CONSERVATION COMMISSION: Right of Conservation Agents to inspect persons
FISH AND GAME: and motor vehicles on the highways.

December 18, 1942

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Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Monett, Missouri

Dear Sir:

This will acknowledge receipt of your request under date of December 2, for the following opinion. Your letter reads as follows:

> "I am having a great deal of complaint and trouble with the agents of the Conservation Commission, who are stopping all cars at the cross roads, including ambulance and people traveling through the state peaceable. These agents are searching the cars for game. I would like to have your opinion whether or not they have the right to search cars when they have no evidence that the party has violated the game law without a search warrant.
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> "The case 315 Missouri page 1267 State vs. Benton seems to give them a good deal of authority, but I am not clear on this matter and would appreciate an opinion."

The people of this state amended the Constitution of Missouri by adopting Section 16, Article 14 of the Constitution. Said amendment in effect abolished the old Fish and Game Commission and created in lieu thereof a body known as the Conservation Commission of the State of Missouri and further granted said body almost unlimited authority to control, regulate, manage, restore and conserve all wildlife in this state. Said Section 16 reads:

> "The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources

of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party. The commissioners shall have knowledge of and interest in wild life conservation. Vacancies shall be filled by appointment by the Governor for the unexpired term within thirty days from the date of such vacancy; on failure of the Governor to fill the vacancy within thirty days, the remaining commissioners shall fill the vacancy for the unexpired term. The first members of said commission shall be appointed for terms, as follows; one for a term of two years, or until his or her successor is appointed and qualified; two for terms of four years, or until their respective successors are appointed and qualified; one for a term of six years, or until his or her successor is appointed and qualified. Upon the expiration of each of the foregoing terms of said commissioners, a successor shall be appointed by the Governor for a term of six years, or until his or her successor is appointed and qualified, which term of six years shall thereafter be the length of term of each member of said Commission. The members of said Commission shall receive no salary or other compensation for their services as such. The members of the Commission shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties. Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is

> exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employees as the Commission may deem necessary. The Commission shall determine the qualifications of the Director, all assistants and employees and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment. The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose. The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

This constitutional amendment specifically provides that the General Assembly may enact laws in aid of but not inconsistent with the Amendment and further that all present laws inconsistent shall no longer remain in force and effect.

In Marsh vs. Bartlett, 121 S. W. (2) 737, l. c. 744, 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 existing 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 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."

Section 8951, R. S. Missouri 1939, reads:

> "It is hereby made the duty of every person participating in the privileges of taking or possessing fish, birds, animals, and game, as permitted by this article, to permit the game and fish commissioner or his deputies to inspect, and count such fish, birds, animals, and game, to ascertain whether the requirements of this article are being faithfully complied with. Any person who shall refuse to comply with a demand to permit such inspection and count by any authorized officer of this state, or who shall interfere with such officer or obstruct such inspection or count shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than twenty-five dollars ($25.00) nor more than one hundred and fifty dollars ($150.00)."

The above statutory provision is one provision that is not inconsistent with the Amendment in that regulations #31 and #33, promulgated by the Conservation Commission and found in the Wildlife and Forestry Code of Missouri follow said provision and read:

> "All permits shall be signed by and carried upon the person of the permittee, or posted in the place of business of the holder thereof when so required, and shall, on demand, be exhibited to any officer charged with the enforcement of these regulations, or to any transportation company or postal employee to whom is presented any wildlife for shipment."

> "The acceptance of any permit shall be deemed an acknowledgement by the permittee of his duty to comply with these regulations and prevailing amendments thereto, and shall be deemed also a consent by the permittee that the title to all wildlife is, and shall remain, in the state, subject to the control, management, restoration, conservation and regulation by the Conservation Commission, and that any permit is revocable by the Commission for cause."

Furthermore, said Section 8951, supra, has been incorporated in said Code and the Commission has on page 12 of said Code gone on record as considering said statutory provision to be consistent with the Conservation Amendment and therefore still in full force and effect. Not only is this true but said statute is in the nature of a punitive provision and the Supreme Court has held that the legislature only, shall enact any such punitive laws. Therefore, the Conservation Commission is without authority to adopt regulations pertaining to penalties and punishment for violations of its rules and regulations. In so holding, the court said in Marsh vs. Bartlett, 121 S. W. (2) 737, l. c. 744-745:

> "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 Admendment 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."

Another thing that we must not overlook is the fact that title to wildlife in this state is in the sovereignty of the State of Missouri. The cases are unanimous on this point of law. Worington vs. Richart, 41 S. W. (2) 410, holds that title to continued game being in the state for the purpose of regulating use thereof, ownership cannot be considered in replevin to recover possession from game warden . In State vs. Weber, 205 Missouri 36, l. c. 48, the court held the title to deer raised and kept in captivity is no better than the title to wild deer which is killed or captured and reduced to his possession. State vs. Heger, 194 Missouri 707, l. c. 711, held that the ownership of wild game is vested in the state and such is not subject to private ownership.

