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## THE EFFECT OF AN OVERRULING DECISION

JAMES A. SPRUILL, JR.\*

This article is addressed to the problem of the effect of an overruling decision upon parties who have acted in reliance on a rule of law previously enunciated judicially. At the threshold of this study stands the age-old question as to the nature of law. Some answer must be given to this query. It cannot be a simple one. Indeed, it seems well to stress that the answer is intentionally complex and flavored with compromise.

### I. THE NATURE OF LAW

There is too much of the idea that truth is an all or nothing concept. The application of a rigorous logic to the affairs of life may be prolific of half-truths—of Jekyll-Hyde propositions which alternately assume the cast of truth or error. Much that has been written about law seems to bear this dual personality. Perhaps this is caused in part by failure to keep in mind the several features of the problem. When one turns to speculation about the law, he should be mindful of the theoretical and the practical aspects of his problem. He should distinguish between what we might call, for want of better names, its juristic and political phases. The first might be characterized as philosophic speculation as to the nature of law of such a kind as a jurist might entertain in the sanctuary of his study; the second, as those practical considerations which should, and to a certain extent must, be in the mind of him who sits upon the bench and, armed with the power of the state, judges between and passes judgment upon his fellow citizens.

#### *A. The Juristic Phase*

We shall begin with a brief examination of the theories of the nature of law which pass current. But we cannot tarry to attempt a catalogued exposition of the ideas of numberless thinkers. It is not our purpose to attempt to detect nuances in philosophical theories. Rather, it is our purpose to try to set forth in broad contrast the basic ideas of two great antithetical schools which are of significance in the consideration of our problem. This effort is made with the realization that it involves groupings which are to be justified, if at all, on the basis of the major contrast rather than on the score of identity. The first of the schools to which we refer is that which holds an idealistic conception of the nature of law.

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It would seem to a non-subscriber that the idealist has indulged in wishful thinking. Law, to him, is a Platonic ideal which possesses a reality superior to that of the rules which lawyers study and cite and judges apply.<sup>1</sup> We are told that "Law . . . is self-created and self-existent";<sup>2</sup> that "It is not, therefore, possible to *make law* by legislative action";<sup>3</sup> and that "Law not only cannot be directly made by human action, but cannot be abrogated or changed by such action".<sup>4</sup> Still another idealist says, "Law is a concept, a generalized abstraction attained by mental processes."<sup>5</sup>

Professor Beale, the most distinguished of the legal idealists of today, recognizes a law, not sprung full bodied from the head of Jove, but, more miraculously still, conceived, born, and dwelling in the collective mind of the legal profession.<sup>6</sup> The law is something which dwells safe beyond the impact of judicial decisions. It is not changeless; but to him, "It must be obvious that neither by legislative nor by judicial legislation can the basic system of law be changed."<sup>7</sup> This basic system of law, in England and America the common law, is to be distinguished from the rules applied by the courts. It is the Platonic ideal to be set in contradistinction to the particular.

Professor Beale wants something less fallible and changeable than particular decisions. The decision is, to him, not the law. The law is the idea of the general which inheres in the particular. Such a theory gives unity at a level above the diversity obviously present in the law as applied by courts. Such an idealized theory of law, he says, yields continuity. And to him, "predicability is possible only if the law is continuous."<sup>8</sup> This predicability is of the ideal law and not of that applied by the courts; so, presumably it is for the satisfaction of philosophers rather than the service of clients. But Professor Beale's law sometimes dwells in less ethereal realms. He speaks of a "reasonable degree of certainty".<sup>9</sup> And this means no more than a degree of probability which may be predicated of a changing, shifting, judge-made law.

And judge-made the law is, in whole or in part, says the opposing school. Austin speaks of ". . . the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a

<sup>1</sup> See discussion by Mr. Justice Cardozo in *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 365, 53 Sup. Ct. 145, 148, 77 L. ed. 360, 366 (1932).

<sup>2</sup> CARTER, *LAW: ITS ORIGIN, GROWTH AND FUNCTION* (1907) 129.

<sup>3</sup> *Id.* at 130.

<sup>4</sup> *Ibid.*

<sup>5</sup> Zane, *German Legal Philosophy* (1918) 16 MICH. L. REV. 287, 347.

<sup>6</sup> "The law of a given time must be taken to be the body of principles which is accepted by the legal profession, whatever that profession may be. . . ." I BEALE, *CONFLICT OF LAWS* (1935) 40.

<sup>7</sup> *Id.* at 35.

<sup>8</sup> *Id.* at 47.

<sup>9</sup> *Id.* at 46.

miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges."<sup>10</sup> He fully agrees with Bentham that judges do make law;<sup>11</sup> but he does not look to the bench as the only law-making body. Professor Gray, however, looks to the courts as the sole makers of the law. He says: "The Law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties."<sup>12</sup> And further: ". . . the judges are rather the creators than the discoverers of the Law."<sup>13</sup> Professor Gray is primarily interested in the decisions and sees in them the true law.<sup>14</sup> This he holds to be so even in the case of statutes for the reason that they are implemented and given final meaning only by judicial action.

Mr. Justice Holmes, in answer to the question from whence does the law issue, says, ". . . it does issue and has been recognized by this court as issuing from the state courts as well as from the state legislatures."<sup>15</sup> And again, he says: "The prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."<sup>16</sup> Mr. Justice Cardozo says: "I take judge-made law as one of the existing realities of life."<sup>17</sup>

It would seem that anyone not writing fairy tales must recognize that judges do make law.<sup>18</sup> But recognition of this fact is by no means the equivalent of saying that law is "a series of isolated dooms".<sup>19</sup> The "free judicial decision", if considered as a generality, is as much

<sup>10</sup> 2 AUSTIN, LECTURES ON JURISPRUDENCE (3d ed. 1869) 655.

<sup>11</sup> And unlike Bentham, he thinks they might do the job well. *Id.* at 549.

<sup>12</sup> GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1927) 84.

<sup>13</sup> *Id.* at 121.

<sup>14</sup> But note that there is still a trace of the idealist in him. He says: "If the courts generally of a country follow certain rules, those rules do not cease to be the Law because of a sporadic departure from them by a particular judge." *Id.* at 116.

<sup>15</sup> Dissenting opinion, *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 372, 30 Sup. Ct. 140, 148, 54 L. ed. 228, 239 (1910). See also his dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 532, 48 Sup. Ct. 404, 408, 72 L. ed. 681, 686 (1928).

<sup>16</sup> Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 460.

<sup>17</sup> CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1925) 10.

<sup>18</sup> The courts are generally very hesitant to acknowledge this fact. But we find one court recognizing it thus in speaking of one of its earlier decisions: ". . . the court, in illustrating what constituted the common law, said that if a case was presented not covered by any law written or unwritten, the power of the court is adequate, and it is the duty of the court to adopt such a rule of decision as right and justice in the particular case seemed to demand, that, notwithstanding in such case the decision made the law and not the law the decision, 'this is the way the common law itself was made, and the process is still going on,' and further that the common law was not unchangeable, and was not adopted to remain perpetual and unaltered and unalterable, 'not to be tempered to our habits, wants, and customs.'" *Gross v. State*, 135 Miss. 624, 632, 100 So. 177, 178 (1924) (a decision denying the common law right of a husband to chastise his wife).

<sup>19</sup> See CARDOZO, THE GROWTH OF THE LAW (1924) 54.

a figment of the imagination as is the ideal law. The law of the decisions has definite and recognized sources and this fact serves as a limitation to judicial legislation. As has been said, the judge's is interstitial law-making.<sup>20</sup> In most cases the judge goes through the form of applying the law much as the idealists would have us think he does in all cases.<sup>21</sup> And even when the judge enunciates a new rule of law, his creation is subject to influences and forces which, at least so far as the future is concerned, act upon it somewhat in the manner of a referendum.<sup>22</sup> By this it is meant that in those cases where the judge has more or less complete freedom of action, the result of his choice may be great or small. His rule is "the law of the case" for a particular set of litigants; for others it is only a source of law. It may or may not become the law of future cases.

