

GAME AND FISH DEPARTMENT:

Right to prosecute for
possession of more than
twenty-five game fish.

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letter.*

March 17, 1933



Mr. John H. Ross, Commissioner
Game and Fish Department
Jefferson City, Missouri

Dear Mr. Ross:

This Department acknowledges receipt of your letter dated March 8, 1933, as follows:

"I wish you would please give me your interpretation of that part of Section 8275, R. S. Missouri 1929, which reads as follows:

*****No person shall take, capture or kill, when taken from the waters of this state, in any one day, more than twenty rock bass (goggle-eye), ten bass of all other specie, ten trout, fifteen crappie, five jack salmon or pike, fifteen white perch, ten channel cat, or a total of twenty-five game fish, the possession of more than the number of the fish herein stated shall be prima facie evidence of the violation of this section. *****

I desire your opinion as to just what is the possession limit on game fish.

Please inform me in your opinion whether or not a person, who has in his possession forty-five crappie and who furnishes affidavit that he has been fishing for a period of three or more days, is guilty of violating this section of the law."

Section 8224 Revised Statutes Missouri, 1929, declares that the ownership of fish not held by private ownership is in the State of Missouri and that no fish shall be caught or taken in any manner, at any time, or had in possession except the person so catching and taking same in possession shall consent title of such

fish be and remain in the State of Missouri, for the purpose of regulating and controlling the use and disposition of same after the same are caught or taken. The section further providing that the catching or taking of fish at any time or in any manner, shall be deemed a consent of the person taking or catching same that the title to the fish shall be and remain in the State, for the purpose of regulating the use and disposition of same and the possession thereof shall be consent to such title in the State.

Section 8247 prohibits the possession by any person of fish during the closed season thereon prescribed by law and making such possession a misdemeanor.

Section 8248 provides it shall be unlawful for any person after the passage of the section, to fish in this state without first obtaining a license permitting him or her to do so and such license shall authorize the person named thereon to fish during the calendar year of its issue and subject to the regulations and restrictions as provided by law. Fishing in privately owned lakes or ponds where a fee is charged for the privilege of fishing, is exempted and likewise certain exemptions are made in Section 8254.

Sections 8249 to 8253, inclusive, cover the application for and issuance of licenses to non residents of the State.

Section 8254 provides for the issuance of county and state fishing licenses. County resident licenses shall entitle the holder to fish in the county wherein such license is issued and also in any county adjoining the issuing county. State resident licenses entitle the holders thereof to fish in all counties in the State of Missouri. Any person who has been a bona fide resident of this state for six months last past may secure a license for himself or herself, by filing an affidavit with the county clerk or the license collector of the City of St. Louis, making certain statements and giving certain information, whereupon a license to fish in the county where the applicant resides and any county adjoining the same, shall be issued, it being provided that the section shall not apply to owners and tenants of farm lands used exclusively for agricultural purposes and members of their families under the age of twenty-one years who are entitled to fish on their own and leased lands without obtaining a license so to do, it being further provided in the section that no female or minor who are resident citizens of this state shall be required to take out a fishing license and it being further provided that no person shall be required to take out a fishing license to fish in the water in the boundaries of the county in which he resides,

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it being further provided that the ^{section} shall not be so construed as to permit a person to fish in any county other than that in which he resides without first taking out fishing license.

Section 8257 requires every person holding a fishing license in this state to present the same for inspection by the fish and game commissioner or any of his deputies or any sheriff, marshal or constable, making a refusal so to do a misdemeanor.

Section 8253 provides a penalty for fishing in this state without at the time being in possession of a license duly issued to such person and covering the period of time in which such fishing is done.

You have correctly set out in your letter the material part so far as your inquiry is concerned, of Section 8275 Revised Statutes Missouri, 1929.

Section 8224 first quoted from is only declaratory of the common law as to the ownership of fish in the waters of the state. The ownership being in the State, the right to fish becomes a privilege which the State may withhold from its citizens or grant upon such terms and conditions as to the State, acting through its Legislature, may seem proper and wise in the protection of the wild life of the state. That the Legislature has undertaken to do, so far as fish are concerned by means of sections of the statutes above referred to in this opinion.

