IN RE: Status Congressional Districts of Missouri with reference to circulating referendum petition under state constitution.

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March 15, 1933.

Hon. Thomas A. Mathews,
Prosecuting Attorney,
St. Francois County,
Farmington, Missouri.

Dear Sir:

You have written me as follows:

> "I would like to have an opinion from your office as follows: 'What reference to our present Congressional Districts in the State with regard to circulating a petition referring a bill enacted by the present General Assembly', (are the old sixteen (16) Congressional Districts still in existence, or is the State as a whole one Congressional District?)

Chapter 63 R.S. Mo. 1929 divides the state into sixteen congressional districts. These provisions were carried forward from R.S. Mo. 1919. In so far as I know, this statute has not been repealed by the General Assembly of Missouri.

This statute was enacted as a general law and was not an emergency act. A congressman is a Federal and not a State officer. Section 4, Article I of the United States Constitution provides:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof."

In 1900, Congress by a statute provided if by reason of a Federal census the number of congressman provided under the congressional apportionment to the states should at any time be less than it was before, the whole number of congressmen in such state should be elected at large unless the Legislature of said state should provide otherwise.

We see, therefore, the authority of the state to divide the state into congressional districts comes from the Federal Constitution and the Acts of Congress. The Missouri Legislature after the 1930 census passed an Act redistricting the state into thirteen congressional districts and the Governor vetoed it and therefore, we elected our thirteen Congressmen at large in Missouri in 1932.

In my opinion the statute found in Chapter 63 R.S. of Mo. 1929 dividing the State into sixteen congressional districts can be repealed only by express provision of a legislative Act passed by the Missouri General Assembly, or by necessary implication. In

Homer vs. Commonwealth, 106 Pa. St. Rep. l.c. 226

the rule of law on this question is stated as follows:

> "The settled rule is that a statute can be repealed only by express provision of a subsequent law or by necessary implication."

There has been no express statute repealing the Act dividing the state into sixteen congressional districts. Has the Act dividing the state into sixteen congressional districts been repealed by implication? This brings up the question of what is a repeal by implication. Our Supreme Court has defined what constitutes both an express and an implied repeal. In the case of

City of St.Louis v. Kellman, 235 Mo. p. 687

our court said:

> "Definition of repeal - By repeal is meant the abrogation or annullment of a previously existing law by the enactment of a subsequent one, which either declares that the former law is revoked and abrogated, or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two can stand in force. The latter is repeal by implication; the former is express repeal."

There having been no law passed repealing expressly the statute dividing the state into sixteen congressional districts, and no law passed creating thirteen new congressional districts, and not mentioning the statute now on the books dividing the state into sixteen congressional districts, it is my opinion the statute creating the old sixteen districts has not been either expressly or by implication repealed.

The statute creating sixteen congressional districts could not be used in Missouri in 1932 because when the census of 1930 was taken under the ratio of apportionment by Congress of representatives to the respective states the population of Missouri authorized election of only thirteen in place of sixteen Congressmen, and as the Governor vetoed the bill redistricting the state, then under the Act of Congress we elected our thirteen Congressmen from the state at large.

Did this non-user affect repeal of the statute creating the sixteen congressional districts?

> "The law, except in a few jurisdictions, is a statute cannot be repealed by non-user unless such non-user is accompanied by the enactment

of irreconcilable statutes or the establishment of an opposite legislative policy."

Pearson v. International Distillery, 72 Iowa 348
(Affd. 128 U.S. 1
Snowden v. Snowden (Maryland) 1 Bland 550
State v. Nease, 80 Pac. 897
Hawes & Son v. Commonwealth, 106 Pa.St. 221
Gulf Refining Co v. City of Dallas, 10 S.W. (2d) 151
State v. Meek, 26 Wash. 405, 67 Pac. 76
English - Herbert v. Purchas L.R. 3 P.C. 605, 17 Reprint 468

The Legislature passed a bill creating thirteen congressional districts to replace the sixteen old districts, but the Governor vetoed it. It is true we elected only thirteen Congressmen in 1932, but the law under which they were elected was an Act of Congress, and not a statute of Missouri.