### *B. The Political Phase*

At this point we have reached the juncture (ill-defined, we confess) where we pass over to what we have called the practical or political aspect of our problem. Here it seems necessary to say a word about certain human characteristics. The first of these is the psychological fact that in general things seem better in retrospect. This has led men to look to the past for rules of action which will furnish guidance and justification and yield greater happiness to them; and, in so doing, they have, in the field of law as elsewhere, been seeking a source and a limit. They have sought thus to satisfy the dual and antithetical needs of social flux and stability.<sup>23</sup> And with instinctive wisdom, men have in general placed primary emphasis on stability—on the conservation of that measure of freedom and wealth which is theirs, be it great or small.

The idealists, when they set up their Platonic law, are but doing what instinct prompts in most men. Man has a natural reverence for institutional wisdom—for what seems to be the product of an illimitable past. Institutions are both tested and hallowed by the passing of centuries. So most men are willing to agree with Lord Coke that "the wisdom of the law is wiser than any man's wisdom". But if the law be regarded as a mere system of reason to be applied by individual judges, it loses much of its power as an instrument of social stability. The law of the idealist is the law of the people because the bulk of them crave the stability which it seems to offer.

Moreover, men seem to have a natural preference for judgment by

<sup>20</sup> See *Gross v. State*, 135 Miss. 624, 631, 100 So. 177, 178 (1924).

<sup>21</sup> Here the controversy between the schools is reduced to a matter of terminology. The dispute is as to whether the judge discovers the law or merely turns to sources for the law which he himself makes or ordains for the particular case.

<sup>22</sup> Perhaps the better analogy would be to popular recall.

<sup>23</sup> For a discussion of this general problem, see CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1927) Lecture One, p. 1.

law rather than by individuals. Because of pride, or, perhaps, because of religious instinct, they prefer to think that they make obeisance to the law rather than to the magistrate. This leads to popular objection to the free judgment of individuals, and to a demand for something not unlike the Aristotelian concept of rule by a law which is dispassionate reason.

Further, our particular part of the Anglo-Saxon world has taken pains to ensure that the law should not be made and administered by the same individual. The doctrine of the separation of powers is enshrined in our Federal and state constitutions. It sprang from a misinterpretation and from an unwarranted opinion of the simplicity of government; but there it is, of a sacred origin and high in popular esteem. The realist may say that it is now and always has been a fiction. But still it is not a fiction which can be ignored. Constitutional provisions are real limitations to the form of judicial legislation, even though they do not prevent it.<sup>24</sup>

It seems to be of prime necessity that we should bear in mind not only the nature of the law which men have, but the nature of that which they desire. We need realism—much more of it—, but we need a more realistic realism. Mr. Jerome Frank shares Bentham's impatience of fiction. To him the fiction that covers judicial law-making is crass deceit. He says there might once have been a day for it, but that there is no place for it in our "adult civilization".<sup>25</sup> But as we are very much of the opinion that human aspirations and prejudices are still of vast importance, we must stand up in defense of fiction. It offers the means of reconciling our law in action with a theoretical system which is unworkable. The rejoinder will doubtless be to throw overboard the false theory and construct a new one which is in harmony with actual facts and with the needs of society. There are at least two replies to this. The first is an uncertainty. Perhaps, on the whole, popular belief in an ideal law and the separation of powers produces socially desirable results. The second is the statement that such beliefs present an imponderable weight and are likely to defy destruction for generations. Such being the case, it seems that realism demands not that jurists speak to the people in a strange tongue, but that they attempt to meet the demands of the existing system. We should worry less about the people who demand that they be fooled and more about that part of the bench and bar which fools itself. The language of the law suffices so long as those who use it do so with understanding.

<sup>24</sup> *Eastman v. State*, 131 Ohio St. 1, 1 N. E. (2d) 140 (1936).

<sup>25</sup> FRANK, *LAW AND THE MODERN MIND* (1930) 41. This is a bit reminiscent of the enthusiasm of Revolutionary France which gave way to the realism of Bonaparte.

If courts abstain from practicing self-deception, there may be room within our legal order for them to meet the greater part of the needs which confront them. The fact of prime importance is that they can and do legislate. It matters little how their action is designated.

This brings us to the point where we must decline to stand with Satan or the Angels. We agree with the realists that the courts do legislate. (However, we would stress the fact that they do so subject to rather definite limitations.) So we would answer our theoretical inquiry. But we would recognize that for practical reasons the courts must, in most cases, talk the language of the idealists. This is a necessity if they would serve under our present political and social order. The demands upon our judiciary have been well stated, thus: "The judge . . . has as his prime duty to keep within measurable distance of filling social needs as they arise, and as his second duty to stay within the bounds of legal decency—which as the system we impose upon him stands, means keeping measurably within the tradition-hallowed formulae."<sup>26</sup> The formulae should and will change, probably to recognize greater scope for judicial legislation; but this will be the work of generations. The great duty of the jurist of any age is to meet the two demands upon him which are named—in short, to serve his generation and to serve it with an eye to the manner in which it would be served; to do this and not to regenerate it. This is the belief which guides our study.

## II. CONCEPTS OF THE NATURE OF LAW AS GOVERNING THE RETROACTIVE EFFECT OF OVERRULING DECISIONS

Now, having taken a look at the law as it is, and the conditions which it must seem to meet, we come to our principal task, which is the consideration of the effect of overruling decisions. Here we find that the courts, virtually without exception, speak the language of the idealist. The logical result of the theory that judges do not make, but only apply, the law is the requirement that an overruling decision be given retroactive effect. Blackstone, after speaking of *stare decisis* says: "Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the estab-

<sup>26</sup> Llewellyn, *Legal Tradition and Social Science Method—A Realist's Critique* (1931) BROOKINGS INSTITUTION ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES 89, 106.

lished custom of the realm, as has been erroneously determined."<sup>27</sup> As one court has said: "The first decision, upon the point on which it is overruled, is wholly obliterated, and the law as therein construed or declared must be considered as though it never existed, and that the law always has been as expounded by the last decision."<sup>28</sup> The courts affirm that: "The decisions of courts are not the law. They are only the evidence of the law. . . ."<sup>29</sup> And one judge has said: "My conclusion from a survey of the authorities is, that the fundamental rule still holds, that is, that when former decisions are overruled they are considered as never having been the law, but that for a time they obscured the true and sound law. . . ."<sup>30</sup>

Such a theory is a labor saving device for the courts.<sup>31</sup> It saves the occupant of the bench the necessity, often a disagreeable one, of apportioning the incidents of the change among the litigants before him. It offers a rule of thumb for allocating burdens and benefits and seems to place the responsibility for the decision entirely upon the law rather than the judge. Probably, too, this formula serves a higher purpose. It may add to the political strength of the judiciary by making it seem that the public's desire to be judged by a preëxisting law is being met. There seems to be an instinctive dislike of the idea of *ex post facto* laws.

#### A. Effect on Substantive Rights

It seems that the preëxistence of the law is maintained because of the extreme hesitation of the courts to admit that they make *ex post facto* laws—criminal and civil alike. It does not matter that, as Professor Gray points out, ". . . for most of the laity, the Law, except for a few crude notions of the equity involved in some of its general principles, is all *ex post facto*."<sup>32</sup> So we find the paradoxical result that

<sup>27</sup> 1 BL. COMM. \*69.

<sup>28</sup> *Center School Township v. State*, 150 Ind. 168, 173, 49 N. E. 961, 962 (1898).

<sup>29</sup> *Hibbits v. Jack*, 97 Ind. 570, 578 (1884).

<sup>30</sup> *Falconer v. Simmons*, 51 W. Va. 172, 178, 41 S. E. 193, 196 (1902). See also *Allen v. Allen*, 95 Cal. 184, 199, 30 Pac. 213, 215 (1892), where the court said: "These decisions did not change the law; they simply declared what was the law. Every one is conclusively presumed to know the law, although the ablest courts in the land often find great difficulty and labor in finally determining what the law is."

<sup>31</sup> But note that it is not employed in all of the opinions which recognize that overruling decisions should be given retroactive effect. For example, in *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56, 57 (1871), the chancellor, in speaking of the effect on the law of the overruling *Legal Tender* case, says: "Now it is changed; as much changed as the law of this state would be by statute, but not in the same manner. A change by statute is only for the future. A change by decision is retrospective, and makes the law at the time of the first decision as it is declared in the last decision, as to all transactions that can be reached by it."

<sup>32</sup> GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1927) 100. This fact seems to have been ignored in the cases dealing with the effect of overruling decisions. Those courts which have refused to give such decisions retro-

dislike of *ex post facto* laws seems to require a theory by which judicial decisions are given retroactive effect. And the critics of the Blackstonian theory raise up against it the emotions which gave it birth. But if we pass over the inconsistency of a theory which produces in fact that which it is designed to eliminate, we find that the results of its operation may sometimes be desirable.

