1938

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Carl Seeman Jr.

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THE RETROACTIVE EFFECT
OF REPEAL LEGISLATION

By CARL SEEMAN, JR.*

Since the Eighteenth Century retroactive legislation has, by its very name, aroused great antagonism. Somehow it seems to imply unfairness, arbitrariness, uncertainty, and to bring in its wake the threat of oppressive and tyrannical government; that a person may have performed an act yesterday in a just reliance on the law, and today suffer because in the interim the legal consequences of that act have been changed, is a situation repulsive to all the so-called "natural instincts of man." \(^1\)


\(^1\) The English attitude from the time of Bracton has been unfavorable to retroactive legislation, but there has never been a successful attempt to deny the power of Parliament to pass such laws. Instead, the courts construe legislation very strictly to give it a prospective operation, and only allow retroactivity when required by the clearest terms of the statute. This attitude, in the past, however, was chiefly directed toward ex post facto laws; Blackstone criticizes laws which change the legal effect of past actions as very unreasonable. I Commentaries 46. The emphasis is clearly on criminal laws. For present law in England, Mew's Dig. Statutes, c. I, 3.

The ex post facto clause of the United States Constitution has been construed to apply only to criminal statutes (Calder v. Bull, 3 Dallas 386; Kring v. Missouri, (107 U. S. 221) 2 S. Ct. 443, and it might be thought that the United States courts would follow the English rule. But Justices Kent and Story used their great influence to implant in our law, in its infancy, a horror of retrospective legislation, and to read into our Constitution the idea that all such laws are contrary to the natural rights of man. In perhaps the most important opinion on the subject, Dash v. Van Kleeck, 7 Johns 477 (1811), quoted with approval in Duke Power Co. v. So. Carolina Tax Commission, 81 F. (2d) 513, as recently as 1936, Justice Kent said at pages 505-6: "Laws impairing previously acquired civil rights are equally within the reason of that [the ex post facto] prohibition and equally to be condemned. . . . The distinction [between the retroactivity of laws in criminal and in civil cases] consists only in the degree of oppression, and history teaches us that the government which can deliberately violate the one right, soon ceases to regard the other." The constitutions of several states contain provisions prohibiting retroactive legislation. See Note 11.

Decisions and textbooks, even to the present, retain a good deal of this holy horror, and the conception of vested rights, that is, rights which cannot be affected by later legislation, has been given the support of the contract and due process clauses of the Federal Constitution. 2 Sutherland, Statutes, 644 ff. and footnotes 38 ff. below. For a discussion of the status of retroactive legislation some years ago see Address by G. W.
The traditional objections to retroactivity may be combatted by a philosophic analysis. As Jerome Frank justly remarks, all law is, in a very real sense, retroactive, because no one can be quite sure what the legal effect of his action will be until the decision of the court has been handed down and put into effect. But this approach, conclusive though it may be to the philosopher of law, does not reduce our subject to meaninglessness. Though all law may be retroactive in the above sense, there is obviously enough practical predictability in the law in many situations to permit members of the community to act in just and justified reliance on the law. In most situations which confront the average person it is far more sensible to regard the law as settled than to regard it as uncertain, and therefore retroactive, either because there is one chance in a hundred that the court will reverse its previous decisions—or even because there is the far greater chance that for one reason or another "justice" will not be done.

A far more serious fault than that of being "unphilosophical", in those who accept the customary abhorrence of retroactive law, is that in so doing they ignore the basic problem of government. Every government is established within a framework of society, many parts of which have developed and exist independently of that government. If the government is to adjust any set of relations within that society, (and this is admittedly the function of government) it must to some extent alter and upset expectations, traditions, and even institutions. To the extent that this is done, the government must make illegal today that which yesterday was relied upon as perfectly legal. Laws

Biddle before the New York Bar Association, IV Report of N. Y. S. Bar Assoc. 107 (1880), and for a recent discussion, Bryant Smith, in 5 Texas L. R. 231 (1927) and 6 Tex. L. R. 409 (1928).

*J. Frank, Law and the Modern Mind, 34-5.*

*It must be granted, of course, that quite a number of situations arise which create relationships not as yet defined by any law, and when litigation occurs over such situations we have the so-called cases of first impression. These cases form an appreciable proportion of the total of litigated cases. But compared with the millions of legal relations which are daily created and dissolved during the multifarious transactions of our society, the number of unique situations referred to above is so small as to be negligible for the purposes of our present argument. The fact that this no man's land exists does not prevent persons from transacting the vastly greater proportion of their affairs with quite reasonable assurance that they are thus creating and dissolving legal relations which are perfectly predictable.*
which have this effect are often put into action and are indeed unavoidable. A man who buys a piece of land thinking that he may use it as he pleases is prevented by a zoning law from opening a store on it. A minimum wage law upsets the calculations and plans of the factory owner. A change in the tariff destroys the business of the importer, or throws the factory worker out of his job. All these persons depended upon a certain law and suffer because the law is changed. The sufferings may differ widely in degree (who is there who is not so injured at one time or another?) but they are all caused by the same sort of phenomenon.4

Retroactive laws, if permitted, make existing legal relations more uncertain, while they permit governments to perform their functions more freely than if such laws were forbidden. A business economy wants the least possible disturbance of the legal

4Although this paper deals particularly with the retroactive effect of repeal legislation, it must be remembered that this division of the subject is quite arbitrary. Whenever a law is passed dealing with a subject which has not been treated before by statute, and which changes whatever common law which has previously existed on that subject, persons who relied on the former state of the law are disappointed when the new law is applied to them, in exactly the same way as if they had previously relied on a written legislative enactment.

