

GAME AND FISH:

Provision for election by counties on question of closed season for shooting quail not repealed by Amendment No. 4, Laws of Missouri, 1937, page 614.

August 12, 1938

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Honorable Arthur C. Mueller
Prosecuting Attorney
Hermann, Missouri

Dear Sir:

This is in reply to yours of August 9th wherein you request an opinion based upon the following statement:

"A petition for a closed season on quail was filed in this county under Section 8246 R. S. Mo. '29. Will you kindly advise this office if the County Court is compelled to place this question on the ballot in November as provided in the above section or does Amendment No. 4, Laws '37, page 614, take precedence over the said section."

Your request involves the question of when does a constitutional amendment repeal a special statute dealing with the same subject matter.

In the case of State ex rel. Harrison v. Frazier, 98 Mo. 429, the court said:

"The terms of a special law are not ordinarily regarded as repealed by a later law of a general nature on the same subject. To thus effect a repeal such an intent must be clearly manifested in the latter. The constitutional declaration regarding the power and duty of the general assembly, in respect of the

registration of voters, is, by its terms, evidently designed to have a prospective operation only. It does not purport to repeal any existing law such as is here under discussion. Nor do we think any such purpose can be fairly inferred from its language, especially when we consider that, unless such an intent is evident beyond reasonable question, we should assume as a rule of construction that only a prospective operation of the constitution was contemplated."

The rule is further discussed in the case of *State ex rel. Goldman v. Hiller*, 278 S. W. 708, 709, wherein the court said:

"If a previous law conflicts with a new constitutional provision, the law withers and decays and stands for naught, as fully as if it had been specifically repealed. This is the simplest rule of horn book law. So that if the enactment of 1921 conflicts with the constitutional provision of 1924, it stands for naught."

So if Section 8246, R. S. Mo. 1929, is in conflict with Amendment No. 4, Laws of Missouri, 1937, page 614, it stands for naught the same as if it had been specifically repealed. But, as stated in *State ex rel. Harrison v. Frazier*, supra, there must be a conflict in the provisions of the statute, which conflict must be beyond a reasonable question, before the existing law will be repealed by implication. If said Section 8246 or the provisions thereof relating to an election on the question of a closed season for killing quail in the county, are repealed by said Amendment No. 4, they are repealed by implication, and, as said supra, repeals by implication are not favored.

In *State v. Hostetter*, 79 S. W. (2d) 463, 468, the court said:

"Repeals by implication are not favored (Cooley's Constitutional Limitations (8 Ed.) p. 316; Black on

Interpretation of Laws (2 Ed.) sec. 107, p. 351; 12 C. J., P. 710, note 54; Endlich on Interpretation of Statutes, sec. 210, p. 280). At page 281 in the authority last cited it is said: 'A rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject.' The same authority at page 731, holds that the same presumption against unnecessary change of law exists in the construction of a constitutional provision."

Vol. 12 C. J., page 725, Sec. 97, provides as follows:

"While a new constitution is, by its very nature, intended to supersede a prior constitution, it is not intended to supersede the entire body of statutory law. To the extent, therefore, that existing statutes are not expressly or impliedly repealed by the constitution, they remain in full force and effect. * * *"

Section 8246, R. S. Mo. 1929, provides as follows:

"The right given by this article to take or kill game or birds, or to have in possession, unless otherwise specified is

limited to food purposes, and to one turkey, ten quail or bobwhite, and fifteen additional game birds of each and every other family for each person in any one calendar day, and no person shall take, kill or have in his possession at any one time more than one turkey, fifteen quail or bobwhite, and twenty-five additional legal game birds of each and every other family; and no person shall kill during any calendar year more than one turkey: Provided, that it shall be unlawful to kill turkey at any time within the confines of any state park. No birds, game or fish protected by this article shall be held in possession by any person for more than five days after the close of the season for killing the same: Provided, that upon the filing of a petition signed by one hundred or more householders of any county and presented to the county court at any regular or special term thereof more than thirty days before any general election to be had and held in said county, it shall be the duty of the county court to order the question as to whether or not there should be a closed season upon quail for the next two years in their said county submitted to the qualified voters, to be voted on by them at the next election. Upon the receiving of such petition it shall be the duty of the county court to make the order as herein recited, and the county clerk shall see that there is printed upon all the ballots to be voted at the next election the following:

For a closed season upon quail

Yes.

No.

Erase the word you do not wish to vote.

The returns of said election upon said subject shall be opened, canvassed and certified, as the returns for general elections.

August 12, 1938

If the majority of the votes cast upon such subject be in favor of the closed season upon quail, then it shall be unlawful to take, capture or kill any quail or bobwhite within such county for the period of two years thereafter following the announcement of the result of said election, and the county court shall spread the result of such election upon its records and give notice thereof by publication in some newspaper printed and published in such county, and such law shall become operative and effective from the time such publication is made. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor."

The Constitutional Amendment No. 4, page 614, Laws of Missouri, 1937, provides in part as follows:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party."

While the power is granted to the Conservation Commission by this Amendment to control, manage, restore, conserve, and regulate the bird, fish and game resources, yet we do not think, beyond a reasonable question, that the voters intended to repeal by implication that part of said Section 8246, supra, which authorizes the voters to vote upon the question of a closed season for killing quail in their respective counties. This part of said section is for the purpose of conserving the quail of that particular county, and even though the Commission has authority and does make a regulation to conserve quail, such

August 12, 1938

regulation would be in harmony with the vote of the people who have voted on the question of a closed season on the killing of quail.

In the case of *Barker v. St. Louis County*, 104 S. W. (2d) 371, 377, the court in discussing when a statute was repealed by a later act or a constitutional amendment, said:

"There is no better settled law in our state than the rule that courts will not hold a statute to be unconstitutional unless it contravenes the organic law in such a manner as to leave no doubt of its unconstitutionality.' *Bledsoe v. Stallard*, 250 Mo. 154, loc. cit. 165, 157 S. W. 77, 80. On the other hand, if there is no doubt that a statute or part thereof is in conflict with the Constitution, then it is the duty of any court, whose duty it is to decide, to declare the conflict and declare void the statute or part thereof in conflict with the Constitution."

The last paragraph of Amendment No. 4, supra, is as follows:

"The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

That part of said Section 8246 which provides for the counties to vote a closed season on killing quail would be classed as legislation in aid of the provisions of the Amendment and would be in conformity with the last clause of said Amendment referred to above, and we do not think it contravenes said provision, or at least we think there is some doubt as to whether or not it does, and applying the rule announced in the *Barker v. St. County* case above, such statute is not repealed if there is some doubt as to whether or not it contravenes

August 12, 1938

the provisions of the Constitutional Amendment. That being the case, that part of said Section 8246, supra, providing for the election on the question of a closed season for killing quail is not repealed by implication by the provisions of said Constitutional Amendment No. 4.

CONCLUSION

From the foregoing, it is the opinion of this department that when a petition which complies with the provisions of Section 8246, R. S. Mo. 1929, is presented to the County Court, then it is the duty of such County Court to order the question of whether or not there should be a closed season upon quail for the next two years in their county submitted to the voters, to be voted on by them at the next election as provided in said Section 8246, supra. We are further of the opinion that this provision of this section is in aid of the provisions of Amendment No. 4, Laws of Missouri, 1937, page 614, and that it is not repealed by implication by the provisions of said Amendment.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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