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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

BANKS AND BANKING—LIABILITY OF STOCKHOLDERS—WHETHER OR NOT CASH PURCHASER OF SHARES IN HOLDING COMPANY WHICH OWNS STOCK OF BANK IS SUBJECT TO SUPERADDED LIABILITY IMPOSED ON STOCKHOLDERS OF INSOLVENT BANK—The management of a national and of a state bank located in Kentucky, seeking to establish an alliance between them, organized a holding company with broad charter powers and worked out an exchange of shares so that the holding company eventually acquired most of the shares of the two banks. In addition to such exchange, however, the holding company sold some shares for cash to the former bank stockholders and marketed a large number to other cash purchasers who did not own bank stock. With funds obtained in this fashion, the holding company then acquired majority interests in several other banks as well as shares in an insurance company, but in little more than a year after this varied financial career began the banks and the holding company were in receivership. Assessment of double liability having been made against the national bank shareholders,¹ the receiver thereof

¹ 12 U. S. C. A. § 63. It should be noted that the effect of that statute was nullified, after the operative facts of the instant case occurred, by 12 U.S.C.A. § 64a, but the problem is still a live one under many state statutes.
notified the shareholders of the holding company that he intended to proceed against them in the event he was unable to collect from their corporation. Suit by the bank receiver against the holding company resulted in the collection of but a small amount on the double liability assessment, so the receiver instituted action against the holding company shareholders to recover from each his proportionate part of the balance of the assessment. Such suit was dismissed by the district court, and the decree was affirmed by the intermediate appellate court. The United States Supreme Court, although divided five to four, decided in the case of Anderson v. Abbott to reverse and remand with directions to uphold the suit against all shareholders of the holding company, whether they became such by exchange of bank stock or by cash purchase, resting its decision on the proposition that the protection of bank depositors was a matter of such paramount concern that double liability might be imposed on a person several links removed from the actual holder of the bank stock.

There can be little dispute with the decision insofar as it concerns the liability of persons who traded in their bank shares for those of the holding company. Decisions relating to shareholders' statutory liability disclose a trend on the part of the courts to disregard the corporate entity and to go directly against the beneficial owner of the bank stock. In such cases, liability is usually imposed on either of two theories: that it is the beneficial owner who really owes the fundamental duty, or else that the court is entitled to pierce the corporate entity. The latter theory is most likely to be applied where bank stocks form a substantial part of the assets of the holding company, whereas the former one is apt to be chosen where the holding company is merely a shell organized to avoid the double liability. In Fors v. Farrell, for example, several holding companies existed, each holding for the next link, yet the court knifed through each intermediate entity to set liability on the ultimate holding company. But good faith and honest motives have not deterred courts from fastening the liability on the holding company shareholders, for if a holding company could be set up to enable the holder of bank shares to sidestep his double liability while he retained the benefits of his bank stock, it would be too easy to circumvent the statute.

More significant, though, is that part of the decision of the instant

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4 Ibid., 127 F. (2d) 696 (1942).
5 32 U. S. 2, 64 S. Ct. 531, 88 L. Ed. (adv.) 535 (1944). Mr. Justice Jackson wrote a dissenting opinion, concurred in by Justices Roberts, Reed and Frankfurter.
6 See McClanahan, "Bank Stock Liability and the Holding Company Device,"
7 Barbour v. Thomas, 86 F. (2d) 510 (1938).
10 Metropolitan Holding Co. v. Snyder, 79 F. (2d) 263 (1935), presents the best application of this doctrine.
case which imposes liability on those who paid cash for their shares in the holding company. Involved therein is the question of whether or not the underlying policy of the double-liability statutes is so compelling that the obligations thereof should be fastened upon a buyer of shares in the holding company for cash as well as on the person who formerly held bank shares and traded them for such stock. It is on this point that the court divided sharply, the majority finding that it made no difference to the question of liability, while the dissent thought such holding constituted a "trap for unwary and unwarned investors.""11 While statutes fixing superadded liability have never contemplated that lack of knowledge on the part of the ordinary holder of stock in a bank should operate to defeat the assessment of liability against him, there may be reason why a lack of knowledge thereof on the part of the stockholder in a holding company should entitle him to more sympathetic treatment. Rules of statutory liability are usually harsh in operation as their foundations rest not in any fault on the part of the shareholder but rather in apposition thereto. Yet, investors have often found that they have bought a liability for the debts of the enterprise as well as a benefit, when such may have been farthest from their intention. In Horgan v. Morgan,12 for example, the certificate of stock purchased by the defendant declared that it represented "non-assessable shares of stock," but the shareholder was nevertheless held liable on certain promissory notes as if he were a partner. In Bartlett v. Stephens,13 the shareholder who had been induced to become such on the part of the corporation, but who gave notice of rescission and tendered return of the stock, was held liable for the court said: "if . . . a person voluntarily assumes the relation of a stockholder . . . he fixes his own status and is liable for the consequences."14 In like fashion, the case of Mundell v. Cravens15 will serve as authority in Illinois for the rule that a shareholder who was induced by fraud to purchase bank stock has no defense to a suit for superadded liability. The majority holding is not, therefore, without support and serves to re-emphasize the wisdom of investigation before investing.

It should not be difficult, in the light of these decisions, for the Illinois Supreme Court to produce a holding comparable to that of the United States Supreme Court in the Anderson case. There is language in the Appellate Court decision in Flanagan v. Madison Square State Bank16 which points in that direction for the court there upheld a complaint, against a motion to strike, that sought to force shareholders of the holding company which owned bank stock to stand responsible for the added liability. When discussing the theory to support such complaint, the court said: "It is a rule recognized in this State and elsewhere, that where it is sought to hold the real owner of the stock though his name does not appear

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11 —U. S.—at—, 64 S. Ct. 531 at 547, 88 L. Ed. 535 at 552.
13 137 Minn. 213, 163 N.W. 288 (1917). The case was cited with approval in Rosenfeld v. Horwich, 221 Ill. App. 304 (1921), cert. den.
14 137 Minn. 213 at 215, 163 N.W. 288 at 289.
15 267 Ill. App. 447 (1932).
upon the transfer books of the bank, the court will determine who is the real owner and decree accordingly." 17 Although that action was begun against the shareholders of a holding company without attempting any distinction between the original holders of bank stock and those who bought holding company shares for cash, such language is strongly akin to that used by other courts when applying the "beneficial-owner" theory of liability. It is unlikely, therefore, that our Supreme Court will draw any distinction between the two classes of shareholders.

Since lack of fault on the part of the owner of bank shares will constitute no defense to his liability, it is difficult to see why the liability of an owner of holding company shares should be less exacting, particularly where the assets of the holding company consist of bank stocks and it lacks financial integrity to respond adequately to the burden of the added liability. 18 As the holding company shareholder stands to benefit through any dividends passed on to the holding company by the bank, his benefit being no less or no more than that of the ordinary bank shareholder, the detriment which accompanies the ownership of holding company stock should be on a par with that of the ordinary bank stockholder.

J. E. Reeves

Corporations—Dissolution and Forfeiture of Franchise—Whether Prior Dissolution of Corporation in Separate Proceeding Brought by Attorney General is Fatal to Existence of Equity Jurisdiction to Appoint Receiver to Liquidate Assets of such Dissolved Corporation—The facts in the recent case of McNeill v. Savin 1 showed that an Illinois corporation had been organized in 1937 and shortly thereafter it leased a store building for a term of years. A sizeable sum was paid into the corporation for its capital stock but it never engaged in active merchandising and the promoters, being unable to raise sufficient capital, decided to abandon the business. The assets of the corporation, consisting solely of cash, were therefore returned to the contributors less certain preliminary expenses. In 1939, the corporation was dissolved in an involuntary proceeding brought by the Attorney General, but prior to dissolution the lessors obtained judgments against it which remained unsatisfied. About a year and a half

17 302 Ill. App. 468 at 473, 24 N.E. (2d) 202 at 204. See also Galinski v. Adler, 302 Ill. App. 474, 24 N.E. (2d) 205 (1939), wherein a complaint for discovery and accounting against a holding company to ascertain if certain defendants, who also had owned bank stock, had exchanged their shares for holding company stock was held good on motion to dismiss. Of like interest is Trupp v. First Englewood State Bank, 307 Ill. App. 258, 30 N.E. (2d) 198 (1940).

