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OIL AND GAS—STATUTORY CONSTRUCTION—IMPLIED REPEAL OF STATUTE RESERVING MINERAL RIGHTS TO COUNTIES.—During the 1941 session of the North Dakota Legislative Assembly, a bill was enacted providing that fifty per cent of the mineral rights on any land obtained by any county under tax deed proceedings would be retained by the county upon any future sale of the land.[1] Two days later the Legislative Assembly passed a bill providing that the county, upon the sale of any land acquired by it through tax proceedings, was to furnish the purchaser with a deed "conveying to him all right, title, and interest of the county in and to such property."[2] These bills were subsequently incorporated into the North Dakota Revised Code of 1943, which was enacted in toto by the Legislative Assembly. The bill providing for the fifty per cent reservation became § 11-2704 and the bill providing for passage of title became § 57-2815 of the Code. In 1945, the plaintiff obtained from the defendant county deeds to two tracts of land he had purchased from the county, the deeds containing no mineral reservations. The plaintiff then brought an action to quiet title. Defendant county, answering, asserted a claim to fifty per cent of the mineral rights in the land. The Supreme Court of North Dakota *held* that the enactment of § 57-2815 two days after the passage of § 11-2704 had the effect of repealing the latter statute by implication and that full title to the mineral rights passed to the plaintiff on his purchase of the land. Judgment for plaintiff affirmed. *Kershaw v. Burleigh County,* 47 N.W. 2d 132 (N.D.1951).

The instant case rests upon the authority of the decision in *Adams County v. Smith*[3]. The *Smith* case was an attempt by Adams county to share in the coal royalties received by a purchaser of county land under a tax deed where the deed contained no reservation of mineral rights. It was there held that § 11-2704, *supra,* was repealed by the enactment of § 57-2815, *supra,* in so far as § 11-2704 purported to reserve to the county fifty per cent of the mineral rights. In reaching its decision the court concluded that these two code provisions were in irreconcilable conflict. The decision in the *Smith* case, based on the premise that coal was a "mineral" within the terms of § 11-2704, obviously foreshadowed the present result. A series of decisions[4] which thus strip North Dakota counties of extremely valuable property rights which the legislature manifestly thought it was giving to them clearly deserve careful scrutiny.

In dealing with problems of statutory construction, the courts have enunciated from time to time a series of canons of construction applicable to problems of the type here involved. The North Dakota court has repeatedly stated,[5] in common with the great majority of

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[1] N.D. Laws 1941, c. 136, N.D. Rev. Code § 11-2704 (1943): "Upon the sale of any land by the county whether . . . acquired by tax proceedings, deed, quit claim deed . . . there shall be reserved to the county transferring . . . fifty per cent of all oil, natural gas or minerals . . . on or underlying the land. Any transfer, deed, or lease which does not contain such reservation shall be construed as if such reservation were contained therein . . ."

[2] N.D. Laws 1941, c. 286, N.D. Rev. Code § 57-2815 (1943).

[3] 74 N.D. 621, 23 N.W.2d 873 (1946).

[4] The line of cases includes the instant decision, Adams County v. Smith, *supra,* and Kopplin v. Burleigh County, 47 N.W.2d 137 (N.D. 1951).

[5] *E.g.* State *ex rel.* Fargo v. Wetz, 40 N.D. 299, 168 N.W. 835 (1918); State *ex rel.* Kopriva v Larson, 48 N.D. 1144, 189 N.W. 626 (1922).

other jurisdictions,[6] that repeals by implication are not favored by the law. The courts will, however, give effect to a legislative intention to implied repeal a prior enactment where that intention is clear to the court,[7] even though the intention was not specifically stated. This doctrine rests upon the principle that the latest expression of the legislative will ought to control,[8] since a legislative body is presumed to have intended to give effect to its own enactments.[9] The courts indulge in the presumption that the progress of all measures through the legislative mill and their final passage is accomplished with deliberation and full knowledge of prior enactments.[10] The intention of the legislature is at all times said to govern.[11]