The protection ordinarily afforded by the Constitution of the State against unreasonable search and seizure, as well as that a defendant in a criminal case is entitled to be confronted with the witnesses against him, do not apply in the enforcement of the laws, rules and regulations with reference to the protection of birds, fish and game. In other words, upon the acceptance of a license from the State to take and keep its property the license agrees to become amenable to the rules and regulations laid down by the State. Without investigation it would ordinarily occur to one with knowledge of the Constitution of the State and rules of evidence, that that part of Section 8275 making the possession of fish prima facie evidence of the violation of the Section would violate the constitutional rights of the defendant in that he is in a way producing evidence against himself and may be in a way convicted without being confronted with the witnesses against him. However, if the person being prosecuted is the holder of a license issued by the State and we assume you refer to that character of case in your letter, then such constitutional privileges have been waived by the acceptance of the license. The law of this State in

the above regard is stated by the Supreme Court of Missouri, en banc, in State v. Bennett, 285 S. W. 50, and on page 53, where the court quoted with approval the following:

"Rights in private property must, to a reasonable extent, yield to the public welfare. The protection of game is a public advantage, to which private interests may be made to yield to some extent. The Legislature may enact a reasonable regulation to prevent an easy evasion of the law and a defeat of its purpose to protect and preserve game, and in doing that it may make it unlawful for any person to have in his possession the carcass of a deer, which does not have on it the natural evidences of its sex, whether the deer was a wild or a domesticated one, and the game and fish law of 1905 does that and is valid in that respect".

And further on the same page and on page 43 said:

"The defendant cannot play fast and loose, that by accepting a hunter's license and exercising the privilege under the restrictions and limitations of the statute, one of which was his duty to submit to the inspection and count of the quail in his possession by the game warden, he waived the constitutional rights invoked so far as applicable to the facts in this case.

In Diaz v. United States, 223 U. S. 442, 452, 32 S. Ct. 250, 252 (56 L. Ed. 500, Ann. Cas. 1913C, 1138), in considering the question of the right of the accused to be confronted by a witness against him, the court said:

The view that this right may be waived also was recognized by this court in Reynolds v. United States, 98 U. S. 145, 148, (25 L. Ed. 244), where testimony given on a first trial was held admissible on a second, even against a timely objection, because the witness was absent by the wrongful act of the accused."

Under Section 8275 any person entitled to fish may for instance catch 20 rock bass and 5 jack salmon in one day, or for instance he is entitled to catch 15 white perch and 10 channel cat in one day, but in no event can such person catch more than a total of 25 game fish in any one day, that is a person might catch 5 rock bass, 5 trout, 5 crappie, 5 jack salmon and

5 white perch.

If a person is apprehended and has in his possession more than 25 of the fish designated as game fish by Section 8275. then a charge should be filed against such person before an officer having jurisdiction thereof and proof that such person was in possession of 25 game fish at a time certain is sufficient evidence upon which a conviction may be sustained. The defendant, however, would have the right to make proof that he did not catch all of the 25 fish in one day, then it would become a question for the jury to pass on. If the jury thought he did catch all the fish on the same day they would find him guilty, if they did not they would find him not guilty.

Under no circumstances should your Department accept such an affidavit as you refer to in your letter, as that permits the person in possession of the fish without a hearing and without the State having a right to present its evidence, to acquit himself of any wrongdoing. In such a case as you refer to an affidavit should have been filed before a Justice of the Peace of the proper district, charging the person with a violation of the law and the person should have been arrested and brought into court and tried, but in no event should any deputy of yours or other officer have a right to pass upon the guilt or innocence of the party and upon an affidavit furnished by the person suspected of violating the law.

In what we have thus far said we have had in mind persons who were required to have and who were in possession of fishing licences, however, we do not want to be understood as implying that a person not required to procure a license to fish could violate the provisions of Section 8275.

Very truly yours,

W. C. BUFORD,
Assistant Attorney General

APPROVED:

Attorney General.

WCB:LC