18 It is interesting to note that suit against the holding company was deemed not to be res adjudicata so as to prevent further action against its shareholders: Anderson v. Abbott,—U. S.— at —, 64 S. Ct. 531 at 534, 88 L. Ed. (adv.) 535 at 538. As partial satisfaction by the holding company was treated as amounting only to a pro tanto discharge, the court concluded that suit for the balance could still be brought against the individual shareholders on their separate liability arising from their beneficial ownership in the insolvent bank. That theory of liability was treated as creating an entirely different issue from the one involved in the suit against the record owner of the shares of the bank.

1 244 Wis. 552, 13 N.W. (2d) 82 (1944).
after the corporation had been dissolved, the lessors filed a creditor’s bill in an Illinois court seeking to enforce collection of such judgments. A receiver was appointed therein and, upon petition, he was given authority to bring suit in Wisconsin against the non-resident subscribers to reach assets in their hands belonging to the defunct corporation. The instant case was accordingly started by the Illinois receiver in Wisconsin just before the expiration of the two-year period after dissolution of the corporation and resulted in a judgment for plaintiff in the trial court. Upon appeal to the Supreme Court of Wisconsin, it was held that such judgment should be affirmed.

The significant issue in the case was defendant’s contention that the receiver had no right to bring the instant action because the Illinois court lacked jurisdiction to appoint a receiver for an already dissolved corporation. His contention was based on the supposition that, under the Illinois statutes, the only power enjoyed by the court was to appoint a receiver prior to dissolution as an aid to a suit asking for liquidation and dissolution of the company. The Wisconsin court, after examining the sections of the Illinois Business Corporations Act, stated that it found no provision therein specifically requiring that a receiver had to be appointed prior to dissolution, nor could it find that it was the legislative intent that such should be the rule. It therefore deemed that the general power of a court of equity was sufficient to support the appointment.

Section 86 of the statute does provide that courts of equity shall have power to liquidate the assets and business of a corporation when, among other things, suit is brought by an unsatisfied judgment creditor who has had execution on his judgment returned unsatisfied or whose claim is admitted by the corporation to be due. Another section expressly gives the court power to appoint a receiver in connection with such litigation. But these sections contemplate that liquidation shall occur before dissolution for it is provided that the actual dissolution shall not take place until a final decree is entered in such proceedings. The claim of the defendant would seem, on the surface, to be not entirely without merit. It would seem, however, that recognition must also be given to Section 94 of the Business Corporations Act which specifically provides that dissolution of a corporation shall not take away or impair any remedy given against such corporation, its directors, or shareholders, for any liability incurred prior to such dissolution if suit thereon is brought and service had within two years after the date of such dissolution. If the prior dissolution prevented the appointment of a receiver and the gathering in of the corporate assets, the remedy intended by such section would well be nullified.

It is true that it has been said that courts of equity lack general power to appoint liquidating receivers for corporations and may appoint such

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3 Ibid., § 157.86.  
4 Ibid., § 157.87.  
5 Ibid., § 157.91.  
6 Ibid., § 157.94.
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only when expressly authorized by statute, but the basis of such rule seems to be that the corporations there involved were going concerns and the appointment of a receiver would be tantamount to dissolution. As chancery courts are without jurisdiction to decree a dissolution without specific statutory authority, it might well be held that the same rule should apply to the appointment of a receiver. In the case before the Wisconsin court, however, the appointment of the receiver occurred after the corporation had been dissolved, hence such decisions and the rule announced therein can hardly be considered applicable.

The precise question presented has not been decided in Illinois. Before the enactment of the Business Corporations Act in 1933 probably no problem of corporation law was more obscure than that relating to the jurisdiction of a court of equity to appoint a receiver for a corporation. Such confusion resulted, for the most part, from lack of an adequate statutory definition of such jurisdiction. Although the existence of the power was generally denied, there is dicta in one case that the ordinary powers of equity to deal with cases of fraud would include the power to appoint a receiver for a corporation. When interpreting Illinois law applicable to the case before it, a federal court once found, on a factual situation similar to that involved in the instant case, that the appointment of a receiver for a corporation after dissolution was within the general powers of an equity court. Such decision relied on a statutory provision then in effect which corresponded closely to Section 94 of the present statute. It was held that as such provision continued corporate existence after dissolution for a period of two years in order to permit creditors to assert their claims, the net effect thereof was to make the corporation and its officers, after dissolution, a trustee of the corporate assets for the primary benefit of any unpaid creditors. As so interpreted, authority in the court to appoint a receiver was regarded as an incident to its original jurisdiction over trusts. The reasoning of that decision appears to be sound and could well have influenced the outcome of the instant case.


8 Wheeler v. Pullman Iron and Steel Co., 143 Ill. 197, 32 N.E. 420, 17 L.R.A. 818 (1892). Prior to statute, dissolution was accomplished by quo warranto proceedings at law: Baker v. The Administrator of Backus, 32 Ill. 79 (1863).


11 Abbott v. Loving, 303 Ill. 154, 135 N.E. 442 (1922).


13 Laws 1895, p. 130.
As it is usually impossible to cover every eventuality by statute, the problem presented in the instant case has arisen with variations in a number of states. The general rule has there been established that, in the absence of a governing statute, courts of equity will take charge of the property of a dissolved corporation through a receiver in order to collect and apply the same to the payment of its debts or for distribution to its stockholders.¹⁴ No Illinois case can be found where the facts have required an expression of the attitude of the local courts on this point but it would seem probable that the Illinois courts would conclude to uphold the jurisdiction of an equity court to appoint a receiver for a dissolved corporation provided the application for the same occurred within the two-year period after dissolution. Justification for such assumption may be found either in the general rule noted above or on the narrower ground adopted by the Wisconsin court. It is unthinkable that an Illinois court would ever hold that equity could not exercise its powers to preserve the assets of a dissolved corporation or arrange for the proper distribution thereof, even though express statutory authority does not exist.

C. F. Marquis

**EASEMENTS—Extent of Right, Use, and Obstruction—Whether or Not Railroad May Lease Portion of Its Easement of Right of Way for Use in Ordinary Retail Business—** In the case of Mitchell v. Illinois Central Railroad Company¹ it appeared that the defendant railroad had secured an easement for the purpose of constructing, maintaining, and operating a railway, with all necessary appurtenances, over the land presently owned by plaintiff. Thereafter, the railroad leased a portion of such right of way to one Beach to be used by him as a site for a combination bulk oil and filling station. Such lease was afterwards approved by the Illinois Commerce Commission and, pursuant to its terms, Beach entered into possession and engaged in the business of selling gasoline and similar products both at retail and wholesale. Plaintiff thereupon sued to enjoin the operation of the retail aspect of the business, probably to eliminate competition with a retail station operated by himself on adjacent property, contending that the lease was invalid as exceeding the easement rights of the railroad company. The trial court dismissed the complaint on the ground that the lease was a proper exercise of the rights conferred by the easement. Upon appeal, such decree was reversed by the Appellate Court for the Third


¹ 384 Ill. 258, 51 N.E. (2d) 271 (1943), reversing 317 Ill. App. 501, 47 N.E. (2d) 115 (1943). Murphy, J., noted a dissent on rehearing.
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District with directions to grant the injunction; that court considering that the use for retail purposes amounted to an undue additional burden on the fee. A certificate of importance having been granted, the Illinois Supreme Court reversed such action and affirmed the decree of the trial court dismissing the complaint.

That the railroad might lease a portion of the easement for use as a bulk station was apparently conceded by the plaintiff, hence that problem was not in issue. The prime question, then, was one with regard to the right to operate a retail station. On that point, there appears to be considerable confusion as to what use may be made by a railroad of its right of way. Such confusion may be due to several reasons. The first of these reasons turns upon the nature of the service the railroad is called upon to perform. Its prime function of transportation requires exclusive occupancy of the right of way, hence the easement granted to it differs from the common easement across the land of another. Being held to the highest degree of care, it is necessary that the railroad should keep its right of way clear from anything that may endanger the operation of its trains.

