IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1961

No. 91

ROBERT MACK BELL, LOVELLEN P. BROWN, ARIMENTHA D. BULLOCK, ROSETTA GAINEY, ANNETTE GREEN, ROBERT M. JOHNSON, RICHARD McKOY, ALICETEEN E. MANGUM, JOHN R. QUARLES, SR., MURIEL B. QUARLES, LAWRENCE M. PARKER AND BARBARA F. WHITTAKER,

Appellants,

v.

STATE OF MARYLAND,

Appellee.

APPEALS FROM THE CRIMINAL COURT OF BALTIMORE (JOSEPH R. BYRNES, Judge) AND ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The State adopts Appellants' Statement of the Case.

QUESTIONS PRESENTED

The State accepts the Questions Presented by Appellants.

STATEMENT OF FACTS

The State adopts Appellants' Statement of Facts.

STATUTES INVOLVED

Section 577, Article 27, Annotated Code of Maryland (1957 Edition). (Criminal Trespass after Warning Statute):

> "Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor . . . provided . . . That nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others . . . ."[1]

Section 11, Article 49B, Maryland Code (1963 Supp.) (State Public Accommodations Law):

> "It is unlawful for an owner or operator of a place of public accommodation or an agent or employee of said owner or operator, because of the race, creed, color, or national origin of any person, to refuse, withhold from, or deny to such person any of the accommodations, advantages, facilities and privileges of such place of public accommodation. For the purpose of this subtitle, a place of public accommodation means any hotel, restaurant, inn, motel or an establishment commonly known or recognized, as regularly engaged

[1] Section 577 has been amended on two occasions since Appellants' convictions — Chapter 616, Acts of 1961, made certain technical amendments of no pertinence here, and Chapter 453, Acts of 1963, provided that nothing in the Trespass Act should be construed as being in conflict with the authority of Baltimore City to enact a Public Accommodations Ordinance.

in the business of providing sleeping accommodations, or serving food, or both, for a consideration, and which is open to the general public; except that premises or portions of premises primarily devoted to the sale of alcoholic beverages and generally described as bars, taverns, or cocktail lounges are not places of public accommodation for the purposes of this subtitle * * *."[2]

Section 3, Article 1, Maryland Code (1957 Edition). (General "Saving Clause" Statute):

"The repeal, or the repeal and re-enactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal, shall not have the effect to release, extinguish, alter, modify or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal which shall have been incurred under such statute, section or part thereof, unless the repealing, repealing and re-enacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and re-enacted, revised, amended or consolidated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings or prosecutions, civil or criminal, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability."

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[2] Sections 12-16 of this Article set forth the enforcement powers provided by law to persons aggrieved by racially discriminatory practices notwithstanding the proscription of Section 11.

Baltimore City Ordinance No. 1249, effective June 8, 1962, added Section 10A to Article 14A of The Baltimore City Code (1950 Ed.) and is in all respects here material similar to the State Public Accommodations Act.

ARGUMENT

I.

THE PASSAGE OF PUBLIC ACCOMMODATION LAWS BY THE CITY OF BALTIMORE AND STATE OF MARYLAND, WHILE THE CASE AT BAR WAS ON APPEAL, DOES NOT REQUIRE REVERSAL OF APPELLANTS' CONVICTIONS.

Appellants were convicted on March 24, 1961, in the Criminal Court of Baltimore, of the crime of wanton trespass upon private property (a restaurant) in violation of Section 577 of Article 27, Annotated Code of Maryland (1957 Edition). The convictions were affirmed by the Court on January 9, 1962 — *Bell v. State,* 224 Md. 186 — but the mandate was stayed pending application for certiorari, which was filed with the Supreme Court of the United States on June 8, 1962. On this same day, the City of Baltimore enacted Ordinance No. 1249, adding Section 10A to Article 14A of the Baltimore City Code (1950 Edition), which Section, *inter alia,* prohibited owners of places of public accommodation, as defined in the Ordinance (including a restaurant), from denying services or facilities to anyone solely because of his race.[3] Similarly, effective June 1, 1963, the State of Maryland, by Section 11 of Article 49B of the Maryland Code (1964 Supp.), made it unlawful for an owner of a place of public ac-