### 1. GENERAL RULE

There are times when it is to be desired that a change in the law should be given retroactive effect.<sup>33</sup> For example, under a line of Pennsylvania cases a divorced wife had no right to an accounting from a divorced husband for income from property conveyed to them by entireties. But in the case in which this rule was reversed, the court granted the divorced wife this relief.<sup>34</sup> It seems too clear for argument that if such a remedy was a desirable one it should have been granted in the instant case where there was no showing that there had been a settlement or division of property on the basis of the old rule. And, in another case an appellate court reversed itself and sustained the jurisdiction of a lower court which had been exercised in trying one accused of a petty misdemeanor.<sup>35</sup> It seems obviously correct that a party who had received a trial, to which only the jurisdictional objection could be taken, should not have been granted a new trial in another court while the jurisdiction exercised by the trial court was recognized as proper for the future. So also, the Pennsylvania Supreme Court, in sustaining a conviction in which the jury was not charged in the long recognized formula to the effect that they "were the judges of the law and the fact", held that the earlier decisions were wrong and that the accused had no vested right to the procedural error enshrined in them.<sup>36</sup>

After the Supreme Court of the United States reversed its former decisions protecting the income of federal and state employees from intergovernmental taxation,<sup>37</sup> Congress passed the Public Salary Tax

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active effect seem to have been at least tacitly in accord with this statement of the Montana court: "It is unnecessary that it be shown that reliance was actually placed by defendants upon the former decisions. Reliance thereon will be presumed." *Continental Supply Co. v. Abell*, 95 Mont. 148, 171, 24 P. (2d) 133, 140 (1933) (refusal to apply retroactively more stringent interpretation of the banking laws so as to hold officers to personal liability).

<sup>33</sup> See von Moschzisker, *Stare Decisis in Courts of Last Resort* (1924) 37 HARV. L. REV. 409, 428.

<sup>34</sup> *O'Malley v. O'Malley*, 272 Pa. 528, 116 Atl. 500 (1922).

<sup>35</sup> *State v. Williams*, 13 S. C. 546 (1880) (Court of General Sessions held to have concurrent jurisdiction with magistrate's court to try for thefts of less than \$20).

<sup>36</sup> *Commonwealth v. Castellana*, 277 Pa. 117, 121 Atl. 50 (1923).

<sup>37</sup> *Helvering v. Therrell*, 303 U. S. 218, 58 Sup. Ct. 539, 82 L. ed. 758 (1938); *Helvering v. Gerhardt*, 304 U. S. 405, 58 Sup. Ct. 969, 82 L. ed. 1427 (1938);

Act of 1939<sup>38</sup> in response to a very considerable sentiment to the effect that the new rule should not be given effect as to incomes earned in past years. However, overruling decisions on questions of tax law have, in general, been given retroactive effect; and, in most cases, it seems desirable that this should be done. We have an illustration in the cases which arose after *Fox Film Corp. v. Doyal*<sup>39</sup> reversed the rule of *Long v. Rockwood*<sup>40</sup> to the effect that income from patents and copyrights was not subject to state taxation. If a party could be forced to contribute to the support of the state government from his 1933 income from these sources, there seems no injustice in requiring a like contribution from his 1931 income. And the New York<sup>41</sup> and Wisconsin<sup>42</sup> courts so held in upholding the right of the state to collect back taxes.<sup>43</sup> As the Wisconsin court observed, ". . . the Fox Film Corporation Case not only did not put any limitations upon its retrospective operation, but applied its doctrine retrospectively to the facts there presented."<sup>44</sup> And another court has but recently applied the same principle to the converse situation, where taxes have been paid as required by a decision which was subsequently overruled.<sup>45</sup>

This last decision suggests a type of case where, because of another rule of law, it is inconsequential whether the overruling decision be considered as changing the law retrospectively or only for the future. We refer to those cases where a payment or settlement has been made on the strength of a decision which was subsequently overruled. If the change is not retroactive, the parties can be said to have acted on a correct view of the law and there is no basis for upsetting their settlement. On the other hand, if the courts hold, as they are inclined to do, that the later decision declares what the law is now and "was aforesaid", the party who seeks to open up the settlement, or recover the

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Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466, 59 Sup. Ct. 595, 83 L. ed. 927 (1939).

<sup>38</sup> 53 STAT. 574, 5 U. S. C. A. §84a, 26 U. S. C. A. §§22, 116 (Supp. 1939).

<sup>39</sup> 286 U. S. 123, 52 Sup. Ct. 546, 76 L. ed. 1010 (1932).

<sup>40</sup> 277 U. S. 142, 48 Sup. Ct. 463, 72 L. ed. 824 (1928).

<sup>41</sup> *People v. Graves*, 242 App. Div. 128, 273 N. Y. Supp. 582 (3d Dep't 1934), *aff'd*, 270 N. Y. 498, 200 N. E. 288 (1936), *cert. denied*, 298 U. S. 683, 56 Sup. Ct. 953, 80 L. ed. 1403 (1936).

<sup>42</sup> *Laabs v. Wisconsin Tax Comm.*, 218 Wis. 414, 261 N. W. 404 (1935).

<sup>43</sup> *Cf. Donohue v. Russell*, 264 Mich. 217, 249 N. W. 830 (1933) (lessor allowed to recover back rent after overruling decision held riparian owners owned to the water line rather than to the meander line as held by earlier decisions).

<sup>44</sup> *Laabs v. Wisconsin Tax Comm.*, 218 Wis. 414, 421, 261 N. W. 404, 408 (1935).

<sup>45</sup> *O'Malley v. Sims*, 51 Ariz. 155, 75 P. (2d) 50 (1938) (inheritance tax paid in accord with the rule of *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1903), which decision was subsequently overruled in *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371 (1930)).

payment made, is met by the rule that there is no relief for a mistake of law.<sup>46</sup>

The rule which denies relief for mistake of law has been freely, and, it seems, justly criticized;<sup>47</sup> but it appears firmly established in its application to those cases where parties have made payments under mistake of law.<sup>48</sup> And it seems justified in the special case where the mistake was induced by a judicial decision which was subsequently overruled. It can be maintained that in such a case the parties must have realized the possibility that at some future date the courts might declare the law differently. From this it can be argued that if, with this realization, a party paid or settled rather than going to court and attempting to obtain the benefit of a more favorable rule, he thereby chose to assume the risk that the law, as it stood, was unduly prejudicial to him. To accept this argument, as the courts are inclined to do, is to place a great burden on the debtor; but it seems probable that in the average case the value of effecting a settlement and saving the expense of litigation will more than compensate for the risk of mistake which one is forced to assume. This seems to be one of the situations where the law can say with reason founded in the social good, if not without hardship to individuals, that it favors the termination of disputes, actual and potential. If this opinion be accepted as correct, it can be affirmed that the overruling decision presents no problem here whether the Blackstonian theory be accepted or rejected.

These illustrations have been given as a suggestion that the Blackstonian theory does not deserve general condemnation. It is justly subject to criticism only when it is applied in a mechanical fashion, as some of its staunchest advocates would have us believe it should be applied.<sup>49</sup> Unfortunately, as we shall see, courts do sometimes employ the theory with an entire disregard of the consequences to the parties before them, but often the decisions are more just than the language of the courts. Indeed, it is interesting to note that the two cases which are perhaps most cited in American legal literature as illustrating the Blackstonian theory did not, in fact, give retroactive effect to the overruling decision. We refer to the cases of *Stockton v. Dundee Manufacturing*

<sup>46</sup> *Kenyon v. Welty*, 20 Cal. 637 (1862); *Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109, 76 N. W. 395 (1898); *Doll v. Earle*, 59 N. Y. 638 (1874); *Henderson v. Folkestone Waterworks Co.*, 1 T. L. R. 329 (Q. B. 1885).

<sup>47</sup> See KEENER, *THE LAW OF QUASI-CONTRACTS* (1893) 85 *et seq.*; WOODWARD, *THE LAW OF QUASI CONTRACTS* (1913) 57 *et seq.*

<sup>48</sup> RESTATEMENT, *RESTITUTION* (1937) §45.

