

CONSERVATION: Section 39 of the Wildlife Code is not violative of the "commerce clause" of the Federal Constitution.

February 11, 1941

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Honorable H. A. Kelso  
Prosecuting Attorney  
Vernon County  
Nevada, Missouri



Dear Sir:

We are in receipt of your letter of recent date wherein you state as follows:

"The following facts occurred in this county and since we are rather close to Arkansas, Kansas and Oklahoma they may occur again and I would like to have your opinion on what the law is as to this matter.

"The local Conservation Agent found a man in this county with about 270 pieces of fur. The fellow was driving an Oklahoma pick-up truck and had no hunting licenses or dealers licenses of any kind. He gave the explanation that he was a resident of Oklahoma, said that he bought the furs there and was transporting them to Fort Scott, Kansas through Missouri. The Conservation Agent signed an affidavit for his arrest and I filed an information charging him with illegal possession and transportation under section 39 of the Wildlife and Forestry Code.

"Trial of the defendant was had before a local Justice of the peace, a lawyer, who believe it or not, released the defendant on the grounds that the section of the statutes was unconstitutional being in violation of the inter-state clause of the Federal constitution. The Conservation Agent and I would like to know whether the defendant violated section 39 of the Wild Life and Forestry Code and whether or not the said section is violative of the Federal Constitution."

Section 39 of the Wildlife and Forestry Code (1941 revision), to which you refer, provides in part as follows:

"Sec. 39. Subject to the provisions of these regulations and to any changes officially promulgated by the Commission, and to any statutes appertaining thereto, permits may be obtained by non-residents and aliens as evidences of granted and revocable privileges to pursue, take, transport, ship, buy; sell, store, use or possess certain wildlife, upon the payment of fees hereinafter stipulated; provided that such fees shall be the minimum and shall be increased to the amount of the fee for similar privileges required of non-residents by the applicant's home state; and further provided, that the domicile of the principal, and not of his agent, shall govern the type of permit required of any dealer or dealer's agent:

\* \* \* \* \*

"(d) Non-resident State-wide Fur-buyer's Permit \$150.00--To possess, buy, store, transport and ship the products of fur-bearing animals, as

defined herein, throughout the state, at no time other than during the prescribed buying season, upon the payment of a non-resident fur-buyer's permit fee of one hundred and fifty dollars (\$150.00).

(e) Limited Non-resident Fur-buyer's Permit \$25.00--To buy, possess, transport and ship the products of fur-bearing animals from authorized resident fur-buyers or fur-dealers, upon the payment of a limited non-resident fur-buyer's permit fee of twenty-five dollars (\$25.00); provided that such limited non-resident fur-buyer shall be exempt from such fee when all purchases made by him in this State are direct from an authorized resident fur-dealer who, within twenty-four (24) hours, certifies to the Commission each sale of a specified number and kind of furs to such limited non-resident fur-buyer."

You inquire whether the above section is violative of the "interstate commerce clause" of the Federal Constitution.

A rather detailed discussion of this question is found in 92 A. L. R. 1267, wherein it is said:

"On the theory that wild game belongs to the state in its sovereign capacity in trust for the whole public, and that any right of property acquired therein by capture and possession is a qualified right only, and subject to all reasonable limitations imposed for the protection and preservation of such game, it is generally held that statutes or regulations regarding the possession, transportation, or sale within the state of fish or game taken outside of the state are

a valid exercise of the police power, and not unconstitutional as an interference with foreign or interstate commerce."

Among the cases cited to support the above proposition are *State v. Randolph*, 1 Mo. App. 15, and *State v. Judy*, 7 Mo. App. 524.

The court in the former case said (l. c. 17):

"It is urged by defendant that, inasmuch as it appears that these prairie chickens were imported from Kansas, there can be no conviction. But the act in question makes it a penal offense to have prairie chickens in one's possession from February 1st to August 15th, in Missouri, no matter where the birds were caught. It is insisted that, if this be the meaning of the act, it is in violation of the Constitution of the United States; Congress alone having power to regulate commerce among the several States. We see nothing unconstitutional in the act. The game law would be nugatory if, during the prohibited season, game could be imported from the neighboring States. It would be impossible to show, in most instances, where the game was caught. The State of Missouri has as much right to preserve its game as it has to preserve the health of its citizens, and may prohibit the exhibition for sale, within the State, of provisions out of season, without any violation of the Constitution of the United States. So far as we know, this right has never been disputed, and its exercise by the absolute prohibition of the having in possession, or sale, of

game within the State limits, during certain periods of the year, is no more an illegal attempt to regulate commerce between the States than would be a city ordinance against selling oysters in July."

