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Repeal by Implication

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tion consists in the return of the property to the landlord in a cheapened appearance at the end of the term, but this is not accurate. On the contrary, the true irreparable damage to the plaintiff will take place all during the lease term, and will consist in the cheapening influence of the changed frontage upon the whole building, the repute of the hotel, and the commercial respectability of the adjoining store space. This condition, if allowed to exist for eight years, would continue to have its effect for an unpredictable time after the expiration of the term.

Granting this as true, it is submitted that if a mandatory injunction is to issue at all, it should be directed at the continuation of a condition which now causes irreparable damage and present injury to the landlord, and that the only way to protect this present interest is the grant immediate restoration. From these considerations the proposition favored by the dissent seems not only to be more authoritative,[11] but also more logical and reasonable than the majority, for:

> "It is no justification of an act of waste that a party will at some future time put the premises in the same condition as they were when the lease was made. The landlord has a right to a continuance of the state of things as they existed when the injury was done."[12]

HOWARD E. TRENT, JR.

REPEAL BY IMPLICATION

The county judge *pro tem* in Jefferson county presided at a meeting of the fiscal court. It was objected that an appropriation make by this court was not authorized by law and void because the county judge *pro tem* could not preside at the meeting. Upon a petition for a binding declaration of rights brought by the county attorney the defendants contended that the legislature intended for the *pro tem* judge to step into the shoes of the county judge and perform all of his functions including serving as a member of the fiscal court. This contention was based on Section 1059 of the Kentucky Statutes which provides:

> "The county judge may by order entered on the order book of the county court appoint and designate a county judge *pro tem*, who shall serve at the pleasure of the county judge. . . Said county judge *pro tem* shall when the county judge is absent from office, or for any reason is made unable to perform the duties of his office, perform any and all duties imposed by law upon the regular county judge."[1]

In affirming the ruling of the lower court the Court of Appeals held that the county judge *pro tem* may not preside at a meeting of the fiscal court. *Jefferson County Fiscal Court* v. *Grauman*, 281 Ky. 608, 136 S. W. (2d) 1102 (1940).

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[11] *Supra* notes 7 and 8.

[12] Hamburger & Dreyling et al. v. Settlegast et al., *supra* note 7, at 641.

[1] Kentucky Statutes (Carroll, 1936) sec. 1059.

The court stated that were Section 1059 the only statute in reference to the appointment of a presiding officer for the fiscal court it might be led to adopt the view contended for by the defendants. However, in view of the fact that no *pro tem* judge is provided for in the constitutional set-up of the fiscal court[2] and since repeals by implication are not favored, the court refused to adopt this contention in face of Section 1833 of the Kentucky Statutes which reads:

> "Each county in the Commonwealth of Kentucky shall have a fiscal court, which shall consist of the judge of the county court and the justices of the peace of said county, . . . in which court the judge of the county court shall preside, if present. If said judge is not present and cannot preside then a majority of the justices of the peace shall elect one of their number to preside; said justice so elected to act as judge of said court during absence or inability of a county judge to preside."[3]

But the court further stated that a statute may be repealed by implication if the provisions are so repugnant to each other that they cannot be reconciled. The court reconciled the statutes in the instant case by saying that the later statute gave to the *pro tem* judge only those powers exercised by the county judge as such[4] and not as a member of the fiscal court.

Generally when the courts discuss the problem of repeal by implication they begin by applying the maxim that "repeal by implication is not favored"[5] and then add "but when two statutes are so repugnant as to be inreconcilable repeal by implication will operate."[6]

The apparent judicial dislike of repeal by implication is, however, generally overcome in cases: 1) where the later statute covers the entire subject matter and is substantially a new enactment concerning the same subject;[7] 2) where parts of one statute are so repug-

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[2] Kentucky Constitution, sec. 144.

[3] Kentucky Statutes (Carroll, 1936) sec. 1833.

[4] Apparently the court meant those duties exercised by the county judge as as set out by Kentucky Statutes, sec. 1061 and following defining the duties of the county judge. The function of the county judge on the fiscal court arises from a statute concerning the court.

