

- GAME AND FISH CRIMES: (1) Territorial jurisdiction of crimes is limited to statutory and constitutional boundaries which change by "accretion" but not by "evulsion".
- (2) Netting of fish in April and May in Missouri waters is a misdemeanor.
- March 31, 1936.

Honorable Maurice Hoffman  
Prosecuting Attorney  
Buchanan County  
St. Joseph, Missouri

4-2

FILED  
41

Dear Sir:

We acknowledge your request for an opinion dated March 16, 1936. Your request reads as follows:

"I would appreciate an opinion from you regarding the rights of commercial fishermen to use nets or seines in that portion of the Missouri River which forms the boundary between Missouri and Kansas, during the months of April and May. Sec. 8273 R. S. 1929. Particularly where the fishermen live in Missouri and have both a Missouri fishing license and a Kansas Commercial fishing license. Also if a fisherman living in Kansas and holding a Kansas Commercial fishing license would be violating the laws of Missouri by fishing in the Missouri river with nets or seines during April and May. Sec. 1, Art. 1 Const.

"Also if the thread of the stream is ever used as a dividing line between the states for the purpose of determining jurisdiction of the respective states."

Section 8270 R. S. Mo. 1929, provides in part:

"It shall be unlawful for any person or persons to take, catch, or kill, any fish in any of the waters of this state, by means of any trammel net, gill net, fish trap, firearm, rifle or gun or any other kind of net, trap, firearm, device or any other means other than by ordinary hook and line, gig, spear.

trot line, artificial bait, or seine,  
of the kind and at the time, and in  
the manner permitted by law. \* \* \* \*

A violation of the provisions of this section shall constitute a misdemeanor, for which the minimum fine shall be ten dollars (\$10.00) for the first fish illegally taken or possessed, and a fine of one dollar (\$1.00) for each additional fish illegally taken or possessed."

Section 8273 R. S. Mo. 1929, provides in part:

"The use of seines, hoop nets and trammel nets, is hereby permitted, in the Mississippi, Missouri and Osage rivers, during the months of January, February, March, June, July, August, September, October, November and December of each year, with seines and nets, the mesh of which shall not be less than two inches square;\* \* \* \*."

From the foregoing, the use of nets is prohibited in rivers within the jurisdiction of this State, excepting the use of same in the Mississippi, Missouri and Osage rivers during certain months. The months of April or May are not noted as months in which netting of fish is permitted. The force of the Statutes is not abated because one violating these provisions happens to have a Missouri State fishing license or a Kansas commercial fishing license. Fishermen are not licensed to violate the law. Where one violates these sections and fish in prohibited waters under the jurisdiction of the Missouri courts, he is subject to prosecution in Missouri.

In proceeding against one who has violated any game and fish law, it is necessary that the Court, before whom a proceeding be filed, have venue in the matter. Venue in such cases is limited to territorial meets and bounds of the township, the county, or the state, according to whether the criminal proceeding be filed before a Justice of the Peace or direct in the Circuit Court. Section 3377 R. S. Mo. provides:

"Offenses committed against the laws of this state shall be punished in the county in which the offense is

committed, except as may be otherwise provided by law."

Section 3414 R. S. Mo. 1929, provides:

"Justices of the peace shall have concurrent original jurisdiction with the circuit court, coextensive with their respective counties in all cases of misdemeanor, except in cities having courts exercising exclusive jurisdiction in criminal cases, or as otherwise provided by law: Provided, that all prosecutions before justices of the peace for misdemeanor shall be commenced and prosecuted in the township wherein the offense is alleged to have been committed. Provided further, that nothing herein contained shall prevent the defendant from taking a change of venue, as provided for in this article."

We are not familiar with the legal boundaries of the different townships in Buchanan County, but we know that their western boundary lines are contiguous to the western boundary line of Buchanan County, and of the State of Missouri. The boundary lines of Buchanan County may be found in Section 11895 R. S. Mo. 1929, which provides as follows:

"Beginning at a point in the middle of the main channel of the Missouri river, where the prolongation west of the line run and marked by M. M. Hughes, under the act of the general assembly of 1838 and 1839; thence east of said line to the old boundary line of the state; thence north with said line to the point where it is intersected by the subdivisional line between sections twenty-one and twenty-eight of township fifty-eight, range thirty-three, west; thence west with the subdivisional lines to the middle of the main channel of the Missouri river; thence down said river, in the middle of the main channel thereof, to the place of beginning."

