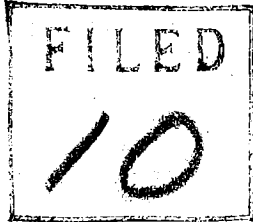


CONSERVATION COMMISSION AGENTS: No Conservation Commission agent  
: or other officer has any lawful  
: authority to confiscate or hold  
: permanently or destroy property  
: of an individual used in the  
: violation of the Game and Fish  
: Laws or regulations of the Con-  
: servation Commission. Such offi-  
: cer or agent may only take tem-  
: porarily into his custody any  
: such property to be used as  
: ..... evidence to convict a vio-  
: lator.

POWERS:



June 24, 1953

Honorable W. T. Bollinger, Jr.  
Member  
Missouri House of Representatives  
67th General Assembly  
Van Buren, Missouri

Dear Mr. Bollinger:

This is the opinion you recently requested, by letter, from this office, respecting the power of agents of the State Conservation Commission to confiscate or hold property of persons apprehended in the violation or believed to be violating hunting and fishing regulations established by that Commission. Your letter reads as follows:

"I desire a ruling on whether a Conservation Agent has authority to confiscate or hold property such as boating equipment if a man is either caught violating a regulation or if he is merely thought to be violating a regulation.

"This is a result of people coming to me who have been warned by Agents that this will be done."

Your question is, "whether a Conservation Agent has authority to confiscate or hold property such as boating equipment if a man is either caught violating or is merely thought to be violating a regulation." As we view your question we understand it to mean: Is an agent of the Commission authorized to confiscate and hold, under such circumstances, the property of an individual permanently and to deprive him of the ownership thereof? Webster's New International Dictionary, Second Edition, page 560, defines the word "confiscate," definition 1: "To seize as forfeited to the public treasury; to appropriate, as an estate."

We believe, therefore, that your question must be answered by reference to pertinent text authorities, our

Honorable W. T. Bollinger:

Constitution and our statutes, as construed by our Supreme Court, and upon the theory that such confiscation and holding of property under the assumed conditions which you state, divest the owner of title thereto, and you ask that this office give our opinion whether such agents have the authority to take such property into custody for the State, and whether the State thereupon becomes vested with the permanent title thereto. Generally, the rule involving the right to confiscate property, unlawfully used in the violation of law, is stated in 25 C.J., pages 1172, 1173, to be as follows:

"There can be no forfeiture of property unless the forfeiture is judicially determined. Even where under statute the forfeiture takes place at the time of the commission of the offense, it is not fully and completely operative and effective and the title of the state or the government is not perfected until there has been a judicial determination. A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial officers without inquiry before a court or an opportunity of being heard in his own defense is a violation of the elementary principles of law and the constitution. \* \* \*."

There are conditions and occasions in the enforcement of statutes prohibiting crimes and misdemeanors which constitute exceptions to the above-cited text when a statute provides that property may be seized at the time of a lawful arrest or is taken under a lawful search warrant and may be held and used as evidence in the trial of a charge of violation of criminal statutes. There is also an exception where property lawfully seized may be confiscated and destroyed without judicial approval if such property constitutes per se a public nuisance or a public danger, and other property, capable of lawful use, may be ordered confiscated and destroyed by judicial decree that such other property is used in violation of law. 12 C.J., pages 1251, 1252, on this question states the following text:

"\* \* \* It is competent for the legislature to authorize the summary seizure and destruction of things which cannot be put to a lawful

Honorable W. T. Bollinger:

use, as, for example, gaming apparatus, lottery tickets, false weights and measures, food products unfit for human consumption, and milk kept for sale and not conforming to the standard fixed by law, and also of things that, either by the common law or by statute, constitute a public nuisance. The legislature may also authorize the destruction of property in case of urgent necessity, for example, to prevent the spread of a conflagration or of pestilence, or the advance of a hostile army. Other things, susceptible of property rights and capable of lawful use, may be authorized to be confiscated or destroyed on a judicial determination of their use in violation of law, but not otherwise. Thus the confiscation of intoxicating liquors kept in violation of law may be authorized on judicial condemnation, and it seems even on summary proceedings where kept in such a manner as to constitute a nuisance; but such liquors are regarded as property and therefore not subject to confiscation except as stated above. And in like manner the confiscation of boats, nets, or fishing tackle used in violation of law may be authorized on notice and hearing, or if a public nuisance, by summary process; but, in the absence of these conditions, due process does not permit the destruction of such property, or of guns, ammunition, or dogs used in unlawful hunting. The legislature may, without violation of due process of law, authorize the destruction of animals or their products, or of fruit trees, for the purpose of preventing the spread of disease or pests; but a statute authorizing the summary destruction of any animal disabled from further use is void for want of due process, as is also a statute authorizing the destruction of unlicensed dogs, and a statute directing that hogs running at large be taken up and sold without notice to the owner. \* \* \*."

Respecting the disposition of property seized under a lawful arrest or under a search warrant, 56 C.J., page 1260, states the following text:

Honorable W. T. Bollinger:

"Where the property was not illegally seized, as where it was taken under a search warrant issued on probable cause, or was taken as an incident to a lawful arrest, or was voluntarily surrendered such property need not be returned before it is used in the criminal prosecution, \* \* \*."

The case of State vs. Rebasti, 306 Mo. 336, involving the question of search and seizure, was considered by the Supreme Court of this State. The Court held that, under a lawful arrest officers have the right to search the person arrested and take from him and seize any article for evidential purposes, found upon his person, or belonging to him and found in his presence, or on his premises. The Court so deciding, l.c. 345, said:

"No complaint is made as to the manner of the defendant's arrest; he was lawfully arrested. Being lawfully arrested, the officers had a right to search him and his possessions in the room where he was arrested and take from him any article which might be used in securing his conviction. \* \* \*."

The Supreme Court of this State held to like effect in the case of Holker vs. Hennessey, et al., Pixler, Sheriff, Garnishee, 141 Mo. 527, l.c. 539, 540, the Court on the point saying:

"Generally speaking, in the absence of a statute, an officer has no right to take any property from the person of the prisoner except such as may afford evidence of the crime charged, or means of identifying the criminal, or may be helpful in making an escape. The officer has the undoubted right to make the search, and considering the nature of the accusation he may, when acting in good faith, take into his possession any article he may suppose will aid in securing the conviction of the prisoner or will prevent escape. He holds all, whether money or goods, subject to the order of the court, which, in proper circumstances, will direct him to restore the whole or

Honorable W. T. Bollinger:

a part to the prisoner." Bish. Crim.  
Proc., secs. 211, 212; Wharton, Crim.  
Pl. and Pr., secs. 60, 61."

The Supreme Court of this State has had before it numerous cases for the construction of statutes authorizing the seizure and destruction of property used in the violation of criminal laws where the unlawful use of the property was determined by judicial process and also in cases where the property so unlawfully used was seized by officers as constituting a public nuisance itself, or as some of the cases put it, was "outlawed," and was summarily and lawfully destroyed. The case of State ex rel. Igce, et al. vs. Joynt, Circuit Judge, 110 S.W. (2d) 737, was a case which arose out of the operation of what the Court held was a gambling device called a "rotary merchandiser", operated much on the plan of a slot machine, and was set up for public play, and it was played by the public, so the case recites, in the City of St. Louis, Missouri. The Police Department seized the machine as a gambling device under statutes then permitting the Board of Police Commissioners of the City of St. Louis to seize and destroy gambling devices. The owner obtained a temporary restraining order against the Board of Police Commissioners from Judge Joynt, Judge of Division No. 2 of the Circuit Court of the City of St. Louis, Missouri, and praying that, after hearing, permanent injunction be issued against the Board. The Board sued out a writ of prohibition in the Supreme Court against the Circuit Judge. The Supreme Court held that the respondent Circuit Judge had no jurisdiction to hear the case, and made its preliminary rule in prohibition against the Judge, permanent. The effect of the decision was to approve the seizure of the gambling device by the Police Department and which also left said Board of Commissioners free to order and accomplish the summary destruction of the device. So holding, the Court, l.c. 740, said:

"Here, the rotary merchandiser, as we have demonstrated above, is shown by the petition to be unlawful in itself. It is apparent from its construction that the device lends itself to no lawful purpose, but only to illegal use. Its only design and value is for use in violating our gambling statutes. That it is set up by the owner for use

Honorable W. T. Bollinger:

by the public is admitted in the petition, which action under our laws constitutes a felony. The maintenance of this device described by the owner as a gambling device, capable of no lawful use and being extensively used and displayed by the owner and his licensees for public play, is a public nuisance, and the police under their general powers have the right to seize it and destroy it summarily. \* \* \*."

The Court, in the Joynt Case, referred to the case of Lowry vs. Rainwater, 70 Mo. 152, cited by the owner of the gambling device. The Rainwater case, however, arose out of the seizure of property in and of itself not unlawful property but in its very nature harmless. In the Rainwater case the Court had held that before the property seized could be destroyed, it must be determined by judicial proceedings to be an element and an item used in gambling so as to become a public nuisance, and, thereupon, be destroyed. The Court on the same page, l.c. 740, on this point, said:

"\* \* \* An extension dining table had been seized and destroyed by the police on the charge that it was kept as a prohibited gaming table. We held that a summary mode of judicial proceedings should be provided in order to determine whether such property was used or held for purposes condemned by the statutes. That case is clearly distinguishable from the one now before us. There the property under the scrutiny of the court was in its very nature lawful and harmless. It was only by proof of its unlawful use that it became subject to destruction. The table in itself constituted no offense, but it was its employment in gaming which was unlawful, and proof of that fact, we held, required judicial determination. \* \* \*."

Again, the Supreme Court considered a like case in State ex rel. McDonald, Justice of the Peace, et al. vs. Frankenhoff, Judge, 125 S.W. (2d) 816. The case originated in St. Joseph, Missouri. A Justice of the Peace had given notice to the owner of the property in question that on a certain subsequent date at his court room the Justice would conduct a hearing to determine whether the property described

Honorable W. T. Bollinger:

in said notice were gambling devices. The respondent Circuit Judge ordered certiorari for the Justice of the Peace to submit his record in the case. Prohibition followed at the instance of the Justice and Constable in the Supreme Court. The Court held the property, one slot machine and two pin ball machines, were gambling devices, and that the Circuit Judge had no jurisdiction to hear the case and that it had no jurisdiction to issue the extraordinary writ of certiorari. The Court, l.c. 818, in holding that the machines were unlawful, and following the rule stated in the Joynt case, supra, l.c. 818, said:

"Therefore, under our ruling in State ex rel. v. Joynt, supra, we hold that the machines in question were unlawful property and not protected by law, regardless of the manner in which they were seized. \* \* \*"

The Joynt and Frankenhoff cases are cited only to indicate the distinction observed by the Supreme Court of this State between the kind of property and its unlawful use as a public nuisance that authorizes its seizure and summary destruction without judicial proceeding, and the kind of property, although used in violating criminal laws, and yet not in itself harmful to the welfare of the community, and which may be used for a lawful purpose, that requires a judicial decree of seizure and authorization for the destruction of such property.

There is now no statute in force in this State authorizing the seizure, forfeiture and summary destruction of property used in a violation of the Fish and Game Laws or the rules and regulations, in relation to fish and game, fixed by the Conservation Commission.

Section 40 (a) of Article IV of the 1945 Constitution of this State under the title of "Conservation", gives the Conservation Commission jurisdiction to control and regulate forestry and wildlife resources of this State. Said Section in that behalf reads, in part, as follows:

"Conservation Commission--Jurisdiction--  
Number, Qualifications, Terms and Reimbursement of Members--Vacancies--The control, management, restoration, conservation and regulation of the bird,

Honorable W. T. Bollinger:

fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor, not more than two of whom shall be of the same political party. \* \* \*."

The authority given the Conservation Commission by said Section 40 (a) of the present Constitution, was Section 16 of Article XIV of our Constitution of 1875, adopted under initiative petition as Amendment No. 4, November 3, 1936, and published Laws of Missouri, 1937, pages 614, 615, as provided in Section 675, Article IV, Chapter 4, R.S. Mo. 1929.