Courts have differed on what sort of expectations and rights they will disappoint and what sort they will protect, just as much whether the retroactive effect is produced by a repeal or not, but the remainder of this paper will deal only with cases which involve a repeal. Nevertheless, it must be borne in mind that the litigation over the effect of repeals has its parallel in the probably more numerous cases where retroactivity without repeal was involved. The situations given in the text at this point exemplify expectations which the courts will not protect; many of the constitutional cases on the "due process" clause, which have invalidated laws which injured property rights show that the courts will designate the same sort of expectations as "rights" and protect them as such against the retroactive effect of some legislation. "Walls v. Midland Carbon, 254 U. S. 300, 40 S. Ct. 543 (1920); Pa. Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 153 (1922) and very many others. The question also arises often under the "contracts" clause when the court has to decide whether the rights formerly possessed by the attacking party are to be protected or not. Note that the Connecticut saving statute quoted below in footnote 24 recognizes that the passage and repeal of laws may similarly affect existing rights.

An unusual distinction based chiefly in §327 of the California Political Code was made in Callet v. Alioto, 210 Cal. 65, 290 P. 438 (1930), where the court held that although a cause of action based on a statute fell simultaneously with the repeal of that statute, the Legislature nevertheless could not deprive anyone of an accrued common-law cause of action by abolishing that cause of action by statute. Pittsley v. David, 11 N. E. (2d) 461 (Mass., 1937) and discussion in 51 Harvard L. R. 1104 (1938). See footnote 37.
elements which condition business relations. The property owner wants to be secure in his possession of all those legal rights which constitute his property. All private interests in the community demand that they be inviolate not only in the present, but in the future as well. But a government which desires to improve the lot of those with less property, or to decrease the power of those with more property will want to alter the status quo whenever public benefits seem to warrant such a disturbance. Of course there is no solution to this fundamental dilemma of our present social and political structure.

At any rate nowadays we all admit the necessity of many deprivations of property by the government, and of alterations in its status. But we differ much as to how far the government should be allowed to go. The traditional attitude accepts tariff changes without complaints of unfairness, it even accepts zoning and minimum hours laws without much objection, but it claims to discern a class of "real" retroactive laws; laws which are of such a character that they can never be justified. Criminal laws penalizing actions which were legal when performed are the most obvious examples of this sort of "objectionable" law. Laws destroying rights of action are somewhat less disliked; opinions differ about laws changing rights of appeal and rules of evidence. In the rest of this article numerous examples will show that there is no definite way of telling whether a law that is actually retroactive (in that it brought injury to persons who depended on the law as it was before it was changed by this one) will also be called retroactive in the popular and objectional sense.

In this paper we can merely outline the above situation, for we intend to deal only with laws that are retroactive in the generally accepted sense; that is, laws whose retroactive effect is recognized by the courts. Furthermore, the subject which is studied herein is restricted to a single sub-division of the field of retroactive legislation; that is, the retroactive effect of repeals.

See R. Pound, Interpretations of Legal History, pp. 153-5 wherein the author makes an interesting distinction between cases where economic interests are chiefly involved, and those which concern the conduct of individuals. The former, he suggests, should be governed by rigid mechanical rules to obtain the maximum certainty so necessary for economic enterprises, while the latter cases should be governed by considerations of the individual case, because no set of rules could ever really cover most of the situations which arise. Criticized by Frank, op. cit. supra note 2, Part Two, ch. I, p. 207 ff.
The examination of this branch, however, brings to light a good many of the problems found in the whole larger subject, and in discussing it, we will gain some knowledge of the nature of particular difficulties which arise in all its phases.

To discover whether a law which seems to be a repealing law acts retroactively, two things must be determined. First, the law must really be a repeal of some existing law, and second, it must act in some way to affect some legal relation already existing by virtue of the law which is thereby repealed. The first problem is not within the field of our present inquiry, and only a summary of the “rules” controlling repeals will be given. The problem is one of construction.

Repeals may be roughly divided into two groups, express and implied. Express repeals are, of course, the simplest to apply. The new law repeals a previously enacted law, whether in whole or in part, in perfectly precise terms. The legislative intent is clear that the older law shall no longer be operative. But it is far commoner (even where the exact repealing clause is also present) to have a general repealing clause in a new statute, which says that all previous laws inconsistent with the present one are thereby repealed. This clause is really superfluous, however, because newer laws are always construed to repeal earlier ones which are inconsistent with the more recent. The difficulties which arise immediately are obvious. The new law may amend the old or may alter it in some minor way: punishment, procedure, definition, etc. It is then up to the court to decide whether the new law really changes the old so as to supersede it in whole or in part, or whether there is a continuation of the old law in the new and therefore no question of any loss of rights, because of repeal.6

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6 State v. Texas & N. O. Ry. Co., 58 Tex. Civ. App. 528, 125 S. W. 53 (1910) (repeal because of too substantial a change, though repeal by implication not favored); Galveston Ry. Co. v. Anderson, 229 S. W. 998 (Tex. 1920) (repeal because new law covers same subject); Heath v. State, 173 Ind. 296, 90 N. E. 310, 21 Ann. Cas. 1056 (1910) (no repeal—new law continues the old); State v. Hackman, 272 Mo. 600, 199 S. W. 950 (1917) (no repeal—new law continues the old). This question often arises after a revision of all the statute law of a state on a particular subject. Merlo v. Johnston City Coal Co., 258 Ill. 328, 101 N. E. 525 (1913).

A different sort of problem in this field arose in United States v. Curtis-Wright Export Co., 99 U. S. 304, 57 S. Ct. 216 (1935); in which case a joint resolution of Congress in 1934 gave the President power to
But we must pass on to our immediate subject and see what
the courts have done after they have decided that a repeal has
been effectively legislated. How shall the repealed law and how
shall the repealing law be applied? The common law rule has
always been that once a law has been repealed, it shall hence-
forth be as if it had never existed, but this rule has often been
modified by legislation and by qualifying judicial rules. The
legislation may be of two sorts: it may be precise and definite,
or it may be general in terms.

