

- PROHIBITION: An Indictment obtained before repeal may be prosecuted after appeal.

February 19, 1934 2-26-34

Honorable Gordon P. Dorris
Prosecuting Attorney
Alton, Missouri



Dear Sir:

This Department is in receipt of your request for an opinion as to the following state of facts:

"Will you please advise me what effect the newly enacted prohibition laws will have on cases filed and pending under the old laws. As an example, a party is charged in this County with transportation of intoxicating liquor, he was given a preliminary hearing last November and held for trial in Circuit Court, our Circuit Court convenes in February. Can we legally try this man for the commission of that offense, which was an offense at that time, but which probably is no offense now under the new laws?"

Thanking you, we remain."

Section 661 R. S. Missouri 1929 provides:

"No offense committed, and no fine, penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such

offenses, and the recovery of such fines, penalties and forfeitures, shall be had, in all respects, as if the provisions had remained in force."

In the case of State v. Balsamo (Kansas City Court of Appeals 1923) 246 S. W. 963, the court said:

"Section 7064, R. S. 1919, provides that future repealing laws shall not affect the punishment prescribed for a previous violation of a statute. Section 7065, R. S. 1919, makes a like provision as to prosecutions pending at the time of the repeal of such laws. Section 3709, R. S. 1919, is in effect a repetition of sections 7064 and 7065, R. S. 1919, with this proviso:

'Provided, that if the penalty or punishment for any offense be reduced or lessened by any alteration of the law creating the offense, such penalty or punishment shall be assessed according to the amendatory law.'

Defendant contends that under this proviso the punishment to be assessed is that prescribed by the Prohibition Enforcement Act. We think there is no merit in this contention, for the reason that the proviso relates to a reduction or lessening of the punishment made by an alteration of the law prescribing the offense. The Prohibition Enforcement Act is not an amendment or alteration of the local option law, but wholly repeals such law. State v. Walker, 221 Mo. 511, 108 S. W. 615, 120 S. W. 1198.⁴

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And in the case of State v. Walker 221 Mo. 511, the Supreme Court of Missouri in an opinion rendered by Burgess, J., said:

"Appellant's position that the occurrence of the local option election prior to the trial sufficed to prevent a conviction, because the dramshop act under which defendant was tried was not in force in the county at the time of the trial, might be well taken, but for the provision of section 2392 of the Revised Statutes of 1899. This section says no offense committed and no fine, penalty or forfeiture, or prosecution commenced or pending previous to or at the time when any statutory provision shall be repealed or amended, shall be affected by such repeal or amendment, but the trial and punishment of all such offences, and the recovery of such fines, penalties or forfeitures, shall be had as if it had not been repealed or amended."

In view of the foregoing it is the opinion of this department that the repeal of the State Prohibition Law does not prevent the trial and conviction of a person, who prior thereto was indicted for the violation of the State Prohibition Law.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General.

APPROVED:

ROY MCKITTRICK
Attorney General.

JWH:LC