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## Estoppel - Effect of Overruling a Judicial Decision - Equitable Estoppel Against the Taxing Power of the State

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The last case on this matter in Wisconsin prior to the instant case stated that, regardless of the differentiating facts, *Laun v Kipp* overruled *Uecher v. Sheer* wherever they were in conflict and that the Wisconsin rule is that intrinsic fraud is sufficient under certain circumstances to warrant intervention of court of equity in relieving from unconscionable judgments.<sup>16</sup> The instant case firmly establishes this as the controlling law in this forum.

The *Throckmorton Case* bases its general rule on the fear that the trouble of retrying each case would be much greater and work greater hardship than the compensation that would arise from doing justice in particular cases. This fear seems to be groundless because in Wisconsin only seven cases have reached the Supreme Court on this issue since *Laun v. Kipp*, which expressly rejected the *Throckmorton* rule.<sup>17</sup>

The position of the Wisconsin Courts seems to be more in harmony with the spirit and purpose of equity as originally conceived and is a commendable attempt to escape from the rigidity of rules which to a considerable extent have destroyed the discretion and effectiveness of equity courts.<sup>18</sup> It is also in harmony with Rule 60 of the Federal Rules of Civil Procedure which rejects the *Throckmorton* rule.<sup>19</sup> It would seem that this rule should be universally adopted.

DONALD GRIFFIN, JR.

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**Estoppel—Effect of Overruling a Judicial Decision—Equitable Estoppel against the Taxing Power of the State—**The Wisconsin Legislature had established a tax<sup>1</sup> on the declaration by foreign corporations of dividends based on income earned in the state, but the petitioner relied on an earlier decision of the Wisconsin Supreme Court<sup>2</sup> and did not deduct the tax from dividends paid by it in the years 1944 through 1946 because profits were insufficient to offset losses previously accumulated in the state. The Wisconsin Department of Taxation acknowledged the same Supreme Court decision and did not question the petitioner's action until the Supreme Court reversed its stand in a subsequent case.<sup>3</sup> Thereupon, the Department of Taxation assessed the privilege dividend tax against the petitioner upon

<sup>16</sup> *Amberg v. Denton*, 223 Wis. 653, 271 N.W. 396 (1937).

<sup>17</sup> Note, 3 ALA. L. REV. 224 (1950-51).

<sup>18</sup> FREEMAN, JUDGMENTS Sec. 1233 (5th ed., 1925).

<sup>19</sup> Fed. R. Civ. P. 60(b)

"... court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic) . . . ."

<sup>1</sup> WIS. STATS. (1951), sec. 71.16.

<sup>2</sup> *J. C. Penny Co. v. Tax-Commission*, 238 Wis. 69, 298 N.W. 186 (1941).

<sup>3</sup> *Department of Taxation v. Nash-Kelvinator Corp.*, 250 Wis. 533, 27 N.W. 2d 899 (1947).

the dividends paid in the years 1944 through 1946. This appeal is from the judgment of the Circuit Court affirming the Board of Tax Appeals' denial of petitioner's application for abatement of the assessment. *Held*: Judgment reversed. Although the overruling of a judicial decision is a declaration that the former decision never was the law, to avoid injustice the overruled decision may be considered law for intermediate transactions. *Libby, McNeill, & Libby v. Wisconsin Department of Taxation*, 260 Wis. 551, 51 N.W. 2d 796 (1952).

Although the effect of overruling one of its own judicial decisions is a matter to be determined by the highest court of each state,<sup>4</sup> the majority of courts hold that the overruling of a judicial decision is retroactive and is a declaration that the former decision never was the law.<sup>5</sup> Because of this retrospective effect, injustice and hardship to persons relying on the overruled decision are inevitable. Different state courts have attempted to alleviate this injustice while nevertheless preserving the rule by various methods.

