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goods. . . ."⁸ The North Carolina Supreme Court, in *Tufts v. Griffin*,⁹ which was decided seven years after the passage of the conditional sales recordation statute, states that the vendee has a right to the "actual legal and rightful possession" with a right to the title upon payment of purchase price; and further, that the "vendor could not interfere with possession 'until a failure to perform condition.'"

Therefore, it appears that the court in taking one type of transaction and placing it in the category of another transaction, then giving it all the attributes of this other transaction—a dangerous procedure at best—has adopted a theory which cannot be supported by direct authority in our own or in other jurisdictions.

WILLIAM MEDFORD.

Constitutional Law—Protection of Rights Acquired in Reliance on Overruled Decision.

A significant factor in the change and growth of Anglo-American law is the overruling of prior judicial decisions. The overruling process, though unquestionably salutary in the course of time, engenders immediate difficulties. One of these difficulties—the adjustment of acts done and rights vested in reliance on the decision overruled—faced the United States Supreme Court in the case of *Great Northern Ry. Co. v. Sunburst Oil Co.*¹

The Supreme Court of Montana, in *Doney v. Northern Pacific Ry. Co.*,² had indicated a certain procedure to be followed by shippers in suits against carriers to recover overcharges for freight. Plaintiff in the *Great Northern* case, in bringing suit against defendant carrier, had followed the procedure indicated in the *Doney* case. On the appeal of the *Great Northern* case to the Montana Supreme Court, that tribunal held that the rulings of the *Doney* case were erroneous, and would not be followed in the future, but that nevertheless they

⁸ UNIFORM CONDITIONAL SALES ACT §2. See (1922) 2 ORE. L. REV. 1 for discussion of the scope of the purpose of this act.

⁹ *Supra* note 4. See also *Whitlock v. Lumber Co.*, *supra* note 6, at 126, 58 S. E. at 911, where the court quotes with approval from 3 CENT. L. J. 413 as follows: "There is no doubt but that title and the right of property by the terms of the note remained in the seller while possession and right to possession were in defendant (buyer)." This was in the absence of a specific provision in the contract as to which party was to have possession.

¹ *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 53 Sup. Ct. 145, 77 L. ed. (Advance Opinions) 173 (1932).

² *Doney v. Northern Pacific Ry. Co.*, 60 Mont. 209, 199 Pac. 432 (1921).

were law until reversed and would control the rights of shippers and carriers who had relied on them. The Montana court thus gave its ruling a prospective effect but refused to give it a retrospective effect. The carrier appealed to the United States Supreme Court, insisting that the Montana court's judgment was unconstitutional as violating due process of law. But it was *held* that the Montana court had not transcended constitutional guaranties in defining the limits of its adherence to precedent.

The difficulties attendant on the overruling of a decision are traceable to varying theories of the judicial function, to the doctrine of *stare decisis*, and to the efforts of the courts to protect vested rights.

The classical Blackstonian postulates that law exists as a sort of Platonic absolute or ideal and that judges can merely declare this universal law through decisions which are no more than its evidence³ have been assailed for some time by the exponents of the antipodal realistic view that judges can and do make law.⁴ Most courts, however, still purport to accept the Blackstonian or Declaratory theory.⁵ The logic of this theory demands not only that an overruled decision be considered an erroneous declaration of the law and hence a nullity, but also that the overruling decision be given a retroactive effect.⁶ Constitutional guaranties against the retroactive effect of laws ex-

³ 1 BL. COMM. *68-72.

Judicial expressions of allegiance to the Blackstonian doctrine are manifold. The following example from *Ray v. Western Pennsylvania Natural Gas Co.*, 138 Pa. St. 576, 20 Atl. 1065, 1067 (1891) is typical: "The courts . . . are not infrequently constrained to change their rulings. . . . In so doing the doctrine is not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decision. . . . The members of the judiciary in no proper sense can be said to make or change the law. They simply expound it and apply it to individual cases."