The effect of Constitutional Amendment No. 4 on the statutes that named the offense and prescribed the punishment for violation of Fish and Game Laws as to whether the Amendment repealed such statutes, was the basis of the decision in Marsh vs. Bartlett, Sheriff, 121 S.W. (2d) 737, a proceeding in the Supreme Court in Habeas Corpus. The Court, in that case discussed fully the legislative authority necessary to be expressed in naming the offenses and prescribing the punishment therefor, for violations of game and fish statutes and regulations as promulgated by the Conservation Commission, and the regulatory and administrative authority of the Commission, as well. In holding that the Conservation Commission had constitutional authority to control fish and game and to fix regulations respecting the entire subject, and further holding that the Legislature had the authority and had exercised the authority to prescribe the violation of such regulations as criminal offenses and prescribe the punishment therefor, the Court, l.c. 744, said:

"It has been indicated above that the Conservation Commission has been granted the authority to control, regulate, etc., the matters committed to it. \* \* \*

"The term 'regulate' will be sufficient for the moment. It includes ordinarily



Honorable W. T. Bollinger:

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. \* \* \*."

There was a statute in force in this State until its repeal, Laws of Missouri, 1945, page 664, authorizing the seizure and summary destruction or other disposition thereof by the Commission of articles found in use in the violation of the Fish and Game Laws. This was Section 8952, R.S. Mo. 1939. The section as it then stood read as follows:

"§ 8952. Certain articles forfeited to state and fund derived from sale thereof to be placed in game protection fund

"The unlawful use of any articles contrary to the provisions of the game and fish laws shall forfeit the same to the state, and upon their being found by law under any of the conditions prohibited by this article, shall be destroyed, used in the work of the game and fish department, or sold by the game and fish commissioner and the money derived from the sale thereof placed in the game protection fund."

Honorable W. T. Bollinger:

Section 8952, R.S. Mo. 1939, was first enacted, Laws of Missouri, 1909, page 519. The section was carried in each Revision thereafter, with one amendment of little consequence, down to and including the Revision of 1939. This section, along with many other sections of Article II and Article III, Chapter 47, R.S. Mo. 1939, was repealed, Laws of Missouri, 1945, page 664. There has been no statute of like terms or effect in force in Missouri since the repeal of said Section 8952.

We are advised, however, by the office of the Secretary of State of Missouri that the Rules and Regulations of the Conservation Commission revised to January 1, 1951, by the Commission, including Section 8 on page 9, as published by the Commission in brochure or booklet form have not been amended, changed or set aside, and now remain on file as required by law in the office of the Secretary of State of this State. Said Section 8 of such Rules and Regulations providing for the confiscation and forfeiture of any articles used contrary to the statutes of this State or to the provisions of said Rules and Regulations and for the summary destruction of such articles or other disposition of the same, is, with slight deviations of words, in almost the identical language as was contained in said Section 8952 as it stood in the Revised Statutes of Missouri, 1939, and until its repeal, Laws of Missouri, 1945, page 664. Said Section 8 as the same is now included in such Rules and Regulations filed in the office of the Secretary of State, reads as follows:

"Sec. 8. Certain articles forfeited to state.--The unlawful use of any articles contrary to the statutes of this state or to the provisions of this code shall forfeit the same to the state, and upon their being so found by law under any of the conditions contrary to such statutes or this code, may be destroyed, used in the work of the Commission, or sold by it and the money derived from the sale thereof placed in the Conservation Commission fund."