It is true the action of the Legislature in passing the Congressional Redistricting Bill evinced but did not establish a legislative policy in opposition to the statute creating the sixteen districts and this legislative opposition thus evinced failed to become a statute because the Governor vetoed the bill. The fact is the Act creating the sixteen districts is on the statute books and cannot be used for electing Congressmen, not on account of State, but Federal Legislation.

But it will be observed the Act of Congress providing where census reduces congressional representation on failure of state to redistrict in accord therewith election of Congressmen shall be at large does not attempt to create new congressional districts in the state. Does the altered condition of the state in having thirteen in lieu of sixteen Congressmen repeal the Act creating sixteen districts on the ground that the reason for and object of the statute has ceased to exist? In

Brown v. Clark, 77 N.Y., l.c. 373

the court answers this question as follows:

"But the courts cannot dispense with a statutory rule because it may appear the policy upon which it was established has ceased."

and the courts of Texas and Arizona likewise so hold.

Benson v. Hunter, 202 Pac. 233 - 23 Arizona 132
Refining Co. v. Dallas (Tex. Civ. App.) 10 S.W. (2d) 151

It is claimed three cases in other states hold when reason for statute ceases, the statute is repealed. The three cases are:

James v. Commonwealth (12 S.& R.Pa.) 220 (1824)
Watson v. Blaylock, 9 S. Car. 351
Broadwater v. Kendig, 80 Mont. 515

The later cases in Pennsylvania, in my opinion, overrule the James case

(See 106 P. St. 221). As to the South Carolina case of Watson v.Blaylock decided in 1818, the South Carolina court later in 1853 used the following language:

> "We have in South Carolina unrepealed statutes requiring registry of marriage and inhibiting any lay magistrate from joining persons in marriage under penalty. But it was never supposed that unregistered marriages were void; and the court in Watson v. Blaylock, 2 Mill. 351, declared the Act imposing penalties on lay magistrates obsolete and invalid, the only instance in our judicial history in which courts have ventured to declare the Act of the Legislature inoperative from mere non-user. "

Therefore, the South Carolina court itself puts the decision in the Blaylock case on ground of non-user and holds the statute was only declared inoperative. As the South Carolina Act was passed in 1706 and as the court in the Blaylock case said:

> "The Act was passed in 1706 and was intended as one of the means of establishing the Episcopal church in preference to all others in the then province *** but since the establishment of our free Constitution the Act is totally inapplicable to our changed situation and must therefore be considered as obsolete."

I am of the opinion the court really intended to put its decision on the ground the constitution when adopted conflicted with the statute and therefore repealed it as of course repeal of a statute can be made by Constitution as well as by another statute. But whether the court intended to rest Blaylock case on the ground it conflicted with the later adopted constitution or not, the fact is the statute was in irreconcilable conflict with the later adopted constitution if it did what the court said, that is, operated in favor of the Episcopal and against all other churches, and these facts existing, the case is not an authority for proposition that changed conditions operate as a repeal of a statute no longer applicable.

On the question of a repeal by non-user of a statute, the weight of authority is repeal does not occur. In my opinion the operation of the Act of Congress making it incumbent to elect our thirteen Congressmen at large in 1932 on failure to redistrict the state only suspends the Act creating the sixteen districts in so far as the election of Congressmen is concerned but not repealing and continuing as to all other matters in force.

It is well settled that a suspension of a statute may be based on a state of facts declared by legislative enactment theretofore made to warrant such suspension.

State v. Bentley, 164 Pac. 290, 59 C.J. p. 940 par. 553

The Act of Congress, of course, is general and applies to all the states of the union and not objectionable on the ground of discrimination. Does suspension of the Act creating the sixteen congressional districts by operation of the Act of Congress directing the thirteen Congressmen to be elected at large from Missouri on failure to redistrict the state after the census of 1930 leave the state enactment so suspended operative in other respects?

