

CONSERVATION COMMISSION: Section 54 of Wildlife and
Forestry Code of Missouri
FISH AND GAME: 1944, construed.

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Honorable L. E. Merrill
Prosecuting Attorney
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Keytesville, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of June 27, which reads:

"I desire your opinion on the following: Section 54 of the Wildlife-Forestry Code provides that certain furs legally taken by hunter or trapper may be possessed and sold by the hunter or trapper not later than January 20th next thereafter.

"Question: If a hunter or trapper, on January 20th next after legally taking the said fur, consigns such fur to the fur buyer and such fur is not received by the fur buyer until after January 20th, that is to say, the 24th or 25th of January, has the hunter or trapper violated the terms of said Section 54?"

One of the cardinal rules of statutory construction is to try to determine from the Act, if possible, the intention of the Legislature expressed therein. The same rule is applicable to a regulation adopted by the Conservation Commission who is vested with power, under Section 16, Article XIV, Constitution of Missouri, to promulgate regulations. (See City of St. Louis v. Senter Comm. Co., 85 S. W. (2d) 21, 337 Mo. 233; Cummins v. Kansas City Public Service Co., 66 S. W. (2d) 920, 334 Mo. 672.)

Under Section 54, Wildlife and Forestry Code of Missouri 1944, no hunter or trapper may take certain fur-bearing animals

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after January 15, and said hunter or trapper, under the same regulation, cannot possess and sell said furs later than the following January 20. Section 54 reads:

"Opossum, muskrat, skunk, spotted skunk (civet cat), weasel (ermine), mink, red and gray fox may be taken by pistol, rifle, gun, dog or trap, or by pistol and dog, or by rifle and dog, or by gun and dog from December 1 to January 15 next thereafter; and may be possessed and sold by the hunter or trapper not later than January 20 next thereafter. All traps so used shall be labeled as provided herein, and shall be attended daily. No metal-jawed trap may be baited or set except in dens or holes or as water sets. Nothing in this Section shall be construed as interfering in any way with the right of farmers or other property owners to take animals at any time in protection of their property as provided in Sections 27 and 99 hereof, or to prevent the running of foxes for sport as provided in Section 98."

The Conservation Commission has also defined certain terms, as used in the regulations, contained in the Wildlife and Forestry Code. "Possession" has been defined in Section 101 as follows: "Actual and constructive possession and any control of things referred to." The word "and," as used in "possession and sale," is employed disjunctively and is not synonymous with the word "or."

In *Pitcairn v. American Refrigerator Transit Co.*, 101 Fed. 929, l.c. 937, the court said:

"The contract is limited to lines of railroad owned, controlled and operated. These subsidiaries were not owned, controlled and operated by the railroad companies. True, 'and' is sometimes read as 'or,' when necessary to effectuate an apparent intent. *Rice v. United States*, 8 Cir., 53 F. 910; *Atlantic Terra Cotta Co. v. Masons' Supply Co.*, 6 Cir., 180 F. 332. But here again, the practical interpretation of the contract by the parties to it, clearly shows that the word 'and' should not be construed as 'or.'"

See also *Marble v. Jackson*, 139 N. E. 442, 444, 245 Mass. 504.

The word "and," as commonly used, means in addition thereto, and when used in penal statutes can never be construed as "or." In *McCaul-Webster Elevator Co. v. Adams*, 167 N. W. 330, l.c. 332, the court in so holding said:

"* * * * The word 'and' in the language above quoted is not used in an explanatory sense, but means and expresses the relation of addition. It is used as a co-ordinate conjunction and signifies that the person claiming the lien shall have a lien upon the building, erection, or improvement, and in addition to a lien upon them he also has a further or additional lien upon the land upon which the improvement is situated, or to improve which said labor was done or material furnished. * * * *"

In *Buck v. Danzenbacker*, 37 N. J. L., 359, l.c. 361, the court said:

"* * * * A penal statute can never be extended by implication, and a case, which does not come within its words, shall not be brought within it by construction. In such a statute the word 'and' can not be construed to mean 'or.' * * * *"

From the above we are of the opinion that a hunter and trapper cannot have either actual or constructive possession of furs after January 20 following the legal taking of said furs. We are further of the opinion that if said hunter and trapper has not sold said furs on January 20, as stated in your letter, he must at least retain constructive possession of them, even though not actually in his possession.

Your request states that the hunter or trapper has consigned to the fur buyer such furs on January 20, however the fur buyer did not receive them until after January 20, and probably January 24 or 25. The word "consigned," as used in a commercial sense, carries a decided implication that the property consigned is not property of the consignee, but remains the property of the consignor; that it is merely given him for the purpose of selling same for the consignor. Therefore, it is not difficult to see the distinction between the word "sale" and the word "consignment."

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In *Globe Securities Co. v. Gardner Motor Co.*, 85 S. W. (2d) 561, l. c. 567, the court said:

" It has been said that the feature which vitally distinguishes conditional sale from consignment is that in the former the purchaser undertakes an absolute obligation to pay for the property, whereas the latter is nothing more than a bailment for sale. * * * * "

In *Edgewood Shoe Factories, etc., v. Stewart*, 107 Fed. (2d) 123, l.c. 126, the court said:

" * * * * All agree then, that if out of the agreement itself alone, if clear and unambiguous, or out of the acts and agreements of the parties, if the agreement is of doubtful purport, there arises an obligation on the part of the apparent consignee to buy and pay for the delivered goods, such that a suit can be maintained by the consignor as creditor, the transaction is one of sale, or agreement to sell, and not of consignment for sale. Whereas, if no binding obligation to buy or pay for the goods, on which consignor could sue, arises out of the agreement alone, or out of the agreement taken with the facts, but only an obligation to account to the consignor for the proceeds of the goods when sold, the relation must be held to be, not one of buyer and seller, but one of consignor and consignee for sale. * * * * "

See also *Terminal W. & Refrigerator Co. v. Cross Transp. Co.*, 33 A. (2) 617, l.c. 619 (4-5).

The courts in this state have also held that upon delivery of goods for shipment to a carrier, the vendor parts with title to said goods. In *Schanbacher v. Lucido Bros. Grocery Co.*, 93 S. W. (2d) 1076, l.c. 1082, the court said:

"It was not essential to show delivery of the merchandise to the appellant in St. Louis. The showing that the merchandise was delivered to the carrier for transportation was sufficient. (Cases cited)

"Appellant contends, however, that

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actual receipt and acceptance of the merchandise by appellant in St. Louis was essential under the statute of frauds. As to this contention, it will suffice to observe that the statute of frauds was not pleaded, or invoked, by objection to the evidence, or otherwise, at the trial, or in any manner called to the attention of the trial court. (Cases cited)"

See also Graff v. Foster, 67 Mo. 512, l.c. 520; State v. Rosenberger, 212 Mo. 648, l.c. 654.

Therefore, if this actually amounts to a consignment for the purpose of sale and the furs were not actually sold on January 20, then it is a violation of Regulation 54 because the hunter or trapper still holds title to said furs, at least he has constructive possession thereof. If the furs were actually sold on January 20, even though the fur buyer had not received shipment of said furs, the hunter or trapper has violated no regulation because he parted with title when said furs were delivered for shipment to the carrier.

Respectfully submitted,

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APPROVED:

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