Neither Section 40 (a) nor any other section of our Constitution, 1945, in the powers given to the Conservation Commission to control, manage, restore, conserve and regulate forestry and wildlife resources of this State, contains any authority for the Commission to promulgate rules

Honorable W. T. Bollinger:

or regulations authorizing its agents to confiscate or destroy or otherwise dispose of articles used in violation of the Game and Fish Laws or in violation of the Rules and Regulations adopted by the Commission for enforcing the Act, so as to deprive the owner of ownership thereof. It appears clear, we believe, that said Rule 8 in its terms and form was considered by the Commission as taking life and authority from said Section 8952, R.S. Mo. 1939, or from Revisions of statutes prior thereto, containing sections of similar terms with like purpose and intent. It further appears, therefore, that upon the repeal of said Section 8952, R.S. Mo. 1939, Laws of Missouri, 1945, page 664, whatever authority, if any, the Commission had to adopt said Section 8 and include the same in the Rules and Regulations of the Commission, filed in the office of the Secretary of State, respecting the control and regulation of forestry and all wildlife resources of this State as an effective authority, if any, for the confiscation, destruction or other disposition of property used in the violation of such Rules and Regulations or in violation of the statutes of this State, became a nullity and was rendered void by the repeal of said Section 8952, R.S. Mo. 1939, Laws of Missouri, 1945, page 664, and that said Section 8 of such Rules itself, was by said repeal of said Section 8952 rendered void and of no effect. It, therefore, appears plain that said Section 8 as the same now appears in the Rules and Regulations of the Commission, on file in the office of the Secretary of State of this State, and as published by the Commission in brochure or booklet form, exists without statutory or constitutional authority, and is, therefore, void and of no effect. Chapter 252, RSMo 1949, contains the present statutes relating to fish and game. There are numerous sections of said Chapter authorizing the inspection by any agent of the Commission of licenses, the inspection of any warehouse, common carrier or agent, servant or employee thereof, and to examine every package in any such place which the agent has reason to believe contains wildlife not lawfully transported or lawfully had in possession, or if any such agent shall suspect or have reason to believe that any such package is falsely labeled, making the refusal to permit such search or evading the same, a misdemeanor with a fine prescribed of not less than \$50.00 nor more than \$150.00. These sections, 252.060 and 252.090, authorizing such inspection are cited and their general terms noted in order that they may not be confused with the terms of other statutes which we now refer to, which provide for the arrest of persons found violating, or reasonably believed to be violating the Game and Fish Laws, or Rules and Regulations adopted by the Conservation Commission, and prescribing the proceedings thereafter to be followed.

Honorable W. T. Bollinger:

Sections 252.080 and 252.100, RSMo 1949, we find, are the only sections in said Chapter 252 which provide the authority of agents of the Conservation Commission to make arrests and prosecute violators of the Game and Fish statutes of this State and the Rules and Regulations adopted by the Commission respecting the preservation and the taking of game and fish in this State. Section 252.080, providing when arrests may be made by the Conservation agents or other officers, reads as follows:

"252.080. Arrests by commission agents, when

"Every authorized agent of the Commission shall have the same power to serve criminal process as sheriffs and marshals, only in such cases as are violations of this law and rules and regulations of the commission, and have the same right as sheriffs and marshals to require aid in the execution of such process. Any such agent may arrest, without warrant, any person caught by him or in his view violating or who he has good reason to believe is violating, or has violated this law or any such rules and regulations, and take such person forthwith before a magistrate or any court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases. (L. 1945 p. 774 sec. 6.)"

This section provides that any such agent may arrest, without warrant, any person caught by him or in his view violating or whom he has good reason to believe is violating, or has violated, the Game and Fish Laws, or any such rules and regulations, and take such person forthwith before a Magistrate, or any Court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases. (Emphasis ours.) There is no provision, not one word or syllable in said section, or elsewhere, authorizing the agent to "confiscate", or "hold", or destroy any articles of property, summarily or otherwise, being used by a person violating the Game and Fish Laws or whom such agent has good reason to believe has violated such laws. We believe that, under such statutes, as would be the case in the prosecution of the violation of any other criminal statute, when an arrest is made for the

Honorable W. T. Bollinger:

violation of game and fish statutes or such regulations, any such agent or other officer would be authorized to take into his possession at the time of the arrest of the individual any articles or property from the person or found in the custody and presence of such individual as may afford evidence which will aid in the securing of conviction of the prisoner for violation of the Game and Fish Laws. This is the holding in the Hennessey and Rebasti cases, supra. He may take the individual arrested before a Magistrate or Court having jurisdiction, to be dealt with according to law. Section 252.100 of said Chapter 252 points out what proceedings shall then be commenced against said individual so under arrest. Section 252.100, RSMo 1949, reads as follows:

"1. Any authorized agent of the commission, sheriff, marshal or their deputies, may make complaint and cause proceedings to be commenced against any person for the violation of this law or of any such rules and regulation and such officer shall not be obligated to furnish security for costs.

