FISH AND GAME: Construction of Section 20, Wildlife and Forestry
CRIMINAL LAW: Code, page 664, Laws of Missouri, 1945.

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October 23, 1947

Honorable Gerald W. Gleason
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

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

"We would like an opinion arising out of a question in Section 20 of the Wildlife Forestry Act.

"On Friday October 16, 1947, Clarence Taylor was tried in Greene County Circuit Court, Division One for feloniously dynamiting fish in Greene County, Missouri. The dynamiting occurred in a pond on a farm of the witness, L. C. Combs. Pond was privately owned and about two acres in size during dry weather and about ten acres in size during wet weather. In wet season it overflows to a river. This only occurred infrequently during the year. The pond was a natural pond.

"Mr. E. C. Curtis, who represents the defendant has filed a motion for a new trial after a jury verdict of guilty. The hearing on the motion will be largely on the question of interpretation of Section 20, above mentioned, that is, 'in any water of this State.'

"It is the prosecution contention that it included all waters, public and private. Whereas, attorney for defendant has cited Arkansas cases which seem to indicate that such a statute would not be extended to include ponds reservoir.

"We would appreciate your opinion on this

> question before our hearing on Saturday morning October 25, 1947."

You stated in your request that you would like to have this opinion Saturday morning, October 25, 1947. We have not had time to do much research in this instance; however, we believe that the conclusion reached herein is the proper construction to be placed upon the words "in any of the waters of this state," as used in Section 20 of the Wildlife and Forestry Act passed by the 63rd General Assembly, page 669, Laws of Missouri, 1945.

You state the counsel for the defendant has cited Arkansas cases which seem to indicate that such words should not be extended to include ponds and reservoirs. Such construction is not binding upon the courts in this state (see Bowles vs. Smith, 111 Mo. 45). Apparently what the defendant is depending upon to support his contention is the decision of Milton vs. State, 221 S.W. 461, 144 Ark. 1, l.c. 3, wherein the words "waters of this state" are construed under the Arkansas law. In that case, the appellant was charged with the offense of unlawful fishing in violation of the statute which made it unlawful to fish with a seine, net, trap or other device of that character in any waters of that state. The court, in holding that the defendant was not guilty by reason of the fact that the water he was fishing on did not come within the classification of "the waters of this state," said:

> "The question presented is whether or not the body of water described is such as falls within the designation of the statute, 'the waters of this State.' We interpret the language of the agreed statement of facts to be, that Cogbill and Porter are the owners as tenants in common of the lands surrounding the lake, and are not separate owners. In other words, we find that the lake in question is an inland body of water wholly within the boundaries of certain owners, who hold title as tenants in common, and that it has no outlet or connection with any other body of water. In view of these facts, we are of the opinion that it does not fall within the terms, 'in any of the waters of this State.'

> "The purpose of the statute was to protect and preserve fish in the public waters or such privately owned waters as were connected with other streams or bodies of water, and not to a private pond or lake wholly on the premises of an owner or common owners, which is not connected in any way with another stream or body of water. The former statute of this State regulating the taking of fish (Kirby's Digest, section 3600), contained an express provision exempting from the application of the statute waters 'wholly on the premises belonging to such person or persons using such device or devices.' This provision was omitted from the statute now in force, but, as before stated, we think that the term, 'in any of the waters of this State,' when considered in the light of the obvious design of the statute, excludes privately owned waters having no connection with other streams."

The court stated above that the former statute, regulating the taking of fish, contained an express provision exempting therefrom waters wholly on the premises belonging to persons using such devices. However, said provision is now omitted from the statute in force. We think the foregoing statutes of Arkansas should be construed in the following manner--that by deleting from the former statute the exception contained therein, the words "the waters of this state" should be all inclusive.

The primary rule of statutory construction is to ascertain from the language used the intent of the lawmakers, if possible, and to put upon the language its plain and rational meaning in order to promote its object. See Donnelly Garment Co. vs. Keitel, 193 S.W. (2d) 577. Another well established rule of statutory construction is that in construing statutes in pari materia, not only acts passed at the same session of the Legislature but also acts passed at prior and subsequent sessions may be considered. See State ex rel. and to Use of Geo. B. Peck Co. vs. Brown, 105 S.W. (2d) 909, 340 Mo. 1189. We find several Missouri decisions touching upon the question involved, such as State vs. Lewis, 73 Mo. App. 619, wherein the question of whether or not a slough was technically and, according to accepted legal definitions, a water of the state. However, the court in that case went off on the theory that

the defendant was seining with a prohibited seine and it was unnecessary to define a slough. In State vs. Blount, 85 Mo. 543, the Supreme Court of Missouri held that a bayou extending back from Lake Contrary, a public body of water in Buchanan County permitting fish to have free and uninterrupted access thereto, and not being wholly on the premises of the defendant, falls within the description "waters of this state." However, in that case, Section 1625 of the Revised States prohibited the erection and maintenance of any seine, net or trap in any water of the state, and contained a proviso that the prohibition therein shall not apply to waters wholly on premises belonging to persons using such devices. However, at that time, Section 1631 of the Revised Statutes of Missouri, defined "waters of the state" and specifically included in said definitions, sloughs.