[5] United States v. Burroughs, 53 Sup. Ct. 574, 289 U. S. 159, 164 (1932); Sneeden v. City of Marion, 64 F(2d) 721, 728 (1933); Cissen v. U. S., 37 F. (2d) 330, 331 (1930); Mays v. Phillip County, 170 Ark. 880, 279 S. W. 266, 268 (1925); Costa v. Reed, 113 Conn. 377, 155 Atl. 417, 419 (1931); Nash v. State, 205 Ind. 22, 184 N. E. 169 (1933); State v. Bd. of Commissioners, 203 Ind. 23, 178 N. E. 563, 567 (1931); Lewis v. Mosely, 215 Ky. 573, 286 S. W. 793 (1926); Town of Nichols v. Tioga County, 224 N. Y. S. 267, 270 (1927).

[6] United States v. Tuginovich, 41 Sup. Ct. 551, 256 U. S. 450, 463 (1921); United States v. Tiger, 19 F(2d) 35, 38 (1927); Curlin v. Watson, 187 Ark. 685, 61 S. W. (2d) 701, 702 (1933); State v. Std. Oil of La., 179 Ark. 280, 16 S. W. (2d) 581, 584 (1929) p Ex Parte Bryson, 13 Cal. App. 546, 21 P. (2d) 695, 696 (1933); Bullen v. Anderson, 81 Utah 151, 17 P. (2d) 213, 215 (1923).

[7] H. Rouw Co. v. Cirvella, 105 F. (2d) 434 (1939); Johnson City v. Town of Hackman, 177 Ark. 1009, 85 S. W. (2d) 469 (1928); Hessick v. Moynihan, 83 Colo. 43, 262 Pac. 907 (1928); Quick v.

nant to the other that they cannot be reconciled;[8] 3) where a specific or local act is inconsistent with a general law.[9] Section 1059 in no way attempts to cover the entire subject matter nor is it a special act; therefore, our problem is to determine whether a repugnancy exists between the two statutes and if so whether it is so great as to work a repeal by implication.

The later of two conflicting acts on the same subject is deemed legislative will,[10] and when the subsequent act is in conflict with a prior act, it, by implication repeals so much of the prior act as is in conflict with the later act;[11] and that is true although it contains no recital of such intent.[12] The later act must be given full effect where the conflict is irreconcilable.[13] But there seems to be much diligence of opinion as to just when such irreconcilable conflict occurs. California, for instance, holds that the inconsistency must be clear, actual and irreconcilable.[14] Mississippi says it must be "so repugnant as to demonstrate legislative purpose".[15] The result of such a strict interpretation is that repeal by implication is hardly ever recognized. On the other hand some jurisdictions applying the same maxims do find in anologous cases that there is such repugnancy as to repeal the prior statute.[16] It has been suggested that the difference in the various states might be accounted for by the fact that courts of a particular state acquire the "feel" of the legislature of that state and its

Smith, 86 Ind. App. 676, 159 N. E. 556 (1928); Godfrey v. Building Com. of Boston, 263 Mass. 589, 161 N. E. 819 (1928); Lach v. Kenyon, 261 N. Y. S. 676, 146 Misc. 571 (1933); Peterson v. King County, — Wash. —, 90 P. (2d) 729 (1939).

[8] State v. Std. Oil of Louisiana, 179 Ark. 280, 16 S. W. (2d) 581 (1929).

[9] People v. Mo. Pac. R. R. Co., 342 Ill. 226, 173 N. E. 816 (1931); In re Ross, 21 N. Y. S. (2d) 848 (1940); Crable v. City of Cleveland, 115 Ohio St. 484, 154 N. E. 738 (1926).

[10] Board of Health v. Frohmiller, 42 Ariz. 231, 23 P. (2d) 941 (1933); People ex rel Pierce v. Howe, 217 N. Y. S. 739, 128 Misc. 31 (1926).

[11] City of Bisbee v. Chochise County, 44 Ariz. 233, 36 P. (2d) 559 (1934); Gaddis v. Bd. of Commissioners of Gibson County, 93 Ind. App. 658, 179 N. E. 279 (1932); McAdam v. Fed. Mutual Life Ins. Co., 288 Mass. 537, 193 N. E. 362 (1935); State v. Taylor, 323 Mo. 15, 18 S. W. (2d) 474 (1929).