<sup>49</sup> Zane, *German Legal Philosophy* (1918) 16 MICH. L. REV. 287, 339: "Every judicial act resulting in a judgment consists of a pure deduction. . . . The old syllogism, 'All men are mortal, Socrates is a man, therefore he is mortal', states the exact form of a judicial judgment."

*Co.*<sup>50</sup> and *Falconer v. Simmons*.<sup>51</sup> In the first of these the New Jersey court stated in unequivocal language that the law was to be applied as declared in the last and overruling Legal Tender decision, so that the defendant's tender of greenbacks was to be regarded as good and sufficient at the time it was made; but, the court said: ". . . a tender of the mortgage debt does not, in this state, discharge the lien of the mortgage. . . ." <sup>52</sup> The West Virginia court, in the *Falconer* case, had greater difficulty in extricating itself and the litigant before it from difficulty after holding that the latter's remedy had always been by appeal rather than by certiorari, as an erroneous decision had led him to believe. The court's language affords an illuminating illustration of the manner in which theory not infrequently yields to realities in this field. The court said:

"Now while the case of *Barlow v. Daniels* prevailed no appeal could be gotten from a justice. That seems to me to constitute good excuse for a failure to apply to the justice and for applying to a judge. . . . We now hold that such a writ under the particular circumstances of this case can be made to answer the purpose of an appeal. True, it is pretty difficult to so hold, it somewhat jars against strong principles; but the call of justice, the plain right of the party to have the judgment reviewed in the circuit court, have impelled us in the spirit of liberality in a matter of mere form of procedure to hold the writ of *certiorari* under the circumstances to be efficacious. It is rather straining a point to do so, we confess; but the arguments against doing so are rather technical than substantial."<sup>53</sup>

## 2. EXCEPTIONS TO THE RULE THAT THE LAW OF OVERRULING DECISIONS SHALL BE APPLIED RETROSPECTIVELY

Because courts have, on the whole, preferred to squirm and attempt to give what seems to be justice rather than to follow their theory to its logical conclusion, the cases where the courts apply or do not apply the law retroactively present no very definite pattern. In examining these cases it is necessary to watch the actual decision closely if we would not be misled by the language of the court.<sup>54</sup> By so doing we

<sup>50</sup> 22 N. J. Eq. 56 (1871).

<sup>51</sup> 51 W. Va. 172, 41 S. E. 193 (1902).

<sup>52</sup> *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56, 57 (1871).

<sup>53</sup> *Falconer v. Simmons*, 51 W. Va. 172, 179, 41 S. E. 193, 196 (1902). It is to be noted that procedural cases present the easiest problem.

<sup>54</sup> Such errors are by no means uncommon. For example, see Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision* (1918) 18 COL. L. REV. 230, 239, where the *Stockton* and *Falconer* cases are cited in support of this proposition: "A strict and logical adherence to this doctrine (the Blackstonian theory) has led many courts to refuse to circumvent in any way the retroactive effect of an overruling decision."

can sketch roughly a number of exceptions to the theory that the law of the cases is to be applied retrospectively as well as prospectively.

The first of these exceptions which we shall examine is in the field of the criminal law. Here we find courts stating roundly: "The doctrine of stare decisis in criminal cases cannot be carried to the extent of allowing to violators of law a vested interest in rules which have been erroneously sanctioned."<sup>55</sup> But in many cases the courts are loath to abrogate what they consider "rules of personal liberty" by giving a new rule retroactive effect.<sup>56</sup> As examples of this tendency we find that the Iowa court refused to give retroactive effect to a new rule holding a criminal statute (liquor law) valid when the court had previously held it to be unconstitutional in a unanimous opinion.<sup>57</sup> The Mississippi court, whose language is quoted immediately above, declined to give retroactive effect to a more stringent construction of a statute making it a crime to receive deposits, having good reason to believe the receiving bank to be insolvent.<sup>58</sup> In reversing a conviction under an agricultural tenancy statute, the Supreme Court of North Carolina said: "While we hold the law to be as stated, we are embarrassed in applying this ruling to this case. It may be that these defendants have acted upon the advice of counsel based upon the decision of this Court in *S. v. Neal, supra*. If so, to try them by the law as herein announced would be an injustice. . . . If the defendants shall be able to establish their defense in accordance with the ruling in Neal's case they are entitled to do so, but the construction now put upon the statute will be applied to all future cases."<sup>59</sup>

One of the most peculiar cases in this field, and one which seems to lead us to the heart of the subject, is the North Carolina case of *State v. Fulton*.<sup>60</sup> This was an appeal to a five-judge court from an order quashing an indictment. Three judges voted to overrule an old construction of a criminal statute to the effect that a husband could

<sup>55</sup> *Lanier v. State*, 57 Miss. 102, 107 (1879). Accord: *Gross v. State*, 135 Miss. 624, 100 So. 177 (1924); *Commonwealth v. Castellana*, 277 Pa. 177, 121 Atl 50 (1923); *State v. Williams*, 13 S. C. 546 (1880).

<sup>56</sup> See *People v. Tompkins*, 186 N. Y. 413, 416, 79 N. E. 326, 327 (1906), where the court says that it is not for it, but for the legislature, to make a desirable change in the criminal law. The court says: "We cannot change the existing rule without enacting, in effect, an *ex post facto* law. This cannot be done without ignoring the constitutional rights of many who may legally claim the protection of the rule. Neither can it be done without judicial usurpation of legislative power." This contains a large element of good sense, but the talk about constitutional rights seem to be nothing more than judicial rhetoric since the prohibition of *ex post facto* laws contained in Article I, Section 10, of the Federal Constitution is a limitation on the legislative and not the judicial branch of the state governments. *Frank v. Mangum*, 237 U. S. 309, 35 Sup. Ct. 582, 59 L. ed. 969 (1915).

<sup>57</sup> *State v. O'Neil*, 147 Iowa 513, 126 N. W. 454 (1910).

<sup>58</sup> *State v. Longino*, 109 Miss. 125, 67 So. 902 (1915).

<sup>59</sup> *State v. Bell*, 136 N. C. 674, 676, 49 S. E. 163, 164 (1904).

<sup>60</sup> 149 N. C. 485, 63 S. E. 145 (1908).

not be guilty criminally for slandering his wife. Two judges were of a contrary opinion, and one of the three others joined with them to dismiss on the grounds that the new construction of the statute should not be given retroactive effect. The writer of a *Yale Law Journal* case note approves highly of the protection afforded the wife slanderer in this case.<sup>61</sup> He proceeds to say that the new rule should be denied retroactive effect or should operate retrospectively to the prejudice of the accused according to whether the offense is *malum prohibitum* or *malum in se*. It seems that he is on the track of a distinction, but his recourse to the old terminology of the law is productive of confusion. His application of it to *State v. Fulton* proves this.

It is hard to think of one justifiably relying on the advice of counsel when setting out to slander his wife.<sup>62</sup> In fact, the Mississippi wife beater,<sup>63</sup> who was not spared by the law, seems to merit more manly sympathy than does the slandering husband. It would be a distinction without substance to say that a statute was involved in the one case and not in the other. The true answer is that conduct, which, in the one case, was considered but a proper exercise of the husband's marital authority and, in the other case, was beyond the reach of the law because of its fiction of the identity of the husband and wife, has become so contrary to the mores of the community as to move the law to intervene. And when a course of action becomes sufficiently offensive to the society in which one lives, the individual addicted to such behavior can expect that it will be held criminal. It is true that this is the assumption as to acts *malum in se*; but through the course of centuries the division of crimes into *malum in se* and *malum prohibitum* has assumed an arbitrary cast which makes the old classifications an unsatisfactory guide for determining whether or not overruling decisions should be applied retroactively. For this reason it seems best to pass over the old classifications and look to the reason on which they were founded. And the complaint of neither the wife beater nor the wife slanderer can stand when examined in the light of the popular mores.

On the other hand, when the new rule forbids a course of action in a field where, in the language of Blackstone, the choice of rules of action was indifferent before, then it seems that the court should, and generally does, decline to prejudice a party by subjecting him to the new rule *ex post facto*. There are other cases where the new rule prohibits action which was before only slightly offensive to popular opinion

<sup>61</sup> Note (1909) 18 YALE L. J. 422.

<sup>62</sup> "Anyone who would defame another, relying upon existing rules of law to shield him from liability for his deliberate wrong doing, deserves no special consideration from a court by reason of such reliance." Carpenter, *Stare Decisis and Law Reform* (1927) 1 SO. CALIF. L. REV. 53, 63.