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[3] This Ordinance was declared invalid by the Circuit Court of Baltimore City (Harlan, J.) on January 31, 1963, the court being of the opinion that the Ordinance was in conflict with the State trespass law, a public general law, and hence beyond the authority of the City to enact. *Karson's Inn, Inc. v. Mayor and City Council of Baltimore,* Daily Record, February 4, 1963. The City entered its appeal to this Court from judgment on February 25, 1963. By Chapter 453, Acts of 1963, effective June 1, 1963, the State trespass law (Section 577 of Article 27) was amended by providing that nothing in the Trespass Act shall be construed as being in conflict with the authority of Baltimore City to enact a public accommodations law. On August 6, 1964, this Court dismissed the pending appeal on the ground that it was moot.

commodation, specifically including a restaurant, to refuse or deny to any person on account of his race any of the services or facilities of such place of public accommodation.

On June 22, 1964, the Supreme Court vacated and reversed the convictions, remanding the case for reconsideration "so that the State court may consider the effect of the supervening change in State law" — viz, the effect wrought upon the criminal trespass statute by the supervening public accommodation laws of the City and State. *Bell v. Maryland,* 378 U.S. 226, 12 L. Ed. 2d 822. While making it clear that the question on remand was one of Maryland law — and, as such, to be decided by the Maryland courts — the Supreme Court nevertheless ventured the view that this Court would necessarily render its decision in accordance with the law in force at the time of its final judgment; and since the statutory offense of which Appellants were convicted (trespass) has ceased to exist, by reason of the public accommodation laws of the State and City, the convictions would be reversed and the indictments dismissed. Although cognizant of Maryland's general "saving clause" statute (Article 1, Section 3, Maryland Code), and noting that "in certain circumstances" the statute "saves" convictions from the common law effect of supervening enactments, the Supreme Court expressed the further view that, by its terms, the statute "does not appear to be applicable at all to the present situation". *Bell v. Maryland,* 12 L. Ed. 2d, at page 828.

Appellants, in the main, embrace the views expressed by the Supreme Court, maintaining in their brief that the convictions cannot be sustained because (a) their conduct no longer constitutes a crime under present state and local law, and (b) that the trespass statute is still

in effect, although it cannot be applied to enforce racial discrimination in places of public accommodation; and hence, neither being repealed, repealed and re-enacted, revised, amended or consolidated, the "saving clause" statute is utterly without application.

As a matter of law, the State differs with all of the aforegoing conclusions.

It is the common law of Maryland that the *repeal* of a statute pending a prosecution, for an offense created under it, arrests the proceedings and withdraws all authority to pronounce judgment, even after conviction. The rule was precisely stated in *Keller v. State,* 12 Md. 322 (1858), at pages 325-326, as follows:

> "It is well settled, that a party cannot be convicted, after the law under which he may be prosecuted has been repealed, although the offense may have been committed before the repeal. * * * The same principle applies where the law is repealed, or expires pending the appeal, * * *. And so if the law be repealed, pending the appeal, * * * the judgment will be reversed, because the decision must be in accordance with the law at the time of final judgment. * * *".

In *Keller,* the statute creating the crime with which Appellant was charged had been expressly repealed and, as stated by this Court in *Beard v. State,* 74 Md. 130, 135, in reviewing the rationale of the *Keller* decision, "as a necessary consequence (of the repeal) the offense (had been) thereby obliterated". The *Beard* court announced the rule at common law as follows (pages 135-136):

> "* * * Where an offense has been created by statute, and that statute has been subsequently repealed without reservations or savings, conviction under it cannot be had, and sentence cannot be imposed even though a conviction has been secured, because it is

> no longer in force, and the offense which it created having ceased to exist is no longer punishable at all."[4]

Hochheimer, *Criminal Law,* Section 8, states the rule to be:

> "The effect at common law of actual repeal of a statute is to terminate all proceedings under it. If repeal takes place before final judgment, further proceedings must be stayed, and if there has been a conviction judgment must be arrested. If an appeal is pending at the time from a judgment rendered, there must be a reversal of judgment. * * * ".