[12] See McDonald v. Wasson, 188 Ark. 782, 67 S. W. (2d) 722, 724 (1934). The court however found no repugnancy in the case—the act dealt with different subjects.

[13] Trimble v. Kantas, 190 Ark. 1092, 82 S. W. (2d) 847 (1935); State v. Second Judicial District, 52 Nev. 379, 287 Pac. 957 (1930).

[14] Chilson v. Jecome, 102 Cal. App. 635, 283 Pac. 862, 864 (1930). The court held two statutes not in conflict.

[15] Coke v. Wilkinson, 142 Miss. 1, 106 So. 886 (1926); see also New Smyrna v. Matthewson, 113 Fla. 861, 152 So. 706 (1934).

[16] Cullin v. Watson, 187 Ark. 685, 61 S. W. (2d) 701 (1933); Ouachita City v. Stone, 173 Ark. 1004, 293 S. W. 1021 (1927); State v. White, 170 Ark. 880, 281 S. W. 678 (1926); Masey v. State, 168 Ark. 175, 269 S. W. 567 (1925); Bullen v. Anderson, 81 Utah 151, 17 P (2d) 213 (1933).

method of procedure.[17] But in general the aversion of the courts to repeal by implication is so strong that even though there may be at first glance a conflict the courts will attempt to harmonize the acts and construe them so as to be read together so that both may stand.[18]

The law in Kentucky seems to be in accord with the following principles: Repeal by implication is not favored,[19] and if possible the court will so construe the acts so that both shall be effective, providing it can be done without contradiction or absurdity; if any part of the existing law can be harmonized or reconciled such part will not be deemed repealed.[20] A new law covering the whole subject repeals a prior law on the subject.[21] Where two statutes confict a latter statute dealing with the specific subject matter is given effect rather than an earlier statute dealing with the subject in general terms.[22] If the repugnancy is so clear as to admit of no other reasonable construction the prior act or part thereof will be deemed repealed.[23]

While the Kentucky Court renders "lip service" to the maxim that "repeal by implication will operate if the repugnancy is so clear as to be irreconcilable", it apparently belongs to the group that strictly interpret the word "irreconcilable", and so as a practical matter has seldom declared the prior statute repealed. Further evidence of the strict application of the maxim, "repeal by implication is not favored", is found when the court takes the view that the legislature is presumed to know of the prior statute,[24] and if it intends a repeal thereof it will so express itself.[25] In the instant case the court seizes upon

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[17] Note (1937) 37 Col. L. Rev. 292, first footnote.

[18] People v. Shader, 326 Ill. 145, 157 N. E. 225 (1927); Bennett v. Brewer Hardware Co., 160 La. 407, 170 So. 286 (1926); Perkins v. N. H. Power Co., — N. H. —, 13 Atl. (2d) 475 (1940); Atlantic Life Ins. Co. v. Wade, 195 N. C. 424, 142 S. E. 474 (1928).

[19] Logsdon v. Howard, 280 Ky. 342, 133 S. W. (2d) 60 (1940); V. T. C. Line v. Hurham, 272 Ky. 638, 114 S. W. (2d) 1089 (1938); Williamson v. City of Raceland, 245 Ky. 212, 53 S. W. (2d) 370 (1932); Panke v. City of Louisville, 229 Ky. 186, 16 S. W. (2d) 1024 (1929); Schultz v. Ohio County, 226 Ky. 633, 11 S. W. (2d) 702 (1928); Naylor v. Bd. of Education, Fulton County, 216 Ky. 766, 288 S. W. 690 (1926); Lewis v. Mosley, 215 Ky. 573, 286 S. W. 793 (1926); Commonwealth v. Barnett, 169 Ky. 731, 245 S. W. 874 (1922); Horton v. Horton, 185 Ky. 131, 214 S. W. 88 (1919); Lee v. Forman, 60 Ky. (3 Metc.) 101 (1860).

[20] Tipton v. Brown, 277 Ky. 625, 126 S. W. (2d) 1067 (1937).