The fencing in of its right of way, thereby preventing access of the public and abutting property owners, has undoubtedly been instrumental in facilitating such service even to the point of causing the public to believe that the railroad has exclusive jurisdiction though it does not own the fee and has only an easement in the land.

If the use in question in the instant case was likely to interfere with the operation of the railroad, it certainly should be denied as being inconsistent with the original purpose of the easement. For such reason it has been held that it cannot license a third person to construct other lines along its right of way, nor grant an easement in a private way over its tracks, or one along its right of way for the purpose of laying water pipes not intended to be used for purposes of the railroad.

3 The testimony tended to indicate that the property might be used for that purpose, and it was the lessee's claim that such was his intention but that his operations had been hindered by the pending litigation: 384 Ill. 258 at 263, 51 N.E. (2d) 271 at 273. On that point generally, see Weir v. Standard Oil Co., 136 Miss. 205, 101 So. 290 (1924).
4 The Supreme Court placed stress upon the fact that leases of the character in question were a matter of common practice and had received the approval of the Illinois Commerce Commission. The Appellate Court had rejected the latter point on the ground that the commission was a mere administrative agency and, as such, had no jurisdiction to adjudicate controverted individual or contract rights: 317 Ill. App. 501 at 509, 47 N.E. (2d) 115 at 119.
7 Joseph v. Evans, 338 Ill. 11, 170 N.E. 10 (1930); Branch v. Cent. Trust Co., 320 Ill. 452, 151 N.E. 284 (1926); Walker v. Ill. Cent. R. Co., 215 Ill. 610, 74 N.E. 812 (1905); Wiggins Ferry Co. v. Ohio etc. R. Co., 94 Ill. 83 (1879).
9 Lincoln v. Great Northern Ry. Co., 26 N.D. 504, 144 N.W. 713 (1914).
On the other hand, the wisdom of utilizing unused space not needed for transportation has led both Illinois and other states to permit railroads to lease portions of the right of way for warehouse and similar purposes, but the power to grant leases of that character has been limited to situations in which the exercise thereof did not interfere with the duties of the railroad to the public.\textsuperscript{11}

Recognition must, however, be accorded to the rights of the servient owner who still retains an interest in the land under the right of way. He has, for example, been permitted to use those portions of the right of way not in use by the railroad nor necessary to the safe and convenient operation of its trains.\textsuperscript{12} In like manner he has been permitted to enter on and use the land,\textsuperscript{13} or the superincumbent air-space over the land,\textsuperscript{14} in any manner not inconsistent with its use by the railroad company.\textsuperscript{15}

In an effort to work a compromise between these views, the railroad has been permitted to lease portions of its right of way to concerns whose operations directly enhance the business of the carrier. It is, perhaps, for this reason that the plaintiff in the instant case raised no question of the propriety of a lease for bulk station purposes. But even this practice is an open invitation to abuse. As was once said in a Pennsylvania decision: "No one can pretend that a railroad company may build private houses and mills, or erect machinery, not necessarily connected with the use of their (sic) franchise, within the limits of their right of way. If it could, stores, taverns, shops, groceries and dwellings might be made to line the sides of the road outside of the track—a thing not to be thought of under the terms of the acquisition of the right of way. The problem is one of degree."\textsuperscript{16} In this light, the use in the instant case would seem not to be incidental to the legitimate use of the easement for railroad purposes, but would appear to constitute an independent use in itself.

Whether or not an abandonment has occurred has been used as a standard to ascertain whether there has been a proper or an improper use of the right of way in situations like the present one.\textsuperscript{17} Such test suggests that if the business were such that it could be continued after the

\textsuperscript{11} Checkley v. Ill. Cent. R. Co., 257 Ill. 491, 100 N.E. 942, 44 L. R. A. (N.S.) 1127 (1913); Ill. Cent. R. Co. v. Wathen, 17 Ill. App. 582 (1885).
\textsuperscript{12} Atlantic Coast Line R. R. Co. v. Bunting, 168 N.C. 579, 84 S.E. 1009 (1915).
\textsuperscript{14} Farmers Grain & Supply Co. v. Toledo, P. & W. R. Co., 316 Ill. App. 116, 44 N. E. (2d) 77 (1942), noted in 22 CHICAGO-KENT LAW REVIEW 92.
\textsuperscript{15} The general doctrine that the grant of an easement for right of way purposes does not extend to the sky was recognized in Gulick v. Hamilton, 293 Ill. 126, 127 N.E. 383, 9 A. L. R. 1629 (1920).
\textsuperscript{16} In re Lance's Appeal, 55 Pa. 16 at 25, 93 Am. Dec. 722 at 726 (1867). The doctrine of that case was approved in R. I. & P. Ry. Co. v. Leisy Brewing Co., 174 Ill. 547, 51 N.E. 572 (1898), and it was cited with approval by the Appellate Court in its decision in the instant case: 317 Ill. App. 501 at 507, 47 N.E. (2d) 115 at 118.
\textsuperscript{17} See In re Lance's Appeal, 55 Pa. 16, 93 Am. Dec. 722 (1867), where the erection of a coal chute on land condemned for railroad purposes was held to be an abuse of the power conferred by the easement so created.
railroad had abandoned its easement and given up its business of transporta-
tion, then the use should be held to be not incidental or necessary to the 
grant given the railroad. Such was the view in In re Chicago & 
Northwestern Railway Company where it was held that the operation of 
a retail filling station upon a railroad right of way was a misuse of the 
servient property. The fact that the business received its goods by rail 
was held not to be a conclusive factor that the use of the easement was a 
proper one rather than an unwarranted burden.

It is true that decisions differ on this point and support may be found 
or either view, but it is suggested that the abandonment test is the 
ounder one. If the railroad abandons the right of way, it must necessarily 
also abandon any use peculiar to the railroad business for which it was 
given an easement. If the use of the servient property would automatically 
end at that time, such use may be regarded as a proper one and clearly 
within the scope of the railroad’s activities. If, however, the business could 
continue after the abandonment, such fact would indicate that its life is 
not directly dependent upon the railroad. Not being established as an aid 
to the performance of the railroad’s primary function, but for a completely 
independent purpose, it should be regarded as one clearly beyond the 
cope of the railroad’s activity and not within its power to grant to another 
less it owns the right of way in fee.

Frederika Marston

HIGHWAYS—OBSTRUCTIONS AND ENCOCHRMENTS—WHETHER OR NOT OWNER 
F FEE UndER PUBLIC HIGHWAY CAN, WITH HIGHWAY COMMISSIONER’S CON-
SENT, ERECT AND MAINTAIN OIL DRILLING EQUIPMENT IF THE SAME DOES NOT 
AMOUNT TO A TOTAL OBSTRUCTION OF THE HIGHWAY FOR PURPOSES OF TRAVE—
A novel and interesting application of legal principles was called for in 
impson v. Adkins, when the Illinois Supreme Court, for the first time, was 
sked to decide whether or not an oil drilling lease, sanctioned by the local 
commissioner of highways, was valid if the wells so drilled merely en-
roached upon but did not obstruct the public way. The plaintiffs therein 
rught suit to quiet title to a strip of land entirely occupied by a public 
ay. The defendants claimed under an old tax deed, and sought, by 
ounterclaim, to have their rights under certain non-drilling oil leases 
icated so as to prevent the plaintiffs and their lessee from actually 
oving the oil by surface operations. The trial court held that the plain-
iffs were owners of the strip of land under the highway and, as a conse-
quence, did own the oil and gas therein but that the maintenance of oil 
ells thereon amounted to a public nuisance and directed that the re-
eiver, whose appointment had been questioned in a companion case, had 
ould cap the wells below the surface and remove all obstructions from 
e highway. On direct appeal, the Illinois Supreme Court modified the 
cision by upholding the non-drilling lease in favor of the defendants
s being valid, but in all other respects affirmed the decree. In support of

1 386 Ill. 64, 53 N.E. (2d) 979 (1944).
such holding, the court cited the earlier Illinois case of *Snyder v. City of Mt. Pulaski* which had laid down the rule that a city had no power to grant the permanent use of any public highway to private purposes. In agreement with that position might be added other Illinois cases wherein the illegal grant of the highway commissioner to maintain an obstruction was deemed not to be a defense.