In discussing this question it should be borne clearly in mind what the distinction is between the repeal and suspension of the enactment. A repeal removes the law entirely; but when suspended it still exists and has operation in every respect except wherein it has been suspended. A repeal puts an end to the law - a suspension holds it in abeyance either for all purposes or for some particular purpose.

59 C.J. p. 899, Sec. 499
Maresca v. United States, 277 Fed. p. 727

In the case of Sturgis v. Spofford, 45 N.Y. p. 446 the action was brought by plaintiffs as commissioners of pilots to recover penalties given by the Act of the New York Legislature regulating pilotage in New York Harbor for employing a person not holding a license from the commissioners or a license under New Jersey laws to act as pilot. The case was tried before a court without jury and the court found defendant employed said person as pilot on steamers and sailing vessels outward bound from New York port; the said person so employed at the time held a license under Act of Congress of 1852; he held a license under the laws of New York passed in 1836; that he took a license under the State Board of Commissioners of Pilots in 1853 and every year thereafter until 1860. The Commissioners claimed that the pilot was suspended by the Board April 10, 1860, but continued to act as pilot, no other pilot being appointed in his place, until a new license was issued to him April 26, 1865. In the meantime he piloted the vessels in question. The Commissioners were appointed under the Act of 1853 of New York state. It was claimed that the legislation of Congress passed in 1852 superseded the New York state legislation in question and all state legislation on the subject of pilots in New York Harbor. The court in discussing the question, said:

> "It is also claimed that the Legislation of Congress has superseded the act in question, and all state legislation on this subject. It is doubtless true that the whole subject of pilotage is embraced in the power conferred upon Congress by the Constitution of the United States, to regulate commerce with foreign nations, and among the several states; but until the exercise of this power by Congress, it is competent for the states bordering upon the sea, to exercise it themselves. The jurisdiction of the states has been acquiesced in by the general government from its foundation , and has been expressly recognized by Congress. (See Act of 1789).
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> The Act of Congress of 1852 (10 United States Statutes at Large, 61, 67) is claimed to have superseded the act of the state; but in Steamship Co. v. Joliffe (2 Wall., 450), it was held, by the Supreme Court of

the United States, that this act applied only to pilots for the voyage, and not to port pilots, and did not affect State legislation as to the latter. (Cisco v. Roberts, 36 N.Y., 262).

The act of Congress of August, 1866 (14 United States Statutes at Large, 228), is more comprehensive in its provisions, and seems to include pilotage in harbors as well as at sea. In February 1867, the Act was amended so as in substance to exempt port pilotage from its operation, and leave to the State its former power of legislation. (14 United States Statutes at Large, 411.) The penalties for which this action was brought had been incurred before the act of Congress of 1866 was passed, but the trial and judgment was afterward. The jurisdiction of Congress becomes exclusive upon its exercise, which precludes all State action and supersedes all state laws previously passed. Assuming that the act of 1866 embraced port pilotage, it is insisted that the penalties, previously incurred under the State law, became extinguished and abrogated. It is a general rule that criminal offences created by statute cannot be prosecuted or punished after the statute is repealed. (Hartung v. People, 22 N.Y., 95, and cases there cited.) And this rule has been extended to quasi criminal prosecutions for penalties. (Butler v. Palmer, 1 Hill, 330) Although a forfeiture or penalty for the benefit of the party injured is regarded as a vested right in the nature of a satisfaction (Palmer v. Conly, 4 Denio, 374), if the statute in question had been repealed by the Legislature of the state, the penalties and all power to enforce them would have gone with the law.

The repeal of the statute would have obliterated the law and all rights of action given by it. (Key v. Goodwin, 4 Moore & Payne, 341, 351.) But I do not think the act of Congress had the same effect as a repeal of the statute by the state itself. The act is not retrospective in terms. It indicates an intention from that time to assume the exercise of the power conferred by the Constitution and the state law became from that time inoperative; but it is not repealed, nor can it be presumed that any rights or interest secured or obligations incurred under it were intended to be interfered with.

