IN THE COURT OF APPEALS OF MARYLAND

No. 91

SEPTEMBER TERM, 1961

ROBERT MACK BELL, et al

v.

STATE OF MARYLAND

Henderson, C.J.
Hammond
Prescott
Horney
Marbury
Sybert
Oppenheimer,
JJ.

DISSENTING OPINION

by

Oppenheimer, J.

Filed: October 22, 1964

Oppenheimer, J., dissenting.

The only difference between the majority of the Court and myself is on the issue of whether the convictions of the appellants for acts which, under the Maryland public accommodations law would today be legal, are to be upheld because of the saving clause statute. I agree with my brethren that the passage of the 1963 public accommodations law brought about a fundamental change in the criminal trespass statute; that, in the situations specified in the public accommodations law, the two enactments are repugnant and are in irreconcilable conflict; and that the common law of Maryland is that our decision must accord with the law as it is at the time of final judgment. It is undisputed that, because of the remand of the cases to us by the Supreme Court of the United States, after our affirmance of the convictions in Bell v. State, 227 Md. 302, 176 A.2d 771 (1962), and after the passage of the public accommodations law, the judgments of conviction have not become final. It is implicit in the opinion of the majority, and is clearly the law, that, apart from the operation of the saving clause statute, the convictions could not now stand. The majority holds, however, that, while the public accommodations law does not in terms amend or repeal the criminal trespass statute, the saving clause statute is nevertheless operative. With all due deference to the views of my brethren, I disagree.

The question is one of statutory construction, of phraseology and inferences, but as in other cases in which the Court must determine the meaning of legislative enactments, we must look to the nature and purpose of the statutes. Darnall v. Connor, 161 Md. 210, 155 Atl. 894 (1931); Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950). The public accommodations law deals with important rights of the individual. In essence, it not only negates the criminal nature of certain acts which formerly constituted trespasses but it restricts the very property rights which the criminal trespass statute was designed, in part at least, to protect. The effect of the public accommodations law includes the removal of a property right which formerly existed and the substitution of an affirmative personal right. This is a positive and basic change in the rule which governs the law. The saving clause statute has the effect of continuing a prior criminal statute in force for the purpose of punishing offenses committed prior to a change in law which makes the same acts legal in the future. State v. Clifton, 177 Md. 572, 576, 10 A.2d 703 (1940). While the saving clause statute does not of itself impose a criminal penalty, it continues in effect penalties which, but for it, would be abolished, and therefore, in my opinion, should be subject to the same strict construction which applies to laws which impose the penalties in the first instance. The rights and liberties of the individual against the State are directly involved in both cases. See State v. Fleming, 173 Md. 192, 195 Atl. 392 (1937); Wanzer v. State, 202 Md. 601, 611, 97 A.2d 914 (1953)

The saving clause statute, by its terms, applies only to 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." Code (1957) Article 1, Section 3. When there is such repeal or amendment, the act has the effect of continuing the repealed or amended statute in force for the purposes of punishing the offenses committed prior to the amendment or repeal. Where it is applicable, it affects a change in the common law.

The common law principle which the saving clause statute affects, when it is applicable, was stated by Chief Justice Marshall in these words:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional * * * I know of no court which can contest its obligation * * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." United States v. Schooner Peggy, 1 Cranch 103, 110 (1801).

This language was cited with approval in Keller v. State, 12 Md. 322, 71 Am. Dec. (1858). In most of the decisions applying the principle, the subsequent legislation repealed or amended the

prior act under which there was a conviction. The rule applies also, however, where there is no repeal or amendment but where the effect of the prior law is abrogated or destroyed. 1 Sutherland, Statutory Construction, §2043 (3d ed. 1943); Berger v. Berger, 104 Wis. 282, 80 N.W. 585 (1899).

The majority opinion holds, in effect, that whenever the principle enunciated by Marshall and followed by us in Keller and subsequent cases comes into effect, it does so because the prior rule or statute has been repealed or amended, and that when, as in this case, the subsequent act contains no language of repeal or amendment, the repeal or amendment is to be implied, and therefore, the saving clause statute becomes operative. This reasoning, to me, disregards the distinction between invalidity of prior convictions *because* of subsequent legislative repeal or amendment and invalidity because of a fundamental change in the law - here, of basic individual and property rights - which, of itself, makes the prior convictions repugnant to present policy.