⁴ See, for example, FRANK, *LAW AND THE MODERN MIND* (1930) 33, 121, and 328; Frank, *Are Judges Human?* (1931) 80 U. OF PA. L. REV. 17, 233; Carpenter, *Court Decisions and the Common Law* (1917) 17 COL. L. REV. 593.

GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1927) 232, 233: "The only thing I am concerned with is the fact. Do the judges make Law? I conceive it to be clear that, under the Common Law System, they do make Law."

Justice Cardozo has said: "I take judge-made Law as one of the realities of life." Quoted in FRANK, *op. cit. supra* at 328.

See *infra* note 18.

⁵ FRANK, *op. cit. supra* note 4, at 32; (1915) 29 HARV. L. REV. 80.

⁶ See quotation *supra* note 3, and *Harbert v. Monongahela River R. Co.*, 50 W. Va. 253, 40 S. E. 377 at 378 (W. Va. 1901). Freeman, *Protection Afforded Against the Retroactive Operations of an Overruling Decision* (1918) 18 COL. L. REV. 230 at 232.

tends only to the written law—*i.e.*, statutes.⁷ Since contract and property rights often vest on the faith of a judicial pronouncement, courts feel an understandable reluctance in overruling a decision. This reluctance has expressed itself in two courses of judicial conduct: (1) the courts resort to a stricter adherence to the doctrine of *stare decisis*;⁸ (2) when justice requires that vested rights be saved, the courts pitch logic overboard and proceed to protect these rights.⁹

The rule of *stare decisis*, binding on inferior courts and a persuasive moral force on supreme courts, has often impeded the healthful growth of the law.¹⁰ The Declaratory theory with its logical mandate of retroactivity causes a stricter adherence to *stare decisis*,¹¹ because of this correlation, therefore, the Declaratory theory together with the rule of *stare decisis* unduly restrict the development of the law through intelligent judicial pruning.¹²

⁷ Although the language of the "municipal bond cases" indicated that the Supreme Court thought that to give an overruling decision a retroactive effect would violate the contract clause of the Constitution (see for example *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520 (1864), and *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968 (1880)), later cases have made it clear that the prohibition against impairing the obligations of contracts applies only to legislative acts and not to judicial decisions. *Central Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. ed. 91 (1895); *Bacon v. Texas*, 163 U. S. 207, 16 Sup. Ct. 1023, 41 L. ed. 132 (1896); see GRAY, *supra* note 4, at 259. Many state courts, however, have construed the municipal bond cases as though they were decided under the contract clause. *Freeman, supra* note 6 at 236 and 243.

See *Shepherd's Point Land Co. v. Atlantic Hotel*, 134 N. C. 397, 399, 46 S. E. 748, 749 (1904).

The constitutional provision against *ex post facto* laws is directed against legislative acts only and has no application to judicial decisions. *Ross v. Oregon*, 227 U. S. 150, 33 Sup. Ct. 220, 57 L. ed. 458 (1913).

⁸ *Freeman, supra* note 6, at 233; *Kocourek, Retrospective Decisions and Stare Decisis and a Proposal* (1931) 17 A. B. A. J. 180.

⁹ See *infra* note 14.

¹⁰ As applicable to this contention, witness the following passages:

"It is safe to say that there are many hundreds of legal rules, especially those of a ceremonial type, which by general consent of the bar need to be overhauled. The obstructive influence of the rule of *Stare decisis* is beyond calculation." *Kocourek, supra* note 8, at 180.

"The history of our law shows repeated instances where courts have failed, through an unreasoning conservatism, to cut away technicalities utterly meaningless and having their origin in conceptions long since passed away; and the law as a science has suffered accordingly." Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law* (1891) 5 HARV. L. REV. 172 at 200. The last-quoted passage was not written on the subject of *stare decisis*, but it is reasonable to believe that the learned author implicitly recognized *stare decisis* as one of the causes of the "unreasoning conservatism."

¹¹ *Kocourek, supra* note 8 at 181.

¹² *Ibid.* There is no intention of implying that the rule of *stare decisis* is not desirable when it is intelligently, and not too strictly, applied.