The removal of gas and oil below the surface of the highway ought to be permitted if the highway is not thereby disturbed, since the right of the owner in fee is limited only by the public right of travel over the surface. In a New York case, for example, it was held that the owner of land abutting upon the highway, who also owned the subsurface rights thereunder, had the right to remove minerals located under the highway by tunneling in such a manner as not to disturb the surface. In much the same way, a permit for temporary obstruction might be sought if an adequate bridge be maintained over the excavation, provided the owner is responsible for possible accidents caused thereby and for the rebuilding of the road when the temporary use has ceased.

But highway officials have no power to surrender the use of the highway for private purposes, nor may they authorize the maintenance of a nuisance on the same. If, in authorizing an obstruction, they exceed their powers, such obstruction will be deemed illegal, and cannot be justified subsequently. In *Adams v. Atlantic City Electric Company*, therefore, an electric power company was held liable for damage done by its pole when an automobile collided therewith because it was not placed pursuant to legislative authority even though the company had a permit from the state highway commission.

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8 176 Ill. 397, 52 N.E. 62, 44 L. R. A. 407 (1898).
4 Town of Canoe Creek v. McEniry, 23 Ill. App. 227 (1886). A license by the commissioner of highways to build a drainage ditch on right of way which flooded plaintiff's land was held not to exempt defendant from liability in Johnson v. Rea, 12 Ill. App 331 (1882). The entire use of a highway granted to a railroad by the commissioner of highways in *Town of Rice v. Chicago, B. & N. Ry. Co.*, 30 Ill. App. 481 (1888), was considered an illegal grant. See also *Pittsburgh, Ft. W. & C. R. R. Co. v. Reich*, 101 Ill. 157 (1884). 6 Section 167 of the Illinois Revised Statutes of 1943. 7 Driggs v. Phillips, 103 N. Y. 77, 8 N.E. 514 (1886). 8 A township board was held to lack the authority to permit a mill to partially obstruct a township highway in *U. S. Gypsum Co. v. Christenson*, 226 Mich. 347, 197 N.W. 497 (1924). Legislative authority to county officials so to do was held ineffective in *Sharp v. Chicago, B. & Q. R. Co.*, 110 Neb. 34, 193 N.W. 150 (1923). 9 *Dade County v. Snyder*, 140 Fla. 135, 191 So. 185 (1939). 10 A fence and gate was erected across a highway prior to enactment of stock-grazing statute. Held, in *Duncan v. State*, 16 Okl. Cr. 175, 181 P. 736 (1919), that permit by board of county commissioners was no defense. See also *Illinois Central R. Co. v. Ward*, 237 Ky. 478, 35 S.W. (2d) 863 (1931), where a railroad permanently obstructed a public highway leading to two farms. Defense that a statute authorized the county engineer to change the location of a highway and that such change had been approved was held unavailing. 11 120 N. J. L. 357, 199 A. 27 (1938). See also *Allen v. New York Central R. Co.*, 230 N. Y. S. 140, 228 App. Div. 342 (1930), reversing 233 N. Y. S. 445, 133 Misc. 618 (1929).
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The Illinois court in the instant case, however, seems to have predicated its holding on two statutory provisions which make it a criminal act to obstruct or encroach upon a public highway,\(^\text{12}\) rather than upon these general principles. For that reason, it held that the lease given to the lessee of the plaintiffs, since it required the drilling of wells on the property demised, called for the doing of an illegal act, hence was void under well-established principles of law. The court might have found ample support for its decision, even in the absence of such statute, in the Texas case of Boone v. Clark\(^\text{13}\) which was a case strikingly similar to the instant one on the facts, the law, and the outcome. In that case, one Boone procured from the county commissioner's court an oil and gas lease on all public roads in the county. The lease stipulated that if any highway was obstructed by drilling operations the lessee would pay the cost of securing an additional highway. The lessee also secured leases from the adjoining fee owners for the county had only an easement of right of way on the highways. It was held that the county had no authority to make such lease, either by statute or by implication,\(^\text{14}\) because of a provision in the Texas penal code which made it a misdemeanor punishable by fine or any one to wilfully obstruct any public highway.\(^\text{15}\) The application of that statute had been considered in a prior case, where a right of way had been partially obstructed by a fence,\(^\text{16}\) just as had been the Illinois statute relied on in the instant case.\(^\text{17}\) The parallel between the two cases is too obvious to warrant further comment.

While the outcome of the instant case is obviously the correct one, it provides small consolation for the owner of the fee under the highway to earn that he may remove the minerals and oil from beneath the highway, provided there is no obstruction thereof, if he has no way of reaching the same. If the adjoining land is under his control, he may enjoy his property by drilling to reach the same from the adjoining land, but if he does not have abutting property there is no practical value to owning the oil and gas in place if to reach it he must sink his well on the highway and hereby create an obstruction thereof with its attendant consequences. As he local authorities have no power to sanction his operations, unless specially authorized by statute so to do,\(^\text{18}\) his right as owner would seem to be lacking in utility. His only protection, then, would seem to rest in joining with his neighbor's operations through participation in a non-

\(^{12}\) Ill. Rev. Stat. 1943, Ch. 38, § 466, declares such conduct to be a public nuisance, while § 467 states that it shall be no defense that the nuisance "is rected or continued by virtue or permission of any law of this state." See also Ill. Rev. Stat. 1943, Ch. 121, § 167.

\(^{13}\) (Tex. Civ. App.) 214 S.W. 607 (1919).

\(^{14}\) The doctrine of consent by implication has been upheld in Illinois in cases of vaults under streets: Gridley v. City of Bloomington, 68 Ill. 47 (1873); Nelson v. Godfrey, 12 Ill. 20 (1850).

\(^{15}\) Vernon's Tex. Penal Code, Title 13, Ch. 1, § 784.

\(^{16}\) Cornelison v. State, 40 Tex. Cr. 159, 49 S.W. 394 (1899).

\(^{17}\) See Boyd v. Town of Farm Ridge, 103 Ill. 408 (1882).

\(^{18}\) Leases may be so authorized where the public owns the fee: Ontario Natl. Gas Co. v. Gosfield, 18 Ont. App. 626 (1891). See also Thornton, Oil and Gas (W. I. Anderson Company, Cincinnati, 1932), 5th Ed. rev. by Willis, Vol. II, § 476.
drilling lease such as was upheld in the instant case. Only in that way, unless an express statute should be passed sanctioning the conduct here attempted, can he realize upon his property rights.

**Frederika Marston**

**Municipal Corporations—Use and Regulation of Public Places, Property, and Works—Whether Statute Which Authorizes Municipality to Vacate Streets and Purports to Give Conclusive Effect to Finding That Public Interest Is Served Thereby Prevents Inquiry by Courts into Factual Basis for Such Conclusion—By ordinance properly passed, the City of Chicago vacated about a mile of a certain public street under authority conferred by the Cities and Villages Act.\(^1\) Shortly thereafter, interested persons filed the case of *People ex rel. Foote v. Kelly*\(^2\) seeking a writ of mandamus to compel the city and certain abutting property owners to remove obstructions from the right of way of the street which had been vacated. The petition alleged, among other things, that the purported vacation of the public highway was for purely private purposes and for the exclusive benefit of certain private corporations rather than for the benefit of the general public. Defendants moved to strike the petition on the ground that the public interest in the vacation of the street was to be deemed as conclusively established from the passage of an ordinance to that effect. Such motion to strike having been granted, the cause was dismissed by the trial judge who certified the case to the Illinois Supreme Court for direct appeal inasmuch as the constitutionality of a statute and an ordinance was involved. That court reversed and remanded with directions to overrule the motion and to require the defendants to answer the petition.

Although the applicable statute declares the determination of the corporate authorities to be "conclusive, and the passage of such an ordinance is sufficient evidence of that determination, whether so recited in the ordinance or not,\(^3\)" the opinion of the Supreme Court indicates that if it be alleged that no public interest exists, then the judicial department may review the determination of the legislative department to see if, in fact, there is any public interest being subserved by the vacation ordinance. While the plain, ordinary meaning of the language of the statute would seem to show a clear intent on the part of the legislature to shut out the courts from all inquiry into the question of public interest, the court nevertheless concluded that the statute, properly construed, did not preclude judicial inquiry into the question of whether a consideration of public interest existed or was totally lacking.

