

CRIMINAL LAW:)	Criminal cases pending in Circuit Court
REPEAL OF RSMo 1949)	charging defendants with larceny, embez-
CRIMINAL STATUTES:)	zlement, and obtaining money under false
SENATE BILL NO. 27)	pretenses under RSMo 1949, in effect
68th GENERAL ASSEMBLY:)	at time crimes were alleged to be com-
PROCEDURE:)	mitted, but repealed by Senate Bill No. 27
)	of the 68th General Assembly giving new
)	definitions of said offenses. Cases

shall be tried on charges filed under RSMo 1949. If punishment for such crimes is less under Senate Bill No. 27 than under RSMo 1949, each defendant convicted before effective date of bill on August 29, 1955, but judgment not rendered until subsequently, said judgment shall be in accordance with applicable provisions of bill.

FILED
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July 27, 1955

Honorable James Woodfill
 Prosecuting Attorney
 Vernon County
 Nevada, Missouri

Dear Sir:

This department is in receipt of your request for a legal opinion, reading in part as follows:

"I understand that recently the several Missouri statutes concerning Larceny, Embezzlement and obtaining money under false pretenses were repealed, and there was enacted in lieu thereof, one general statute covering all three offenses.

"I have at present several cases pending on which prosecution was based on the repealed statutes. The statutes were in effect on the date of the alleged offenses and also on the date when the informations were filed; but, of course, will not be on the date when the cases are set for trial.

"I would like an opinion from your office on the following question:

"Should the prosecution of these cases proceed under the repealed statutes which were in effect when the offenses were committed, or should they be made to conform to the newly enacted statutes?"

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Section 1.160 and 1.180 RSMo 1949 are upon the subject of statutory construction, and we desire to call your attention to them in this connection. Section 1.160 reads as follows:

"No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision shall be repealed or amended, shall be affected by such repeal or amendment, but the trial and punishment of all such offenses, and the recovery of such fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except that all such proceedings shall be conducted according to existing laws; provided, that if the penalty or punishment for any offense be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."

Section 1.180 reads as follows:

"No action, plea, prosecution, civil or criminal, pending at the time any statutory provisions shall be repealed, shall be affected by such repeal; but the same shall proceed, in all respects, as if such statutory provisions had not been repealed, except that all such proceedings had after the time of taking effect of the revised statutes shall be conducted according to the provisions of such statute, and shall be in all respects subject to the provisions thereof, so far as they are applicable."

Statutes substantially the same as the sections quoted above have been in force in Missouri for many years, as will be seen from a citation of authority given in the case of Ex Parte Wilson, 330 Mo. 230. In this case the court cited another case reported in 14 Mo. in which a law similar to that quoted above was involved.

In the Wilson case, the petitioner requested the Supreme Court to issue a Writ of Habeas Corpus so that petitioner might be released from the State Penitentiary, where he had been committed under the judgment of the Circuit Court of Montgomery County. Said petitioner had been convicted of the crime of receiving a deposit of \$100.00 in the Peoples

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Savings Bank of Bowling Green, when as assistant cashier and director of such bank, he knew it to be insolvent. He was prosecuted under an indictment drawn under Section 4416 RSMo 1929, defining above mentioned criminal offense. This section was repealed by an act of the Legislature which became effective upon September 14, 1931, although the court did not render judgment against said petitioner until November 2, 1931.

In his motion for new trial, petitioner contended that Section 4416, resulted in a reduction of the offense of which he had been convicted within the meaning of Section 4468, and that the trial court was unauthorized to assess any punishment, and to render judgment against him, since such statute had been repealed. He further contended the section was unconstitutional and denied him equal protection of the law, in violation of Section 1, Amendment 14 of the Constitution of the United States. In discussing these contentions the court said at 1, c, 233, 234, and 235:

"(1). There is nothing in Section 4468 to indicate such legislative intent, and it cannot be so interpreted. The general provision of this section, written in clear and unmistakable language, is that the repeal or amendment of a statute which creates an offense shall not affect the prosecution or the punishment of offenders for offenses committed prior to such repeal or amendment. And the meaning of the exception to the general provision is equally clear when the exception is considered in connection with the general provision; that is, that any offender against the criminal laws of this State shall have the benefits of any reduction in the punishment prescribed for the offense by an amendment of the law creating the offense which becomes effective after the commission of the offense but before the entry of judgment and sentence. Indeed, if Section 4468 should be given the construction for which the petitioner contends, the general provision thereof would be meaningless and would serve no purpose.

"(2). Moreover, Section 4468 must be construed in connection with Sections 661 and 662, Revised Statutes 1929, which reads as follows:

Sec. 661. No offense committed, and no fine, penalty or forfeiture incurred previous to the time when any statutory provision

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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 forfeiture, shall be had, in all respects, as if the provisions had remained in force.

'Sec. 662. No action, plea, prosecution, civil or criminal, pending at the time any statutory provisions shall be repealed, shall be affected by such repeal; but the same shall proceed, in all respects, as if such statutory provisions had not been repealed, except that all such proceedings had after the time of taking effect of the Revised Statutes shall be conducted according to the provisions of such statute, and shall be in all respects subject to the provisions thereof, so far as they are applicable.'