The precise expression of the legislative intent as to the effect
of repeal legislation is embodied in the so-called "saving" clause.
This section of the repealing act states that the said act shall not
be construed so as to effect any rights accrued, penalties or lia-
bilities incurred, proceedings pending, etc. under the law now
being repealed. The courts are willing to abide by such expres-
sions. For example, where proceedings were begun to enjoin
enforcement of a certain act passed in Missouri in 1905 and were
still pending after that act had been repealed, the court granted

put an embargo on shipments of arms to the Chaco region, if he did so
after consultation with the other South American countries and deemed
that it would aid peace. A Proclamation established such an embargo,
and the defendants violated it in 1934. In 1935 another Proclamation
revoked the first, and in 1936 an indictment was brought against the
defendants. At page 331 of the opinion the Supreme Court held that
the indictment was good; the law existed all along awaiting conditions
which would give it "occasion to function." The second Proclamation
merely removed the occasion for its exercise, and there was no need of
any saving clause to save penalties incurred, because there had never
been any repeal of the law at all.

In the foregoing case the court used the analogy of the old case,
Stevens v. Diamond, 6 N. H. 330 (1833) wherein the fact that the law
in question applied to a single period of one year did not prevent the
penalties incurred during the year from being enforceable later. The
New Hampshire court said at page 333: "A very little consideration
of the subject will convince anyone that a limitation of the time to
which a statute is to apply, is a very different thing from the limit of
the time a statute is to remain in force." But perhaps contra, Yeaton v.
U. S., 5 Cranch 281, 3 L. Ed. 101 (1809) wherein Marshall, C. J. said at
page 283: "It has long been settled on general principles that after
the expiration or repeal of a law, no penalty can be enforced, nor
punishment inflicted for violation of the law committed while it was in
force unless some special provision be made for that purpose by statute."

In Sturgis v. Spofford, 45 N. Y. 446 (1871) state pilotage laws were
superseded by Congressional legislation on the subject, but this was
held to suspend and not repeal the state laws. Thus a penalty pre-
viously incurred was still enforceable.

See note 36 below.
the injunction because the repealing act expressly saved all penalties which had been incurred under the now repealed law.8

But more often than not no express saving clause exists and the common law rule would step in to destroy all the effects of the repealed statute. Particularly as a result of some flagrant escapes from punishment due to this rule,9 the legislature in many states has seen fit to enact a blanket provision to cover its own occasional lapses and to show its disapproval of the common-law rule by permitting it to operate only when expressly required by the legislature.10 This "general saving statute" has even been embodied in the Constitution of three States.11 The courts, after some preliminary qualms, now construe such statutes as applicable to all legislation.12 The statutes have saved a

8 St. Louis & S. F. Ry. v. Hadley, 161 F. 419 (1908); see also Beilin v. Wehn, 51 Misc. 595, 101 N. Y. S. 35 (1906).
11 In these states the saving statutes refer only to criminal legislation: Cal. Polit. Code 1931, § 329; Mont. Rev. Codes 1935, ch. 12, § 97; Wash. Reming. R. S., § 2006 (Title 13, ch. 8).
12 Ariz. Const. § 22, 1, 2; N. M. Art. 4, §§ 33 and 34; Okla. Const. §§ 54-5. Note that these states are the last three to be admitted to the Union.
13 Constrained only to apply to Code adopted at one particular session of legislature: Continental Oil v. Montana Concrete, 63 Mont. 223, 207 P. 116 (1922). A similar situation existed in New York after the passage in 1892 of Stat. Const. Act, c. 677, § 31, a general saving statute. This law was ignored in People v. Cleary, 13 Misc. 546, 35 N. Y. S. 538 (1895), but in People v. Madill, 91 Hun. 152, 36 N. Y. S. 534 at 537 (1895) the court said that the law "simply prescribes a rule of construction applicable when not inconsistent with the general object of the subsequent statute, or that context of the language construed or other provision of the repealing law indication a different intent." This statement was approved in M'Cann v. New York, 65 N. Y. S. 308 (1900); in New York v. Herdjie, 74 N. Y. S. 104, 107, 68 App. Div. 370 (1902). Also, Taylor v. Strayer, 167 Ind. 23, 78 N. E. 236, 119 Am. St. Rep. 469 (1906), and Zintsmaster v. Aiken, 173 Ind. 369, 38 N. E. 509 (1899) for the earlier Indiana situation.
penalty incurred under a later repealed statute prohibiting the transportation of liquor.\textsuperscript{13} The statutory right which accrued to a child at birth to be supported by its father cannot be destroyed by repeal of the statute when a general saving statute stands behind the legislation of the state.\textsuperscript{14} The General Construction Law of New York has been held to save a mandamus proceeding to withdraw registration of a title after the statute which supported the proceeding had been repealed.\textsuperscript{15} Personal liability of directors of corporations incurred before the statute which imposed the liability was repealed is not avoided by repeal of that statute,\textsuperscript{16} nor is liability under a wrongful death statute avoided.

General saving statutes vary much in details as well as in length. The Illinois statute is very lengthy (R. S. 1935, ch. 131, § 4):

"No new laws shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law or in any way whatever to affect any offense or act so committed or done or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect save only that proceedings thereafter shall conform so far as practicable to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the Act making any new provision on the same subject or in any other Act."

Compare with this the brief statute in effect in Indiana (Burns, Ann. Stat. 1933, I, 307), and in Federal legislation (Mason's U. S. Ann. Code I, 29):

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing Act shall so expressly provide, and such statute shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

The Illinois statute makes no mention of expression of legislative intent to avoid the effect of the statute; neither does the Kentucky savings statute, but in Pannell & Co. v. Louisville Warehouse, 113 Ky. 630, 68 S. W. 662 (1902) it was held that such legislative intent can override the effect of the Kentucky saving statute. The effect of the omission may perhaps restrict the effectiveness of the statute by allowing the implication of legislative intent to avoid the statute, which otherwise requires an express provision.