Where, however, the legislative intent expresses itself in the form of two irreconcilable statutes whose harmonization is impossible, the later enactment is said to express the later intent of the legislature.[12] Upon this principle the doctrine of repeal by implication rests. To determine whether a repeal by implication was intended the courts look either to the terms of the later enactment itself[13] or the actual intent which motivated the passage of the alleged repealing act.[14] Out of this search, it is said, an intent on the part of the legislature to repeal by implication must clearly appear[15] and to be effective it must

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[6] United States v. Noce, 268 U.S. 613 (1925); Railroad Comm. v. Riley, 192 Cal. 54, 218 Pac. 415 (1923). Illustrative of cases where a particular statute was held not to have effected a repeal by implication are Seminole Nation v. United States, 316 U.S. 286 (1942); City of Tombstone v. Macia, 30 Ariz. 218, 245 Pac. 677 (1926).

[7] State v. Atlantic Coast Line Ry., 56 Fla. 617, 47 So. 969 (1908).

[8] *See* Dougherty v. Joyce, 233 Mich. 619, 207 N.W. 863 (1926).

[9] United States v. One Ford Automobile, 292 Fed. 207 (S.D.Tex.1923); Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N.E. 853 (1891) overruled on other grounds in Lewisville Natural Gas Co. v. State, 135 Ind. 49, 34 N.E. 702 (1893); Kempien v. Board of Comm'rs of Ramsey County, 160 Minn. 69, 199 N.W. 442 (1924).

[10] This must, as the instant case demonstrates, be placed in the same category with the presumption that a woman of ninety can have children and the North Dakota rule that every collision between a train and livestock wandering on the track is presumptively due to the negligence of the railroad.

[11] R. S. Blome Co. v. Ames, 365 Ill. 456, 6 N.E.2d 841 (1937); State *ex rel.* Erickson v. Burr, 16 N.D. 581, 113 N.W. 705 (1907). But see Radin, *Statutory Construction*, 43 Harv. L. Rev. 863, 870 (1930), in which it is stated: "A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstratably did have, different ideas and beliefs." See also Mr. Justice Holmes' statement in Pine Hill Co. v. United States, 259 U.S. 191, 196 (1922): "It is a delicate business to base speculation about the purpose or construction of a statute upon the vicissitudes of its passage."

[12] Patchett v. Webber, 198 Cal. 440, 245 Pac. 422 (1926); First Nat. Bank v. Lewis, 18 N.D. 390, 121 N.W. 836 (1909); Commonwealth *ex rel.* Matthews v. Lomas, 302 Pa. 97, 153 Atl. 124 (1930).

[13] State *ex rel.* Shepard v. Superior Court, 60 Wash. 370, 111 Pac. 233 (1910). Cf. Leete v. Griswold Post No. 79, American Legion, 114 Conn. 400, 158 Atl. 919 (1932).

[14] United States v. Yuginovich, 256 U.S. 450 (1921); Madison v. Southern Wisconsin Ry., 156 Wis. 352, 146 N.W. 492 (1914), *aff'd* 240 U.S. 457 (1916).

[15] State v. Atlantic Coast Line Ry., *supra. See* Adams County v. Smith, 74 N.D. 621, 627, 23 N.W.2d 873, 877 (1946).

be either necessary[16] or follow as the only logical consequence because of the language employed.[17]

Thus, it is the intent of the legislature which is the cardinal factor.[18] However, there are many situations where the intent of the legislature does not appear clearly. In such cases the result is often arrived at through the strict application of the rules of statutory construction. It is submitted, however, that such a mechanical application of the rules of statutory interpretation is unwise. Before the court should hold legislation of the type found in the instant case impliedly repealed, every effort should be made to reconcile the legislative intent apparent on the face of the challenged legislation with that apparent on the face of the alleged repealing statute, even though in so doing the court might find it necessary to incorporate the earlier into the later, thereby creating an exception.[19] This view is expressed in *McCain v. Farmers Electric Cooperative Corporation*,[20] and appears to have found general approval. Applied to the instant case, such a rationale would indicate that § 11-2704 might well have been read as an exception to the language of § 57-2815.[21] It is manifest from a reading of the language of § 11-2704, which provides for the construing of deeds which do not contain a reservation of mineral rights as if such a reservation was included, that the legislature foresaw situations where implied exceptions to deeds would be necessary to preserve the rights of the counties.[22]