\(^1\) Ill. Rev. Stat. 1943, Ch. 24, § 69-11.

\(^2\) 385 Ill. 543, 53 N.E. (2d) 429 (1944). Murphy, J., dissented on the ground that the construction placed on the pertinent statute in *People v. Eakin*, 383 Ill. 383, 50 N.E. (2d) 474 (1943), dictated a contrary result.

\(^3\) Ill. Rev. Stat. 1943, Ch. 24, § 69-11. The section also states that: "The relief to the public from further burden and responsibility of maintaining any street or alley, or part thereof, constitutes a public use or public interest authorizing the vacation."
On this question, the court said: "The statute limits the authority of the courts but it does not assume to deny them the right to examine the record to see if any public use or interest is subserved in vacating a street or alley. Properly construed, the statute merely declares the long-established rule that the courts will not inquire whether the subordinate body selected to exercise the power delegated by the General Assembly acted wisely or not . . . Courts must not, of course, substitute their judgment for that of the city council . . . The question is, instead, whether the purpose and result of the legislative act . . . is to solely benefit private interests without any semblance of benefit accruing to the public . . . discretion must not be so grossly abused as to amount to a nonexercise of discretion." Without doubt, the statute purported to give the corporate authorities an apparently unlimited and conclusive power and discretion to determine the nature and extent of the public interest to be served by the vacation of a street or alley. The prime question, therefore, is whether or not such legislative intention is controlling on the courts.

In that regard, it is well settled that determinations left to the discretion of a person, official, or body are not reviewable, if declared to be so, when made in the actual exercise of discretion as contrasted with those which result from purely arbitrary action. Running through decisions on that point is the doctrine that the proper exercise of discretion is not negatived by a showing that poor judgment has been used, or that too much weight has been given to one factor and too little to another. For example, the United States Supreme Court once said, in reference to a municipal zoning ordinance, that "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." It is beyond dispute, however, that an entrusted discretion has been fatally abused when there is no basis whatever for an action, finding, or determination purportedly made in the exercise of such discretion. It constitutes a clear case of illegality of action, for example, for an officer to act, or threaten to act, in a capricious and arbitrary manner, as his conduct should be "regular and governed by rule, not by humor." A failure to disclose that discretion has been exercised is apt to be treated as

4 385 Ill. 543 at 548, 53 N.E. (2d) 429 at 431.
5 Two illustrations will suffice. In Roberts v. Richland Irrigation District, 289 U. S. 71, 53 S. Ct. 519, 77 L. Ed. 1038 (1933), for example, the court pointed out that the action of the public body in apportioning the burden of taxation could not be assailed unless the same was palpably arbitrary so as to amount to a plain abuse. United States v. Interstate Commerce Commission, 294 U. S. 50, 55 S. Ct. 326, 79 L. Ed. 752 (1935), holds that mandamus is not available to compel the commission to set aside an order and make a contrary determination where that body has determined, in the exercise of its discretion, that the statute does not authorize the relief prayed for.
7 Ickes v. Underwood, 141 F. (2d) 546 (1944).
being tantamount to arbitrary action, while the adoption of rules that ignore the differences which invoke discretion will inevitably lead to judicial condemnation.

In the light of these principles, the purported conclusiveness of the ordinance concerned in the instant case must be deemed to yield to the right of the judicial department to ascertain if discretion has been validly exercised. To have adopted any other view might have called into question the constitutionality of the fundamental statute upon which the municipal authority in the instant case depended. By taking the view it did, then, the court was saved from the necessity of considering the constitutional issue which had been raised, and instead it was left free to reiterate that when acts are done capriciously, or without any foundation in fact, the judicial branch may intervene to protect the disregarded rights of the public.

When so doing, according to the dissenting judge, the court was supposedly rejecting the earlier decision in People ex rel. Hill v. Eakin. That case, however, unlike the present case, did not reach the reviewing court until after a full trial was had and comprehensive evidence was of record on both sides bearing on the factual questions. At the time of upholding the vacation ordinance therein, the court discussed such evidence at length and found that there was a public interest served, hence it felt itself precluded from inquiring into the wisdom of the vacation or the extent or nature of the public interest served thereby. Although some language used therein would indicate that court inquiry was regarded as prevented by the statute, these statements may well be considered as dicta. In contrast, the present case went up simply on the sufficiency of the petitioner's unanswered allegations, which, if true, would well justify adequate judicial inquiry. The decision in the instant case, therefore, instead of overruling the Eakin case, is complementary thereto.

Certainly the giving away of public rights to benefit private persons ought not be permitted without some opportunity for an unbiased investigation of the facts offered in support thereof. Only if that safety factor has been provided by the legislative body should the courts be bound. To hold otherwise would result in an offense to principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

J. I. Bellamy

11 The challenge was based on the due process sections of the state constitution: Ill. Const. 1870, Art. II, §§ 1 and 2. Also involved was the question of the proper distribution of powers between the several departments of the state government under Ill. Const. 1870, Art. III, and the prohibition against special legislation found in Ill. Const. 1870, Art. IV, § 22.
12 383 Ill. 383, 50 N.E. (2d) 474 (1943).
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PUBLIC SERVICE COMMISSIONS—POWER TO REGULATE CHARGES—WHETHER OR NOT RATE WHICH ENABLES UTILITY TO MAINTAIN ITS FINANCIAL INTEGRITY IS SUBJECT TO JUDICIAL INVESTIGATION ON GROUND THAT IT AMOUNTS TO A CONFISCATION OF PROPERTY BECAUSE IT PERMITS ONLY A MEAGER RETURN ON SO-CALLED "FAIR VALUE" RATE BASE—The Federal Power Commission upon its own motion, but after complaint had been made by two municipalities, instituted an investigation into the rates charged certain utilities, operating in several communities in Ohio and Pennsylvania, by the Hope Natural Gas Company, the operator of a system of natural gas pipe lines. After appropriate proceedings, the Commission found that certain rates charged by Hope were excessive and ordered a rate reduction.\(^1\) The company appealed such order to the United States Circuit Court of Appeals, which reversed the order and remanded the proceedings, holding that the rate base should reflect the "present fair value" of the property and that certain items of property charged to expense during a period prior to federal regulation should be considered in arriving at such "present fair value."\(^2\) The Supreme Court of the United States, in Federal Power Commission v. Hope Natural Gas Company,\(^3\) overruled the Circuit Court of Appeals and held that if the rates set by the Commission permitted the utility company to operate successfully, to attract capital, and to compensate its investors for the risks assumed, such rates were to be deemed "just and reasonable" within the meaning of the applicable statute and the method of arriving at such rates was not to be a matter of judicial inquiry.

The fixing of rates for public utilities is a legislative act\(^4\) which may be delegated\(^5\) and, in the case of natural gas carried in interstate commerce, has been delegated to the Federal Power Commission by the Natural Gas Act of 1938.\(^6\) That statute requires that all rates or charges in connection with the transportation or sale of natural gas which is subject to the act be just and reasonable and it further declares that any rate or charge that is not just and reasonable be deemed an unlawful one.\(^7\) It also provides that the Federal Power Commission, upon the complaint

\(^1\) As reduced, the result meant a cutting down of not less than $3,609,857 in operating revenues on an annual basis, calculated on a finding that a 6 1/2% return on an interstate rate base was a fair rate of return. The rate base established amounted to $33,712,526 which, in the Commission's opinion, represented the "actual legitimate cost" of the company's property less depletion and depreciation on an "economic-service-life" basis, plus unoperated acreage, working capital and future net additions: 320 U. S. —, 64 S. Ct. 281 at 284, 88 L. Ed. (adv.) 276 at 279.


\(^3\) 320 U. S. —, 64 S. Ct. 281, 88 L. Ed. (adv.) 276 (1944).