\textsuperscript{13} Commonwealth v. Louisville & N. Ry., 186 Ky. 1, 215 S. W. 938 (1919).
\textsuperscript{14} State v. Shepherd, 202 Iowa 437, 210 N. W. 476 (1926).
\textsuperscript{15} People v. Cheshire, 128 Misc. 10, 217 N. Y. S. 215 (1926).
\textsuperscript{16} Cavanaugh v. Patterson, 41 Colo. 158, 91 P. 1117 (1907). But see Coombe v. Getz, discussed on page 10 of text.
if the accident occurred before the statute was repealed,\footnote{Lavner v. Chicago-Sandoval Coal Co., 179 Ill. App. 476 (1913).} because the general saving statutes of the states of Colorado and Illinois intervened in such situations. Under a similar legislative set-up, a particular method of capital punishment,\footnote{Simborski v. Wheeler, 121 Conn. 195, 183 A. 688 (1936).} an action to enforce registration of county bonds,\footnote{State v. Hackman, 272 Mo. 600, 199 S. W. 990 (1917).} and in a great variety of other cases,\footnote{Crittenden v. Judson, 57 Conn. 333, 17 A. 929 (1889); People v. Zito, 237 Ill. 434, 86 N. E. 1041 (1908); Carlton v. Herndon, 81 W. Va. 219, 94 S. E. 131 (1917); Miller v. Chicago & N. W. Ry. Co., 133 Wis. 183, 113 N. W. 384 (1907); Chicago, Peoria & St. Louis Ry. Co. v. People, 136 Ill. App. 2 (1907); In re Schenck, 78 Kan. 207, 96 P. 43 (1909) (general saving statute saves the severer criminal penalty because the Kansas law has no provision as do the Illinois and New York laws, allowing the milder penalty to be applied when a criminal punishment is mitigated by a repealing law); Merlo v. Johnston City Coal Co., 258 Ill. 323, 101 N. E. 525 (1913); O'Donnell v. Ritter-Conley Mfg. Co., 172 Ill. App. 601 (1912). See also Dec. Digests—Statutes, 272-277 and Amer. Dig. Cent. Ed. Statutes, 365-375.} a similar result has been reached.

Where the saving statute requires an express legislative provision to avoid its effect, the courts may construe strictly, as in United States v. Chicago, St. Paul, M. & O. Ry.\footnote{Hepburn Act of 1906, § 10.} In this action the defendants had incurred a penalty under the Elkins Act which forbade the giving of rebates by interstate carriers. The Hepburn Act, passed before indictment, added “carrier or shipper” after the words “person or corporation”. and added “knowingly” to provisions otherwise similar to the Elkins Act. The Hepburn Act generally repealed all laws in conflict with it and expressly saved “causes now pending in the United States courts”.\footnote{Quoted in note 12.} The Federal saving statute allows only expressed legislative intent to override its provisions,\footnote{151 F. 84 (D. Minn. 1907).} and it was the contention of the defendant that the saving of pending cases excluded the saving of any others. But since this conclusion can only be reached by implication, the court held that it could not be allowed to defeat the general saving statute. Though this decision is strict, it must also be noted that the Hepburn Act clearly intended to continue the spirit and most of the content of the Elkins Act, indeed was stricter in several ways, and therefore, there was not even an implication of any Congressional intent to release offenders under the prior statute.
The background of legislation and other facts should always be examined in such doubtful cases, because it is necessary to know many facts before it can be seen whether the new law really changes the old, and (where implied legislative intent to avoid the saving statute can be effective) whether the sort of change made indicates an intent to release offenders under the earlier law.

There have naturally been attempts to apply the sustaining qualities of the general saving statutes to support things which the courts have declared to be beyond the power of such laws. For example, a Connecticut decision based on the strict words of the statute which saves "any action then pending", held that the right to appeal, if not applied for by the time of repeal of the statute providing for the appeal, was not saved. It has been said that the statute refers only to rights of a private nature, and that it cannot save a mere rule of evidence; nor

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24 Neilson v. Perkins, 86 Conn. 425, 85 A. 686 (1913). Accord: Worley v. Pappas, 161 Miss. 330, 135 So. 348 (1931). The Connecticut saving statute provides "that the passage or repeal of an act shall not affect any action then pending," but the court stated that this is only a rule of construction and preserves no rights possessed under the statute repealed; the legislative intent, whenever ascertainable, is always to be paramount. Since the repealing act in question was clearly intended by the Legislature to take effect at once, there is no need to use this rule of construction, but the court will apply the act in accord with that intent.

25 Coffey v. Rader, 182 N. C. 689, 110 S. E. 106 (1921). During an action to restrain the holding of a recorder's court in a certain district, a law was passed withdrawing the whole district from the judiciary act establishing it, and thus taking away all power to hold the court. The Supreme Court denied that the saving statute was applicable because it refers only to rights and interests of a private nature, and here the question involved only the power of the legislature to abolish the court.

26 Virginia & W. Va. Coal v. Charles, 251 F. 83 (1917) affd. 254 F. 379, 165 C. C. A. 599 (1918). In an ejectment action the title depended on the validity as evidence of copies taken from records of deeds made prior to 1865 and now destroyed. A 1912 law made such copies prima facie evidence, the suit was begun in 1913, and in 1914 the law was repealed. The court said that only an inchoate procedural right had been created in the plaintiff while the saving statute protected only accrued procedural rights. Whether the case was begun before or after the law had been passed, the copy lost its character as prima facie evidence. The court declared that any other decision would affect the title to most of the real property in the state, but actually the court could have limited the effect of the act to actions begun while it was in effect. It seems not unlikely that litigants might have sold or claimed land in reliance upon what the court designates as "procedure" here, and that the application of the said procedure might have made all the difference between a good title and a bad one. (See note 47 below.)
will it protect a privilege as opposed to a right.\textsuperscript{27} Care must always be used, of course, in reading the saving statute in question, as they differ from state to state. For example, the New York law does not save the severer criminal penalty of the repealed law, if the repealing law is milder for the same offense.\textsuperscript{28} A robbery in New York, committed by a fifteen year old child, was held to be juvenile delinquency and no felony, because a law passed after the crime, made all non-capital felonies by persons under sixteen amount only to juvenile delinquency.\textsuperscript{29} Where the law in question depends entirely on a constitutional amendment, and that amendment has been repealed, all penalties under the law are avoided. This is because the people have withdrawn the only authority under which Congress could pass such a law, and the government is thus without power to continue the execution of that law; the Federal saving statute cannot give Congress such power and therefore is without effect in such a case. The application of the common-law rule was declared very appropriate in this situation.\textsuperscript{30}