Section 12005 R. S. Mo. 1929 provides:

"Whenever a county is bounded by a watercourse, it shall be construed to the middle of the main channel thereof; and range, township and sectional lines shall be construed as conforming to the established surveys."

From the provisions of Section 11895 and 12005, supra, there can be no doubt but that the statutory boundary of Buchanan County and of the State of Missouri on the west was originally established as the middle of the main channel as the same existed at the time that these statutes became the law. These statutes were in force at the time of the adoption of the Constitution of 1875, the present Constitution.

Article IX, Section 1 of the Missouri Constitution provides:

"The several counties of this State, as they now exist, are hereby recognized as legal subdivisions of the State."

In the case of State v. Hoffman, 318 Mo. 991, 1. c. 994; 2 S. W. (2d) 582, the Supreme Court said:

"Because of the constitutional and statutory provisions just mentioned the State in all of its contentions in this case has assumed that the boundary between the two counties has never varied a hair's breadth from where the middle of the channel of the river was in 1875, notwithstanding the channel had prior to 1915 gradually and imperceptibly shifted from that place far to the east and north. Under all the authorities the assumption is clearly wrong. For there is nothing in the language of either the statute or the Constitution to indicate that the framers in the one case or the Legislature in the other intended to alter or abolish the rules of the common law relating to running water as a

boundary. In dealing with questions touching such a boundary, the Supreme Court of the United States has uniformly applied those rules (which are the same as those of the civil law and the law of nations), whether the boundary was one fixed by treaty or by Act of Congress. \* \* \* \*

"For a statement of the rules referred to in the preceding paragraph we cannot do better than quote from the opinion of Mr. Justice Brewer in *Nebraska v. Iowa*, supra, at page 360:

"It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In *New Orleans v. United States*, 10 Pet. 662, 717, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." (Citing cases.)

"It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel,

although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." (Citing cases.)

"These propositions, which are universally recognized as correct where the boundaries of private property touch on streams are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the centre of the old channel."

CONCLUSION.

- - - - -

If, since the Constitution of 1875 the middle of the main channel of the Missouri river, bordering on and flowing through Buchanan County, Missouri, has changed its main channel by avulsion, then this department is of the opinion that under the Missouri Game and Fish Laws all persons who fish with nets in that portion which at the establishing of the Constitution of 1875 lay east of the main channel, bordering on and flowing through Buchanan County, Missouri, during the months of April and May, are guilty of a misdemeanor and are subject to the penalty provided in Section 8270, supra.

If, since the Constitution of 1875 the middle of the main channel of the Missouri River, bordering on Buchanan County, Missouri, has changed its main channel by accretion, then this department is of the opinion that the State, County and Township boundary line on the west has changed

March 31, 1936.

contiguous with the channel, and under the Game and Fish Laws all persons who fish with nets in that portion of the river which is between the middle of the main channel and the terra firma of Buchanan County east of the main channel, during the months of April and May, are guilty of a misdemeanor and are subject to the penalty provided in section 8270, supra.

The State, County and Township boundary line follows any changes in the stream due to accretion, but remains in the middle of the 1875 channel in case of avulsion. It is common knowledge that the middle of the main channel, since the Constitution of 1875, has changed its course at this location and has moved to the east. No facts stated in your letter tell us whether this change was by accretion or by avulsion, hence this opinion covers both possibilities, and the law is applicable in either case.

Crimes and misdemeanors committed within the Constitutional and statutory bounds of Buchanan County have their venue in Buchanan County, or if a misdemeanor, in the township, irrespective of the present thread of the stream.

It is common knowledge that April and May are the spawning season when fish travel in schools. The Missouri Game and Fish Laws are for the protection of fish from those who would net schools of fish from the Missouri waters. The Legislature intended the conservation of fish life while they are breeding. Kansas may not have such a conservation law, but on the other hand neither a Missouri nor a Kansas license is any protection to one who has violated the Game and Fish Laws of Missouri in Buchanan County, Missouri, and parts of Buchanan County, Missouri, at this time may be dry land west of the present main channel and thread of the stream, if since the Constitution of 1875 this channel change to the east came about by avulsion. It is altogether possible that the Missouri river flows through land located in Buchanan County, Missouri, at this time.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS  
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.  
(Acting) Attorney General.

WOS:H