The repeal of a statute indicates a change of policy on the part of the state upon the particular subject, and it would be inconsistent to enforce the provision of an act, after the state had declared it to be unwise. In this case the propriety of the state law is not even impliedly questioned. The repeal of the act of Congress would leave the state law in full force and the amendment of February 1867 produced the same effect; and there is no sound reason for depriving the state of rights secured under the law before the interference of Congress."

The court distinctly says in the cited New York case:

> "There is no sound reason for depriving the state of rights secured under the law before the interference of Congress."

This sentence contains exactly what the court decided in the New York case. Apply that rule to the situation of the initiative and referendum, the sixteen congressional districts and the right of the people to use the referendum, and we arrive at this clear result: The initiative and referendum provision in the state Constitution was a part of said instrument before 1930 census was taken and after the sixteen congressional districts had been created; the initiative and referendum amendment itself in plain language says the people shall use the sixteen congressional districts for signing and filing of petitions in exercising the supreme power of the state - the vote of the people - to enact new or approve or reject laws passed by the Legislature.

This right to use these sixteen districts as a means of setting in motion the power of the people to enact laws or reject or approve existing laws is embedded in the state Constitution by that unlimited and illimitable power which can create and destroy legislatures, the command of voters issued through their ballots.

In discussing this same question, the Federal Supreme Court in Anderson v. Pacific Coast S.S. Co., 225 U.S., l.c. 196-197, said:

> '"In 1866, Congress passed a more comprehensive statute embracing port pilotage (Act of July 25, 1866, c. 234, 14 Stat. 227). After defining the vessels subject to the navigation laws of the United States, it enacted (Sec. 9) that "every sea-going steam vessel", so subject, should "when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels; vessels of other countries and public vessels of the United States only excepted." In the following year, however, this section was amended by the addition of a proviso that the act should not be construed to "annul or affect any regulation established by the existing law of any state requiring vessels entering or leaving a port in such state" to take a state pilot (act of February 25, 1867, c. 83, 14 Stat. 411). The existing state laws respecting port pilotage again became operative. Sturgis v. Spofford, 45 N.Y. 446, 451; Henderson v. Spofford, 59 N.Y. 131, 133)"'

To the same effect is:

Henderson v. Spofford, 59 N.Y., 131
Cimmino v. Clark & Son, 184 N.Y. App. Sup. C. Rep., 745

In Winterton, et al v. State, Sup. Ct. Miss., So. (3d), l.c.736 the court said:

> "A repeal makes a law as if it had never been. Suspending its operation for a time leaves it operative as to the past and in all respects

wherein it is not abrogated by the statute."

It will be seen that these decisions hold that any rights secured under the statute suspended can still be enforced provided same does not conflict with the legislation suspending the statute.

After the census of 1930, in 1931, the Missouri General Assembly passed a bill creating thirteen congressional districts, which was vetoed by the Governor. Thereafter, a proceeding by mandamus was begun in the Supreme Court by one Carroll to compel the Secretary of State to receive and file the relator's declaration of his candidacy for Congress of the United States. This case is reported in

State ex rel Carroll v. Becker, 45 S.W., 533

The petition recited Acts of Congress providing for decennial census and authorized President to submit to each state a message designating the number of members apportioned to such state in accordance with the decennial census; also compliance with said Act by the President after the census of 1930 showing Missouri entitled to thirteen representatives; that thereafter Missouri Legislature passed an Act dividing the state into thirteen districts and the Governor vetoed the same; the relator based his claim for mandamus on the proposition that as the redistricting of the state was authoritively complete when the bill passed the two houses of the Legislature, it did not need the Governor's approval and on this ground he asked for a writ of mandamus. In this decision, however, the court did say in speaking of the sixteen districts:

> "Since the number of representatives from Missouri has been reduced, former districts no longer exist."

The one and only thing decided by the Carroll v. Becker case is that the General Assembly of 1930 of Missouri failed to redistrict the state. The issue in this case was whether or not thirteen new districts had been created by the Legislature. The court decided that question and held no new districts had been created by the Legislature.

