

CONSERVATION COMMISSION: Farmer and his family not entitled
to fish without permit in waters
FISH AND GAME: on land leased by said farmer
but not residing thereon.

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Filed No. 15

Honorable John M. Cave
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Fulton, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"I hereby request your opinion as to the interpretation of Sections 38 and 39 and the definition of the word FARMER, Wild Life Code of Missouri for 1949, as applied to the following facts:

"A farmer owns a farm in Callaway County, Missouri; he also rents a farm, which contains no residence, and which does not adjoin the farm which he owns at any point; he conducts farming operations on both farms; his son attempts to catch fish in waters upon the rented farm without first obtaining a fishing permit. Is the son guilty of a misdemeanor for fishing upon property rented as a farm under the above circumstances?

Under Section 38 of the Wildlife Code of Missouri, 1949, no one may pursue, take or possess wildlife who does not have in his possession at the time, a fishing permit as provided in said Wildlife Code.

Section 39 of the same Code makes an exception to the foregoing regulation and provides that a farmer as defined in said Code may take, possess and transport wildlife without a fishing permit when done as permitted under said Code and only upon the farm where he resides.

Sections 38 and 39 supra read:

"Sec. 38. Permits required unless otherwise provided.--Wildlife may be pursued, taken, transported, shipped, bought, sold, given away, stored, served, used or possessed only by a person who at the same time has in possession the prescribed permit to do so or who is specifically allowed by this code to do so without permit."

"Sec. 39. Permits: farmer exempted.--A farmer as defined in this code, may take, possess and transport wildlife and may sell rabbits and the products of furbearing animals without permit when done as permitted by this code and only upon the farm where he resides; provided, that a farmer who is under seventeen (17) years of age may also transport and sell without permit, within the county where he resides and in any adjoining county, rabbits and the products of furbearing animals legally taken by him on such farm."

Farmer, as defined in said Code comes under Section 56 of the Code which defines various words and terms as used therein. Farmer is defined therein as follows:

"For the purpose of this code and its application, the following definitions shall govern unless a different 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:

* * * * *

"FARMER: Any bona fide owner or lessee of lands, or his permanently employed hired hand, or any member of the immediate household of such owner, lessee or employee within the state, who is a citizen of the state and who actually resides upon and operates such land exclusively for agricultural purposes."

There can be no question as to the authority vested in the Conservation Commission under and by virtue of Section 40(a), 45-46, Article IV, Constitution of Missouri, 1945, to make such rules and regulations. (See Marsh v. Bartlett, 343 Mo. 526, 121 S.W. (2nd) 737.)

There are two well established rules of statutory construction which likewise are applicable in construing rules and regulations promulgated and adopted by the Conservation Commission and which might be invoked herein in construing the foregoing regulations and definitions. They are to determine the intent of the legislature in enacting statutes, or as in this case, the intent of the Conservation Commission in adopting such regulations and to construe sections or regulations that are related together, so as to harmonize all, if at all possible, and to then give it that effect. (See Donnelly Garment Company v. Keitel, 193 S.W. (2d) 577, 354 Mo. 1138; Little River Drainage District v. Lasseter, 29 S.W. (2d) 716, 325 Mo. 493; Whalen v. Buchanan County, 111 S.W. (2d) 177, 342 Mo. 33.)

Under Section 38, supra, all persons would be required to take out a permit to fish before taking fish if it were not for some rules making exceptions thereto. One especially pertinent here is rule 39, supra, which excepts therefrom farmers fishing under certain conditions. That exception is that farmers as defined in the Wildlife Code are not required to take out a permit when taking fish in accordance with said Code and only upon the farm where they reside. If it were not for the definition of "farmer" found in the Code, we would conclude under the facts stated in your request, that this farmer's son by fishing out of the waters upon the land leased by his father but not where he resided or lived, would not be violating the law and be subject to misdemeanor under Sections 26 and 27, page 671, Laws of Missouri, 1945.

Attempting to harmonize the foregoing regulations, we find that the definition as adopted by the Conservation Commission for farmer, provides that for the purpose of this Code it shall mean, any bona fide owner or lessee of lands or any member of his immediate household who is a citizen of this state and who actually resides upon and operates such land exclusively for agricultural purposes. The principle part of that definition to be construed is the underscored portion. In other words, if the word "and" should be construed in the disjunctive as "or" then we would in all probability hold that the farmer's son could fish on such leased premises without a fishing permit. However, we are inclined to believe that the word "and" as used herein should be construed in the conjunctive and not as "or" and therefore would mean something in addition thereto. This would require the farmer not only to reside on land owned or leased but also to operate said land for agricultural purposes.