"2. He may search, without warrant, any creel, container, gamebag, hunting coat, or boat in which he has reason to believe wild life is unlawfully possessed or concealed; and at any and all times may seize any wild life in the possession or control of any person violating or who there is good reason to believe has violated this law or any of the rules or regulations of the commission; provided, however, that he shall first obtain a search warrant to enter and search an occupied dwelling and out-buildings immediately adjacent thereto, cold storage locker plant, motor vehicle, or sealed freight or express car for such purposes and then only in the daytime, and in the search of a cold storage locker plant every precaution shall be exercised to prevent contamination of foods stored therein. Any judge, or magistrate having jurisdiction, shall issue to such agent, sheriff, or marshal, a search warrant upon his complaint being made on oath in writing that the affiant has reasonable and probable cause to believe that wild life is possessed or concealed in such occupied dwellings and out-buildings immediately adjacent thereto, cold storage locker plant, motor vehicle, or sealed freight or express car contrary to this law or to any such rules and regulations.

Honorable W. T. Bollinger:

"3. Any person who shall resist such search or interfere with such agent or officer in the execution of a search warrant shall be deemed guilty of a misdemeanor."

We have seen from the terms of Section 252.080, supra, that any agent of the Commission may arrest, without warrant, any person caught by him or in his view, for violating, or whom he has reason to believe is violating, or has violated the Fish and Game Law or any such rules and regulations. We believe that Subsection 2 of Section 252.100, supra, must be considered and applied to any case at the time of making such arrest. The terms of said Sections 252.080 and 252.100 must be applied together, each as the complement of and as a necessary aid to the other, providing for an arrest and taking custody of property used in the violation of the Game and Fish Laws or regulations of the Commission as evidence in a prosecution for such violation. Said Subsection 2 of Section 252.100 provides that the agent or officer may search, without warrant, (meaning a search warrant), any creel, container, gamebag, hunting coat or boat in which he has reason to believe wildlife is unlawfully possessed or concealed, and at any and all times may seize any wildlife in the possession or control of any person violating or whom there is good reason to believe has violated this law or any of the Rules or Regulations of the Commission. Certainly, specimens of game killed or fish caught illegally and found in such receptacles would be competent, admissible and material evidence to be introduced at a trial upon the prosecution of the prisoner for violation of such Game or Fish Laws or such regulations. It would be proper and lawful also, we believe, for such agent or officer to take any other item of property from the person or in the presence and custody of the prisoner to be used in like manner as evidence in the prosecution of any such prisoner and to keep such property in his custody and available for such purpose, or, as said Subsection 2 further provides, after such prisoner has been taken before a Magistrate, under Section 252.080, either before or after the actual prosecution has been commenced against the prisoner, if the officer or agent shall make complaint, in writing, and upon his oath that the affiant has reasonable and probable cause to believe that wildlife is possessed or concealed in occupied dwellings and outbuildings immediately adjacent thereto, under the control of the prisoner, cold storage lockers, plants, motor vehicles or sealed freight or express cars contrary to the Fish and Game Laws or to any such rules and regulations, the Judge or Magistrate having jurisdiction shall issue to such officer or agent a search

Honorable W. T. Bollinger:

warrant, first had and obtained however, before any such place is searched, authorizing the search in the daytime only any such places or things for such purpose of supplying evidence to convict such violator.