<sup>63</sup> *Gross v. State*, 135 Miss. 624, 100 S. 177 (1924), cited *supra* notes 18 and 55.

or objectionable to only a limited part of the public;<sup>64</sup> and in these cases it seems that the court is inclined not to give the new rule retroactive effect. If this be true, it seems that we have a nebulous line separating those cases where the defendant suffers from *ex post facto* application of the law from those cases where he is spared. The sheep to be saved are those who relied, actually or presumptively, on a rule of law which is not so obnoxious to public opinion, as interpreted by the courts, that reliance on it is not to be deemed justifiable; the goats are those who seek to rely on a rule of law which is so contrary to the mores that the court feels no one is entitled to rely on it. Perhaps it would be well for the courts to limit the first half of this rule to actual reliance, but they do not seem to have done so. However, with or without this limitation, this rule, thus broadly stated, is about as satisfactory a guide as we can construct to assist in applying or declining to apply the Blackstonian theory in the criminal law field.

We come now to the consideration of the protection accorded to contract rights against the effect of overruling decisions. Here we have what is perhaps the most frequently recognized exception to the rule that court law is to be given retrospective operation. There has been an effort to invoke the contracts clause of the Federal Constitution,<sup>65</sup> but, despite favorable dicta by Mr. Chief Justice Taney,<sup>66</sup> this attempt has been unsuccessful.<sup>67</sup> The Supreme Court says: "As this Court has repeatedly ruled, the Constitution affords no protection as against an impairment by judicial decision."<sup>68</sup> Mr. Justice Brandeis expresses the rule and its reason thus: "The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well

<sup>64</sup> As *State v. O'Neil*, 147 Iowa 513, 126 N. W. 454 (1910), cited *supra* note 57 (prohibition law); *State v. Longino*, 109 Miss. 125, 67 So. 902 (1915), cited *supra* note 58 (restriction on receipt of bank deposits); *State v. Bell*, 136 N. C. 674, 49 S. E. 163 (1904), cited *supra* note 59 (limitation on tenant's right to dispose of crop).

<sup>65</sup> Art. I, §10. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

<sup>66</sup> *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. 416, 432, 14 L. ed. 997, 1003 (U. S. 1853).

<sup>67</sup> *Central Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. ed. 91 (1895); *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 44 Sup. Ct. 197, 68 L. ed. 382 (1924); *Fleming v. Fleming*, 264 U. S. 29, 44 Sup. Ct. 246, 68 L. ed. 547 (1924). For possible exception see note 68, *infra*.

<sup>68</sup> *Columbia Ry., Gas & Electric Co. v. South Carolina*, 261 U. S. 236, 244, 43 Sup. Ct. 306, 308, 67 L. ed. 629, 633 (1923). But note that this decision shows jealousy of the state court's freedom. The opinion says: "But, although the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that in real substance and effect, force has been given to the statute complained of our jurisdiction attaches." *Id.* at 245, 43 Sup. Ct. at 308, 67 L. ed. at 633.

as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions."<sup>69</sup>

There has been but one rule applied in the federal courts which has protected contracts from the effect of overruling decisions, and it has not rested upon any provision of the Constitution. Like the rule of *Swift v. Tyson*<sup>70</sup> it has been one of the conspicuous anomalies of our federal system. It is the principle associated with the case of *Gelpcke v. Dubuque*<sup>71</sup> from which it stems, and is to the effect that the federal courts in the trial of cases arising within their jurisdiction need not apply the latest decision of the state supreme court on a statutory or constitutional question when to do so would prejudice contract rights of parties before it, which rights were acquired in reliance on prior decisions of the state court.<sup>72</sup> The application of this rule has meant that the success of litigants has turned on the fortuitous circumstance that they had, or had not, grounds for access to the federal court. But now it is doubtful if even this measure of federal protection from the effect of the overruling decision remains, for the case of *Erie R. R. v. Tompkins*<sup>73</sup> seems to impugn the basis of the rule.<sup>74</sup>

But as we are not here interested in the conflicts question which the rule of the municipal bond cases raise, or in the implications of the *Erie* case, we shall pass on to the consideration of the protection which the state courts afford to contract rights. Here we find some few courts citing the *Gelpcke* case and applying it, apparently under the belief that the Federal Constitution—presumably the contracts clause—requires them to do so.<sup>75</sup> However, it seems that generally where courts protect contract rights, they do so as a matter of policy rather than because of a misinterpretation of their constitutional obligation.

We find courts very ready to say that, "Decisions long acquiesced in, which constitute rules of property or trade, or upon which important rights are based, should not be disturbed, even though erroneous

<sup>69</sup> *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 681, 50 Sup. Ct. 451, 454, 74 L. ed. 1107, 1114 (1930). The exception which the quotation suggests falls under the due process rather than the contracts clause. It will be discussed under procedure.

<sup>70</sup> 16 Pet. 1, 10 L. ed. 865 (U. S. 1842).

<sup>71</sup> 1 Wall. 175, 17 L. ed. 519 (U. S. 1864).

<sup>72</sup> *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 519 (U. S. 1864); *Douglass v. County of Pike*, 101 U. S. 677, 25 L. ed. 968 (1880).

<sup>73</sup> 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1938).

<sup>74</sup> Long, *A Warning Signal for Municipal Bondholders: Some Implications of Erie Railroad v. Tompkins* (1939) 37 MICH. L. REV. 589; McCormick and Hewins, *The Collapse of "General" Law in the Federal Courts* (1938) 33 ILL. L. REV. 126, 137.

<sup>75</sup> *Thomas v. State*, 76 Ohio St. 341, 81 N. E. 437 (1907); *Walker v. South Carolina*, 12 S. C. 200 (1879); see *Vermont & Canada R. R. v. Vermont Central R. R.*, 63 Vt. 1, 23, 21 Atl. 262, 267 (1890).

as original holdings."<sup>76</sup> And when they do change their construction of statutory or constitutional provisions upon which contract rights, executory or executed, are dependent they frequently decline to give their new construction retroactive effect so as to allow it to defeat contract rights and vitiate titles.<sup>77</sup> As the Pennsylvania court explained: "Judgment is therefore rendered for the plaintiff on the special verdict, not because he has the law, but because he was entitled to believe that he had it when he took the mortgage on which he sues."<sup>78</sup> Further, the Alabama court, in declining to give retroactive application, prejudicial to a mortgagee, to its new ruling to the effect that the statutes of the state did not remove the disability of coverture so as to enable a married woman to mortgage her property, said: "Persons contracting are presumed to know the existing law, but neither they nor their legal advisers are expected to know the law better than the courts, or to know what the law will be at some future day. Any principle or rule, which deprives a person of property acquired by him, or the benefit of a contract entered into in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the court of last resort, at the time of the transaction, and no fault can be imputed to him in the matter of the contract, unless it be held a fault not to foresee and provide against future alterations in the construction of the law, must be radically wrong. Such a principle, or rule of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the Supreme Court of the State."<sup>79</sup>

Most courts are inclined to state the exception baldly; and, if they set out to sustain it argumentatively, they generally argue in the above manner, much as would a layman who was interested in results and given to appraising them in terms of what he considered justice and common sense. However, there have been efforts to work out a logical basis for the exception. For example, the North Carolina court seems to consider the law as announced by the court as a tacit stipulation in contracts made in reliance thereon.<sup>80</sup> And counsel for appellant in

<sup>76</sup> *State ex rel. Pitts v. Nashville Baseball Club*, 127 Tenn. 292, 303, 154 S. W. 1151, 1154 (1913). Accord: *Laclede Land & Improvement Co. v. Schneider*, 177 S. W. 388 (Mo. 1915). See also von Moschzisker, *Stare Decisis in Courts of Last Resort* (1924) 37 HARV. L. REV. 409, 415.

<sup>77</sup> *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 9 So. 532 (1891); *Eagle v. Corbin*, 275 Ky. 808, 122 S. W. (2d) 798 (1938); *Payne v. Covington*, 276 Ky. 380, 123 S. W. (2d) 1045 (1938); *Ebert v. Board of Education*, 277 Ky. 633, 126 S. W. (2d) 1111 (1939); *World Fire & Marine Ins. Co. v. Tapp*, 279 Ky. 423, 130 S. W. (2d) 848 (1939); *Hill v. Brown*, 144 N. C. 117, 56 S. E. 693 (1907); *Menges v. Dentler*, 33 Pa. 495 (1859); *Geddes v. Brown*, 5 Phila. 180 (Pa. 1863); see *Center School Township v. State*, 150 Ind. 168, 173, 49 N. E. 961, 963 (1898). *Contra*: *Hibbits v. Jack*, 97 Ind. 570 (1884).