The Supreme Court has repeatedly held the common law rule to be that on the *repeal* of an act, without any reservation of its penalties, all criminal proceedings taken under it fall. *United States v. Reisinger,* 128 U.S. 398, 32 L. Ed. 480 (1888); *The Irresistible,* 7 Wheat. 551, 5 L. Ed. 520 (1822); *Yeaton v. United States,* 5 Cranch 281, 3 L. Ed. 101 (1809). In *United States v. Tynen,* 11 Wall 88, 20 L. Ed. 153 (1870), the Court held that there can be no legal conviction, nor any valid judgment pronounced upon conviction, *unless the law creating the offense be at the time in existence.* See also cases collected in Annotation following 1 U.S.C.A. 29; Wharton's *Criminal Law and Procedure* (Anderson's Edition, 1957), Vol. 1, Sec. 173; 22 C.J.S., *Criminal Law,* Section 27(b).

It is entirely clear that essential to application of the common law rule is the repeal or expiration of the statute creating the offense; and when this occurs it operates, in effect, to efface the Act from the statute books as though it had never existed. See Sutherland, *Statutory Construction,* (3rd Edition, Harack), Sections 2046, 4937. True application of this principle is found in *State v. Gambrill,*

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[4] *Beard* held that a party convicted of a common law offense is liable to the common law penalty, even though after his conviction, and pending his appeal, a statute is passed providing a different punishment for future cases of the offense.

115 Md. 506 (1911). There, Appellee had been indicted for issuing certain receipts in violation of Section 194 of Article 27 of the 1904 Code. This Section was repealed by clear and necessary implication by a later enactment of the Legislature during pendency of the indictment. In dismissing the State's appeal, upon the basis that there was no offense in force at the time of its decision, the Court announced the rule, at page 513, that "after the repeal of a law, no penalty can be enforced nor punishment imposed for its violation, when in force, without a saving clause in the repealing statute. * * * ". In light of the *Gambrill* case (decided in 1911), it would appear other than coincidental that the 1912 Legislature enacted two general saving clause statutes, Chapters 120 and 365 of the Laws of 1912, which together now comprise the substance of Section 3 of Article 1 of the Code, and preserve penalties incurred under a repealed penal statute.

In view of the foregoing, therefore, the threshhold inquiry is whether there was a repeal, express or implied, of the State trespass statute under which Appellants were convicted. That no express repealer is contained in either the State or City law is manifest from a review of those acts. The question narrows, therefore, to whether these laws repealed the trespass statute, or any part thereof, by necessary implication.

It is, of course, a familiar principle that the law does not favor repeals by implication — *Waye v. State,* 231 Md. 510 — and they will not be adjudged to occur except when they are inevitable, or the language of the Act shows plainly that the Legislature intended it. 20 M.L.E., *Statutes,* Section 53. Such legislative intent is never presumed, *Beard v. State, supra,* at pages 134-135, and "if there is any question whether a repeal was intended, the statute is strictly construed". *Clifton v. State,* 177 Md. 572,

574. It is, of course, necessary to the implication of a repeal that the objects of the two statutes be the same; and, notwithstanding inconsistency, there is no repeal of a statute if it clearly appears that the Legislature did not intend to repeal. See *Clifton v. State, supra,* where despite the express repeal of a penal statute this Court treated the repealing act as, in effect, a repeal and re-enactment thereof, so as to avoid possible application of the common law rule. In any event, where two statutes are directed against distinct offenses there can ordinarily be no repugnancy and no repeal by implication, but the fundamental test in all cases is the intention of the Legislature. 82 C.J.S., *Statutes,* Section 303; 50 Am. Jur., *Statutes,* Sections 544-545; Sutherland, Sections 2012, *et seq.* In *State v. Gambrill, supra,* a case where two penal statutes covering the same subject were manifestly in conflict, and a repeal by implication was decreed, the Court stated at page 511:

> "* * * The general rule of implied repeal, where there is no express repeal in terms, is stated, in *State v. Yewell,* 63 Md. 121, to be, when there are two Acts on the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions the latter Act, without any repealing clause, operates to the extent of the repugnancy, as a repeal of the first. The test, whether repugnancy or conflict exists, is, can the two laws stand together and be executed at one and the same time. * * * ".

