GAME AND FISH:
CONSERVATION COMMISSION:
SALE OF RABBITS AT
RESTAURANT OR CAFE:

Persons who serve rabbits for a charge are not included in the definition of the term "retail vendor" and not required to have a permit under Conservation Commission Code Section 37, subdivision (1).

November 26, 1940

12-3 FILED 10

Mr. I. T. Bode, Director
Conservation Commission
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an official opinion from this department on the question of whether or not an operator of a tavern, who serves rabbits to his customers, is required to obtain a "retail vendor's" permit from the Conservation Commission.

In the case of Marsh v. Bartlett, 121 S. W. (2d) 737, l. c. 744, the Court, in discussing the powers imposed on the Conservation Commission, said:

> "The sovereign people having enlisted the Conservation Commission as the constitutional agency to exercise the powers and functions granted in Amendment No. 4, it is not our function to consider or to determine the wisdom, the expediency or the policy to be executed by that body. * * * * * * * * * * * * * * * * *
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> "It has been indicated above that the Conservation Commission has been granted the authority to control, regulate, etc., the matters committed to it. * * * * * * * * * * * * * * * * *"

Pursuant to the provisions of Constitutional Amendment No. 4, and also of the Supreme Court in the above case, the Conservation Commission adopted certain

rules and regulations for the preservation and protection of the game and fish of this State, among which are the following which are pertinent to your question:

Section 27, page 3, of the Supplement to Wildlife and Forestry Code, State of Missouri, dated April 15, 1940, provides in part:

> "No wildlife may be pursued, taken, transported, shipped, bought, sold, given away, stored, served, used or possessed, and no equipment, material or facility for the taking of such wildlife may be used for such purpose by any person, other than one who at the same time has in his possession the required permit as hereinafter described; * * * * * * * * * * * * * *"

Section 37 (1), of said amended code, provides as follows:

> "Resident State Retail Vendor's Permit $1.00--To possess, transport, buy and sell, exclusively for retail purposes, rabbits and only such frogs and fish as are permitted to be sold by these regulations and which have been legally obtained from without this State, or from an authorized resident game breeder, or from the Missouri and Mississippi Rivers taken by the holder of a commercial fishing permit, and supported by a bill of sale, upon the payment of a resident retail vendor's permit fee of one dollar ($1.00)."

Section 101, page 39, of the Wildlife and Forestry Code of the State of Missouri, provides, in part, as follows:

> "For the purposes of these regulations and their application, the following definitions and interpretations shall govern unless a diferent meaning is clearly evident from the context, and where one or more synonymous names or words are used, they shall be deemed to be interchangeable. * * * * * * * * * * * *"

And, at page 46 of said Code in the same Section, the term "Sell, Sale and Disposal" is defined as follows:

> "Sell, barter, exchange, give away, including also the offering for sale, barter, exchange or gift; and applying in like manner to the seller or person offering for sale, barter, exchange or gift and to the recipient or buyer."

At page 47 of said Code, the term "Serve and Serving" is defined as follows:

> "Shall include the preparation of wildlife for human consumption as well as the serving or offering for consumption, whether or not a fee, charge, or other consideration is involved."

On the same page "Retail Vendor" is defined as follows:

> "Any person who possesses and sells or offers for sale for retail purposes, any rabbits, fish or frogs."

Your letter indicates that the Conservation Commission has held that the tavern operator who serves rabbits to his customers should obtain a "Retail Vendor's permit, as provided by said Section 37 (1), in order that he may comply with the provisions of the Code.

The answer to the question here involved depends upon whether or not the term "sale at retail" would include the person who serves rabbits and makes a charge therefor.

From our research on this question, we find two lines of authority, one holding that such a transaction is a sale at retail and the other that it is not.

In Volume 23, R. C. L., at page 1203, at Section 19, the rule, holding that such a transaction is not a sale, is stated as follows:

> "The common transaction between an innkeeper or a restaurant keeper and his customer under which the latter is furnished with food to consume on the premises is not a sale. The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is carved for his use, or of that which finds a place on his plate or in side dishes set about it. No designated portion becomes his. He is privileged to eat and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over uncon-

> sumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire--ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor in the service rendered."

In the case of Misky, et al. v. Childs Company, the New Jersey Court of Errors and Appeals, cited at 50 A.L.R., at page 227, l. c. 229, said:

> "* * * From the earliest times, however, a distinction has been drawn between a sale of an article and the furnishing of food at an eating house, hotel or restaurant; the latter partaking rather of the character of service, in which case the standard of liability is the failure to use that reasonable care which the circumstances require. As was said many years ago in Parker v. Flint, reported in 12 Mod. 1303, 88 Eng. Reprint, 1303, 'An inn-

keeper . . . does not sell but utters his provisions,' and by Professor Beale in his treatise on Innkeepers, Sec. 169: 'As an innkeeper does not lease his room, so he does not sell the food he supplies to his guests. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs and to take no more. Having finished his meal he has no right to take food from the table, even the uneaten portion of the food supplied him; nor can he claim a certain portion of the food as his own to be handed over to another in case he chooses not to consume it himself.'