In three states, Oklahoma, New Mexico and Arizona, the state constitution contains a general saving provision.\textsuperscript{31} These provisions seem to act no more rigidly than do similar statutes in other states. Statutory proceedings by state officers to discover state indebtedness, preliminary to issuing of bonds,\textsuperscript{32} have been saved, as well as mortgage foreclosure actions begun before the passage of a mortgage moratorium bill.\textsuperscript{33} But it has been held

\textsuperscript{27}Miller v. Hagemann, 114 Ia. 195, 86 N. W. 281 (1901). A law declaring that property assessed for certain special taxes should be exempted from payment of general street taxes until the latter exceeded the amount of the former, was held to grant only a privilege to the owners of such property, which could be abolished by later legislation. No contract had been established between the state and the property owners by the original law. See R. R. Co. v. Grant, 98 U. S. 398, 402 (1879) wherein the right to appeal to any particular court was referred to as a privilege which the legislature can withdraw at will regardless of the effect on pending appeals. (See footnote 36 below).

Welton v. Iowa State Highway Comm., 211 Iowa 625, 233 N. W. 876 (1930).

\textsuperscript{28}People v. Roper, 259 N. Y. 635, 182 N. E. 213 (1932).

\textsuperscript{29}People v. Roper, 258 N. Y. 170, 181 N. E. 88 (1932).


\textsuperscript{31}See Footnote 11.

\textsuperscript{32}In re Application of State to Issue Bonds, 40 Okla. 145, 136 P. 1104, Ann. Cas. 1913 E, 470 (1913).

\textsuperscript{33}State v. Worten, 167 Okla. 187, 29 P. (2d) 1 (1933).
that the saving provision does not affect procedure, and therefore will not save the right to file an appeal within one year, when a later law reduces the time limit to sixty days (and the appellant still had some time to file his appeal). Likewise an application to a court expires when the statute giving jurisdiction to the court is repealed.

The other division of our subject deals with the retroactive effect of repeals where there is no saving clause or legislative provision of any kind; in short where the common law rule of construction must be applied. As remarked above, this rule states uncompromisingly that the repeal of a statute makes that statute as ineffectual from that moment as if it had never existed. Immediately all proceedings under it which have not gone to a final judgment must cease. All rights, liabilities, penalties, forfeitures and proceedings expire when the law on which they are founded is repealed. "The bringing of suit vests in a party no right to a particular decision; and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered." There are hundreds of cases in which the

35 In re Feland's Estate, 26 Okla. 448, 110 P. 736 (1910).

Several other states, including Colorado, Georgia, Idaho, Missouri, Montana, New Hampshire, Ohio, Tennessee and Texas have constitutional provisions forbidding retroactive legislation categorically, but I do not know what effect this clause has upon our subject. See 35 Yale L. R. 482, footnote 10.

36 2 Cooley, Const. Limit. 789: "When a cause of action is founded on a statute, a repeal of that statute before final judgment destroys the right, and a judgment is not final in this sense so long as the right of exception remains." L. Lewis' Sutherland, Statutory Construction (2nd Ed.) p. 285.

"As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repeal statute and defeats all actions pending under it at the time of its repeal. . . A suit the continuance of which is dependent upon the statute repealed stops where the repeal finds it." 35 Cyc. 1228.

In Ex Parte McCardle, 74 U. S. 506, 19 L. Ed. 284 (1868), the law authorizing the appeal was repealed while appeal was pending and the court, following Insurance Co. v. Ritchie, 72 U. S. 541, 18 L. Ed. 540 (1866), said: "Jurisdiction is the power to declare the law and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (Page 514.)

The whole common-law situation is ably discussed at length in People v. Bank of San Luis Obispo, 169 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cases 1912B, 1148, wherein many English and American cases are cited and considered. (The case itself, however, decides only that under the California Code a cause may have come to "final
rule has been applied, and quite a few jurisdictions which still do apply it.

judgment" and thus be unaffected by subsequent repeals, even though a motion for a new trial is still pending).

The "reason" for the common-law rule is given in the San Luis Obispo case at page 872 as follows:

"The reason why proceedings must abate under these circumstances (i.e., when the law upon which the cause of action depends has been repealed at any time before final judgment) is that, because of the suspension of the judgment by appeal it is without finality; that to give it finality the Court of Appeals must itself pronounce its judgment; and that in pronouncing its judgment it must be governed by the existing law. Therefore, when it finds that by the existing law the previous law, under which alone validity can be given to the judgment, has been repealed, the sole prop and foundation for the support of the judgment has been removed, and of necessity it must be declared null and void."

The foregoing reasoning, of course, applies with equal force to the situation confronting the trial court judge either on demurrers when repeal has occurred before the action has been brought, or on motion to dismiss, etc., when repeal occurs during the trial. But the reasoning itself is unsatisfactory since it assumes without justification that the "existing law" cannot include such rules of construction as would require the application of now repealed laws to causes of action which arose when these laws were in effect.

In Callet v. Alioto, 210 Cal. 65, 290 P. 438 (1930) the court stated the usual rule and justified it by paraphrasing § 327 of the California Political Code as follows: "The justification for this rule is that all statutory remedies are pursued with the full realization that the Legislature may abolish the right to recover at any time." This statement however gives no reason why the rule should be this rather than the opposite.