<sup>78</sup> *Geddes v. Brown*, 5 Phila. 180 (Pa. 1863).

<sup>79</sup> *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 181, 9 So. 532, 533 (1891).

<sup>80</sup> *Hill v. Brown*, 144 N. C. 117, 56 S. E. 693 (1907). "We deduce the well-

*Fleming v. Fleming*<sup>81</sup> argued unsuccessfully but ingeniously to the effect that a decision interpreting a statute inhered in the statute and became a part of it so that a new construction, if given retroactive effect, amounted to a statutory impairment of the obligation of contract.

When we come to the consideration of situations where a forfeiture is effected by giving retroactive effect to an overruling decision, we find some of the worst examples of the mechanical application of the Blackstonian theory. A decision of the Supreme Court of Washington offers an excellent illustration. In 1906 that court held a city ordinance providing for licensing of plumbers to be contrary to the state and Federal constitutions.<sup>82</sup> In 1930 this case was reversed, and such an ordinance was held to be a valid exercise of the police power.<sup>83</sup> In *Lund v. Bruflat*<sup>84</sup> the court gave this new rule retroactive effect and held that, as Lund had held no license, he was not authorized to make such a contract for plumbing as that on which he sued. The court then held that as the plaintiff had performed the plumbing services under an illegal contract, he was not entitled to recover on the contract or in *quantum meruit* for the value of his services. Thus, the court imposed the severe sanction of forfeiture, which is designed to secure observance of police statutes, upon one who, acting in good faith and with legal advice, could not have been expected to act differently. But the court cut off only one of the plaintiff's arms in order to vindicate the law. It found the provisions of the contract to be so severable in nature as to allow it to affirm the judgment of the court below in so far as it allowed recovery for materials furnished. It is submitted that the court should have permitted the plaintiff to recover on both counts rather than merely to relieve him in part from the forfeiture by applying the rule of severability.

The New York court, in *Harris v. Jex*,<sup>85</sup> affords us an example of how such situations should be met. There the defendant in a foreclosure

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settled principle from a number of authorities, that the law of contract enters into the contract itself and, in the construction, forms a part of it. It is practically a dormant stipulation in the contract, and it must be enforced as a part of it, and as it is construed at the time the contract is made." *Id.* at 119, 56 S. E. at 693.

<sup>81</sup> 264 U. S. 29, 31, 44 Sup. Ct. 246, 247, 68 L. ed. 547, 549 (1924). *Cf.*: *State v. Haid*, 327 Mo. 567, 38 S. W. (2d) 44 (1931); *Continental Supply Co. v. Abell*, 95 Mont. 148, 24 P. (2d) 133 (1933); *Wilkinson v. Wallace*, 192 N. C. 156, 134 S. E. 401 (1926).

<sup>82</sup> *Richey v. Smith*, 42 Wash. 237, 84 Pac. 851 (1906).

<sup>83</sup> *Tacoma v. Fox*, 158 Wash. 325, 290 Pac. 1010 (1930). "The *Richey* case has not met with favor in other jurisdictions, having been followed, so far as we are advised, only by the supreme court of Arkansas." *Id.* at 330, 290 Pac. at 1012. This was a criminal prosecution and the decision operated retroactively but the defendant was subjected to only a small fine.

<sup>84</sup> 159 Wash. 89, 292 Pac. 112 (1930), (1931) 26 ILL. L. REV. 347.

<sup>85</sup> 55 N. Y. 421 (1874); *cf.*: *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56 (1871) (*contra* in language, but in accord in result).

suit, who had purchased the mortgaged property, but had not assumed the mortgage debt, pleaded as a defense that he had tendered payment which had been refused, and that the lien of the plaintiff's mortgage had been thereby extinguished. His tender was made in notes after *Hepburn v. Griswold*<sup>86</sup> had declared the Legal Tender Act to be invalid, and before this decision was reversed in *Knox v. Lee*.<sup>87</sup> The court held: "The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was, as applied to the relations between these parties and to this case, the law, and not the mere evidence of the law."<sup>88</sup> It seems that this decision is fully justified on the grounds that forfeitures are highly technical and often unfortunate in their consequence and that where, as here, the hardship will be even greater than usual, the court of equity will relieve from the forfeiture. Here, justifiable reliance on the first Legal Tender case should certainly warrant such relief.

An analogous problem arises in the case of *Laabs v. Wisconsin Tax Commission*<sup>89</sup> where, after the reversal of the *Rockwood* case,<sup>90</sup> Laabs was assessed back taxes plus six per cent. The majority of the court held the latter good as the equivalent of interest for the use of the money, but there was a dissent on the grounds that this was a penalty which should not be levied on a party for failure to pay a tax which the state authorities, under the decisions, would have declined to receive. On his construction of the facts, the dissenting judge's opinion seems obviously correct.

All of the cases which we have considered thus far involve the overruling of an earlier decision of the Federal Supreme Court or of a state supreme court. A Florida decision offers an interesting variation from the general factual situation.<sup>91</sup> In it the petitioner brought mandamus to test the legality of an order revoking his license to practice dentistry because he had allowed an unlicensed party to practice with him contrary to the provisions of the state statute. The petitioner sought to justify his action as being based on a decision of an inferior court holding the act invalid. This decision had been subsequently re-

<sup>86</sup> 8 Wall. 603, 19 L. ed. 513 (U. S. 1870).

<sup>87</sup> 12 Wall. 457, 20 L. ed. 287 (U. S. 1871).

<sup>88</sup> *Harris v. Jex*, 55 N. Y. 421, 424 (1874). It is to be noted that the court relied to some extent on a statute (2 N. Y. REV. STAT. (1867) §66), but this statute was not controlling. It provided that no one should suffer any penalty or forfeiture because of reliance on a construction of statute by the state supreme court which construction was subsequently reversed by the Court for the Correction of Errors. Except by way of analogy it had no application to the Legal Tender cases involved in *Harris v. Jex*.

<sup>89</sup> 218 Wis. 414, 261 N. W. 404 (1935), (1936) 3 U. OF CHI. L. REV. 332.

<sup>90</sup> *Long v. Rockwood*, 277 U. S. 142, 48 Sup. Ct. 463, 72 L. ed. 824 (1928), *rev'd*, *Fox Film Corp. v. Doyal*, 286 U. S. 123, 52 Sup. Ct. 546, 76 L. ed., 1010 (1932).

<sup>91</sup> *Williams v. Whitman*, 116 Fla. 196, 156 So. 705 (1934).

versed on appeal to the supreme court, but the court held that until such reversal the petitioner was justified in relying on it. The court justified its holding that the petitioner's license was improperly revoked on two grounds. First, that the statute "has reference to a conscious and culpable act amounting to wilful design", and that these elements were not present. Second, that in the case of an act only *malum prohibitum* a party is entitled "to rely upon the expressed decisions of a competent court of general jurisdiction". It seems that the second reason assigned is really the foundation of the first. Such a rationale offers a desirable means for relieving a party from an oppressive penalty. The court, just as the average individual would be inclined to do, gives weight to a rule of law even though it was pronounced by a court whose decisions were subject to appeal; and, recognizing the natural effects of the pronouncement of such a rule, it declines to enforce a penalty when to do so would go beyond the purpose for which the penalty was established.<sup>92</sup>

### B. Effect on Procedure and Jurisdiction

In the procedure field we find the single exception to the rule that the United States Constitution interposes no bar to prevent the state courts from giving retroactive effect to their decisions. The case of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*<sup>93</sup> sets out this exception. In it the plaintiff sought equitable relief from a tax assessment, but the Missouri court<sup>94</sup> declined to give such relief, because it said that the plaintiff had had an adequate remedy available at law. The legal remedy said to have been available was petition to the tax board for a reduction of assessment; but previous decisions of the state supreme court characterized such procedure as "preposterous" and "unthinkable". And when, in the case in hand, the court first recognized the propriety of such procedure, lapse of time made it no longer available to the plaintiff. Thus the Supreme Court of Missouri denied relief because the plaintiff had not had recourse earlier to a procedure which it had

<sup>92</sup> *Contra*: *State v. Striggles*, 202 Iowa 1318, 210 N. W. 137 (1926). It was held to be no defense in a criminal action that the defendant had relied on a decision of a municipal court, subsequently reversed, to the effect that certain machines, which he was charged with operating, were not gambling devices. The court said: "We are disposed to hold with the *O'Neil* case, that, when the court of highest jurisdiction passes on any given proposition, all citizens are entitled to rely upon such decision; but we refuse to hold that the decisions of any court below, inferior to the Supreme Court, are available as a defense, under similar circumstances." *Id.* at 1320, 210 N. W. at 138. But note that the court said that the dismissal of the case would not have been subject to criticism, and it called attention with apparent approval to the fact that the defendant had been assessed the minimum fine. See *Muller Dairies v. Baldwin*, 242 App. Div. 296, 299, 274 N. Y. Supp. 975, 978 (3d Dep't 1934).

