CONSERVATION COMMISSION: Construing Section 8900, R. S. Mo.
FISH AND GAME: 1939.

June 16, 1941.

6-73

FILED

Honorable George Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Mr. Adams:

This will acknowledge receipt of your request for an opinion under date of May 27, 1941 which reads, in part, as follows:

> "I find that there is a statute section 8900 R. S. Mo. 1939 stating under what circumstances that land owners and tenants may destroy any wild fur-bearing animal which is committing depredations upon poultry, crops or domestic animals.
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> "My idea is that the farmer will have a slim chance of protecting his property from the foxes if he is not allowed to kill them except when he sees them committing depredations on his poultry and pigs. The short investigation discloses that the word is sometimes refers to the past as well as the present depending upon the context.
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> "I would like to have your opinion as to the word is in said section with citations of authorities, if any you find, to support Corpus Juris which says 'however, according to the context, the word may not have a present signification, and may accordingly have a future or past meaning.'"

Section 8900, R. S. Mo. 1939, is as follows:

> "It shall be lawful for land owners and tenants to destroy any wild fur-bearing animal which is committing depredations upon their poultry, crops, or domestic animals, but under no circumstances shall it be legal to sell, ship or commercialize in the pelts of such depredating animals, or any part thereof, if caught or killed out of season."

The word "is" is ordinarily defined as third person, present indicative, of the verb "be". The word, in its plain and ordinary usual sense denotes present tense.

In Kasarsky v. New York Life Insurance Company, 260 N. Y. S. 769, l. c. 771, the plaintiff was seeking to recover under two life insurance policies. There are two clauses in each policy which reads as follows:

> "* * * 'Permanent Disability--Disability shall be presumed to be permanent. * * * (b) After the insured has been so totally disabled for not less than three consecutive months immediately preceding receipt of proof thereof.' 'No. 3. Benefit--Upon receipt of the Company's Home Office before default in the payment of premiums, of due proof that the insured is totally and presumably permanently disabled. * * *'"

The court, in construing the word "is" in Clause No. 3, held that same constituted the third person singular of the present indicative of the verb "be". In so holding the court said, at l. c. 772:

> "The company insists that the reasonable construction to be placed upon the word 'is' as used in the policy term, clause

> three, 'Upon receipt of due proof that the insured is * * * presumably permanently disabled,' etc., should be that the defendant was to be furnished with due proof of disability at a period during the existence thereof. In view of the context such construction would appear the fair and reasonable intendment thereof. The word 'is' constitutes the third person singular of the present indicative of the verb 'be.' It is employed only in indication of the present tense. Had it been used with regard to an action or condition consummated or in the past the words 'was' or 'has been' might only appropriately have been employed. * * *"

In Indiana State Board of Medical Registration and Examination et al. v. Pickard, 93 Ind. App. 171, l. c. 179, 180, 177 N. E. 870, in construing the expression "is a graduate" in an act which required the issuance of a license practicing medicine without an examination to one who is a graduate of a certain school or college, the court held the word "is" as used in said statute should be construed as being present tense and that had reference, of course, to the time when the act took effect. In so holding the court said:

> "In construing a statute, courts will give effect to the intent of the Legislature, and, in seeking such intent, will look to the act as a whole, as well as its general purpose and the evils or mischiefs it is enacted to remedy. The words or phrases of a statute will be taken in their plan, ordinary and usual sense unless a contrary purpose is clearly manifest. Smith, Trustee, v. State, ex rel. (1930), 202 Ind. 185, 172 N. E. 911. Webster's New International Dictionary defines the word 'is' as being the third person singular present indicative of the verb be. The word 'is' in its plain, ordinary and usual sense denotes present tense, and

> there is nothing in the above-quoted statute to denote a contrary purpose in the use of this word. The phrase 'is a graduate' has reference, of course, to the time when the act took effect, for, from that time only, a statute ordinarily speaks. Hoagland v. State (1861), 17 Ind. 489. The act in question became effective May 16, 1927. We hold that, as a prerequisite to an applicant being granted a certificate for a license under Section 2 of this act (Acts 1927, ch. 248, p. 725), it is necessary that such applicant present to the board satisfactory evidence that he was, on or before May 16, 1927, a graduate of a school or college teaching the system or method of healing which he was practicing on January 1, 1927."