And in the latter case the court said (l. c. 525):

"It is claimed that the law violates provisions of the Constitution of the United States and of this State. We do not think so. Defendant is not deprived of his property without due process of law. The property was acquired with knowledge of the provisions of the act. The Legislature may, in some cases, pass laws which destroy the right of property. The protection of game is a public advantage, to which private interests may be made to yield to some extent. The Constitution of the United States does not expressly prohibit the passage of game-laws by the several States, nor is there any act of Congress professing to regulate the traffic between the States in game. The State of Missouri is certainly free to pursue its own policy in the matter of protecting game, and by so doing violates no law regulating commerce between the States. Phelps v. Racey, 60 N. Y. 10; The State v. Randolph, 1 Me. App. 15."

Section 39, supra, requires a license to be purchased by non-resident fur-buyers when buying, possessing, transporting and shipping the products of furbearing animals. Said requirement for a license under the authority of many decisions is a valid exercise of the police power and is not unconstitutional as an interference with foreign or interstate commerce.

15 C. J. S., Section 66, page 386, provides in part that:

"According to some of the earlier authorities, after fish or game, lawfully caught, captured, or killed have been delivered to an interstate carrier for interstate transportation, they are articles of interstate commerce, not subject to the state police power; and where they have not only been lawfully caught or killed without the state, but are also intended to be transported to a point beyond the state, the state has no power to interfere with their transportation through the state or with their being temporarily within the state for some lawful purpose. However, in view of a valid federal statute which, by prohibiting the shipment or transportation in interstate commerce of game killed in violation of state laws, and by providing that foreign game, when transported into any state, shall be subject to the laws of that state, enacted in the exercise of its police powers, to the same extent as if such game had been produced within such state, has eliminated all questions of interstate commerce and given the states entire freedom to prohibit the importation of game into, or the exportation out of, its own territory, as well as power to prohibit the possession or sale of imported game, \* \* \* \* \*."

Section 101 of the Wildlife and Forestry Code (1941 revision) provides in part as follows:

"LEGALITY OF WILDLIFE SPECIES TAKEN IN OTHER STATES: The laws of the state in which wildlife is taken shall determine the legality of the taking and permitted possession limits; otherwise when such wildlife is transported into Missouri, the regulations of the Commission shall apply as soon as such wildlife enters this state, except however, interstate shipments when neither the point of origin or point of destination is in Missouri; provided that the burden of proof shall be upon the person in possession of such shipments to show that such possession or transportation are not in conflict with these regulations."

Under the above quoted section it is not sought to require a license from non-resident fur-buyers where engaged in inter-state shipments, but persons having in possession such shipments have the burden of showing that same are properly not inter-state shipments.

In the case presented herein undoubtedly the person in possession of the furs could not show that they were engaged in inter-state shipment and, hence, it was sought to apply the requirements of Section 39 to said shipment.

In the case of Cohen v. Gould, 225 N. W. 435, the game warden of Minnesota seized six hundred and eighty muskrat skins which were purchased at Superior, Wisconsin, and shipped to Duluth, Minnesota. The furs were in two bags and bore no official tag or seal showing the legality of their original taking. The statute of Minnesota imposed upon the possessors of raw skins of wild animals the burden of proof that the animals were legally killed in or without the state. The court held that said statute did not impose a burden on inter-state commerce and pointed out that if the defendants would have accompanied the shipment with an invoice showing a lawful sale no one would have questioned the shipment.

The court said (l. c. 436, 437):

"Such police measures as our game laws would be futile indeed if they did not provide measures of enforcement adequate to oppose successfully the devices of those whose interest it is to violate them. We take judicial notice that much business is done in Minnesota in the sale at wholesale and retail and in the manufacture of furs; that the latter are imported in large quantities, not only from adjoining states, but also from Canada; and that law-abiding fur dealers and manufacturers do not seem to have had much difficulty in obeying our laws and the requirements of the officials charged with the enforcement thereof. In the case supposed by counsel, of a purchase by a Minnesota dealer of furs confiscated and lawfully sold by authority of Manitoba, no Minnesota official would question the shipment were it accompanied by an invoice from the Manitoba official showing the lawful sale by him. It is no objection to a police measure that it imposes upon citizens some but not an unreasonable burden of taking pains to see that the law is obeyed and to satisfy the officials charged with its enforcement that it is obeyed.

"\* \* \* \* \* Those who make a business of buying and shipping furs are not so incompetent in their trade as to be unable to accompany any package of furs with something in the way of invoice or manifest showing its origin and history."



Hon. H. A. Kelso

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From the foregoing we are of the opinion that the defendant violated Section 39 of the Wildlife Code if he was unable to prove that the shipment of furs was made in interstate commerce, and we are further of the opinion that said Section 39 is not violative of the "commerce clause" of the Federal Constitution.

Respectfully submitted,

MAX WASSERMAN  
Assistant Attorney-General

APPROVED:

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COVELL R. HEWITT  
(Acting) Attorney-General

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