The rather primitive formalism of this common law theory (which has often been quoted with approval in American cases) contrasts interestingly with those ideas which found their origin in the Eighteenth Century and rest upon the still popular, though insecure basis of "natural rights." (See first paragraph of the text and footnote 1, as well as the section on "vested rights" in the text.) That either of these rationales should seriously be adopted by a defender and interpreter of the law is a commentary on the state of legal theory in this country.

27 Brown's Committee v. Western State Hospital, 110 Va. 321, 66 S. E. 43 (1909) (state's right against estate of lunatic destroyed by repeal).

Sharrock v. Krieger, 6 Ind. T. 466, 98 S. W. 161 (1906) (repeal destroys equitable features of case; remanded to law court.)

Crow v. Cartledge, 99 Miss. 281, 54 So. 947, Ann. Cas. 1913E 470 (1911) (right to taxes lost when defendant is exempted under later statute).


Galveston Ry. Co. v. Anderson, 229 S. W. 998 (Tex. 1920). (Violation of a statute not prima facie evidence of negligence, when new law passed after accident and before trial repeals provision which made it so.)

Pittsley v. David, 11 N. E. (2d) 461 (Mass. 1937). Plaintiff was
The common law rule has often been deemed to be too harsh, for it frequently gives a retroactive effect to repealing laws with all the evils, real and fancied, resulting therefrom. Courts which claim to adopt the rule have come to feel that in some cases an exception should be made. They feel and say that it is against "natural justice", a violation of "natural rights", to allow legislation to deprive an individual of certain sorts of legal rights. The Supreme Court of the United States and the state courts have used the doctrine of "vested rights" to support this attitude. Not only has the contracts clause of the Federal Constitution been invoked whenever anything slightly resembling a contract has been discovered, but the Supreme Court has gone so far as to say that to deprive anyone of a vested right is equivalent to a deprivation of property without due process of law and unconstitutional under the Fifth and Fourteenth Amendments. The alteration of the Dartmouth College charter by the New Hampshire legislature was declared unconstitutional in Dartmouth College v. Woodward, because the charter was declared to be a contract which might not be impaired under Article I, Section 10 of the Federal Constitution. An even more peculiar interpretation occurred in Coombes v. Getz. A provision of the State Constitution of California making directors of corporations liable to stockholders and creditors for embezzlements of officers was repealed during the appeal of a suit to enforce this liability. The state Supreme Court held that the common law rule applied

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guest in defendant's car when injured by act of defendant's servant. The act consisted of driving on the left-hand side of the road and by a statute existing at the time of the accident created a liability for all damages resulting therefrom. Between the accident and time of trial this statutory provision was repealed, and the Supreme Judicial Court, refusing to give the repeal prospective operation only, applied the common-law rule and denied recovery. The Court stressed the fact that the action was purely the creature of statute. "What the Legislature gave it could take away, no vested rights being involved." (At p. 464.) Discussed in 51 Harvard L. R. 1104 (1933).

38 A vested right is "absolute, complete and unconditional to the exercise of which no obstacle exists and which is immediate and perfect in itself and not dependent on any contingency." State v. Hackman, 199 S. W. 991 (Mo. 1917).

Cooley, Const. Lim. (8th ed.) 745. A vested right is an "interest which it is right and equitable that the government should recognize and protect, and of which the individual cannot be deprived arbitrarily without injustice."

39 A. Wheaton 518 (1819).

and dismissed the suit. But the United States Supreme Court distinguished between a liability established by a statute and one established by constitutional provision and declared that the latter created a contractual liability in the directors of which the plaintiffs could not be constitutionally deprived. The same question arose very recently in the case of Indiana ex rel Anderson v. Brand, when the court decided that the repeal of the so-called Teachers' Tenure Act of Indiana could not constitutionally be applied to affect a "permanent" teaching contract entered into between State and teacher under the provisions of that Act. Justice Black dissented on the ground that there was no real contract involved.

A not entirely dissimilar situation caused the invoking of the due process clause in Ettor v. Tacoma. Here the plaintiff sued under an 1893 law to recover damages resulting from the defendant's grading of the street in front of his property. After suit was brought, but before trial, the law was repealed. There was no saving clause here, and the plaintiff's right was purely statutory. The state court again applied the common-law rule, and dismissed the suit. Again the United States Supreme Court reversed, stating that the obligation of the defendant had become fixed before repeal, and that the plaintiff had previously acquired a vested property right, of which he could not be so deprived by due process of law. In Duke Power Co. v. South Carolina Tax Commission, the plaintiff paid certain taxes to the state under protest. During the suit to recover the taxes, the statute permitting payment under protest was repealed, and the defendant claimed that the suit must be dismissed on the ground that the state had now withdrawn its permission to be sued. The Federal Court, however, stated that the common-law rule must not be applied to affect rights already vested under the statute, that to do so would violate "elementary principles of reason and justice," and that it would deprive the plaintiffs of property without due process of law.

At times courts also employ the vested rights rule without

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41 Coombes v. Franklin, 213 Cal. 164, 1 P. (2d) 992 (1931).
42 58 S. Ct. 443, 82 L. Ed. 444 (1938).
44 Ettor v. Tacoma, 57 Wash. 50, 106 P. 478 (1910); Ettor v. Tacoma, 57 Wash. 50, 107 P. 1061 (1910).
45 81 F. (2d) 513 (1936).
mention of constitutionality, as if it were an independent concept.