The State and City Public Accommodation laws follow the same basic legislative scheme — racial discrimination in places of public accommodation is made unlawful, with the thrust of the laws operating directly against the owners of such covered establishments, provision being made for administrative and legal machinery to enforce the individual's right to services and accommodation where such

are denied, solely on account of race or color. The criminal trespass statute on the other hand serves a different end, its purpose being to protect the actual possession of property against unlawful and forcible invasion. See 87 C.J.S., *Trespass,* Sections 144-146. Only trespass which is "wanton" is made criminal under the statute, viz., a trespass characterized by extreme recklessness and utter disregard for the rights of others. *Bell v. State, supra; Griffin and Greene v. State,* 225 Md. 404, reversed, other grounds, 378 U.S. 130, 12 L. Ed. 2d 754. While it is true that the action which led to Appellants' convictions, if taken today, would not be criminal, nevertheless this is not the test by which to ascertain whether the later enacted public accommodation laws effected a repeal by implication of the trespass Act, or any part thereof. The true test, as aforesaid, is whether the Acts are in irreconcilable conflict — are they manifestly repugnant, one to the other — and did the Legislature, by its language, intend to effect a repeal by implication, such repeals not being favored, and never adjudged to exist except when inevitable. The Supreme Court, in its opinion in this case, unequivocally recognizes (12 L. Ed. 2d, at page 828) that "neither the city nor the state public accommodations enactment gives the slightest indication that the legislature considered itself to be 'repealing' or 'amending' the trespass law". Appellants concede (Brief, page 11) that the trespass law is still in effect, although they maintain, quite properly, that it cannot be applied to enforce racial discrimination in places of public accommodation — this being so because by virtue of the public accommodation laws all persons are vested with a statutory right to enter establishments covered thereunder; and hence, in such circumstances, entry upon such facilities is made under "a bona fide claim of right" which the trespass statute expressly recognizes as

exempting persons from prosecution for trespass. Thus, the two laws are in perfect harmony and no repeal by implication of any part of the trespass law is necessary in order to secure rights created by the public accommodation laws.[5]

It is submitted that a proper interpretation of the legislative intent is simply that that body chose to leave intact and undisturbed all convictions for violation of the trespass statute for offenses occurring prior to enactment of the public accommodation laws. Indeed, it is fundamental that laws are generally enacted to regulate future conduct and establish the basis on which rights are thereafter to be predicated. Statutes which are retroactive in their effect (particularly penal statutes) are not favored; and a statute will not be given a retroactive or retrospective operation unless its words are so clear, strong and imperative that no other meaning can be annexed to them, or unless the manifest intention of the Legislature cannot be otherwise gratified. 20 M.L.E., *Statutes*, Section 164, and cases therein cited.

Finally, in this connection, the case of *Annapolis v. State*, 30 Md. 112 (1869) requires review. There, Appellant corporation was convicted for obstructing a public highway in said city and fined one cent. On appeal, the

[5] The conclusion that the Legislature did not intend a repeal by implication is fortified by the facts, (a) that the trespass Act was itself amended by Chapter 453 of the Acts of 1963, effective June 1, 1963 — the same day that the State public accommodations Act (Chapters 227 and 228) took effect — but such amendment had no bearing, direct or indirect, on that law, (b) that the State public accommodations Act, when initially enacted in 1963, though containing a "severability" clause, did not contain a clause repealing all laws inconsistent with it, nor did it contain any express repealers, and (c) that the State Act, when amended by Chapter 29, Acts of 1964, Special Session (March 11, 1964), contained two express repealer clauses, neither of which had any bearing, direct or indirect, upon the State trespass law.

Appellant maintained that by subsequent act of the Legislature it was expressly vested with authority to do the act for which it had been convicted. The Court queried (page 119):

> "If then, the acts of the traversers, in closing or obstructing South street, and for which they have been indicted are made valid and lawful, the only remaining question to be decided, is whether they can plead the statute in bar to the indictment? * * *".

Finding that the Act *expressly* declared Appellant's action to be valid, the Court reversed the conviction, concluding that it was the obvious intent of the Legislature to confirm and make lawful the very act charged in the indictment. Unlike that case, there is nothing in the present case indicating an intention on the part of the Legislature to make Appellants' acts of trespass lawful *ab initio*.