In State v. Boner et al., 49 S. W. 944, the court also construed the word "is" to be in the present tense, and not the perfect, "has been". In so holding the court said:

> "It is said that the court after judgment had power to remit or release the recognizance by reason of Code 1899, c. 162, Section 9, saying, 'When, in an action or scire facias on a recognizance, the penalty is adjudged to be forfeited, the court may, on application of a defendant, remit the penalty, or any part of it, and render judgment on such terms and conditions as it deems reasonable.' Plainly, this section limits the power of remission to the pendency of the proceeding on the recognizance. The words 'in an action or scire facias' show this. The word 'is' supports the argument. It is the present tense, not the perfect, 'has been.' The words 'render judgment' make it clear and conclusive. The recaption of Ray, I may add, could not be pleaded after final judgment."

In Cunningham v. Moser et al., 215 Pac. 758, l. c. 759, the court in holding "is removing" as used in a statutory provision signifies present action said:

> "In Greeley v. Greeley, 12 Okl. 659, 73 Pac. 295, the court says:
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> 'The language of section 3346--"intends to remove, or is removing, or has within thirty days removed"--is significant as pointing out the time when the acts of the defendant authorize the commencement of an action under this statute. "Intends" refers to future, contemplated action; "is removing" signifies present action; and "has within thirty days removed" limits the backward reach of defendants' acts to 30 days. One of these three acts must exist in order to authorize an attachment under this statute. This affidavit was made on the 20th day of June, 1902, and by no possibility could it authorize an attachment for rent for the year 1901.'"

Therefore to say that "is", as used in this instance shall be construed as to mean in the past, is at least the exception to the rule rather than the rule. There are a few cases reported wherein the word "is" has been construed as past tense.

In Collins v. Carr, 44 S. E. 1000, the jurors returned a verdict which reads, in part, as follows:

> "We, the Jury, find that John H. Carr is of sound mind, and is not, on account of mental weakness, intemperate habits, wasteful and profligate habits, unfit to be intrusted with the right and management of the property; that the trust sought to be created in the second item of the will of Josiah Carr is void; and that the appointment of Jno. G. Collins as trustee be annulled. * * *"

One objection was made to the above verdict in that it does not specify at what time the item of the will appointing the trustee became void. The court said:

> "The father had a right to appoint the trustee upon his knowledge of the son's habits and the presumption is that the son, at the time of the execution of the will was, in the opinion of the father, not a fit person to take charge of the property. That presumption remained until rebutted by proof before the jury. Up to the time sufficient proof was made on the trial to authorize the finding that the trust was invalid, that item of the will was valid and binding upon the son and the trustee. When the jury, in their verdict, declared that the trust 'is void' this meant that the trust was void at the time the petition was filed and at the time of the trial."

In Hall v. Brackett, 62 New Hamp. 509, Brackett was elected Treasurer August 1, 1857 and since that time no treasurer had been chosen. He held office until suspension of the bank in September, 1877. In 1869 the treasurer gave a bond which cited, in part, that "If the above bounden, John M. Brackett, who is treasurer of the Carroll County Five Cents Savings Bank of Wolfeburough, shall faithfully, etc." The charter provided that the treasurer was one of those who shall hold their offices for one year, and until others are chosen and have accepted in the stead. The court, in this case,held that the defendants cannot deny that Brackett was treasurer at the time he gave the bond and that the words "is treasurer", in the bond, might refer to no other term than the indefinite one he was holding, and that the bond given in 1869 covers any default that occurred during the continuance of the indefinite term for which it was given.

In Delaware Bay and Cape May Railroad Company v. Markley, 45 N. J. Eq. 139, l. c. 149, the court said:

"As already stated, this procedure is based on the act to be found in the Rev. Sup. p. 834 Section 42. its general provision is thus expressed, viz,:

'That if any railroad in this state has, or may hereafter, fail or neglect to run daily trains on any part of its road for the space of ten days, then the chancellor of this state, upon petition of any citizen of this state, and due proof of the facts, shall speedily appoint a receiver' &c.

"And then follows the following clause:

'Provided, that this act shall not apply to any railroad company whose road is constructed at any sea-side resort, not exceeding four miles in length, and which was built and intended merely for the transportation of summer travelers and tourists.'