From the foregoing examples it will be seen that the principle of vested rights is complex and indefinite, and in the last analysis, of very little practical value. What is a vested right? The question is surely a reasonable one, but the answer must be unsatisfactory. A vested right is one that cannot be affected by later legislation. We never know whether a right can be affected by later legislation until we know whether or not it is vested. The reasoning is entirely within this small circle; it is very difficult to discover any substantial content in the concept which might guide the judicial discretion in making its decisions. Thus are the courts given a fairly complete freedom to decide which rights are vested and which are not. This is true despite the fact that some courts feel that certain formal rules can be applied to decide the question objectively. As a result it is not surpris-

46 See cases cited in footnote 48 for examples of this.

47 It has often been said that there can be no vested right in a penalty, and courts usually refuse to enforce any penalty after the statute on which it is based has been repealed. “The repeal of the law imposing a penalty is in itself a remission.” Maryland v. B. & O. Ry., 3 Howard 535, 552 (1845); Norris v. Crocker, 13 Howard 429, 14 L. Ed. 210 (1850); Speckert v. Louisville, 78 Ky. 288 (1878); Denver & R. G. Ry. v. Crawford, 11 Colo. 598, 19 P. 673 (1888); Anderson v. Byrnes, 122 Cal. 272, 54 P. 821 (1898). Of course, this brings up the question of whether the statute is penal or not. In the last case cited above, for example, the statute gave any stockholder a right to sue the directors of the corporation for $1,000 “liquidated damages” upon the failure of the directors to post a monthly balance sheet, but the court ignored the literal sense of the statute and declared it to be penal. See Coombes v. Getz, discussed in the text at page 88 for one method of avoiding the general rule.

It has been said that there is no vested right in a remedy. In Butler v. Palmer, 1 Hill (N. Y.) 324 (1841), the plaintiff acquired a statutory right to redeem from a mortgage foreclosure any time during the following year. During the year the statutory time was decreased to about six months, and it was held to be the settled rule that the time limitation on the plaintiff might be reduced constitutionally, since only the remedy was thereby impaired. This case contains a good discussion of still earlier cases, but naturally it fails to clearly define the line of distinction, and gives no basis for such a distinction, except a general appeal to reason and fairness.

What is probably another way of phrasing the rule that no one has a vested right in a remedy is to say that no one can have a vested right in a matter of procedure, because the terms remedy and procedure are both used in contrast to the terms “right” and cover the same ground. The well-known, often used, distinction between “right” on the one hand and “remedy” or “matter of procedure” on the other can be defined only in terms of each and every of the numerous decisions; one can seldom if ever be positive into which category any particular
entity belongs. But at least a few illustrations will serve to indicate the points at which the line has been drawn in the past. In Ettor v. Tacoma, supra, footnote 43, it was held that to deprive the plaintiff of all right to recover under a statute for damage done to his property by street grading, because the statute had been repealed, was a deprivation of property without due process of law. In Crane v. Hahlo, 258 U. S. 142, 42 S. Ct. 214 (1922), however, the plaintiff, who had already been awarded damages for a similar injury, was deprived of the right which he had possessed when the cause of action arose, to have the award of the New York City Board of Assessors reviewed in the State Supreme Court. The right to this review was abolished by statute, but the United States Supreme Court said that "so long as a substantial and efficient remedy remains or is provided, Due Process of Law is not denied by legislative change" (at p. 147), that the plaintiff had had such a remedy by being heard before the Board of Assessors, and thus had been amply protected in his "fundamental rights." The court cited R. R. Co. v. Grant, 98 U. S. 398 (1879) in which it was decided that "a party to a suit has no vested right to an appeal or writ of error from one court to another. Such a privilege once granted may be taken away." (At page 401.) A long line of cases both in the State and Federal courts have agreed that the right to an appeal is a matter of procedure only. See footnotes 36 and 24, supra.

Something which approaches a practical standard for determining whether the matter is right or procedure is more or less explicitly stated in Summers v. U. S., 231 U. S. 92, 34 S. Ct. 38 (1913). Here a defendant in a criminal action was indicted in 56 counts at a time when the law allowed only one count in each indictment. Defendant demurred to the indictment, was overruled and convicted; before the appeal was taken the law was changed so as to allow any number of properly related counts in an indictment. The court below said that the error had become immaterial because of the change in the law, but the Supreme Court reversed, declaring that the defendant had lost a "substantial" right, i. e., the right to choose his pleading, and that "had the law been different, his pleading might have been different."

The above cases may be stated under the general and vague rule that neither party to a cause of action may be substantially prejudiced by a change in the law. In the first case no one can fairly claim that the right to appeal to a particular court, or to appeal at all, was a factor on which they relied when they brought suit or took other steps during the litigation. Thus to find out whether the matter in question concerns right or procedure we must answer this question: If the complaining party had known in advance of the change to be affected by the later repeal, would he have acted so differently at any point in the litigation, that the result of the litigation might reasonably have been different? This suggested standard is fairly comprehensible and useful and is implicit in many of the decisions which do no more than, state the rule in its barest terms. On the other hand this standard is no guarantee of uniformity in the decisions employing it as the essential question can only be answered by exercise of judgment. See footnote 26, supra.

It has also been stated that there can be no vested right in the "existing law," Arnold & Murdock Co. v. Industrial Comm., 314 Ill. 251, 146 N. E. 342 (1924); Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849 (1933); nor in a "legal defense," Ewell v. Daggs, 108 U. S. 143 (1883); Tift v. Buffalo, 52 N. Y. 204 (1839) and that no one can have a vested right to do wrong, Downs v. Blount, 170 F. 15 (C. C. A. 5th 1909);
ing that different courts have been quite inconsistent in their pronouncements as to the "vestedness" of various rights.48

Besides the doctrine of vested rights, the courts are anxious to use other pretexts to avoid the full effect of the common law

Goshen c. Stonington, 4 Conn. 209 (1822); Matter of Sticknoth, 7 Nev. 223 (1872). Taken from 44 Yale L. R. 358-9.

It must be noted also that a number of cases decide that one sort of right or another cannot be divested but do not designate that right as a "vested" one. These cases are substantially identical with the "vested" right cases and can be considered on the same basis.

A compilation has been made in 44 Yale L. R. 358 in which (among other things) it is noted that the courts have held that "existing joint-tenancies can and cannot be changed into tenancies in common . . . ; that misconduct occurring before the enactment of a divorce statute making such misconduct grounds for divorce can and cannot be so used; that claims barred by the Statute of Limitations can and cannot be revived, etc., etc.