Assuming for the purpose of argument that to the extent of a repugnancy existing therein the criminal trespass statute had been repealed by the public accommodation laws, then the question would be whether the State's general "saving clause" statute, Section 3 of Article 1, Maryland Code (1957 Edition), "saves" the convictions from the effect of such repeal. This statute, as a review of its provisions indicates, "saves" from release or extinguishment penalties accrued under a statute which has been repealed, repealed and re-enacted, revised, amended or consolidated, unless expressly provided to the contrary therein — the statute so repealed, repealed and re-enacted, revised, amended or consolidated being treated as still remaining in force for the purpose of sustaining any and all prosecutions for the enforcement of such penalty, as well as for the purpose of sustaining any judgment which may be rendered in such action. A more comprehensive saving clause could hardly be devised, and as the Legislature is presumed to act with knowledge of existing law,

it is also presumed that it acted with reference to the saving clause. The saving clause must be enforced, as stated by the Supreme Court in *Great Northern Railway Co. v. United States*, 208 U.S. 452, 52 L. Ed. 567, at page 575, unless "either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the saving clause provisions". There being nothing to indicate that the Legislature intended to repeal the saving clause itself, it necessarily would become operative in the event that this Court should deem the trespass law repealed by implication upon enactment of the public accommodations legislation.

It is submitted, by way of summary, that the State trespass law was not repealed, but even if it had been, Appellants' convictions would be "saved" by the aforementioned general saving statute. See *Clifton v. State, supra.*

II.

THE PASSAGE OF THE FEDERAL CIVIL RIGHTS ACT OF 1964 PRIOR TO FINAL TERMINATION OF THE PROCEEDINGS IN THE INSTANT CASE DOES NOT REQUIRE REVERSAL OF APPELLANTS' CONVICTIONS.

While readily concurring in Appellants' argument that the Federal Civil Rights Act of 1964 overrides contradictory State law, the State cannot agree that the Act is applicable to abate the instant prosecutions. It is fundamental that whether any given federal statute operates prospectively or retrospectively is a question of Congressional intention. Equally fundamental is the rule that all statutes, State or federal, are presumed to operate prospectively only, where there is no *clear* expression in the statute to the contrary. In other words, every statute operates only on future acts, unless a contrary intention is *expressly* declared, and retroactivity, even where per-

missible, is not favored except upon the clearest mandate. *Claridge Apartments Co. v. C.I.R.*, 323 U.S. 141, 89 L. Ed. 139; *Bruner v. United States*, 343 U.S. 112, 96 L. Ed. 786. There is nothing in the Federal Civil Rights Act of 1964, including Section 203 thereof, which even vaguely indicates that Congress intended the Act to have retroactive application, and the cases relied upon by Appellants in this connection are clearly inapposite. In providing in Section 203 of the Act that no person shall "punish any person for exercising * * * any right or privilege secured by Section 201 or 202", the Congress was necessarily proscribing such action as would date from the time it created such rights, namely, from the date of passage of the Act. A contrary finding would be tantamount to subjecting owners of establishments covered under the Act, who discriminated prior to the law's enactment, to the sanctions imposed by the Act. Manifestly, Congress intended no such result. And see Section 1104 of the Act to the express effect that no provision thereof shall "be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof".

CONCLUSION

The acts of trespass in this case for which Appellants stand convicted were conducted peacefully, with dignity and decorum, and under a *bona fide* belief that their conduct was constitutionally privileged. The owner of the establishment, against which the trespass was made, testified that he was sympathetic with the objectives of the demonstrators. The trial judge, in convicting Appellants, stated that they were "not law-breaking people and their action was one of principle rather than any intentional attempt to violate the law". The sentences of $10.00 fines imposed by the court were in each case suspended.

Under such circumstances, and with the intervening enactment of the City, State and Federal Public Accommodations Laws, no real interest of the State would likely suffer were these convictions vitiated. But, these are matters of policy which the executive branch of government is not, itself, free to promulgate or implement, since there can be no policy of government contrary to the enactments of legislative bodies, State or Federal, on subjects properly committed to their sphere; or contrary to the interpretation of the common law of Maryland, as made by the judicial branch of government. The Federal Civil Rights Act of 1964 was, indeed, one of the great legislative enactments of our history, as noted by Appellants, but failing legislative authority constitutionally enacted by that measure, or in the State or City public accommodations laws, or elsewhere in the law, to advocate reversal of these convictions would be at odds with the legislative intention. Many may deplore the fact that the City, State and Federal legislative bodies did not otherwise provide, but the fact remains that they did not, possibly preferring to leave each conviction for study by the Chief Executive, with an eye toward executive clemency where warranted. Consequently, it is respectfully submitted that the judgments appealed from must be affirmed.

Respectfully submitted,

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