<sup>93</sup> 281 U. S. 673, 50 Sup. Ct. 451, 74 L. ed. 1107 (1930).

<sup>94</sup> *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 323 Mo. 180, 19 S. W. (2d) 746 (1929).

emphatically declared to be improper. On rehearing the plaintiff unsuccessfully raised the question of due process. In the Supreme Court of the United States, however, it was successful on the ground that it had not been accorded due process in the primary sense of being allowed to present its case and be heard in support of it. This exception is limited to procedural law and has nothing to do with substantive law; and it does not aid a party who in the absence of decision makes a bad guess as to his statutory remedy and finds himself without one. It simply prescribes that, under the Fourteenth Amendment, a state court cannot give retroactive effect to an overruling decision on a point of adjective law when the result would be to deny a party the opportunity to adjudicate his rights. The *Brinkerhoff* case seems sufficient to convince one of the desirability of enforcing such procedural due process on the state courts.

This rule will not affect most procedural cases in the state courts; but generally the courts seem more willing than did the Missouri court to protect a party in such a case. *Falconer v. Simmons*,<sup>95</sup> quoted at length above, is an example of a case where a different decision was reached in an almost identical situation. Also, the Louisiana Court of Appeal, in a recent case, declined to let the rule of a new decision on a point of procedure operate retrospectively so as to deprive the plaintiff of the opportunity of present valuable claims.<sup>96</sup> The court said: "We believe that jurisprudence, though later overruled, should rule and control intermediate transactions."<sup>97</sup>

Indeed, where a change of procedural rules would adversely affect titles<sup>98</sup> or accrued rights of action,<sup>99</sup> the courts seem especially willing to decline to give overruling decisions retrospective effect. But, as has been said, relief in such cases is accorded as a matter of policy and not of right, and the court may deem it desirable to refuse it.<sup>100</sup> And when

<sup>95</sup> 51 W. Va. 172, 41 S. E. 193 (1902), cited *supra* note 51; *cf.*: *State v. Haid*, 327 Mo. 567, 38 S. W. (2d) 44 (1931); *Koebel v. Tieman Coal & Material Co.*, 337 Mo. 561, 85 S. W. (2d) 519 (1935).

<sup>96</sup> *Norton v. Crescent City Ice Mfg. Co.*, 146 So. 753 (La. App. 1933), *rehearing denied*, 147 So. 385 (La. App. 1933). But the court followed this principle substantially rather than exactly. It sent the plaintiff back to start over without prejudice, but he was forced to suffer loss of time and taxation of costs.

<sup>97</sup> *Id.* at 757.

<sup>98</sup> *Jones v. Woodstock Iron Co.*, 95 Ala. 551, 10 So. 635 (1892); *Hill v. Brown*, 144 N. C. 117, 56 S. E. 693 (1907).

<sup>99</sup> *Montana Horse Products Co. v. Great Northern Ry.*, 91 Mont., 194, 7 P. (2d) 919 (1932); *Sunburst Oil & Refining Co. v. Great Northern Ry.*, 91 Mont. 216, 7 P. (2d) 927 (1932).

<sup>100</sup> *Great Atlantic & Pacific Tea Co. v. Scanlon*, 266 Ky. 785, 100 S. W. (2d) 223 (1936); *O'Malley v. O'Malley*, 272 Pa. 528, 116 Atl. 500 (1922). In the former case, a new interpretation of the statute of limitations was given retroactive effect so as to permit the prosecution of plaintiff's claim. This seems desirable; but, on the other hand, a decision shortening the statutory period would effect a denial of primary due process if it were applied retroactively to cut off a claim. The claimant, who is the moving party, could have brought his action

we pass into the field of criminal law, as we have seen, there are cases where it seems desirable for new rules as to procedure or jurisdiction to have an *ex post facto* effect.<sup>101</sup>

It is necessary to notice now the great limitation on the relief given by the courts from retroactive decisions. With two exceptions<sup>102</sup> all the cases in which we have seen relief given from the operation of the Blackstonian theory have been cases involving a new declaration of the written rather than the common law.<sup>103</sup> The North Carolina court summarizes the exception and states the limits of it thus: "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. [Cits.] To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. [Cits.] And there is high authority for the position that this is the only exception that should be allowed. *Falconer v. Simmons*, 51 W. Va. 172. And while this Court, in a case of unusual hardship, has extended the principle of this exception to a criminal cause, in *S. v. Bell*, 136 N. C. 674—a cause it will be noted, arising on the construction of a statute—and, in another decision, to a case where a title to real estate had vested (*Hill v. Brown*, 144 N. C. 117), the principle should certainly not be further extended and applied to an erroneous decision on general mercantile law which is contrary to accepted doctrine and recognized business methods."<sup>104</sup>

The refusal to afford equal protection to those who have relied on a judicial declaration of common law seems, in the main, illogical and arbitrary.<sup>105</sup> It is probably to be explained as an instance where the courts, in the interests of justice, sacrifice logic to create an exception, but, because of judicial conservatism, do not apply it in full. Such a limitation can be rationalized by the bench on the grounds of a difference between statutory and common law; it can be urged that the one

sooner, but the erroneous pronouncement of the shorter period could hardly be of substantial prejudice to the party against whom the claim was made.

<sup>101</sup> *Commonwealth v. Castellana*, 277 Pa. 117, 121 Atl. 50 (1923); *State v. Williams*, 13 S. C. 546 (1880).

<sup>102</sup> *Jones v. Woodstock Iron Co.*, 95 Ala. 551, 10 So. 635 (1892); *World Fire & Marine Ins. Co. v. Tapp*, 279 Ky. 423, 130 S. W. (2d) 848 (1939).

<sup>103</sup> This is one explanation of *Gross v. State*, 135 Miss. 624, 100 So. 177 (1924), cited *supra* note 63.

<sup>104</sup> *Mason v. Nelson Cotton Co.*, 148 N. C. 492, 510, 62 S. E. 625, 632 (1908).

<sup>105</sup> See Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision* (1918) 18 COL. L. REV. 230, 244.

is tangible while the other is of such a vague and nebulous character that parties must of necessity take the risk of their interpretation and the court's future decisions.<sup>106</sup> Perhaps the concluding lines of the above quotation suggest some justification for this rationalization. The common law is sprung more immediately from the life and customs of people, so that a party may better anticipate change in it than in the interpretation of statutory law which is, presumably, a permanent expression of the legislature's intent. But this seems to go only to the question of the justification for reliance on the overruled decision. The law makes haste slowly, but it is to be hoped that eventually the same protection will be accorded those who rely on common law decisions as those who act on the strength of the judicial interpretation of statutes.

### III. CONCLUSION

We come now to the question of the protection which should be afforded these parties.<sup>107</sup> Some writers have suggested that courts after handing down an overruling decision should decline to give it retroactive effect to the prejudice of litigants subsequently coming before it. They would, however, give the overruling decision retroactive effect as to the parties involved. This is held necessary to get rid of an objectionable rule, "but once rid of the rule there is no call for the sacrifice of more victims upon the altar of reform"<sup>108</sup> This discloses a difficult problem. If the new rule be announced by a judicial decision, rather than by means of dicta, the decision will generally apply it retroactively to the prejudice of some one. And if this first party is prejudiced, it seems hard later to judge another by a more favorable rule.<sup>109</sup> To do so seems to give the law such an arbitrary cast that it is difficult to think that such a rule, regularly applied, would meet with approval.<sup>110</sup>

It has been proposed that in cases where a court changes a rule of law upon which parties have relied, the court should apply the old rule to the case before it and merely announce the new rule for prospective

<sup>106</sup> It is hardly necessary to remark that all rules of common law are not of one type. Some are by no means vague or nebulous.