The word "and" as used in the foregoing definition of farmer immediately following the word "resides upon" can only mean in addition thereto and not "or" as used in occasional instances. In *McCaul-Webster Elevator Company v. Adams*, 167 N.W. 330, 332, 39 N.D. 259, L.R.A., 1918 D 1036, the court in holding the word "and" commonly means in addition thereto said:

"Section 6814 provides that the person claiming a mechanic's lien--

'shall upon compliance with the provisions of this chapter have for his labor done, or materials, fixtures or machinery furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, or to improve which said work was done, or the things furnished (for it), to secure the payment for such labor, * * * material or fixtures.'

"This language contemplates not only a lien upon the building, erection, or improvement, but in addition thereto a lien upon the land where such improvement is situated, or the land to improve which the work was done, or the material furnished. 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 coordinate 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. And in this case not only has the plaintiff who claims the lien a lawful right to claim it against the building or improvement, but in addition thereto and separate and apart therefrom, there is the additional right existing to claim it against the land. (Cases cited.)

Also in *Heckthorn v. Heckthorn*, 280 N.W. 79, 81, 284, Mich. 677, the court held that the use of the words "or" and "and" is not to be treated as interchangeable and their distinct meanings should be followed when to do so does not render the sense of the context in which they are used dubious, although their strict meaning is more readily departed from than that of other words in statutory enactments. See also *Davis v. Buckeye Light and Power Company*, 61 N.E. (2d) 90, 93, 145

Ohio State, 172, wherein the court held that "and" is a word of addition. Likewise in Board of Insurance Commissioners of Texas v. Guardian Life Insurance Company of Texas, 180 S.W. (2d) 906, 908, 142, Texas 630, wherein the court held that ordinarily the words "and" and "or" are not interchangeable terms, the former being strictly the conjunctive and the latter of a disjunctive nature.

The following text and statutes very well define "reside" and "residence."

54 C.J., Sections 1, 2 and 3, pages 702, 703, defines the word "reside" in the following language:

"In General. An elastic words, often defined and construed by the courts; it is employed in a wide variety of significations, and its meaning has been variously shaded according to the variant conditions of its application, for it is capable of different meanings, and may receive a different meaning according to the connection in which it is found. Specifically, the word is used in two senses, the one, constructive, technical, legal, the other denoting the personal habitual habitation of individuals.

"In the Ordinary Sense. To abide continuously, to sojourn, to dwell permanently or for a length of time; to be present; to be settled as in a home; to have a settled abode for a time, or a dwelling, a home; to have one's dwelling or home; to live in a place; to make an abode for a considerable time; to remain for a long time; to stay. Also to be in official residence; to continue to sit; to exist as an attribute of, inhere.

"In Legal Sense. While the word does not necessarily apply to a legal residence, still it may refer to a person's legal residence and mean an established place of abode, adopted with no present intention of moving elsewhere, being synonymous with 'domicile' in its strict legal sense; and although it means something different from being bodily present, yet in statutes it may be used as meaning actually to occupy, or to live,

or it may be employed as synonymous with being a 'citizen' or an 'inhabitant.'

Section 4 of the same volume in regard to "Continuity and Permanency" states the following:

"While it is said that the word may signify a temporary abiding, the word in its ordinary sense carries with it the idea of permanence, as well as continuity, and embraces the idea of fixed or permanent residence, to be construed as excluding the mere casual presence of a transient, and implying a permanent abode as contradistinguished from a mere temporary locality of existence. Furthermore it imports a habitation of some degree of permanency, coupled with the home thought."

The word "resided" is defined in Section 7, page 704, as follows:

"Domiciled; lived; the term is said to be interchangeable or synonymous with 'residence.' It may be used, not in the sense of actual pedal presence, but rather of legal residence. It ordinarily refers to a fixed, permanent, and established residence, one's home, as distinguished from a mere stopping place for the transaction of either business or pleasure."

Section 655, R.S. Mo. 1929, gives the following definition of "residence":

"The place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively;"

Therefore, in view of the foregoing it is quite apparent that in this instance the farmer and his son do not reside upon the land leased and operated by them.

In view of the foregoing definitions of "reside" and "residence" along with the use of the word "and" following

the words "reside upon" as found in the definition of "farmer" in the Code, we are forced to conclude that it was clearly intended by the Conservation Commission in adopting such regulations and definitions that the farmer's son in this instance, resides upon the farm where the improvements are located, the homestead, and not upon the land leased by his father and connected in no manner with their home.

CONCLUSION

Therefore, it is the opinion of this department that under the facts stated in your request, in view of the foregoing regulations and definitions, that the farmer's son is subject to a misdemeanor for fishing in the waters on the particular land leased by his father prior to securing a fishing permit. However, no offense is committed when he may be fishing upon the farm that he actually is residing upon.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL