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A FINAL DECISION OF A COURT OF LAST RESORT MAY NOT EVER BE THE LAW

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The title heading of this article may appear startling, but it is quite commonplace in the light of the authorities.

The Wisconsin Supreme Court in *Kneeland v. Milwaukee, etc.* 15 Wis. 454, in discussing whether a former decision was ever the law, said at p. 461: Paine J. "And in that, I understand, consists the difference between a change of a decision of a court and a change of the law by the legislature. The latter does not affect things happening before the change. But when a court changes its decision it does so, not because it has any power to change the law, but, because the law was from the beginning different from what it had been held in the former decision, and this, of course, necessarily invalidates all things done under the former, the validity of which depends on the former construction."

In *7 R. C. L. 1010,* it is said as to the effect of the later decision: "the effect is not that the former decision is bad law, but that it never was the law." In *26 Am. & Eng. Enc. of Law, 179,* it is said,

"The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law, at the time of the overruled decision as it is declared to be in the last decision." Let me comment that this quotation is true only when the later decision is the right one.

The proposition I maintain is also declared in many other cases, among them:

Douglas v. Pike Co., 101 U. S. 677; *Center School v. State,* 49 N. E. 961; *Stockton v. Dundee Mfg. Co.,* 22 N. J. Eq. 56; *Storrie v. Cortes,* 35 L. R. A. 666. Blackstone in his *Commentaries,* Vol. 1, page 69, makes this strictly accurate statement of the 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 was bad law, but that it was not law." The Supreme Court of the United States bluntly says:

"The blunder is thenceforward deemed never to have been law." *Douglas v. Pike Co., Supra.* The following observations

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are made by Brannon in his work on the fourteenth (14th) amendment,-page 410:

"The judicial decision does not make law. It is supposed only to declare what the law without it is, what the law before it was. The legislature makes law, the court expounds law. Now, the first of two decisions of the same court upon the same facts, when overruled, was not law up to the time of the second decision, and thereafter not law, but, in legal contemplation after the second decision, the first never for a moment was the law. The law of the two decisions cannot occupy the same time. The first was a misconstruction, a mistake of law." This quotation is not strictly an accurate statement of the law, but Judge Brannon's intention is apparent.

Some courts have recognized an exception to this rule, that where a constitution or statute 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. *Hill v. Atl. etc.* 9 L. R. A. (N. S.) 606; *Gelpcke v. Dubuque,* 1 Wall. 175 (Justice Miller dissenting); *Sedalia National Bank v. Gold,* 91 Mo. App. 32.

It has generally been regarded that this is the only exception that should be allowed. *Falconer v. Simmons,* 41 S. E. 193. But, this exception or one akin to it, has been extended to a criminal case. *State v. Bell,* 49 S. E. 163—and also to a case where the title to real estate had vested. *Hill v. Brown,* 56 S. E. 693. These exceptions are recognized with doubtful logic, and doubted or denied and condemned by many courts. *Weston v. Ralston,* 36 S. E. 446; *Alferitz v. Borgwardt,* 126 Cal. 201, 58 Pac. 460; *Gelpcke v. Dubuque,* 1 Wall. 175 (Dissenting opinion of Miller J.); *Allen v. Allen,* 16 L. R. A. 646; *Ray v. Western, etc.* 12 L. R. A. 290; *Wood v. Brady,* 150 U. S. 18, 14 S. Ct. 6; *Frank v. Darst,* 14 Ill. 311; *Wood v. Travis Co.,* 174 U. S. 499; *Hart v. Burnett,* 15 Cal. 530.

The conclusion stated in the heading is scarcely debatable, notwithstanding the quite common understanding that the expression of a court of last resort is the law of the land, and the prevailing view of trial judges that they must always follow and apply the decisions of a court of last resort, no matter how absurd or unjust.