On the question of what in a Supreme Court opinion is authority for future guidance and what is not authority therein the Missouri Supreme Court en banc in

State ex rel v. St. Louis, 241 Mo. l.c. p. 238

said:

> "There is a pronounced line of demarcation between what is said in an opinion and what is decided by it - between arguments, illustrations and references on one side and the judgment rendered on the other. The language used by a judge in his opinion is to be interpreted in the light of the facts and issues held in judgment in the concrete case precisely as in every other human document. *** The case is only authority for what it actually decides. *** The maxim of stare decisis applies only to decisions on points arising and decided in causes; *** the precedent includes the conclusion only upon questions which the case contained and which were decided. That exposition has been adopted as satisfactory by this court."

Applying this rule to the language used in the opinion in the Carroll v. Becker case saying the old districts no longer existed, we find this language was not what was decided by the court, but only what was said in the opinion. What was decided in Carroll v. Becker case was that no new districts had been created by the Legislature. The fact that made the existence or non-existence of the sixteen districts not an issue and not decided in Carroll-Becker case is there were sixteen districts and only thirteen Congressmen to elect. The mere statement of this fact discloses existence or non-existence of the sixteen districts could not have been an issue in the Carroll-Becker case and was not decided and would not have determined whether or not the Legislature had redistricted the state if it had been decided.

In so far as the sixteen congressional districts might be used for purposes of nominating and electing Congressmen therefrom, the said districts could no longer be considered in connection with such state nominations and elections, but in my opinion for all other purposes than those of election of Congressman from each one of the separate sixteen districts, the said districts would exist and continue to exist because there has been no law passed either expressly or impliedly repealing the same.

The Act of Congress which became operative when the Governor vetoed the bill to redistrict the state directing election of the thirteen Congressmen at large did not repeal Chapter 63 R.S. of Mo., 1929 dividing the state into sixteen congressional districts, but only suspended the operation thereof in so far as the state Act relating to the nomination and election of Congressmen is concerned and this is on the same principle that the New York and the Federal Courts and other courts hold that a law can only be repealed by an act of legislation, either expressed or implied, and that when a statute is suspended to accomplish some one particular purpose, the statute suspended is still in force for all other purposes.

Section 57, Article IV, Constitution of Missouri, known as the Initiative and Referendum provides in general terms for initiating a proposed law by the people; a petition with more than 8% of the legal voters in each of at least two-thirds of the congressional districts shall be required and such petition shall include the full text of the measure so proposed; and for referring a law (and all laws passed by the General Assembly may be referred except those necessary for immediate preservation of public peace, health or safety, and laws making appropriations for current expenses of the state government and for maintenance of the state institutions and for support of public schools) either by petition signed by 5% of legal voters in each of two-thirds of the congressional districts in the state, or by action of the legislative assembly.

This amendment was adopted at the November election held in 1908 and consequently was part of the organic law of Missouri when the message of the President was issued, and after the census of 1930 when the congressional representation of Missouri was reduced from sixteen to thirteen. Here is the constitutional right given by the Constitution of Missouri to the voters thereof to use the congressional districts for the purpose of initiating laws or for the purpose of referring Acts to the people which the General Assembly has passed for approval or disapproval thereof by the electors at the polls. That this is a valuable right goes without saying.

If and when the Legislature of Missouri passes a bill and the Governor signs it creating thirteen districts, Chapter 63, R.S. of Mo. 1929 creating the sixteen districts will be repealed, and the new congressional districts will be available for use by the voters under the provision of Section 57, Article Iv by the Initiative and Referendum Law of the State of Missouri.

Considering the foregoing authorities, I am of the opinion that any general law passed by the General Assembly not falling within the exceptions herein enumerated and set out in Section 57, Article IV may be referred to the people under the Initiative and Referendum, and that the sixteen districts into which the state is divided under Chapter 63, R.S. of Mo. 1929 may be used for the purpose of signing petitions and filing same with the Secretary of State, and that the state as a whole cannot be so used as one congressional district for the purpose of having signed and of filing initiatory and referendum petitions with the Secretary of State.

Yours very truly,

EDWARD C. CROW

APPROVED:

Attorney General

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