Some courts follow the Declaratory theory to its logical conclusion and do not interfere with the retroactive operation of the overruling decision.¹³ Usually, however, rights acquired in reasonable or justifiable reliance on the overruled decision are protected, either upon the ground that the case before the court presents an exception to the retroactive rule, or that citizens are entitled to rely on judicial decisions and have their rights secured.¹⁴ The approach

¹³ *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56 (1871); *Hibbits v. Jack*, 97 Ind. 570 (1884); *Allen v. Allen*, 95 Cal. 184, 30 Pac. 213 (1892); *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154 (1896); *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193 (1902) (court declares overruling decision retroactive, and says that party's rights as fixed by overruled decision are not saved, but for purposes of convenience in disposing of appeal allows result which would have been dictated by overruled decision); *Crigler v. Shepler*, 79 Kan. 834, 101 Pac. 619 (1909).

In other cases, the decision was put upon the ground that no contract or property rights had vested in reliance on the earlier decision. *Center School Township v. State ex rel. Board of School Com'rs*, 150 Ind. 168, 49 N. E. 961 (1898); *Mountain Grove Bank v. Douglas County*, 146 Mo. 42, 47 S. W. 944 (1898); *Lewis v. Symmes, etc.*, 61 Ohio St. 471, 56 N. E. 194 (1900); *Gross v. Board of Com'rs*, 158 Ind. 531, 64 N. E. 25 (1902).

The following cases are also of interest: *Swanson v. City of Ottumwa*, 131 Iowa 540, 106 N. W. 9 (1906) ("There is no showing that appellant . . . relied upon any of the so-called opinions of this court. . ."); *Herron v. Whitely Malleable Castings Co.*, 47 Ind. App. 335, '92 N. E. 555 (1910) (draws distinction between case where earlier decision enunciated an established rule of property or contract, and case where decisions relied on are "conflicting, not well considered, or made so recently . . . that [the contract or property right] could not reasonably be presumed to have been . . . acquired upon the faith of the earlier decision"). *Oliver Co. v. Louisville Realty Co.*, 156 Ky. 628, 161 S. W. 570 (1913) foreign corporation that had not complied with law of forum unsuccessfully invoked *stare decisis*. See *Bradshaw v. Duluth Imperial Mill Co.*, 52 Minn. 59, 53 N. W. 1066 at 1068 (1892) (could have been no reliance on overruled case because of time of its decision). And see *Freeman, supra* note 6, at 239.

¹⁴ *Menges v. Dentler*, 33 Pa. St. 495 (1859); *Haskett v. Maxley*, 134 Ind. 182, 33 N. E. 368 (1863); *Harris v. Jex*, 55 N. Y. 421 (1874); *Vermont & C. R. Co. v. Vermont Central R. Co.*, 63 Vt. 1, 21 Atl. 262 (1890); *Farrion v. New England Mortgage Security Co.*, 92 Ala. 176, 9 So. 532 (1891); *Hill v. Brown*, 144 N. C. 117, 56 S. E. 693 (1907). *Freeman, supra* note 6, 240 *et seq.*; (1915) 29 HARV. L. REV. 80.

Mr. Freeman (*supra* note 6) after an exhaustive analysis of the cases, has offered the following summary:

"1. In cases originating in the federal courts, the last decision of a state court, overruling former decisions, will not be followed where to do so would interfere with rights acquired in reliance upon the first decisions.

"2. The state courts, on one theory or another, almost universally protect property rights acquired in reliance upon a statute or constitutional provision as then interpreted by the courts. [Courts often say that the exception to the retroactive operation of an overruling decision is limited to instances in which the earlier decision or decisions construed constitutions or statutes, and there was reliance upon such decision or decisions. Thus in *Falconer v. Simmons, supra* note 13 at 196, it is said that "a mere decision expressive of general or common law will not protect even a contract valid under that common law, tested by a prior decision, against the effect of a subsequent change

of the North Carolina court to the problem has been typical. Although recognizing, either expressly or by implication, the Blackstonian rule that the overruling decision operates retrospectively, and that the overruled decision is a nullity, the court has not failed to uphold rights acquired by virtue of reliance on the first decision.¹⁵