Many cases, applying the common-law rule, use language of implied repeal or amendment as a means of setting aside prior convictions in the light of *subsequent* enactments; they do not reach the other prong of the rule. None of the cases cited in the majority opinion on this point deals with the construction of a saving clause statute such as is here involved; they only go to the survival or setting aside of the prior conviction because of the subsequent change in law.

The effect of the majority opinion *on the point* is to

construe the saving clause statute to extend to any legislative change which makes prior illegal acts legal. The statute does not so read, and, in my opinion, should not be so construed.

Nor, in my opinion, did the Legislature in enacting the 1963 public accommodations law intend to save convictions under the criminal trespass statute by way of impliedly repealing in part or amending that act so that the saving clause statute would become operative. The enactment of the public accommodations law followed the passage of a Baltimore City ordinance to the same effect. The ordinance had been introduced after the appellants had been convicted and while their appeals from the convictions were pending in this Court. The ordinance was passed on the same day that the petition for certiorari from our decision affirming the convictions was filed in the United States Supreme Court. Further, the ordinance contained no saving clause, and it is generally held that state saving statutes do not apply to ordinances. Pleasant Grove City v. Lindsay, 41 Utah 154, 125 P. 389 (1912); Barton v. Corporation of Gadsten, 79 Ala. 495 (1885); In Re Yeoman, 227 N.Y.S. 711, 131 Misc. 669 (1928). On these facts, there is a strong inference that it was the intent of the Mayor and City Council that the ordinance should apply to the convictions of the appellants as well as to future similar actions. The General Assembly passed the public accommodations law when the validity of the City ordinance was under attack in substantially the same language as that of the City ordinance.

As the majority opinion points out, a few weeks after it had passed the 1963 public accommodations law, the Legislature repealed and re-enacted the criminal trespass statute. This re-enactment was in the same terms as those of the earlier act, except for the addition of a proviso enabling the Mayor and City Council of Baltimore to enact legislation such as its former ordinance. This re-enactment of the criminal trespass statute did not refer in any way to the public accommodations law. If, as the majority holds, the latter law repealed in part or amended the criminal trespass statute, it is reasonable to assume that, in re-enacting the trespass statute after it had passed the public accommodations law, the Legislature would have spelled out the changes which, in the opinion of the majority, it had intended to make. A more probable explanation of the legislative intent, it seems to me, is that the Legislature recognized by its acts that the public accommodations law did not repeal or amend the criminal trespass law but rather fundamentally changed public policy as to certain basic rights. It was that direct fundamental change, rather than implied legislative action, which vitiated the appellants' convictions.

In no prior case have we held that the saving clause statute operates to continue a former law in effect for the purpose of punishing an offense committed prior to the subsequent legislation where the later act did not either in terms eliminate the criminality of the defendant's action or change the penalties. Cf. State v. Clifton, supra; State v. Kennerly, 204 Md. 412, 104 A.2d 632 (1954).

The
/public accommodations law did neither. What the Legislature did in repealing and re-enacting the criminal trespass statute a few weeks after it had passed the public accommodations law, without altering the terminology of the trespass statute, was in effect to recognize the change in the meaning of what constitutes "wanton trespass" effected by the public accommodations law. This later action, in my opinion, strengthens the inference that, when the Legislature created new rights in the public accommodations law, it did not intend the saving clause statute, which is only applicable in cases of amendment or repeal, to apply.

In two cases decided by this Court when the saving clause statute was in effect, a subsequent law was in basic conflict with prior legislation. In both cases, the Court held that an action upon the prior act could not lie. State v. American Bonding Co., 128 Md. 268, 97 Atl. 529 (1916); Green v. State, 170 Md. 134, 183 Atl. 526 (1936). In neither case was there a reference to the saving clause statute. In State v. Clifton, supra, this Court said that the reason the saving clause statute was not applied in those cases was because "in neither of those proceedings did it appear that any penalty, forfeiture or liability had actually been incurred." 177 Md. at 576. The terms of the saving clause statute make it applicable only when a penalty, forfeiture or liability has been incurred. [illegible] Other terms of the statute make it applicable only when the subsequent law amends or repeals

the prior enactment. Under what seems to me to be a proper construction of the saving clause statute, which is penal in nature, there was no such repeal or amendment intended in the public accommodations law.

The judgments of convictions should be reversed.