Three exceptions to the rule that an overruling decision operates retrospectively are generally recognized. An overruling judicial decision may not operate retrospectively so as to impair the obligations of contracts entered into in reliance on the overruled decision,<sup>6</sup> nor injuriously affect vested rights acquired in reliance on the overruled decision,<sup>7</sup> nor make criminal an act which was not criminal under the overruled decision. The retrospective effect of the overruling decision is prevented from extending to the overruled case itself, or to cases intermediately decided in light of the overruled case, by the principal of *res judicata*<sup>9</sup> or "law of the case."<sup>10</sup> Some courts have avoided the retrospective effect entirely by making an express declaration in overruling the former case that the overruling decision shall operate prospectively only.<sup>11</sup> In cases where the necessary elements were present, other courts have, as in the instant case, invoked the doctrine of estoppel to avoid injustice and hardship which would otherwise result from giving the overruling decision retrospective effect.<sup>12</sup>

<sup>4</sup> *Great Northern Railway Company v. Sunburst Oil and Refining Company* 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360, 85 A.L.R. 254 (1932).

<sup>5</sup> 21 C.J.C. COURTS §194a; 14 AM. JUR. COURTS §130; *Laabs v. Tax Commission*, 218 Wis. 414, 261 N.W. 404 (1935). For a history of the rule and criticism of it, see Comment, 28 ILL. L. REV. 277 (1933); Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924).

<sup>6</sup> 21 C.J.S. COURTS §194b; *Laabs v. Tax Commission*, *supra*, note 5.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Laabs v. Tax Commission*, *supra*, note 5. For cases and discussion see Note, 49 A.L.R. 1273 (1927).

<sup>9</sup> 50 C.J.S. JUDGMENTS §592.

<sup>10</sup> 21 C.J.S. COURTS §195.

<sup>11</sup> *Oklahoma County v. Queen City Lodge No. 197, I.O.O.F.*, 195 Okla. 131, 156 P. 2d 340 (1945); *Gibson v. Phillips University et al.*, 195 Okla. 456, 158 P. 2d 901 (1945).

<sup>12</sup> *La Societe Francaise de Bienfaisance Mutuelle v. California Employment Commission*, 56 Cal. App. 2d 534, 133 P. 2d 47 (1943).

There is no black and white distinction as to when a state government may or may not be estopped.<sup>13</sup> However, the rule is generally accepted that a state may be estopped in its proprietary capacity but ordinarily not in its governmental capacity.<sup>14</sup> The basis of the refusal to invoke estoppel against a state goes back to the principle of sovereign immunity from suit and the old maxim that "the King can do no wrong."<sup>15</sup> Consequently, there seems to be no reason why the state should be immune from estoppel when acting in a proprietary capacity. In cases dealing with the taxing power of the state, the courts are particularly reluctant to apply estoppel<sup>16</sup> since taxation is unquestionably a governmental function and one so essential to the existence of the state.

The Supreme Court of Wisconsin early recognized that the principle of equitable estoppel extended to the state.<sup>17</sup> However, the court soon after expressed its refusal to apply estoppel to the taxing power of the state, although affirming that the state could be estopped when acting in a strictly proprietary capacity.<sup>18</sup> The reason given for this refusal was one of public policy. It was felt that the taxing power was too essential to the state to be subject to estoppel.<sup>19</sup> Yet, in a more recent case, the court indicated that it would have estopped the state even in its taxing power, had all the necessary elements been present.<sup>20</sup> However, even in this case the court distinguished estoppel against an individual from estoppel against the state taxing power.<sup>21</sup>

The principal case climaxes the trend of the Wisconsin Supreme

<sup>13</sup> For a complete discussion of estoppel against government see Note, 1 A.L.R. 2d 338 (1948).

<sup>14</sup> 31 C.J.S. ESTOPPEL §138a; Comment, 23 WASH. L. REV. 51 (1948).

<sup>15</sup> *Supra*, note 13, at 340; Comment, 35 MARQ. L. REV. 176 (1951).

<sup>16</sup> After noting that the elements of estoppel were present, the Arizona court concluded, "Still, it is the settled law of the land and of this jurisdiction that as taxation is a governmental function, there can be no estoppel against a government or a governmental agency with reference to the enforcement of taxes." *Duhamé v. State Tax Commission*, 65 Ariz. 268, 179 P. 2d 252 (1947). For other cases see 31 C.J.S. ESTOPPEL §147.