A point made by the counsel for the defendant county in the instant case deserves mention. After the original enactment of the two measures involved in the case by the legislative assembly, their provisions were incorporated into the codification of North Dakota statutes adopted in 1943. It was argued that the later re-enactment of the code containing these two sections wiped out the difference in historical rank between them. It is submitted that the point is sound, and that neither the location of a section in the code nor the date of

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16 Roxana Petroleum Co. v. Cope, 132 Okla. 152, 269 Pac. 1084 (1928); State *ex rel.* Milwaukee v. Milwaukee Electric Ry. & Light Co., 144 Wis. 386, 129 N.W. 623 (1911).

17 Hudson v. State, 37 Okla.Crim.Rep. 290, 258 Pac. 352 (1927).

18 See cases cited Note 11, *supra.*

19 McCain v. Farmers Electric Cooperative Corporation, 206 Ark. 15, 172 S.W.2d 933 (1943); Aday v. Chimes School Dist. No. 49, 209 Ark. 675, 191 S.W.2d 963 (1946). *Cf.* People v. Graves, 204 Ill. 20, 136 N.E. 542 (1922) (where the court states it would disregard priority of enactment to give effect to the ascertained legislative intent).

20 206 Ark. 15, 172 S.W.2d 933 (1943).

21 Such a construction would also result in an exception to § 57-2816, N.D. Rev. Code (1943), where the form of deed used by the county is set out.

22 The legislature seems to have intended this statute to be construed with other similar legislation as is indicated by the use of the following language in § 11-2704: ". . . any transfer, deed, or lease which does not contain such reservation shall be construed as if such reservation were contained therein."

its enactment prior to codification should have legal effect.[23] Particularly is this true where the statutes are incorporated into a statutory compilation which is more than a mere collection of statutes but is instead a revision of them, thus involving affirmative consideration of the merits of the legislation contained in the enactment. However, a majority of the courts have adopted a contrary view,[24] and in *Hines v. Harmon*,[25] a case heavily relied upon by the court in the instant decision, it was held that statutes brought into a revision do not have an equal status because of their simultaneous passage.

La Vern C. Neff

WILLS—NO CONTEST CLAUSE—ACCELERATION OF REMAINDERS.—The will of testatrix left her estate in trust for the benefit of defendant for life with remainder to defendant's children and in default of issue of the defendant to the plaintiff if living, otherwise to plaintiff's children. The plaintiff and defendant were the sole heirs at law of the testatrix. Included in the will was a provision that any person contesting the will was to receive one dollar in lieu of all other provisions made by the will. Notwithstanding this provision the defendant brought suit to contest the will and lost. The executors, in filing their final account, petitioned the court to distribute the estate to plaintiff on the ground that the defendant had forfeited her life estate because of the contest, thus accelerating the plaintiff's contingent remainder. The provision in favor of defendant's children, it was argued, could never become operative because defendant was incapable of having children by reason of a surgical operation. The court *held* that by reason of the contest intestacy resulted as to the life estate, but that the contingent remainder of the plaintiff could not be accelerated so as to include in it the life estate; that the life estate must be distributed according to the laws of intestacy; and that defendant, as an heir at law, was entitled to one half of it. In re *LeFranc's Estate*, 232 P.2d 4 (Cal.App.1951).

According to the overwhelming majority of American courts, vested remainders, whether created by deed or by will, are acceler-

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[23] *Cf.* Barth v. Ely, 85 Mont. 310, 278 Pac. 1002 (1929).

[24] Hopkins v. Superior Court, 105 Cal.App. 133, 286 Pac. 1053 (1930); Pedro v. Hapai, 28 Haw. 744 (1926).

[25] 178 Okla. 1, 61 P.2d 641 (1936).