Some legal thinkers believe that the practical application of the Declaratory theory, and its cognate doctrine, *stare decisis*, although leading to "undesirable results in particular cases" works a "fairer

of decision." And see *Wilkinson v. Wallace*, 192 N. C. 156, 158, 134 S. E. 401, 402 (1926); (1927) 5 N. C. L. REV. 170, 171. But, as Mr. Freeman points out, it would seem that the exception should be extended to changes in construction of the common law as well as of written law; and some courts have made such an extension. *Jones v. Woodstock Iron Co.*, 95 Ala. 551, 10 So. 635 (1891); *Hill v. Brown*, *supra*; par. 4 *infra*.]

"3. Men are not punished as criminals for acts which were done when the highest court of the state had declared them lawful. [Although it is settled that the constitutional prohibition of *ex post facto* laws, like the provision against impairing the obligation of contracts, prevents only legislative acts and not judicial decisions, the courts, following a perfect analogy, should not allow an overruling decision to operate retroactively, wherever a statute could not do so." (1915) 29 HARV. L. REV. 80 at 82.]

"4. The tendency is to extend the same protection to rights acquired in reliance upon decisions interpreting the common or unwritten law." See par. 2, *supra*.

¹⁵ *State v. Bell*, 136 N. C. 674, 49 S. E. 163 (1904) (earlier decision construing statute overruled and a new construction announced for the future, but defendant awarded new trial and permitted to attempt defense under law of overruled case); *Hill v. Brown*, *supra* note 14 (overruling decision not given retroactive effect on ground that law of earlier decision was "practically a dormant stipulation in the contract"); *Fowle v. Ham*, 176 N. C. 12, 96 S. E. 639 (1918) (decision overruling earlier case and making indexing of deeds essential to registration not given retroactive effect, because parties had relied on earlier decision); *Wilkinson v. Wallace*, 192 N. C. 156, 134 S. E. 401 (1926) (holds that two former overruling decisions were prospective, not retrospective, in effect as applied to facts presented; noted in (1927) 5 N. C. L. REV. 170; see concurring opinion of Walker, J., in *State v. Fulton*, 149 N. C. 485, 491 63 S. E. 145, 146 (1908). In *Ely v. Norman*, 175 N. C. 294, 95 S. E. 543 (1918), three judges concurred in the result stated in the principal opinion but added that a former decision of the court should be overruled. This conclusion of the majority, however, operated only prospectively. See *State ex rel. Bryant Mfg. Co. v. Hester*, 177 N. C. 609, 611, 98 S. E. 721, 722 (1919).

There are numerous expressions in North Carolina cases to the effect that titles or vested interests acquired in reliance on earlier decisions will be protected. See *Hill v. Railroad*, 143 N. C. 539, 573-582, 55 S. E. 854, 866-869 (1906); *Young v. Jackson*, 92 N. C. 144, 148 (1885); *Kirby v. Boyette*, 118 N. C. 244, 258, 24 S. E. 18, 19 (1896); *Jones v. Williams*, 155 N. C. 179, 189, 71 S. E. 222, 227 (1911); *Threadgill v. Wadesboro*, 170 N. C. 641, 644, 87 S. E. 521, 522 (1916).

In *Mason v. Nelson Cotton Co.*, 148 N. C. 492, 62 S. E. 625 (1908), the court does not depart from the general rule that the overruling decision must be given a retroactive effect, saying that exceptions against retroactive operation should not be extended to an erroneous declaration of general mercantile law.

average of justice" in the long run.¹⁶ Others contend that it is desirable to protect all rights that have vested from reliance on a judicial decision, and that judicial theory, as well as judicial practice, should be shaped toward this end.¹⁷ The latter view, it is believed, is the more compelling. How, then, can the protection of all rights against the retroactive operation of an overruling decision be realized? It has been repeatedly pointed out that the fictional theory that judges do not make law should be abandoned.¹⁸ With the abandonment of this theory will go the logical implication of retroactivity, and an obstacle to enlightened judicial thought and action will be removed. After the unqualified acceptance of the reality that judges do make law, the bonds of the rule of *stare decisis* should be loosened to the extent that the courts will not be cramped in effecting desirable departures from precedent.

