practical View," 17 J. AM. JUD. SOC. 6 (1933); Kocourek and Koven, "Renovation of the Common Law through Stare Decisis," 29 ILL. L. REV. 971 (1935).

[16] "The considerations of policy that dictate adherence to existing rules where substantive rights are involved, apply with diminished force when it is a question of the law of remedies." CARDOZO, NATURE OF THE JUDICIAL PROCESS 156 (1921). Also see Whitaker & Fowle v. Lane, 128 Va. 317, 104 S.E. 252 (1920).