CONSERVATION COMMISSION: Construing Section 8943 and Regulation #17.
FEES: Fees for Conservation Agent making arrest.

March 3, 1942

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Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of February 16, which reads as follows:

> "The law as written is found in what is carried forward in the R. S. Statutes of Mo., 1939, as section 8943. The same law was in the Conservation Commissions regulations, see the enclosed sheet.
>
> "The new regulations read as shown on page 19, section 17 of the yellow book for 1942.
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> "A game commissioner in this county arrested a defendant and he pleaded guilty to the charge, and a commitment was issued to put the defendant in jail for the non payment of the fine and costs. In this criminal action I find that the deputy game commissioner has charged fees and mileage for serving the warrant and for serving the commitment.
>
> "In your opinion who gets these fees charged. The county school fund, or

> the deputy game commissioner who served the papers? It looks to me as if the new section which went into force on Jan 1, 1942 cut out fees for the deputy game commissioner. I was under the impression that under the decision in Marsh v. Bartlett, Mo., 121 S. W. (2) 737, that all the sections were repealed except section 8967 of the R. S. of Mo. 1939."

One of the primary rules of statutory construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent which should be done from words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose. (City of St. Louis vs. Pope, 126 S. W. (2) 1201, l. c. 1210.)

Marsh vs. Bartlett, 121 S. W. (2) 737, l. c. 744-745, referred to in your letter, did not repeal all prior statutory enactments pertaining to the enforcement of the game and fish laws in this state, but only such provisions as were inconsistent with the constitutional amendment (Article 14, Section 16, Constitution of Missouri) which created the Conservation Commission. While the court in the above case did not attempt to determine what provisions of the statutes were repealed by the Conservation Commission Amendment, they did hold that Section 8311, R. S. Missouri 1929 had not been repealed and furthermore that any provision heretofore enacted by the legislature providing for a penalty, or penal in nature, was not repealed as such authority can be assumed only by the legislature. In so holding the court said:

> "There can be no question but that the Amendment in express terms repealed all existing laws inconsistent therewith. We think the question here is whether there remain sufficient exist-

ing laws not inconsistent therewith. And the correct answer is determinative of self-enforcement. The answer is yes, conditioned upon whether there still exist fixed penalties established by statute and now applicable to violations of rules and regulations established by the Conservation Commission. It has been held that such a provision for such additional legislation as may 'aid' the operation of the constitutional amendment does not hold it in abeyance until such legislation is enacted, the word 'aid' signifying to support, help or assist. State ex rel. Clark v. Harris, 74 Or. 573, 144 P. 109, Ann. Cas. 1916A, 1156; see 12 Cyc. sec. 106.

* *

"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. Hence it follows that unless there be existing statutes that are not inconsistent with the Amendment but which do in effect fix punishment for acts or conduct that may fairly come within the purview of some rule or rules established by the Conservation Commission, it cannot be said that the Amendment is completely self-enforcing; if the situation be the opposite, our conclusion will be the opposite."

In view of Marsh vs. Bartlett, supra, apparently Section 8943, R. S. Missouri 1939, was repealed when the Conservation Commission promulgated Section 17 of the Wildlife and Forestry Code, 1942. Since said provision is not in the nature of a penal statute it is inconsistent with the new regulation and under the Amendment is repealed. Section 17, supra, reads as follows:

> "No representative of the Conservation Commission shall accept any fees, directly or indirectly, incident to the arrest and prosecution of any fish and game law violator; provided, however, that such representatives may be allowed statutory fees and mileage when required to appear as witnesses in the trial of any such case elsewhere than within their respective territories."

You inquire who gets the fees, the school fund or the agent of the Conservation Commission. This Department rendered an opinion to the Hon. Leo A. Politte, Prosecuting Attorney of Franklin County, under date of March 8, 1938, holding fines collected for the violation of the fish and game laws go to the county school fund. Also, under date of October 10, 1939, an opinion was rendered to the Hon. G. C. Beckham, Prosecuting Attorney of Crawford County, holding under Section 8287, R. S. Missouri 1929 (same as 8943, R. S. Missouri 1939) that the Conservation Commission agent is entitled to said fees, copy of which we are enclosing.

Those fees for the agent do not constitute a penalty, but are merely costs in the case, more in the nature of compensation in this instant, for services rendered. In Ryan vs. McGregor, 58 Ontario Law Reports 213, l. c. 216, the court held costs as between party and party are given by the law as an indemnity to the person entitled to them, they are no imposition as a punishment on the party who pays them nor given as a bonus to the party who receives them. In the case of Ryan vs. McGregor, supra, the court said:

> "The fundamental principle is thus

> clearly stated by Baron Bramwell in the case of Harold v. Smith (1860), 5 H. & N. 381, 385: 'Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them.'* * * * * * * * * * * * * * * * *"

In Seaboard Air Line Ry. v. Maxey, 60 Southern 353, the court held costs properly incurred are an incident to a judicial proceeding and are not part of the damages claimed or demand or penalty being adjudicated.

> "Costs properly incurred are an incident to the judical proceeding and are no part of the damages claimed or demand or penalty being adjudicated; consequently costs do not affect the jurisdiction of the court."

Also, see Silberman v. Skouras Theatres Corporation, 169 Atlantic 170, l. c. 171.

Therefore, in view of the above opinions heretofore rendered and authorities holding fees are not fines or penalties but merely a part of costs in the case, unquestionably said fees were never intended to go to the county school fund but it was intended that said fees go to the Conservation agent as his personal property, unaccountable to anyone for same. Assuming that said fee was claimed prior to the Conservation Commission's promulgating regulation #17, supra, said regulation not being retroactive, the Conservation agent would be entitled to said fees if requested, otherwise no one would be entitled to same and it would be as any claim not called for by claimant. In the future no claim shall be filed by the Conservation agent for such fees in view of regulation #17, supra, repealing Section 8943, supra, and so providing that he shall no longer be entitled to same.

Respectfully submitted

APPROVED:

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