"The authorities distinguishing the transaction from a sale recognize that while the food served constitutes, of course, an essential part, yet serving it cannot be regarded as a sale of goods, and this we think the common understanding. A customer at an eating place seeks not to make a purchase, but to be served with food to such reasonable extent as his present needs require. With the service go a place, more or less attractive, in which to eat it, a table, dishes, linen, silver, waiters, and sometimes music as an accompaniment, all tending to render more agreeable and palatable that which he eats. The food he obtains is then and there consumed; he does not eat the portion he can comfortably devour and place the remainder in his pockets or other receptacle, to be stored away for future needs. So one who purchases a steamship ticket, or one who registers at a hotel, does not conceive the trans-

> action as a sale of goods when, as part of his passage in the one case, and as a guest in the other, he is supplied with meals; nor does one who enters a restaurant to be supplied with a meal or any portion thereof so regard the supplying of his food. This attitude of the public mind is indicated by the familiar signs, 'Meals served here,' 'Dinners served here,' and the like.
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> "We think enough has been said to indicate that the service of food at eating houses has never been and cannot be regarded as a sale at common law, but this view is fortified by the absence of litigation (until quite recent years), based upon a claim of warranty, which would necessarily follow if the transaction constituted a sale. * * * * * * * * * * *"

In the case of Ex parte Mehlman, 75 S. W. (2d) 689, l. c. 690, the Court of Criminal Appeals of Texas said:

> "'A "Retail Fish Dealer" is any person engaged in the business of buying for the purpose of selling either fresh or frozen edible aquatic products to the consumer.'"

In this case the retail fish dealer's license was held to be the proper license to authorize the licensee to sell fish to the hotels, restaurants and cafes, because they were the consumers. This rule sustains the position that the restaurant, hotel and cafe operators are the consumers of the foods and not the retailers.

In the case of City of St. Louis et al. v. Smith, 114 S. W. (2d) 1017, in which the term "sale at retail" as de-

fined by the Missouri Sales Tax Act, was under consideration and in that case the Supreme Court of Missouri held that the contractor who had agreed with the City of St. Louis to construct a sewer and a street was the consumer under the terms of the Sales Tax Act, and that the retail sales' transaction took place between the party, or company, which sold the articles for the contractor to the contractor.

In the case of Brevoort Hotel Co. v. Ames, 196 N. E. 461, the Illinois Supreme Court held that the persons engaged in selling meals at restaurants and hotels were selling at retail and subject to the Sales Tax Act which defined sale at retail as follows:

> " Section 1 of the act (Smith-Hurd Ann. St. c. 120, Sec. 440) defines a 'sale at retail' as 'any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration.' * * * *"

In that case, however, the hotel was held to be a retailer of foods on account of the definition of the term "Sale at Retail" as defined by the Sales Tax Act of Illinois.

In our examination of the Code of the Conservation Commission, we fail to find where the term "Sale at Retail" is defined. Referring back to the case of City of St. Louis, et al. v. Smith, supra, it will be noted that the Supreme Court of Missouri refused to follow the definition and construction of the term "Sale at Retail" as defined by the Illinois Supreme Court, and by the cases supporting the opinion, in the Illinois case.

In the case of People v. Clair, 116 N. E. 868, the Court of Appeals of New York, held that the service of game and fish at a hotel, restaurant or cafe is a sale, in the following language (l. c. 869):

> "Clearly, if in a hotel where meals are served a la carte a partridge is ordered prepared and served as food and paid for as such, it would constitute a sale within the meaning of the statute. Commonwealth v. Phoenix Hotel Co., 157 Ky. 180, 162 S. W. 823. * * * * * * * * * * * * * * * * *"

This ruling was based on Section 180 of the Conservation Law of the State of New York, which provides as follows:

> "'The dead bodies of birds belonging to all species or subspecies, native to this state, protected by law or belonging to any family, any species or subspecies of which is native to this state and protected by law shall not be sold, offered for sale, or possessed for sale for food purposes within this state whether taken within or without this state, except as provided by sections three hundred and seventy-two and three hundred and seventy-three.'"

Referring to the Missouri Conservation Code and the amendments thereto, it will be noted that Section 27 of the Code, as amended April 15, 1940, includes the "serving" of wildlife in the prohibitions for which a permit may be required as thereinafter provided. However, in the sections of the Code providing for permits; Section 37 (h). Resident State Dead-rabbit Dealer's Permit; Section 37 (l). Resident State Retail Vendor's Permit; it will be seen that no permit is required for the person who serves dead rabbits in meals, unless it was intended that they be included in the term "Retail Vendor".

Since the Conservation Commission in its definitions and interpretations in Section 101, seems to have especially defined the terms "serve" and "serving", and "retail vendor"

and did not include the person who serves rabbits in meals for a charge in the definition of the term "retail vendor" we do not think the person who so serves such rabbits would be classed as a "retail vendor". These sections of the Code are penal, and, under the rulings of the Missouri courts they are to receive a strict construction and nothing can be read into these sections on account of intendment of the framers of the law.

CONCLUSION.

From the foregoing, it is the opinion of this department that the tavern operator, or the hotel operator, the restaurant operator, the cafe operator, or any other person who serves rabbits in meals for a charge, are not included in the definition of the term "retail vendor", and are not required to have a permit under Conservation Code Section 37 (1).

Respectfully submitted,

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APPROVED:

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