\(^7\) Ibid., § 717c(a).
of any state, municipality, state commission, or gas distributing company, or upon its own motion, whenever it finds that any rate is unjust or unreasonable, shall determine the rate to be thereafter observed and in force, and shall fix the same by order. It may order a decrease when existing rates are unlawful or are not the lowest reasonable rates. Under this authority the Federal Power Commission, in the instant case, applying the "prudent investment" theory, found a rate which it declared to be "just and reasonable." 8

Rate-making is deemed to be a form of price fixing. 10 In fixing rates, however, it has been held to be immaterial that the rate set has reduced the value of the property used in the business, 11 and all that has been deemed reviewable has been whether the result reached has been obtained in accordance with the standards set out in the statute delegating the authority, unless confiscation of the property has been claimed. 12 If confiscation of property is claimed because the rate set is alleged to be too low, the burden of making a convincing showing of confiscation is upon the utility company. 13 It was held, in the instant case, that such a showing was not made by the company.

Taking the instant case in conjunction with Federal Power Commission v. Natural Gas Pipeline Company of America 14 the court, by specifically repudiating the holding in United Railways & Electric Company of Baltimore v. West 15 to the effect that the present fair market value of the property of the utility company is the proper basis for depreciation as well as for the computation of the investment in property on which a fair return should be allowed, seems to be abandoning the so-called rule in Smyth v. Ames. 16 The court also seems to be deciding that commissions and legislatures are to determine utility rates without judicial intervention unless confiscation of property can be shown convincingly. 17 This represents a shading of the view once held by the court that whenever the question of confiscation of property was in point an opportunity was to be had for submitting the issue to a judicial tribunal for determination upon its own independent judgment both as to facts and law. 18 The court

8 Ibid., § 717d(a).
9 See, for example, Los Angeles G. & E. Corp. v. Railroad Com., 289 U. S. 287, 53 S. Ct. 637, 77 L. Ed. 1180 (1933).
10 Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1877).
16 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).
17 See Hale, "The 'Fair Value' Merry-Go-Round," 33 Ill. L. Rev. 517 (1938).
now avoids the Fourteenth Amendment by a holding that no convincing showing of confiscation has been made, hence no review is necessary. Such action would appear to be an effort to leave the matter of utility rates to commissions and legislatures while retaining the right to inquire into the matter of rates if the court should find it necessary at some later date.

The theory now apparently settled by the court is that if the rates set provide an income adequate for a fair return on the depreciated "original cost" of the utility property, measured by the test of whether the resultant income is sufficient to keep the company's securities financially attractive, the rates will be upheld as being just and reasonable. Since, as stated in the instant case, the regulation of rates is not applied with the intent of insuring that there will be profits from which interest on bonds and dividends on stocks representing money invested in the enterprise may be paid, the application of the theory of the present case will only serve to place a constantly lowering ceiling on the earnings of the regulated business. Such a result might well be produced by the instigation of a rate case when economic conditions are such that the volume of business is larger than the average the company may expect and security markets reflect sales of securities at good prices in relation to earnings. When such conditions exist it should not be hard for a commission to order generous reductions in rates which will still permit the securities to sell at fair prices. On the other hand, when business is less favorable, as it has been from time to time in the past, earnings may fall to a point low enough to force the company to recapitalize with less securities outstanding or with securities of reduced par value resulting from deficits in operation which have been underwritten by the security holders. The lowered values and reduced capitalization become in turn the basis for a further reduction in rates during the next period of improved business and security prices. Over the course of several such periods of economic change, the property of a utility company could be appropriated to the public use and the resulting loss would have to be borne by the security holder either through the form of a smaller return or by an actual impairment of his capital.

It was originally thought that one who put his property to public use was required to submit to public regulation in order that a fair bargain might be had by the public but, since the public did not guarantee to provide business, it should hire the property used therein at its then fair market value. Obviously, there were risks to the one venturing his property and there were opportunities to gain through the inflation of property values which might occur through the years, but it was generally felt that this would be only fair in view of the fact that a new invention might make his business entirely obsolete. This balancing of risks and rewards seems to have been overlooked by the courts in their acquiescence in government by administrative bodies which sometimes place undue reliance on bookkeeping forms. An example might be the reliance placed by the Federal Power Commission on the theory of "cost when the property was
first dedicated to public use," which altogether overlooks the broader question of what is public use and when dedication to public use for a particular purpose first occurs.

Further consideration of the question of property values seems necessary if a sound rule is to be developed which will protect the public investing in securities of public utilities, as well as the public which uses the utility service.

L. A. SWANSON

WILLS—PROBATE, ESTABLISHMENT, AND ANNULMENT—WHETHER AMENDMENT TO STATUTE WHICH SHORTENS TIME IN WHICH TO FILE WILL CONTEST PROCEEDING APPLIES TO WILLS ALREADY PROBATED BEFORE SUCH STATUTORY MODIFICATION—In the case of McQueen v. Connor¹ a will had been admitted to probate of June 20, 1939, and contest thereof was instituted on June 17, 1940, within the one-year period allowed by law in force at the time of the death of the testator and effective at the time of probate. After probate, but before the institution of the suit to contest, Section 90 of the new Illinois Probate Act became operative by the terms of which the time for filing complaints to contest wills was reduced to nine months.² Motion to dismiss the contest proceedings for lack of jurisdiction was sustained by the trial court, and the Illinois Supreme Court affirmed on the ground that the right to sue had expired on March 20, 1940.

Since the common law in force in Illinois is only such as existed in England in the year 1606-7 A.D., with certain exceptions specifically mentioned in the statute,³ the law relating to wills, at least in this state, is entirely statutory. Authority to make wills was given by the Ordinance for the Northwest Territory⁴ and has, ever since, been regulated by legislative provision. In the same way, the right of contest rests upon statutory grounds and may be exercised only pursuant thereto. There is no possibility of doubt, then, that if there is a change in the law before the death of the testator occurs, the new law will operate, for there can be no vested right in a bequest or a devise until the will becomes effective. The instant case, however, deals with the effect of changes occurring subsequent to death and probate.

The probate of a will, as provided by statute, merely requires the making of prima facie proof of compliance with statutory requirements.⁵ Under earlier laws, no provision was made for notice to interested persons, hence such proceedings could not be deemed res judicata.⁶ As a con-

¹ 385 Ill. 455, 53 N.E. (2d) 435 (1944). Direct appeal to the Supreme Court was permitted because the will disposed of real estate.
³ Ill. Rev. Stat. 1943, Ch. 28; Lasier v. Wright, 304 Ill. 130, 136 N.E. 545 (1922).
⁴ The language thereof was: "Estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be (being of full age) and attested by three witnesses. . . ." See Thorpe, American Charters, Constitutions, and Organic Laws (Washington, 1909), II, p. 958.
⁵ Ill. Rev. Stat. 1943, Ch. 3, § 221.
sequence, on appeal from the probate of a will a trial de novo was had at which, in addition to the evidence admitted by the probate court, any other evidence competent in chancery was admissible.\(^7\) If probate was affirmed, it would seem that the respective rights of the heirs, devisees, and legatees in and to the decedent's property should then be regarded as vested and established as of the time when the will was first admitted to probate. If not, they were certainly vested when probate was affirmed on appeal and certified to the probate court. At that stage, if not before, the executor would begin to act and creditors might file their claims within the statutory period measured from the issuance of letters testamentary.\(^8\)

Some light may be thrown on the problem from a consideration of the rights of a claimant to file his claim against the estate. The period in which to file such claim has been longer under earlier Illinois laws,\(^9\) but whenever changes were enacted shortening such period it was consistently held that the right to file a claim constituted a vested right in the claimant, accruing when letters were issued, so that any shortening in the filing period could only apply prospectively to estates in which letters were granted subsequent to the change in the statute.\(^10\) Such change was treated as being prospective only because the limitation of time operated in the nature of a statute of limitation rather than as a condition to the existence of the right or as a prerequisite to the existence of jurisdiction in the court. If any analogy existed between the rights of claimants and those filing will contest proceedings, it would be expected that the same rule should apply to the latter.