<sup>17</sup> *State ex rel. Attorney General v. Janesville Water Company and others*, 92 Wis. 496, 66 N.W. 515 (1896). Here the state was estopped from annulling the franchise of a corporation, apparently an exercise of the police power and therefore a governmental function.

<sup>18</sup> *Chicago, St. Paul, Minneapolis and Omaha Railway v. Douglas County and others*, 134 Wis. 197, 114 N.W. 511 (1908).

<sup>19</sup> *Ibid.* at 209: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to re-affirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed."

The court concluded that "we are constrained to hold that the complaint shows the land to be subject to taxation, and that there can be no estoppel *in pais* asserted against the exercise by the state of the taxing power of the state."<sup>20</sup>

<sup>20</sup> *Miller v. Department of Taxation*, 241 Wis. 145, 5 N.W. 2d 749 (1942).

<sup>21</sup> *Ibid.* at 147: "A distinction must be drawn between a benefit to an individual in a private transaction and the receipt of taxes by the state officers. The taxes represent a just debt to the state, and the people of the state have an interest in seeing that each taxpayer bears his fair share of the tax burden."

Court toward a very liberal outlook in respect to estoppel against the state. This attitude seems very much in keeping with present circumstances and modern conditions.<sup>22</sup>

It appears certain that in future cases the court will allow the state to be estopped even in its taxing power provided the petitioner has so changed his position in reliance on the actions of an authorized state agency "that an inequitable result would ensue to it [the petitioner] if the estopped were denied."<sup>23</sup> Apparently, this inequitable result will ensue only when a taxpayer has parted with the money he would otherwise have used to pay the taxes, as in this case, where the petitioner would have been compelled to pay out of its own funds a tax which it could otherwise have deducted from dividends paid to its stockholders. It is doubtful that estoppel would be invoked against the taxing power of the state in any less drastic instance, for the Wisconsin court has refused to invoke estoppel where the overruling of a prior decision resulted in an assessment of back taxes against the taxpayer, together with an interest penalty for failure to pay the tax on time.<sup>24</sup> Although this may seem inequitable, the court reasoned that the petitioner was no worse off paying the tax at one time than at another, and since he had meanwhile had the use of the money, it was not unjust to require him to pay interest.<sup>25</sup> The distinction, between a case where the taxpayer has parted with the money from which he would otherwise have deducted the tax, and one where he is merely required to pay at a later date taxes which he would have paid earlier from the same funds, is genuine and is not merely hair-splitting on the part of the court.

Apparently, the Wisconsin Supreme Court has gone as far as it will, and as far as any court should, in applying equitable estoppel against the state. To allow the state to be estopped to the same extent as an individual would hardly seem wise.<sup>26</sup> Yet, it is obviously an injustice to exempt the state entirely from estoppel, disregarding the equity of the matter. The court has struck a happy medium in the principal case.

DARRELL L. PECK

<sup>22</sup> "When governmental bodies were in the early stages of development, strict adherence to the governmental-proprietary distinction as to matters of estoppel might have been advisable in order to permit development with a minimum of interference. This is a less valid argument today when most government bodies are as well organized and financed as large businesses." Comment, 23 WASH. L. REV. 51 (1948).

<sup>23</sup> Libby, McNeill & Libby v. Wisconsin Department of Taxation, 260 Wis. 551, 559, 51 N.W. 2d 796 (1952).

<sup>24</sup> *Supra*, note 20.

<sup>25</sup> *Ibid.* at 423. "It might be quite a different thing if high rates of interest or penalties, wholly unrelated to the fair value of the use of the money, had been imposed."

<sup>26</sup> "The doctrine of estoppel is not applied as freely against governmental agencies as it is in the case of private persons." Libby, McNeill & Libby v. Wisconsin Department of Taxation, *supra*, note 23 at 559.