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Courts - Overruling of Previous Decision - Effect

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possible, to be predicated upon legitimate legislative considerations.

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COURTS—OVERRULING OF PREVIOUS DECISION—EFFECT—Plaintiff sued to cancel a conditional sales contract and promissory note made in 1960 for the purchase of a house trailer The contract was made in compliance with the Nebraska Installment Sales Act[1] in effect at that time. (Before this suit was instituted the "Sales Act" was declared unconstitutional by the *Elder v Doerr*[2] decision.) The Nebraska Supreme Court held that the finance charges, computed in the sales contract, were in excess of the interest allowable by the Nebraska Istallment Loan Act.[3] Therefore, they canceled the contract and note, ordered the defendant to return the payments which he had received under the contract and also to deliver an unencumbered title for the trailer to the plaintiff. Two Justices, in separate concurring opinions, said that since this was a new rule of law conflicting with previous opinions of this court, and since a great number of important financial transactions had been consummated relying on the past decisions, this decision should be applied only prospectively *Lloyd v Gutgsell*, 175 Neb. 775, 124 N.W 2d 198 (1963)

A judicial decision is generally thought not to *make* law but to *declare* law as it always existed.[4] Under this view a decision is necessarily applied retroactively, and declares that prior inconsistent holdings never were the law.[5] We can readily see that this "declaratory" concept of law can produce serious hardship when contract rights, acquired in reliance on the prior decision, are interfered with by the new decision.[6]

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1. Neb. R. R. S. § 45-301 to 312 (1960).
2. 175 Neb. 483, 122 N.W.2d 528 (1963).
3. Neb. R. R. S. § 45-114 to 158 (1960).
4. Ross v. Board of Freeholders, 90 N.J.L. 522, 102 Atl. 397 (1917) Landers v. Tracy 171 Ky 657, 188 S.W 763 (1916) Falconer v. Simmons, 51 W Va. 172, 41 S.E. 193 (1902).
5. Legg's Estate v. Commissioner, 114 F.2d 760 (4th Cir. 1940) Center School Township v. State, 150 Ind. 168, 49 N.E. 961 (1898).
6. The instant case is an example of a contract made on what was thought to be the law prior to the Elder v. Doerr decision, *supra* note 2. The seller is

Those persons who have acquired rights while relying on the prior decision may find themselves without a judicial remedy if the new decision interferes with those rights.[7] Many courts, in recognizing the hardship that may result from their decision, have held that the new declaration does not apply to those who had acquired rights by relying on the conflicting prior decision.[8] This "prospective only" application of a decision has been justified by reasoning that the prior decision or void act is part of the contract and therefore the new decision does not apply to that transaction.[9] Other courts have held that the gross unfairness that would otherwise result, justifies an exception to the general retroactive application of a decision.[10]

The instant case clearly indicates that the recent *Elder v Doerr*[11] decision overturned the previous holdings of the Nebraska Court to the detriment of those who had relied on earlier decisions.[12] In 1933 the Supreme Court of Nebraska held: " a dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan."[13] Subsequently the Nebraska Court has on numerous occasions restated this proposition as being the law in that state.[14] These decisions apparently helped motivate the Nebraska legislature to enact legislation to regulate finance charges on installment sales.[15]

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penalized for relying on the prior decisions and the legislative act that was subsequently held void.

7. The constitutional prohibition against the impairment of contracts applies only to legislative action and not to judicial decisions. Fleming v. Fleming, 264 U.S. 29 (1924) Cross Lake Club v. Louisiana, 224 U.S. 632 (1912) Alferitz v. Borgwardt, 126 Cal. 201, 58 Pac. 460 (1899) Storrie v. Cortes, 90 Tex. 283, 38 S.W 154 (1896). Also, the argument that the new holding allows the deprivation of property without due process of law is not valid as the cases are heard in the state court in the regular course of proceedings: Tidal Oil Co., v. Flanagan, 263 U.S. 444 (1924) Rooker v. Fidelity Trust Co., 261 U.S. 114 (1923).

8. *E.g.*, Great No. Ry. Co. v. Sunburst Co., 287 U.S. 358 (1932) Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962) Mutual Life Ins. Co. of N.Y. v. Bryant, 296 Ky. 815, 177 S.W.2d 588 (1943).

9. Hill v. Brown, 144 N.C. 117, 56 S.E. 693 (1907)

10. See Loabs v. Wisconsin Tax Comm'n., 218 Wis. 414, 261 N.W 404 (1935) State v. Mayor of Bristol, 109 Tenn. 315, 70 S.W 1031 (1902).

11. 175 Neb. 483, 122 N.W.2d 528 (1963).

12. See generally, *Time*, Nov. 8, 1963, p.76 Wall Street Journal, Oct. 23, 1963, p.1, col. 4, which point out that the unjust result of the instant case has become commonplace in Nebraska.

13. Grand Island Fin. Co. v. Fowler, 124 Neb. 514, 247 N.W 429, 431 (1933).

14. *E.g.*, Trailmobile, Inc. v. Hardesty, 173 Neb. 46, 112 N.W.2d 535 (1961) Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N.W.2d 19 (1958) State v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956) Underwriters Acceptance Corp. v. Dunkin, 152 Neb. 550, 41 N.W.2d 855 (1950), American Loan Plan v. Frazell, 135 Neb. 718, 283 N.W 836 (1939).

15. See note, 58 COLUM. L. REV. 854 (1958).

Since the passage of the Nebraska Installment Sales Act[16] in 1959 a vast amount of sales have taken place in compliance with it.[17] Because *Elder v Doerr*[18] applied retroactively, these contracts are uncollectable if the finance charges exceed the amount of interest allowable in Nebraska for a loan of money

It is submitted that since the *Elder v Doerr* decision would necessarily have a tremendously adverse impact on the financial institutions of the state, the majority of the court should have at least considered a "prospective only" application of its holding. Such a ruling would have avoided the unjust results of which the instant case is an example.

DONALD R. HOLLOWAY

CONTEMPT—CONTEMPT OF COURT BY PUBLICATION—INTENT AS AN ELEMENT OF CONTEMPT—The defendant newspaper was indicted for contempt of court for publishing a false and grossly inaccurate report of proceedings in court in violation of New York statute.[1] The indictment was dismissed in County Court, but the Supreme Court, Appellate Division, reversed and reinstated the indictment. The New York Court of Appeals reversed and dismissed the indictment by a three to four decision, holding that there must be an intent to defy the dignity of the court for a contempt to have been committed. The dissenting justices felt that the liability of a publisher is strict and that his intentions are immaterial. *People v Post Standard Co.*, 13 N.Y.2d 185, 195 N.E.2d 48 (1963)

Twelve states,[2] including North Dakota,[3] have a statute

16. NEB. R. R. S. § 45-361 to 312 (1960).

17. See citations note 12 *supra.*

18. 175 Neb. 483, 122 N.W.2d 528 (1963).

1. N.Y. PEN. LAW § 600. "A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor: (subd. 7) Publication of a false or grossly inaccurate report of its proceedings. But no person can be punished as provided in this section, for publishing a true, full, and fair report of a trial, argument, decision, or other proceeding had in court."

2. ARIZ. REV. STAT. ANN. § 13-341 (West 1956) CAL. PEN. CODE ANN. § 166 (West 1954) IND. ANN. STAT. § 3-905 (Burns 1946), IDAHO CODE ANN. § 18.1801 (1947), MICH. COMP. LAWS § 605.1 (1948), MINN. STAT. ANN. § 613.69