We further believe that, if in any complaint, under oath, in the proceedings it be asserted that any property, taken either from the person of the prisoner or from his immediate custody and presence, or by such search warrant, is being or has been used in the violation of such laws and regulations, and constitutes a nuisance per se and is incapable of other lawful use, the Court or Magistrate before whom such proceeding is being conducted, would be authorized to judicially determine that such property is or is not capable of lawful use; is or is not a nuisance per se and, accordingly, order forfeiture and destruction of the same or refuse, as the case may be, to order such forfeiture or destruction. In the absence of such judicial determination we believe that no officer or agent of the Commission has any authority whatsoever to confiscate and hold so as to permanently deprive the owner thereof, any property used in the violation of the Game and Fish Laws of this State or the Rules and Regulations of the Conservation Commission relating to the same. We believe such officer may only take into his official custody and hold, temporarily, solely as and for evidence in the prosecution of any person charged with the violation of such Game and Fish Laws or such regulations property taken from the person of the prisoner or in his immediate custody and presence, or obtained by reason of a search warrant, and that when the use thereof as evidence in a prosecution of the prisoner has been concluded, such property is subject to the order of the Court or Magistrate to be returned and restored to the prisoner as the owner thereof. This also is the holding of our Supreme Court in the Hennessey case, supra.

It appears clear from the above cited and quoted authorities that neither a Conservation Commission agent nor other officers has any authority to confiscate or hold property so as to deprive the owner permanently thereof, such as boating equipment, or any other property used in violating the Game and Fish Laws of this State or a regulation of the Conservation Commission, or where such agent or officer has good reason to believe that a person is violating such laws or regulations; that an officer or agent of the Commission is authorized by law only to take into his custody at the time of making a lawful arrest, without warrant, or by a search warrant, property from the person of the individual who is violating, or is believed, upon

Honorable W. T. Bollinger:

reasonable grounds by such officer or agent to be violating such laws or regulations, for the purpose of using such property as evidence to convict such individual upon a prosecution against him for such violation; that such property, when its use as evidence in such prosecution has been completed is subject to the order of the Court or Magistrate to be restored to the owner thereof, unless, upon a hearing, under notice to the owner, the property is judicially determined to be incapable of lawful use and is a nuisance per se, and upon such determination forfeiture and destruction of said property be ordered by the Court or Magistrate.

#### CONCLUSION

It is, therefore, considering the premises, the opinion of this office:

1) That no Conservation Commission agent or other officer has any authority to confiscate or hold permanently, so as to deprive the owner thereof of the title thereto, any property, such as boating equipment, or other property, used in the violation of the Game and Fish Laws of this State or the rules and regulations fixed by the Conservation Commission, where an individual is caught violating such statutes or regulations or the agent or officer has good reason to believe that such individual is violating or has violated such statutes or regulations;

2) That Section 8 on page 9 of the Rules and Regulations of the Commission, revised to January 1, 1951, on file with the Secretary of State of this State, as the same is published and appears in brochure or booklet form as issued by the Missouri Conservation Commission and now in circulation, authorizing agents of the Commission or other officers to seize, confiscate and summarily destroy or otherwise dispose of articles and property used in the violation of the Game and Fish Laws of this State or the Rules and Regulations adopted by the Commission respecting the control and regulation of forestry and wildlife in this State, exists without statutory or constitutional authority, and is, therefore, void and of no effect;

3) That such Conservation agent or other officer may take into his possession and custody temporarily, any



Honorable W. T. Bollinger:

property used in the violation of the Game and Fish Laws of this State or the rules and regulations fixed by the Conservation Commission, from the person of the violator or found in his immediate custody and presence or by means of a search warrant, only for the purpose of using such property as evidence to aid in the conviction of any individual, in the prosecution of such individual for such violations, caught violating such statutes or regulations, or whom the agent or officer has good reason to believe is violating or has violated such laws or regulations;

4) That when the use of such property as evidence for the purpose of aiding in the conviction of such violator has been accomplished, all such property is subject to the order of the Court having jurisdiction, or a Magistrate, to be returned and restored to such individual as the owner thereof, unless the Court upon a hearing, after notice to the owner, judicially determines that such property, or any of the same, is incapable of lawful use and constitutes a public nuisance as used in such violations, if any, and orders the confiscation of such property to the State and its subsequent destruction.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON  
Attorney General

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