<sup>107</sup> We pass over the cognate question of the effect of a judicial change in the law upon a case in process of litigation when the appellate court has previously held a different rule to be applicable to it. This problem of "the law of the case", with its theories and practices, presents a question which is too extensive for discussion within the compass of this study.

<sup>108</sup> Carpenter, *Court Decisions and the Common Law* (1917) 17 COL. L. REV. 593, 606. See *Barker v. St. Louis County*, 340 Mo. 986, 1003, 104 S. W. (2d) 371, 379 (1937).

<sup>109</sup> This would not be true of a case which turns on a decision in an action of another kind as did *Harris v. Jex*, 55 N. Y. 421 (1874), cited *supra* note 85.

<sup>110</sup> There is, however, the justification for it that it gives the benefit of retroactive operation of the new rule to the party who, vigilant of his rights, first convinces the court of its former error and thereby, presumably, performs a service to society.

operation.<sup>111</sup> While this method is not new,<sup>112</sup> it has received special attention of late. This seems to be due to the publicity incident to a decision by the Supreme Court of the United States to the effect that if a state court wishes to follow this procedure, there is no provision of the Federal Constitution to prevent it from so doing.<sup>113</sup> The procedure followed in this, the *Sunburst Oil* case, in the state court, has been much discussed and has received a measure of approval.<sup>114</sup>

On the other hand, however, a number of objections have been raised to this suggestion that the court should confine itself to announcing new rules for the future while applying old ones.<sup>115</sup> The first is that such a declaration of rule for the future is undisguised legislation. This is a great objection to the idealists; but it seems that generally the court will find the public much less intolerant of judicial legislation in practice than in theory. This objection seems to carry no weight. If, however, this procedure be established by statute,<sup>116</sup> rather than undertaken on judicial initiative, there is a possibility of constitutional difficulties,<sup>117</sup> and there is more likelihood of popular suspicion of the method.

Another objection is that the announcement of the new rule is only dicta—at most, a prophecy as to how the court will hold the law in the future. Thereafter shall the public rely on the old rule which was applied, or the new rule for which the court expressed its preference? This, however, does not seem a very great objection. A rule so pronounced would not be obiter and so, presumably, ill-considered; therefore, it seems that rules thus pronounced for prospective operation might be regarded as being as good a basis for reliance as the traditional judicial decision. A party who relied on such an enunciation of the law should be able to demand the same protection in case of subsequent change as the party who had acted on the strength of an actual decision.

The great objection to this rule of the limited or prospective operation of overruling decisions is that it would tend to destroy that capacity for growth and change which is one of the best characteristics of judge-made law. The bulk of our law is court law. Such law is case law.

<sup>111</sup> Canfield, *Our Judicial System* (1917) S. C. B. A. REP. 66; Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision* (1918) 18 COL. L. REV. 230; Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal* (1931) 17 A. B. A. J. 180.

<sup>112</sup> *State v. Bell*, 136 N. C. 674, 49 S. E. 163 (1904).

<sup>113</sup> *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 53 Sup. Ct. 145, 77 L. ed. 360 (1932).

<sup>114</sup> Notes (1933) 11 N. C. L. REV. 323, (1933) 28 ILL. L. REV. 277, (1933) 17 MINN. L. REV. 811, (1933) 10 N. Y. U. L. Q. REV. 528, (1933) 42 YALE L. J. 779.

<sup>115</sup> For general criticism, see von Moschzisker, *Stare Decisis in Courts of Last Resort* (1924) 37 HARV. L. REV. 409.

<sup>116</sup> See draft of suggested statute by Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal* (1931) 17 A. B. A. J. 180, 182.

<sup>117</sup> *Eastman v. State*, 131 Ohio St. 1, 1 N. E. (2d) 140 (1936).

Cases are brought and contested by parties, who, in general, are prompted by self-interest. If a new rule will not be given retroactive operation, many errors will, in consequence, be frozen in the law. Some litigants, who have more interest in the rule of law than in the particular case, would doubtless continue to litigate when the law stood against them;<sup>118</sup> but the average litigant is interested in his own recovery and not in improving the law. He would doubtless feel as did Ko-Ko, Pooh-Bah, and Pitti-Sing when the Mikado said to them about the statute under which they stood condemned: "That's the slovenly way in which these Acts are always drawn. However, cheer up, it'll be all right. I'll have it altered next session. Now let's see about your execution—will after luncheon suit you? Can you wait till then?" The average individual is not such a crusader that the purging of error from the law will serve to compensate for his loss and prompt him to bring actions cheerfully to establish rules for prospective operation.

It seems impossible to lay down any principle to be a universal guide for the application of the law announced in overruling decisions. Moreover, there seems the danger that the attempt to do by statute might change the legal problem for the worse and at the same time create political difficulties. Perhaps it would be desirable to have a statute to provide that forfeitures shall not be effected and penalties exacted where a party has acted in justifiable reliance on a judicial decision. But such a statute could not be a judicial touchstone, for each case should present the question as to the reasonableness of the reliance on the former decision.

The simple procedural case presents a problem which seems susceptible of solution by statute. But the borderline between adjective and substantive law is an invisible one<sup>119</sup> and it seems desirable to treat the two in the same manner. Legislation to cover this field, unlike a statute to prevent forfeitures and penalties, would seem to most people to be a mandate to the courts to legislate. Here there would be political and perhaps constitutional difficulties in the way of securing the grant of a power which, as we have seen amply demonstrated, the courts already possess. If such a statute were more than a mere suggestion, it would probably operate too rigidly so as to favor unduly as a class those who relied on the old rule or their opponents in interest. We think it quite

<sup>118</sup> The situation of the railroad company in the *Sunburst Oil* case furnishes an example of a recurring interest which might prompt litigation even though relief in the specific cause in issue were impossible. Because of the prospect of many future claims, the company is interested in the establishment of what is to it a more favorable rule governing the recovery of excessive rate charges exacted by it.

<sup>119</sup> For illustration of this, see *Montana Horse Products Co. v. Great Northern Ry.*, 91 Mont. 194, 7 P. (2d) 919 (1932); *Sunburst Oil & Refining Co. v. Great Northern Ry.*, 91 Mont. 216, 7 P. (2d) 927 (1932); *Wilkinson v. Wallace*, 192 N. C. 156, 134 S. E. 401 (1926).

likely that the greatest social good may come from not treating John Doe as we treat the Great Northern Railway. The litigant with recurring interests may well be treated differently from him who comes to court but once. Moreover, a court may properly be influenced in its decision by the fact as to whether the rule overturned was clear or doubtful, as well as by considerations as to whether the action taken was on the advice of counsel, or as to whether the action involved such moral elements as to make reliance unjustified. We would not attempt, however, to formulate a statute embodying such considerations. What we desire is that the courts should have a broad discretion and exercise it in an enlightened manner. They have the first, and the fiat of legislators cannot ensure the latter.

As a consequence of that quickening tempo of growth and transition in constitutional law and many other fields, which has led to the re-examination and restatement of many principles in these last few years, cases presenting the problem of the effect to be accorded an overruling decision have been arising with increasing frequency. Moreover, it seems not unlikely that our courts will be called upon to handle a growing volume of such litigation in the immediate future. They face this task equipped with certain principles which might be likened to a new and specialized equity. This new equity, if we may call it such, is still in its infancy. The courts are developing it haltingly to ameliorate the hardships of an arbitrary rule. As yet, as we have seen, it has not grown to the point where it protects rights and expectations founded on the unwritten law. The deficiencies and inconsistencies in the rules applied are patent. But it seems that the best remedy lies with the judiciary.<sup>120</sup> And the bench is becoming increasingly aware of its powers and responsibilities in this field. It is to be hoped that our judges will continue to prick out a broader and more just rule as case after case comes before them, for the principal hope for a happier solution of the problem of an overruling decision lies in a wider and wiser judicial discretion.

<sup>120</sup> There may, however, be occasions where it seems desirable to settle particular problems by legislation as was done by the enactment of the Public Salary Tax Act of 1939, cited *supra* note 38.