Admittedly it is futile to believe that such a metamorphosis of juristic thought will occur in the near future. The Declaratory theory is too firmly implanted in our case law to be uprooted without a great deal more spading. Therefore, lest it be supposed that our avowed aim of protecting all rights which have vested in reliance upon an overruled decision is altogether illusory, other more practical means of realizing this aim should be considered.

First, the courts may adopt the view that a judicial decision can operate to deprive a person of his liberty or property without due process of law.¹⁹ Since this view would require some recasting of constitutional thought, it would not be altogether easy of realization, but does not seem wholly impracticable.

In the second place, it has been suggested²⁰ that a statute be

¹⁶ Moschzisker, *Stare Decisis in Courts of Last Resort* (1924) 37 HARV. L. REV. 409.

¹⁷ Freeman, *supra* note 6.

¹⁸ Austin alluded to the Blackstonian concept as a "childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity and merely declared from time to time by the judges." 2 AUSTIN, JURISPRUDENCE (3d ed. 1869) 655. That Austin's views have found wide acceptance among writers on jurisprudence, see Gray, *supra* note 4, at 222; Carpenter, *supra* note 4 at 595.

FRANK, *op. cit. supra* note 4; Carpenter, *supra* note 4; (1915) 29 HARV. L. REV. 80.

See dissenting opinion of Mr. Justice Holmes in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 370, 30 Sup. Ct. 140, 147, 54 L. ed. 228, 238 (1909).

¹⁹ Freeman, *op. cit. supra* note 6, at 251.

²⁰ Kocourek, *supra* note 8, suggests the following statute:

"An Act Declaring the Effect of Judicial Decisions of the Supreme Court.

adopted allowing a supreme court to decide a case by what it believes to be a more just rule than has theretofore been pronounced, except where the former rule is the basis of reliance. The immediateness with which the change would be made recommends this method. Whether it would survive the criticism that it permits an invasion of the judicial province by the legislature, however, is problematical.

A third way out of the dilemma is that which the Montana court adopted in the principal case. That is, the court may announce a new rule for regulating future transactions while applying the old rule to the case being decided. One objection urged to this solvent is that the announcement of the new rule—the prospective ruling—must necessarily be only a dictum.²¹ However, it is believed that this objection is not a serious one: the court may give a binding effect to its prospective ruling if it so desires. The United States Supreme Court now holds that the state's adoption of this view does not abrogate due process. Although such a procedure does violence to the Declaratory theory of the law, it has a definite pragmatic sanction in that it allows the court to protect vested rights and at the same time announce a more just rule to be followed in the future. The course of the Montana court would doubtless be more generally followed were it possible to give the *coup de grâce* to antiquated dogma and useless fiction.

W. J. ADAMS, JR.

- Sec. 1. The final judicial decisions of the Supreme Court are
- (a) Decisive of the rights of the parties.
 - (b) Declarative of the rules of law for future application which govern the questions raised on the facts presented and decided.
- Sec. 2. (1) If the Supreme Court believes that a declaration of rule of law theretofore made by the Supreme Court or by any inferior court is unjust, it will decide the instant case in accordance with the juster rule except
- (a) Where the former rule is a basis of reasonable and justifiable reliance applicable to the facts of the instant case, or
 - (b) Where application of a new rule in its judgment will be unduly disturbing to a standard of reasonable and justifiable reliance as to the existence of non-existence of legal relations of other persons not then before the court.
- (2) When the Supreme Court refuses to depart from an existing rule in favor of what it pronounces a juster rule on the questions adjudicated, the expression of that view is evidence for future cases of the existence of reasonable reliance.
- Sec. 3. Nothing herein shall abridge the duty of inferior courts to apply the declarations of law made by superior courts."

²¹ (1902) 15 HARV. L. REV. 667 at 668.