"These saving clauses, in so far as they relate to statutory offenses, have been upheld by this court in numerous decisions. (State v. Mathews, 14 Mo. 101; State v. Ross, 49 Mo. 416; State ex rel. v. Willis, 66 Mo. 131; State v. Proctor, 90 Mo. 334, 2 S.W. 472.) And we are supported in our construction of Section 4468 by the holding in State v. Walker, 221 Mo. 511, 120 S.W. 1198, wherein it was 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 (now Sec. 4468, R.S. 1929). 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 offenses, and the recovery of such fines, penalties or forfeitures, shall be had as if it had not been repealed or amended. There is a further provision in the clause that if the punishment or penalty for any offense is reduced or lessened after commission of the offense and before the trial of the offender, by alternation of the law creating the offense, such penalty or punishment shall

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be assessed according to the amended law. Such a general statute has been held to save indictments drawn on a statute which is afterwards repealed. (Mullinix v. People, 76 Ill. 211) . . . We think the Dramshop Law, though it remains in force to regulate existing licenses, is repealed by the adoption of prohibition at an election held under the Local Option statute; that is, repealed in such sense as to bring into operation the saving clause of Section 2392 (now Sec. 4468) permitting indictments and informations theretofore found for infractions of the Dramshop Law, to be prosecuted and the delinquents punished.'

* * * * *

"The result of our construction of Section 4468 is to subject all offenders against any statute of this State to the punishment prescribed for the offense at the time it was committed, although the statute creating the offense is repealed before the entry of judgment and sentence, and to give all offenders against any criminal law of this State the benefit of any reduction in the punishment prescribed for the offense by an amendment of the law creating the offense before the entry of judgment and sentence. Thus it is seen that Section 4468, as we construe it, affects all offenders similarly situated and of the same class alike, and does not subject any offender to an arbitrary exercise of the powers of government. And, as we read and understand the authorities quoted above, Section 4468, when so construed, does not deny to the petitioner the equal protection of the laws, within the meaning of Section 1 of Amendment XIV of the Constitution of the United States."

It appears that the law and facts involved in the Wilson case are very similar to those now under consideration and that such decision is in point with the question raised in above inquiry. For example, Section 4468 RSMo 1929 is now Section 1.160 RSMo 1949, and Section 662 RSMo 1929, also referred to in such case, is now Section 1.180 RSMo 1949. Again it will be seen that the facts are very similar to the present statement of facts in that the law under which both defendants were charged with criminal offenses has been repealed.

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Sections 560.155, 560.160, 560.165, 560.170, 560.185, 560.195, 560.200, 560.215, 560.235, 560.245, RSMo 1949, define the offenses of all classes of grand and petit larceny. Sections 560.250, 560.255, 560.260, 560.265, 560.270, and 560.280, RSMo 1949, define all classes of embezzlement and Section 561.370 RSMo 1949, defines the offense of obtaining money or property under false pretenses. All of the above mentioned sections of the 1949 statutes have been repealed by Senate Bill No. 27 of the 68th General Assembly, and five new sections defining said offenses have been enacted.

The 68th General Assembly was officially adjourned May 31, 1955, and under the provisions of Art. III, Section 29, Constitution of Missouri 1945, all bills which have passed both houses shall become effective ninety days after the adjournment date of the General Assembly, consequently, Senate Bill No. 27 (passed by both houses) will become effective as a law upon August 29, 1955. The criminal prosecutions referred to in the opinion request are apparently founded upon indictments or informations charging the crimes of larceny, embezzlement and obtaining money under false pretenses, drawn under the sections of the 1949 statutes defining the offenses. These are the sections which have been repealed by Senate Bill No. 27 and the crimes alleged are said to have been committed before the repeal of the law.

It is noted that Sections 1.160 and 1.180, supra, contain what has been referred to as "saving clauses," that is, in effect, they permit one to be prosecuted, under a repealed criminal statute in the same manner as if the law had not been repealed, when the criminal violation charged in the indictment or information is alleged to have been committed during the time the repealed statute was in effect.

The 1949 statutes which were repealed by said senate bill will continue in force until the effective date of said bill upon August 29, 1955. Therefore, those criminal cases now pending in the circuit court of your county based upon the repealed 1949 statutes, will be tried on the charges filed under the provisions of said repealed statutes. When such cases have been tried before August 29, 1955, and each defendant found guilty is not sentenced and judgment is not to be rendered until after said date, the procedure to be followed in that instance shall be that when the punishment fixed for such criminal offense is less under Senate Bill No. 27, than under the 1949 statutes, the sentence and judgment imposed by the trial court shall be in accordance with the provisions of said senate bill rather than the 1949 statutes.

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CONCLUSION

It is therefore the opinion of this department, that criminal cases pending in circuit court charging the defendants respectively with the offenses of larceny, embezzlement, and obtaining money under false pretenses under the provisions of the Revised Statutes of Missouri for 1949, in effect at the time the offenses are alleged to have been committed, but since repealed by Senate Bill No. 27, of the 68th General Assembly, which gives new definitions of such offenses, such cases will be tried on the charges filed under the provisions of the Revised Statutes of Missouri for 1949, relating thereto. However, if the punishment provided for larceny, embezzlement, or obtaining money under false pretenses is less under the provisions of Senate Bill No. 27 than under those of the 1949 statutes, then each defendant convicted of any such offense or offenses, and judgment is not rendered against him until after August 29, 1955, the effective date of said Senate Bill No. 27, such judgment shall be in accordance with the applicable provisions of said bill.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul W. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:ma:gm