In Reid vs. Ross, 46 S.W. (2d) 567, l.c. 569, the Supreme Court of Missouri, en banc, in construing the words "in any waters of this state" as used in Section 8270, R. S. Mo. 1929, said:

> "Section 8270 (the sections herein named are found in the revision of 1929) provides: 'It shall be unlawful for any person * * * to take, catch, or kill, any fish in any of the waters of this state, by * * * any * * * means other than * * * of the kind and at the time, and in the manner permitted by law.' The phrase, 'any of the waters of this state,' is used in various sections of article II, chapter 43, dealing with the preservation of fish and game. The words employed are broad and all-inclusive in their purport. That the Legislature intended them to be as all-comprehensive as their purport is clearly indicated by the exceptions it thought necessary to make. These exceptions are found in sections in pari materia with said section 8270. Section 8273, limiting the use of seines and nets, concludes as follows: 'Provided, that the restrictions of this section shall not apply to fish taken from private ponds and reservoirs when wholly upon the premises of owner or occupant. * * * ' Section 8275, prohibiting the sale of game fish, contains this proviso: 'Provided, that nothing in this section shall be construed so as to prevent the

> the sale of artificially propagated fish held in captivity.' The article contains no other exceptions or provisos which operate as a limitation upon the meaning naturally to be given to the words, 'any of the waters of this state.' We therefore construe those words to mean any of the waters in this state in which fish do, or may, have a habitat, except private ponds and reservoirs when wholly upon the premises of owner or occupant, and waters in which fish are artificially propagated and held in captivity. Such an interpretation comports with the obvious purposes of the statute considered as a whole. See State v. Blount, 85 Mo. 543; Caldwell v. Erickson, 61 Utah, 265, 213 P. 182; People v. Miles, 143 Cal. 636, 77 P. 666." (Underscoring ours.)

From the above decision, it clearly indicates that had there been no exceptions in the laws dealing with the preservation of fish and game to Section 8270, providing that it shall be unlawful for any person to take, catch or kill any fish in any of the waters of this state, that the words "any waters of this state" would have been construed to include all waters, both public and private, in the State of Missouri.

The 63rd General Assembly, in enacting what is known as the Wildlife and Forestry Act, page 664 to 671 inclusive, outright repealed any provision in the law similar to the exceptions hereinabove referred to in Reid vs. Ross, supra, and did not include in the new Wildlife and Forestry Act any similar exceptions. Section 20 of said act reads:

> "It shall be unlawful for any person to place any explosive substance or preparation in any of the waters of this state, whereby any fish which may inhabit said waters may be killed, injured or destroyed; and no person, by any such means, shall kill, catch or take any fish from said waters; provided, however, that explosive substances or preparations may be used in said waters, but only with the permission and under the supervision of the Commission. Any person violating any of the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be fined

> not less than two hundred dollars, nor more than one thousand dollars, or by imprisonment in the State Penitentiary for not more than two years, or by both such fine and imprisonment, for each such offense."

In view of the decision in Reid vs. Ross, supra, holding that the phrase "any of the waters of this state" when enacted was intended to be all-inclusive had it not been for certain statutory exceptions specifically mentioned in the decision, it clearly indicates that since all of those exceptions have been repealed that the words contained in Section 20, supra, "in any of the waters of this state" are inclusive and include all public and private waters in this state. Such conclusion is further fortified by the following facts. Section 4 of the act of the 63rd General Assembly, known as the Wildlife and Forestry Act, page 665, Laws of Missouri, 1945, provides that the ownership of and title to all wildlife of and within this state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the State of Missouri. Furthermore, Section 26 of the same act provides that no wildlife shall be pursued, taken, killed, possessed or disposed of except in the manner, to the extent, and at the time or times permitted by rules and regulations of the Conservation Commission. Section 3 of the Wildlife and Forestry Code, 1947, adopted by the Conservation Commission of Missouri, provides no bird, fish, animal or other form of wildlife in this State of Missouri shall be molested, pursued, taken, enticed, poisoned, killed, transported, stored, served, bought, sold, given away or possessed, in any manner at any time, except as specifically permitted by these regulations and any laws consistent with Article IV, Sections 40-46 of the Constitution of the State of Missouri. The Conservation Commission has not defined waters of the state.

The courts in this state have often held that absolute ownership of wildlife is vested in the people of the state. In State vs. Heger, 194 Mo. 708, l.c. 711, the court said:

> "The authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the State, and that such is not the subject of private ownership. As no person has in such game any property rights to be affected, it follows that the Legislature, as the representative of the people of the State, and clothed by them with authority to make laws, may grant to individuals the right to hunt and kill game at such times, and

upon such terms, and under such restrictions as it may see proper, or prohibit it altogether, as the Legislature may deem best. (Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238; Geer v. State of Connecticut, 161 U. S. 519; American Express Co. v. People, 133 Ill. 649; Ex parte Maier, 103 Cal. 476; State v. Rodman, 58 Minn. 393; Magner v. People, 97 Ill. 320; Phelps v. Racey, 60 N. Y. 10.)"

CONCLUSION

Therefore, it is the opinion of this department that the words "in any of the waters of this state" contained in Section 20, page 669, Laws of Missouri, 1945, of the Wildlife and Forestry Act of the State of Missouri should be construed to include all waters of the state, both public and private.

Respectfully submitted,

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APPROVED:

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