GAME & FISH - Treapassing: In attempting prosecution under Sec. 8312, R.S. 1929, use of land and custom of owner regarding same should be considered. If either of three elements - "enclosed, improved or cultivated" - exist, prosecution will lie.

October 13, 1936. 10-15

FILED
43

Honorable Theodore P. Hukriede,
Prosecuting Attorney,
Franklin County,
Union, Mo.

Dear Sir:

This department is in receipt of your letter of October 1 relative to Section 8312, R.S. Mo. 1929, which letter is as follows:

> "I have four cases arising under the above section, in which the question arises as to the phrase 'Upon the enclosed, improved or cultivated lands of another.'
>
> "The situation is this: Four hunters parked their automobile on a public road and walked into a field which was improved, but there was no division fence between the field and public road, and I would like to have an opinion as to whether or not it would be necessary for these fields to be enclosed in order that a prosecution could be instituted under this section."

The Section in controversy, 8312, R.S. Mo. 1929, provides:

> "Every person who shall be found hunting, with gun or dog, upon the enclosed, improved or cultivated lands of another, or shall enter the same to catch or kill game of any kind, without the consent of the owner or person

> in charge of such lands, shall, on complaint of such owner or person in charge of such lands, and upon conviction therefor, be fined not exceeding ten dollars."

Evidently, the purpose of the section, by including the words "enclosed, improved or cultivated lands" must be special in nature in that what is commonly called "commons - barren and waste land" in Missouri is unprotected. This statute is given such an interpretation in the case of McKee v. Gratz, 260 U.S. l.c. 170, as follows:

> "But it cannot be said, as matter of law, that those who took the mussels were trespassers, or even wrongdoers, in appropriating the shells. The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of uninclosed and uncultivated land in many parts, at least, of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country. Marsh v. Colby, 39 Mich. 626, 33 Am. Rep. 439. In Missouri the implication is fortified by the limit of statutory prohibitions to inclosed and cultivated land and private ponds. Rev. Stat. 1919, Secs. 5662, 3654. There was evidence that the practice had prevailed in this region. Whether those who took these mussels were entitled to rely upon it, and whether, if entitled to rely upon it for occasional uses, they could do so to the extent of the considerable and systematic work that was done, were questions for the jury. They could not be disposed of by the court. The implication of a license of the kind that we have mentioned from the general understanding and

> practice does not encounter the difficulties that have been suggested in implying a license from conduct alone in cases where the same conduct after twenty years might generate an easement, it being a plain contradiction to imply ad interim a license which would prevent the acquisition of a prescriptive right. Chenery v. Fitchburg, 35 N.E. 554."

The term "enclosed land" implies that the same should be enclosed by a fence of some nature. In the case of Kimball v. Carter, 95 Va. 77, 27 S.E. 823, "inclosed land" is defined as follows:

> "'Inclosed,' when applied to lands, as defined by Webster, is 'separated from common grounds by a fence.' Worcester defines it as 'parted off or shut in by a fence.'"

"Improved land" is referred to in the following manner in the case of People v. O'Brien, 60 Mich. 8, 26 N.W. 795:

> "The term 'improved land' as used in How. Ann. St. Sec.9174, which provides for the punishment of every person who shall willfully commit any trespass by entering on the garden, orchard, or other improved land of another, without the permission of the owner thereof, and with intent, etc. does not include that portion of a farm lying within the limits of a highway."

In the case of Wiggin v. Baptist Soc., 43 N.H. 260, the Court said:

> "'Improved', as used in Rev. St. c. 136, Sec. 9, authorizing the owner of land, who shall have improved the same and erected a division fence, to recover of the adjoining owner the value of

> such part of the fence as it was his duty to build, means land which is used in any way or for any purpose, or occupied by buildings."

The real question in your letter, if we understand it correctly, is as to whether or not the land in question must be enclosed, improved or cultivated lands of another in order to successfully prosecute a charge under the statute, or if any one of the three conditions exist instead of all collectively whether a charge can be successfully prosecuted under this statute.

The general rule with reference to the conjunction "or" used in a criminal statute is stated in the case of State v. Nicholson, 43 Atl. 251, as follows:

> "As used in Rev. Code 1893, p. 944, providing that it shall be unlawful, without first having obtained the consent of the owner or legal proprietor, to take possession of, use, ride off, 'or' drive off a horse, 'or' is disjunctive, and distinguishes between riding off and driving off."

In the case of State v. McDonald, 4 Port. 449, the word "or" is interpreted as follows:

> "The word 'or', being used in a statute providing that if any free person shall be aiding or assisting, or in any wise concerned with any slave or slaves, in any actual or meditated rebellion, or conspiracy, or shall in any manner, devise, plot or consult with any slave or slaves, for the purpose of inciting insurrection, shall be punished, etc. The statute is to be construed as creating separate offenses, and therefore to 'advise' is one offense, to 'plot' another, to 'consult' a third, if done for the purpose of encouraging or exciting, or aiding or assisting."

"Or" generally indicates an alternative, as was said in the case of Shepard v. City of New Orleans, 25 So. 542:

> "'Or' generally indicates an alternative, corresponding to 'either', as 'either' this or that; that is to say, either one thing or another thing. Thus, in a city charter authorizing the granting of licenses to barrooms on written consent of the bona fide householders 'or' property holders within 300 feet, 'or' means 'either'."

In the case of Miller v. Gerk, 27 S.W. (2d) 444, the Court said:

> "Generally, two or more forbidden acts, disjunctively specified in statute providing for single punishment, may be charged conjunctively in one count, if committed in one transaction and not repugnant or inconsistent, nor wholly separate and distinct in nature."

In the case of State v. McCollum, 44 Mo. 343, the general rule is thus stated:

> "When a statute forbids several things in the alternative, it is to be construed as creating but one offense, and an indictment may charge the defendant with the commission of all the acts, using the conjunction "and" wherein the statute used the disjunctive 'or'"

CONCLUSION

It is the opinion of this department that if the land in question be enclosed and the same is trespassed upon as set forth in Section 8312, supra, then it would not be necessary that it be improved or cultivated and vice versa. However, you

state in your letter that the land is not enclosed. Therefore, if it is improved and you can show the same by facts, then a prosecution would lie; likewise, if the land is cultivated. We are of the opinion that proof of any one of the three alternatives would be sufficient to maintain the prosecution.

Regarding the information, we think it could be prepared in two counts, the first count charging trespassing upon improved land and the second count charging trespassing upon cultivated land; however, you are in possession of the facts and know which character of land the evidence would show. It is also possible to file one information charging all three of the alternatives in one count or information.

As stated in the case of McKee v. Gratz, supra, another element would be the question of whether or not the owner or person in charge supervises the land in such a manner that the general public has not been allowed to wander, shoot and fish at will--in other words, the general attitude of the public toward the land in question would be a factor in determining whether you could successfully prosecute under this section.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

OWN:AH