The right to contest a will already admitted to probate, however, may not be on the same plane as no counterpart for such action existed at common law and it exists today only by virtue of Section 90 of the Probate Act.\(^11\) As is the case with probate matters generally, then, will contests are not common-law but statutory proceedings. The Illinois Supreme Court

\(^7\) Ill. Rev. Stat. 1943, Ch. 3, § 223.
\(^8\) Ibid., §§ 344 and 356. Claims so filed might be regarded as conferring vested rights on the creditors, although their validity might remain to be determined by a jury in accordance with Ill. Rev. Stat. 1943, Ch. 3, § 349.
\(^9\) It was two years under Section 70 of the Administration Act: Laws 1871-2, p. 77, § 70; it was reduced to one year in 1903 by Laws 1903, p. 3, § 1.
\(^10\) Hathaway v. Merchants' Loan & Trust Co., 218 Ill. 580, 75 N.E. 1060 (1905). It is interesting to note that a claim for wages has been held entitled to preference in payment whether the services were rendered before or after the passage of the statute establishing such preference, the right thereto being regarded as vested at the time when letters were issued: Chicago Title & Trust Co. v. McGlew, 193 Ill. 457, 61 N.E. 1018 (1901).
\(^11\) Ill. Rev. Stat. 1943, Ch. 3, § 242. The text thereof is the same as Section 7 of the former Wills Act: Cahill's Ill. Rev. Stat. 1833, Ch. 148, § 7. In a note thereto, the editor states: "This statute was originally adopted from Virginia through Kentucky. In Virginia, by statute of 1748 (5 Hen. St. at Large, 454), the English chancery remedy was adopted by the House of Burgesses, and the period of limitation cut down from thirty years to ten years. By Act of 1765 (State of Virginia), it was reduced to seven years; by Act of 1797 (Kentucky), it was continued at seven years; by Act of January 13, 1829 (Illinois R. L. 1829, p. 193, § 5), it was reduced to five years... by Act of 1903 it was reduced to one year."
has even said that the right "to contest a will is not a vested one. The legislature, if it saw fit, could abrogate all the provisions of our statutes authorizing will contests." Such proceedings might seem unnecessary inasmuch as all important issues might well be litigated at the time of admission to probate. At the time when will contests were originally provided for, however, the probate of a will consisted merely of proof of a prima facie case. The purpose of contest was, therefore, to provide for a complete determination of the validity of the will with a full disclosure of all the evidence. It is for this reason that the decision of a probate court does not have the binding force of res judicata so as to preclude further contest, and new points of law or evidence might still be raised. It being clear that the right to contest a will is an additional remedy provided by statute, the question remains can such right be taken away by the legislature and, if so, as of what time?

The answer involves a consideration of general principles of statutory construction, to determine whether a change in law should be given retroactive effect or should only apply to rights accruing subsequently. Since there is no provision in the Illinois Constitution against retroactive laws, resort must be had to general rules and to statutory principles of construction. One such principle is that no new law shall be construed to repeal a former law, whether such former law is expressly repealed thereby or not, as to any right accrued before the new law takes effect. It reiterates the requirement of due process of law, which prevents the taking away, by subsequent legislation, of any right which is already vested. Resolution of the problem, then, requires a determination of just what constitutes a vested right.

It has been decided that a right of action for personal injuries, vested before an amendment to the statute regulating such right, could not be disturbed by such amendment, the same being regarded as applicable only to negligent acts occurring after the amendment. In much the same

15 In Colorado, for instance, the state constitution prohibits retroactive laws: Colo. Const. (1876), Art. II, §11. As a consequence, it has been held that an action for wrongful death might be brought after the repeal of the statute creating the cause of action on the basis that the right to recover was vested at the time of death and could not thereafter be curtailed. See Denver, etc., Ry. Co. v. Woodward, 4 Colo. 162 (1878), and Lundin v. Kansas Pac. Ry. Co., 4 Colo. 433 (1878). Contrast such result with the Illinois decisions in wrongful death actions discussed post, notes 24 to 27.
16 Ill. Rev. Stat. 1943, Ch. 131, §4, declares: "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to...any right accrued, or claim arising under the former law, or in any way whatever to affect any...right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding."
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way, when the right of action was based on the negligence of a municipality, a statutory requirement for notice thereto enacted subsequent to the accident was treated as being inapplicable to a right already vested.\textsuperscript{18} It has also been pointed out that the right to file a claim against a decedent’s estate may not be curtailed by retroactive legislation. If then, the right to contest a will already probated amounts to a vested right, subsequent statutory amendment should have no effect thereon.

If the right is a statutory one, though, distinctions may arise. For example, there may be a vested right to have the controversy determined by some form of judicial proceeding, supplemented by an additional statutory remedy. In such case, the taking away of the special remedy will leave unaffected the fundamental vested right.\textsuperscript{19} If, however, the right itself is entirely statutory, then it may be repealed or modified by legislative fiat without violating any constitutional provision or statutory rule. Thus, in cases where school teachers' pensions are not supported by vested contractual rights, the amount of pension payments may be later reduced.\textsuperscript{20} If the amending statute purports to affect pending litigation, it will be given that effect, so that an original judgment will be set aside if the amendment occurs during the pendency of an appeal therefrom. An illustration of this may be found in the case of Vance v. Rankin\textsuperscript{21} where a statute repealed a law which had provided for the disconnection of territory included in a city or a village. The repealing law purported to apply to all cases where property had not yet been disconnected, whether application for that relief had been made or not. A writ of mandamus granted by the lower court before the original law had been repealed was later denied by the Supreme Court by reason of the intervening legislation. In much the same way, if a statute provides for the refund of excess taxes paid on an overassessment and a suit for refund had been filed accordingly, such statute may be repealed effectively even after a judgment has been recovered, so long as the case is pending on appeal.\textsuperscript{22}

\textsuperscript{18} Ryan v. City of Chicago, 187 Ill. App. 163 (1914).
\textsuperscript{19} In South Carolina v. Gaillard, 101 U. S. 433, 25 L. Ed. 937 (1880), a special act of South Carolina provided a special procedure to determine the validity of tender of bills of the Bank of South Carolina offered in payment of taxes. That statute was repealed after tender but before suit was brought. It was held that the special remedy was effectively repealed, but that this left unimpaired the right to assert the state's contract to pay on the bank's paper so that the right to litigate that issue was unaffected.
\textsuperscript{20} Dodge v. Board of Education, 364 Ill. 547, 5 N.E. (2d) 84 (1938), affirmed in 302 U. S. 74, 82 L. Ed. 57, 58 S. Ct. 98 (1937). It must be noted, however, that amendments of this character are not presumed to be retroactive and will be given that effect only if the legislative intention to make them such clearly appears: United States v. Borden Co., 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181 (1939); United States v. Jackson, 302 U. S. 628, 58 S. Ct. 390, 82 L. Ed. 488 (1938); Krome v. Halbert, 263 Ill. 172, 104 N.E. 1066 (1914).
\textsuperscript{21} 194 Ill. 625, 62 N.E. 807 (1902).
\textsuperscript{22} People ex rel. Eitel v. Lindheimer, 371 Ill. 367, 21 N.E. (2d) 318 (1939), cert. den. 308 U. S. 505, 60 S. Ct. 112, 84 L. Ed. 432 (1939). But in Moore Ice Cream Co. v. Rose, 289 U. S. 373, 53 S. Ct. 620, 77 L. Ed. 1265 (1933), it was held that a
When the right to sue is not entirely abolished but is in some way limited or restricted, a dispute is likely to arise based upon whether the right or only the remedy is affected. The rate of interest on a debt, for example, if not determined by contract but rather resting on a statute, appears to be a part of the right to collect the debt. As a consequence, if the rate is reduced by statutory change, the higher rate in effect at the time of sale under judgment or mortgage foreclosure will prevail in case of redemption rather than the rate at the time of redemption. The right to collect interest at the rate provided by law at the time of sale is treated as a vested one rather than an incidental remedy to the collection of the judgment.