See footnote 4, supra, for a statement of the California rule that statutory actions may be destroyed by repeal of the statute, but that accrued common-law causes of action cannot be affected by later legislation. It is hard to find any practical basis for this distinction.

For the effect of shortening of the Statute of Limitations period while the statute is running, see Sohn v. Waterson, 17 Wall. 596 (1873); U. P. Ry. v. Laramie Stock Yards, 231 U. S. 190 (1913); Fannin County v. Renshaw, 29 S. W. (2d) 475 (Tex., 1930); McGirr v. Pritchard, 258 Ill. App. 467 (1931).

48See Note in 44 Yale L. J. 358 for a typical summary of contradictory decisions.

James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082 (1909) (plaintiff's right to recover in accident case on basis of speed limit in effect at time of accident, is saved).

Summers v. U. S., 231 U. S. 92 (1913) (defendant demurred below correctly on law as it then was, and cannot be judged except on law as it was when he relied on it).

U. P. Ry. Co. v. Laramie Stock Yards, 231 U. S. 190 (1913) (plaintiff cannot be deprived of right to sue because of shortening of statute of limitations).

Lindemann v. American Insurance Co., 217 Mich. 698, 187 N. W. 331 (1922) (statute in force when policy was made becomes part of policy and terms of latter are unaffected by later repeal of statute).

Bank of Norman Park v. Colquitt City, 169 Ga. 534, 150 S. E. 841 (1929) (depositor has vested right in priority under statute in effect when deposit was made).

But Mississippi Bldg. & Loan Assoc. v. McElveen, 100 Miss. 16, 56 So. 187 (1911) (state can alter charters and deprive corporations of rights granted therein).

Detroit Trust Co. v. Allinger, 271 Mich. 600, 261 N. W. 90 (1935) (stockholder's immunity under earlier statute may be altered and stockholders made liable by later statute).

Continental Oil v. Montana Concrete, 63 Mont. 223, 207 P. 116 (1922) (no vested right in director's liability after this penalty is repealed).

Butler v. Palmer, 1 Hill (N. Y.) 324 (1841). See footnote 47.
rule. Many of the cases in this class could be called vested right cases, except that the phrase is not used. At any rate, in this latter division of our subject great uncertainty exists, and to get an idea of what future decisions will be, one must examine not only the facts of the case and the past decisions in the jurisdiction with great care, but must also consider the temperament of the judge and be on the look-out for constitutional issues. The more conservative the court, the more likely will it feel that the rights involved (particularly property rights) should not be divested because it would be unreasonable or unfair or against elementary principles of justice to do so, and thus the court will be more likely to declare that right unalterable by legislative action—or vested. The tradition in this country is far more conservative than in England where no doctrine of vested rights exists, and thus the courts here have been little affected by English precedents. The American courts seem to feel that the power of the judiciary is at stake, and that the division of powers in our government makes it impossible to give the legislatures (even of the states) full power to enact laws with retroactive effect.

To sum up we may note that under the strict common-law rule there is hardship to litigants, evasion of the law by criminals and others, and uncertainty of both personal and property rights in the whole community. This situation has been partly caused by the inability of the legislatures to foresee and provide for all the consequences of the repeal of any given law. Therefore many

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\[ ^{49} \text{Modern Brotherhood of America v. Lock, 22 Colo. App. 409, 125 P. 556 (1912) (suicide an illegal defense to policy when policy was made and remains so despite later change of statute); Brown & Co. v. Ware, 88 A. 507 (Vt. 1913) (statutory liability of directors of grange store creates a contract with creditors and repeal cannot affect this); People v. Carpenter, 274 Ill. 103, 113 N. E. 135 (1916) (repeal of law cannot affect trust established under it); Mutual Film Corp. v. Morris & Daniel, 184 S. W. 1060 (Tex. 1916) (after trial and before appeal new act says what defendant does not deny is regarded as confessed; it cannot be used on appeal); Drainage District No. 7 v. Bernards, 89 Ore. 531, 174 P. 1167 (1918) (repeal of statute allowing lien by drainage district is construed prospectively—defendant cannot be let off—a virtual contract existed); Kingan v. Ossam, 75 Ind. App. 548, 121 N. E. 289 (1918) (modification of Workmen’s Compensation proceedings cannot deprive plaintiff of his right to appeal under older rules).} \]

\[ ^{50} \text{One topic not discussed in the body of this paper, yet related to our subject is the effect of the repeal of a repealing law to revive a repealed statute. Under the common law this former act was revived, but most states now have specific statutory prohibitions of any such effect. (Bouvier, Repeals) The desirability of such legislation is obvious.} \]
states have felt that there would be less hardship in retaining all rights, penalties, etc., under repealed laws, and therefore they enacted general saving statutes. It is impossible to say that either of these general rules would prove better than the other in all cases, but reason and experience seem to show that the general saving statute will be better in the majority of cases. A legislature cannot be expected to provide for all contingencies when it repeals a law; thus the general rule which seems best is set up, and the legislature is allowed to avoid it whenever it clearly expresses the intention to do so. Not only does this system seem fairest, but it is quite easy for the courts to apply, and should give the courts more confidence that the legislature knows what it is doing, and thus decrease the judicial urge in such cases to construe liberally.

The other method of avoiding the difficulties imposed by the common-law rule is far less satisfactory. The whole body of law discussed above under the general name of "vested rights" is so vague that it gives the judiciary virtually an undefined and unrestrained power. There seems to be no such great ignorance, inefficiency or corruption in our legislatures as to warrant giving the judiciary such a check upon them. In England the courts construe retroactive legislation strictly, but give effect to it if they are satisfied of the clear legislative intent, and English experience does not show any great evils arising from the complete freedom of Parliament to pass retroactive laws. It is to be hoped that we will get rid of our unreasonable association of retroactive laws with legislative tyranny, cease to apply the doctrine of "vested" rights in the cases and adopt the English attitude.

"Though no great hardship from the common-law rule seems to have occurred in England."