[21] Washburn v. Paducah Papers, 275 Ky. 527, 1212 S. W. (2d) 911 (1938); Ferguson v. Chandler, 266 Ky. 694, 99 S. W. (2d) 732 (1936); Bell v. Talbot, 252 Ky. 721, 68 S. W. (2d) 36 (1934).

[22] Shannon v. Bucke, 276 Ky. 773, 125 S. W. (2d) 238 (1939).

[23] Driedel v. Louisville, 268 Ky. 659, 105 S. W. (2d) 807 (1937); Pineville v. Meeks, 254 Ky. 167, 71 S. W. (2d) 33 (1934); Russell v. Bd. of Education of Logan County, 247 Ky. 703, 57 S. W. (2d) 68 (1933).

[24] Young v. Grauman, 278 Ky. 197, 128 S. W. (2d) 549 (1939); Ferguson v. Chandler, 266 Ky. 694, 99 S. W. (2d) 732 (1936).

[25] Tipton v. Brown, 277 Ky. 625, 126 S. W. (2d) 1067 (1937); Oldham County v. Arvin, 251 Ky. 317, 64 S. W. (2d) 907 (1933).

the fact that the acts involved relate to distinct subject matters[20] as lending support to the conclusion that there is no repeal by implication.

It is believed that the instant case is consistent with prior decisions of the Court of Appeals of Kentucky and with the attitude to which that court seems to be committed with reference to repeals by implication.

JOE R. JOHNSON, JR.

EQUITY: SPECIFIC PERFORMANCE OF A CONTRACT TO RECONVEY LAND TRANSFERRED BY FRAUDULENT CONVEYANCE

Appellee deeded land to appellant, his son, to prevent the execution of a judgment lien held against his land. Appellant agreed to reconvey and upon his failure to do so appellee filed this bill for specific performance. Appellant contends there is no aid in equity for one who transfers land in fraud of creditors. Appellee asserts that his judgment creditor chose not to enforce his claim against the land and therefore was not in fact defrauded. He claims further that appellant failed to affirmatively plead the fraudulent conveyance. The order of the Circuit Court granting specific performance was overruled. *Asher* v *Asher*, 278 Ky. 802, 129 S. W. (2d) 552 (1939).

It is clear in Kentucky and elsewhere that one who transfers land in fraud of creditors subjects himself to certain limitations on future action, one of which is his inability to have specific performance of a contract to reconvey the land.[1] This inability results from a failure to conform to equitable standards of conduct. These standards as most often expressed by courts of equity in denying relief are two: (1) the parties are in *pari delicto*,[2] or (2) one must come into equity with "clean hands".[3] The court in the principal case reaffirms this principle that equitable relief is predicated on a

[20] Section 1059 relates to the county judge and section 1833 deals with the fiscal court.

[1] Carson v. Beliles, 121 Ky. 294, 89 S. W. 208(1905); Coleman v. Coleman, 147 Ky. 383, 144 S. W. 1(1912); Shamo v. Benjamin's Adm'r., 155 Ky. 373, 159 S. W. 798(1913); Ballance v. Ballance, 213 Ky. 73, 280 S. W. 473(1926); Dunne v. Cunningham, 234 Mass. 332, 125 N. E. 560(1920); Palmer v. Palmer, 100 Neb. 741, 161 N. W. 277 (1917).

[2] Jones v. Jefferson, 334 Mo. 606, 66 S. W. (2d) 555(1933) (The materiality of the maxim "in pari delicto" is fully discussed in this case that is strikingly like the instant case. The grantor conveyed property to his daughter in anticipation of a suit for breach of promise and was precluded by the doctrine of "unclean hands" from having equitable relief from the daughter's repudiation of the agreement to reconvey). Accord: McRae v. McRae, 37 Ariz. 307, 294 Pac. 280(1930); New York, New Hampshire, etc., Railroad v. Pierce, 281 Mass. 479, 183 N. E. 836(1933).

[3] Grant v. Grant, 296 S. W. 647(Tex. App. 1926); Brugman v. Charleson, 44 N. D. 114, 171 N. W. 882(1919); Bouton v. Beers, 78 Conn. 714, 63 Atl. 193(1905).