

FISH AND GAME: Possession of squirrels between June 1st and November 30th is not a violation of section 8277 R. S. Missouri, 1929.

July 20, 1939 7/22



Hon. O. A. Kamp  
Prosecuting Attorney  
Montgomery County  
Montgomery City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of July 14th, 1939, which reads as follows:

"I am writing you for an opinion construing Section 8285 R. S. Missouri, 1929.

"Charles L. Horner, one of the Game Conservation Agents, has filed with a Justice of the Peace, complaints charging a colored boy with selling six squirrels for ten cents each to one person, and two squirrels for ten cents each to another person, on or about June 5th, 1939.

"I have filed the information on the complaint against the party who sold the squirrels, under the provisions of the above section prohibiting the sale of same, and he entered a plea of guilty.

"The conservation agent also filed complaints against the individuals for buying the squirrels, and insists that I file informations, contending that said section 8285 also prohibits the buying of such game.

"This sale was made to individuals, and in no way comes under the provisions of said section prohibiting the serving or storage

of such game, as prohibited by said section.

"I am of the opinion that said section does not operate against the buyer, reading as follows. 'Any person, firm, or corporation, who shall, at any time of the year, barter, sell or offer for sale, . . .' I do not feel that an information should be filed on said complaints, for as I construe said section the buyers did not violate the law under the provisions thereof. I am holding the complaints for the time being and would like to have your opinion on this matter in order to get this adjusted with the Game Conservation Agent. \* \* \* \* "

Section 8237 R. S. Missouri, 1929, reads as follows:

"No person shall pursue, capture, injure, kill, or destroy any grey squirrel, fox squirrel (American squirrel) or black squirrel, except from June 1st to November 30th each year, both dates inclusive; not to exceed ten in any one day, nor shall any person pursue, injure, capture, kill or destroy any such squirrels at any time in any public or private park: Provided, that any person may protect his or her premises from the ravages and depredations of animals named in this section at any time and in any way. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor."

It will be noticed by implication that the date of open season on squirrels is June 1st to November 30th of each year.

Section 8247 R. S. Missouri, 1929, reads as follows:

"Any person who shall have in his possession or under his control any variety of fish, game or birds, during the closed season prescribed by law therefor, and any person who shall have in his possession, or under his control, the carcass, pelt, or flesh of any animal, fish or game protected by this article, except when such possession or control is permitted thereunder, shall be guilty of a misdemeanor and the game warden and his deputies are hereby permitted and authorized to take and confiscate any fish, game, birds, or wild animals, or the carcass, pelt or flesh thereof, from any person who may be holding the same, in violation of this article."

According to the facts stated in your request, the game warden is probably proceeding under this section, and if this is so, the season not being closed, the possession of a squirrel is not in violation of this section, for the reason that the defendants did not buy the squirrels until June 5th, 1939. If the possession was at a time the season was closed on squirrels, the possession of same would be a violation of section 8247, supra. It was so held in the case of State v. King, 97 S. W. (2d) 153.

Section 8285 Session Laws of 1931, page 225 is a new section repealing section 8285 R. S. Missouri, 1929. The only change being the omission of the words "whether taken within or without this state". Section 8285 Session Laws of 1931, page 225, reads as follows:

"Any person, firm or corporation, who shall, at any time of the year barter, sell or offer for sale, or who shall store or serve in any commission house, cold storage house or commercial establishment, in this state, either under the name used in this article, or under any other name or guise whatever, any animal or bird protected in this article, unless the same be fur-bearing animals, lawfully taken shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than one

hundred dollars (\$100.00), and an additional fine of five dollars (\$5.00) for every bird or animal or part of every bird or animal bartered, sold or offered for sale, stored or served: Provided, that nothing in this section shall be construed to apply to the pelts or parts of fur-bearing animals lawfully taken, or as otherwise provided for taxidermists, or scientific specimens in this article: Provided, nothing in this section shall be construed to prohibit the storing, and serving, in any eating establishment, of deer and elk, raised in captivity, as provided for in section 8310."

Under this section, which deals with the possession of protected animals, it is specifically stated "who shall store or serve in any commission house, cold storage house or commercial establishment in this state." It can readily be seen that it was the intention of the legislature in enacting this section that it apply only to commercial enterprises and not to a private individual. In rendering this opinion, this office is taking into consideration that the statute of 1929 and 1931, also any law in regard to the conservation of fish and game, as applied in 1937, is governed by amendment number four which was voted in 1937, and which gave the conservation commission much authority in regulating the conservation of fish and game. Under that amendment the conservation commission was empowered to make rules which would invalidate any statutory law which would be in conflict with any rules made by the newly created conservation commission. It was so held in the case of Marsh v. Bartlett, 121 S. W. (2d) 737, pars. 15,16, where the court said:

"It has been indicated above that the Conservation Commission has been granted the authority to control, regulate, etc., the matters committed to it. There was much discussion by counsel in their oral arguments, and much appears in their brief, with reference to the meaning of the words definitive of that authority. In the aspect of the Amendment now under consideration there is no need to go into

definition of the various terms. They take color and significance from the context.

"The term 'regulate' will be sufficient for the moment. It includes ordinarily the means to adjust, order, or govern by rule or established mode; direct or manage according to certain standards or rules. *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 88 S. W. 648, 5 L. R. A., N. S., 186. Regulation and legislation are not synonymous terms. In re *Northwestern Indiana Tel. Co.*, 201 Ind. 667, 171 N. E. 65, 70. Regulation is comprehensive enough to cover the exercise of authority over the whole subject to be regulated. *Southern R. Co. v. Russell*, 133 Va. 292, 112 S. E. 700, 703.

"It will be remembered that in the body of the Amendment the word 'laws' occurs twice and is therein definitely related to the Legislature or to the legislative power, while the word 'regulate' and kindred words are attributed to the administrative power and duty. Also, as pointed out in our citation of the *Grimaud Case*, supra, punitive laws or laws fixing punishment as for violations of administrative rules are solely referable to the legislative power and function, and, on the other hand, administrative rules may have the force of law in that violations thereof are punishable as public offenses. Hence it follows that unless there be existing statutes that are not inconsistent with the Amendment but which do in effect fix punishment for acts or conduct that may fairly come within the purview of some rule or rules established by the Conservation Commission, it cannot be said that the Amendment is completely self-enforcing; if the situation be the opposite, our conclusion will be the opposite."

Hon. O. A. Kamp

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CONCLUSION.

In view of the above authorities, it is the opinion of this department that any private individual who purchases squirrels between June 1st and November 30th, in any year, is not subject to criminal prosecution unless the purchase is made for the purpose of commercial business and not for private consumption of the squirrels.

Respectfully submitted,

W. J. BURKE  
Assistant Attorney General

APPROVED:

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TYRE W. BURTON  
(Acting) Attorney General

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