The attitude to be taken in wrongful death actions, on the other hand, seems to have baffled the Illinois courts somewhat. It has been decided that although the statute grants a right of action there is no comparable right to a definite period of time within which to sue. Applying that view, the Appellate Court for the Fourth District was led to decide that this period of time could be reduced. In direct contrast is a later decision by the Appellate Court for the First District holding that the time within which to file suit is not a condition precedent to the vesting of a right, the same to exist only when filing was completed, but rather was a limitation upon the time in which to file, which was not subject to reduction by a subsequent statute unless the same was clearly retroactive. A comparable problem was produced when the Mines and Miners Act was amended to reduce the time in which to sue to one year. It was held, in Gruber v. La Salle County Carbon Coal Company, that as there was no expression of legislative intention to make the amendment retroactive suit could be brought within the period fixed at the time the death occurred. Such decision may have been influenced by the fact that, prior to amendment, the law had allowed five years for suit; that sixteen months of that period had elapsed at the time of the change; but that only six weeks were left in which to sue before the new law became effective to bar suit. If the change had been given retroactive effect, its application would have been unjust and unreasonable. In another case involving the same question, however, the Illinois Supreme Court found an intent to make the amended statute retroactive in operation because of the absence of a saving clause and also because of a prohibition against the "prosecu-
tion” of suits as well as against the “bringing” of them. 27

Judging by the history of statutes governing will contests, it would appear that the right to contest a will may well be considered as a special statutory remedy, particularly since it is supplementary to probate proceedings in which, on appeal at least, a fair consideration of the merits is available. 28 It would seem, then, that the legislature is not entirely without warrant in substituting a shorter period for the commencement of will contest cases in place of the longer period hitherto prevailing and also in making such statute retroactive in operation.

There is some question, however, as to the wisdom of such action. Ordinary probate proceedings fail to provide sufficient notice to all parties who might be interested and it is often impracticable to give them such notice therein. There may be devisees or legatees under another will, or beneficiaries under contracts to make a will, whose existence is unknown to the court and to the parties before the court. Such persons may get indirect notice of the existence of probate proceedings when publication for claims is made. They might then wish to come in and object to probate or seek to appeal therefrom but by that time it is normally too late. A remedy such as a will contest proceeding is, then, a necessity to provide adequate protection for such parties. It may be that the right to such a remedy need not vest until notice of some sort has been given, but, if it has been given, the interests of such persons have been given sufficient protection if they are allowed a reasonable time to file complaint for contest after such notice. As soon as this premise is admitted, it follows that the conditions of the existing statute must be complied with strictly. 29 Especially is this true in Illinois as it has been held that there is no absolute right to contest a will and no true vested property right arises until

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27 See the history of Wall v. Chesapeake & Ohio Ry. Co., which first appeared in 101 Ill. App. 431 (1902). Reversed in 200 Ill. 66, 65 N.E. 632 (1902), the case was returned to the trial court. In 210 Ill. App. 136 (1918), a judgment on a verdict for $10,000 was affirmed, but later reversed in 290 Ill. 227, 125 N.E. 20 (1919). The United States Supreme Court, in 256 U. S. 125, 41 S. Ct. 402, 65 L. Ed. 856 (1921), dismissed certiorari for want of jurisdiction on the ground that the constitutional issue had not been raised early enough. The question of the constitutionality of a statutory amendment reducing the time limit in which to sue as applied to existing rights of action, if no time is left, might still be open for litigation.

28 It seems, however, that litigation of all the issues is precluded as to appeals involving existing wills, although there is no such limitation in the case of lost wills: Bley v. Luebeck, 377 Ill. 50, 35 N.E. (2d) 334 (1941), noted in 21 CHICAGO-KENT LAW REVIEW 63.

29 Cronheim v. Loveman, 225 Ala. 199, 142 So. 550 (1932); Manning v. Manning, (Ark.) 175 S.W. (2d) 982 (1943); Security Trust & Savings Bank v. Superior Court, 21 Cal. App. (2d) 551, 69 P. (2d) 921 (1937); Crawfordsville Trust Co. v. Ramsey, 178 Ind. 258, 98 N.E. 177 (1912); In re Duffy’s Estate, 223 Ia. 426, 292 N.W. 165 (1940); MedIll v. Snyder, 71 Kan. 580, 81 P. 216 (1905); Butts v. Ruthven, 292 Mich. 602, 291 N.W. 23 (1940); Campbell v. St. Louis Union Trust Co., 346 Mo. 200, 139 S.W. (2d) 935 (1940); In re Augestad’s Estate, 107 Mont. 619, 88 P. (2d) 32 (1939); In re Martinez’ Will, 47 N. Mex. 6, 132 P. (2d) 422 (1943); Case v. Smith, 142 Ohio St. 95, 50 N.E. (2d) 142 (1943); Branch v. Branch, 172 Va. 413, 2 S.E. (2d) 327 (1939); In re Kane’s estate,—Wash.—, 145 P. (2d) 893 (1944).
the claim of invalidity has been reduced to judgment. As the requirement of filing in apt time is a jurisdictional element, amendment of the law might well prevent any right from ever vesting.

It might be argued that the saving clause of the present Probate Act, adding to provisions in prior laws the additional saving of any "remedy accrued," has changed such rule. A clear vested right would be saved even without this provision because of constitutional protection. It does seem possible, then, that the addition of the words "remedy accrued" might have been intended to preserve not only substantive rights but also remedial provisions previously in effect. The use of the word "accrued" might have been intended to apply especially to remedial provisions, as distinguished from vested ones, since in order for a remedial provision to result in anything vested it would first have to be prosecuted all the way to final judgment after exhausting all appeals. The McQueen case, however, rejects any such argument and decides that even if such were the intention of the legislature it is not expressed strongly enough to produce a change in the prior condition of things.

Changes in the very nature of the right to contest a will have at times been intended by the legislature. As evidence, it might be noted that while the earlier law provided for the saving of the right of contest to infants and persons non compos mentis, such provision was omitted from the new Probate Act. Conversely, the provisions of present Section 90 relating to the survival of the right of contest in favor of representatives of potential contestants, and even to their grantees and assignees, did not appear on the statute books until 1919. But the benefit of these changes has been held inapplicable to contest proceedings pending at the time of the amendment because the survival of a cause of action, being an aspect of a substantive right, must attach at the time when the right to contest comes into existence. It could thereafter be enforced by revival, for such amounts only to remedial or adjective procedure.

80 Spaulding v. White, 173 Ill. 127, 50 N.E. 224 (1898); People v. Clark, 283 Ill. 221, 119 N.E. 329 (1918).
83 Illinois Probate Act Annotated (Foundation Press, Chicago, 1940), 323, states that "the procedural provisions of the Probate Act will apply not merely to proceedings begun after January 1, 1940, to enforce rights theretofore accrued, but also to proceedings pending on that date."
84 The rights of infants or persons non compos mentis to contest a will after removal of their respective disabilities was saved under Section 7 of the former Wills Act: Ill. Rev. Stat. 1939, Ch. 148, § 7. The Probate Act replaced that section with a much shorter one from which that particular provision was eliminated: Ill. Rev. Stat. 1943, Ch. 3, §242. The deletion was held constitutional and applicable in Masin v. Bassford, 381 I. 569, 46 N.E. (2d) 366 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 55.
85 The change was introduced by an act approved June 28, 1919: Laws 1919, p.992, §7. See also Ill. Rev. Stat. 1943, Ch. 3, §242.
86 Havill v. Havill, 332 Ill. 11, 163 N.E. 428 (1928). It is not too easy to see why a will contest, if purely remedial, can include as incidental thereto a substantive
In many instances, when there is a change in the time limited by statute for filing a will contest, there is ample notice of the change and sufficient time is left for interested parties to file. Such, at least, was the situation in the instant case, so no great hardship would result from the application of the newer provision. But it might happen that when the time for contesting is shortened, the shorter period has already elapsed or is about to do so. It will then be up to the parties, or their counsel, to become promptly informed of the new law so as to protect their interests accordingly. This may be difficult to achieve, but the difficulty is usually minimized when, as in the statute here concerned, the effective date of the new law is postponed until a reasonably substantial time subsequent to the date of its enactment.

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right to the survival of the action; nor, for that matter, if a will contest be considered a substantive right so as to permit survival, what makes it a mere remedial right for the purpose of determining the period during which the complaint may be filed. The only answer would seem to be that the statute so provides, however illogical such result may seem.

37 See, for instance, Wall v. Chesapeake & Ohio Ry. Co., 290 Ill. 227, 125 N.E. 20 (1919), a wrongful death action; and Sharp v. Sharp, 213 Ill. 332, 72 N.E. 1058 (1905), a will contest case. Only about six weeks were left in the latter case before the effective date of the new law.