"In the present case, the appellant has shown, in the clearest manner, that, in point of fact, its road is exactly one of those described in this proviso; it is less than four miles in length; is at a sea-side resort; was designed to be and was a mere adjunct of a boat running in the summer season from Philadelphia, and was used merely, except incidentally, for the transportation of 'summer travelers and tourists.' We think, therefore, that the appellant has, under the evidence, demonstrated that it stands within the definition of this proviso, if such proviso applies to roads already in existence at the time of its enactment.

"The vice-chancellor was of opinion that this exceptive clause did not apply to

> the appellant's road, because it was built before the passage of the law, and he declared that he did not feel himself at liberty to give this provision any retrospective operation.
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> "But this interpretation appears to us to be in plain repugnancy, not only to the spirit, but to the language of the statute. In its first line this is manifest, for it declares that its summary processes are to apply not only to roads that thereafter should fail to run their daily trains, but also to roads that had, before the passage of the law, failed so to do; and the proviso, by its strict terms, is made applicable exclusively to a road which, to use the statutory expressions, 'is constructed,' and which 'was built and intended' &c.; plainly designating, if we look to terms alone, roads already in existence, and not those which might come into existence at a future time."

As hereinabove stated, by the court, the contention of the vice-chancellor that the exceptive clause did not apply to this particular road because it was built before the passage of the act, was erroneous, for the reason in reading the whole act such an interpretation would be repugnant to the spirit as well as the language of the statute. The words "That if any railroad in this state has, or may hereafter, fail etc." clearly indicates that it was intended that the acts should apply to roads already constructed.

The writer is fully apprized of the fact that it is very difficult to catch a fox in the act of killing poultry and can sympathize with the farmer. However, in construing this act it is necessary that we follow certain rules of construction as laid down by the Supreme Court in this state.

One of the cardinal rules of construction is to ascertain and give effect to the lawmakers intent which should be done from the words used, if possible, considering the language honestly and lawfully, to ascertain its plain and rational meaning and to permit its object and manifest purpose. City of St. Louis vs. Pope, 126 S. W. (2d) 1201, l. c. 1210.

Another well established rule, and well recognized, is that words of common use ought to be construed in their natural and ordinary meaning. In Betz vs. Kansas City Southern Railway Co., 314 Mo. 391, l. c. 411, the court quoted approvingly:

> "In 36 Cyc. 1106, it is said: 'The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority.' And in 36 Cyc. 1114, it is furthermore said: 'In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. It is a very well-settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the court to give it force and effect.' * * *"

There is still another rule of construction that is applicable in the instant case and that is, that a statute will not be so construed as to require impossibility or lead to absurd results if susceptible of reasonable interpretation. In State vs. Irvine, 72 S. W. (2d) 97, l. c. 100, the court said:

> "* * * The courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reason-

able interpretation. * * *"

Looking to the act the language clearly indicates that the legislature fully intended the word "is", as used therein, to be used in the present and not in the past tense. The courts ordinarily have construed the word "is" in such manner as hereinabove shown. As previously stated, it is the exception instead of the rule to construe the word "is" as used in the past tense. We have hereinabove set out a few cases wherein this was done. In each case the reason given for such a construction is evident. From a reading of the balance of the acts, wherein such construction was given, it clearly indicates the legislature could have intended no other construction, and to construe it in any other manner would defeat the purpose of the act.

In the instant case we are confronted with a very different situation. Here we have a statute which requires a person to kill a fox which is committing depredations upon poultry, etc. If we should construe the word "is", in the past tense, then this would lead to an absurdity for the reason, if the fox had already killed the poultry without being caught or killed, how could a person ever identify the same fox if he should see him again. It is almost impossible to identify one fox from another fox. Surely the legislature never intended to say that if a fox had been preying upon a farmer's poultry and was not killed while in the act, that the farmer thereafter could kill any fox upon sight. We think the legislature never intended such a construction. It would be much more sensible to say, that the legislature intended that the word "is", is to be used in the present tense which follows the ordinary and usual meaning of same.

Furthermore, the fox is protected under the law. The legislature as well as the Conservation Commission have seen fit to enact legislation and promulgate rules and regulations for their protection and the state now has certain closed seasons for their protection. In view of this, it seems to the writer that it would practically amount to repealing these laws and regulations to construe the word "is" as being in the past tense.

CONCLUSION

Therefore, it is the opinion of this department that the word "is", as used in Section 8900, supra, should be interpreted in the present and not in the past tense.

Respectfully submitted,

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APPROVED:

VANE C. THURLO
(Acting) Attorney-General

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