It is fundamental that every individual is immune from unreasonable search. However, it is also well established that such immunity being a purely personal right that same may be waived at any time by said individual. Section 11, Article 2, of the Constitution of Missouri provides persons shall be secure against unreasonable searches and reads:

> "That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

Section 23, Article 2, of the Constitution of Missouri reads in part:

> "That no person shall be compelled to testify against himself in a criminal cause,* ."

In Carrol vs. United States, 267 U. S. 132, 69 L. Ed. 543, 39 A. L. R. 790, l. c. 796, the court said:

> "* * *There are on the statute books of the United States a number of laws authorizing search without a search warrant. Under the common law, and agreeable to the Constitution, search may, in many cases, be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but

> it does forbid unreasonable search. This provision in regard to search is, as a rule, contained in the various state constitutions, but, notwithstanding that fact, search without a warrant is permitted in many cases, and especially is that true in the enforcement of liquor legislation."

In State vs. Owens, 302 Missouri 348, l. c. 358, the court in holding that searches may be made if not unreasonable searches, said:

> "While the Fourth and Fifth Amendments to the Federal Constitution are not involved here, Sections11 and 23, Article II of the Constitution of Missouri, are almost identical in purport and in language with those amendments, and the construction of them by the United States courts is important authority for us in construing the like sections of our State Constitution. Many cases of prosecutions for the violation of prohibition laws lately have received consideration by courts of various states with reference to the production of evidence obtained by illegal search of the person or the premises of the defendant, and these will be noticed.
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> "Whether a search is legal or illegal is not always determined by the presence or absence of a search warrant. The Constitution protects against an unreasonable search. A search may be unreasonable when made by an officer with a valid search warrant in his hands, or a search may be reasonable and entirely within the rights of an officer when he has no search warrant. Whether or not a search is reasonable is a judicial question. It is not within the power of the Legislature to enact a statute which will permit an unreasonable search. * * * * * * * * * "

In State vs. Woods, 292 S. W. 1033, the court held that constitutional provisions relative to search and seizure apply only to unreasonable search and seizure. In so holding the court said:

> "In its contention 7 relator invokes state and federal constitutional provisions against

> unreasonable searches and seizures and guaranteeing the equal protection of the law and due process of law, and also invokes the Missouri constitutional provision for the administration of right and justice without denial. U. S. Constitution, section 1 of amendment 14, and amendment 4. Missouri Constitution, Section 11, art. 2, section 30, art. 2, and section 10, art. 2. Only unreasonable searches are prohibited.* * * "

Willis on Constitutional Law, page 535, said:

> "* * * *It is constitutional without a warrant to search automobiles and other moving vehicles and to seize goods therein on reasonable suspicion without any previous arrest, because in such cases it is not feasible first to procure a warrant. Likewise, it is constitutional without a warrant to search a cave in an open field."

Cornelius on Search & Seizure, Section 23, page 69, is as follows:

> "The defendant may waive his constitutional rights at the time the search and seizure is made or afterwards and if he does so, he can not afterwards secure possession of the property and the same may be used in evidence against him. Thus, where the books and papers of a defendant were seized under a search warrant improperly executed, and the defendant subsequently knew that the government had the books and papers in its possession and further states that he was perfectly willing that same be examined, the court held he had waived his constitutional rights."

Cornelius on Search & Seizure, Section 20, page 67, is as follows:

> "While under both state and federal constitutional provisions the people are entitled to immunity from unreasonable searches and seizures, a defendant may nevertheless waive such

> constitutional rights, so in the sections following we shall discuss in detail the subject of such waiver."

Also, Cornelius on Search & Seizure, Section 25, page 72, reads as follows:

> "The courts almost universally hold that the constitutional right to be immune from unreasonable searches is personal and can not be waived by any one except the defendant himself. Thus in illustration of this principle it has been held that one in charge of another's office can not waive the constitutional rights of the owner by consenting to a search."

In State vs. Fuhman, 42 Federal (2) 733, l. c. 734, the court in holding the right to protection against unreasonable searches and seizures is a personal one which may be waived, said:

> "* * *The right to protection against unreasonable searches and seizures is a personal one which can be waived. When the defendant in this case ascertained that the officers knew about the still, he voluntarily led them to where it was, some half mileaway, and by so doing he waived his right to assert or claim that the searches and seizures made were unreasonable.* * * "

It was held in Zukowski vs. State of Maryland, 167 Maryland 549, l. c. 555, that where it was a prerequisite to obtaining license for the sale of alcoholic beverages that licensee give consent to licensor to search premises licensee waived any rights he might have had to complain of search of premises.

> "The search which resulted in the discovery of the defendant's illegal possession of liquor was made with his consent voluntarily and formally given, under the terms of the statute, to induce the issuance of a license to him for the sale of alcoholic beverages. The consent was none the less voluntary because of the fact that it was a prerequisite to his obtaining the license. In thus authorizing the search he debarred himself from contending successfully that it was unlawful. (Cases cited.)* * * * * * "

Also, in State vs. Davis, 108 Missouri 666, l. c. 666-667, the court held that under a statute it was the duty of a druggist to preserve prescriptions, which duty was imposed upon him to prevent abuses of authority to sell and a condition upon which sale was authorized.

> "* * * * *In the same section the druggist and pharmacist is required to preserve all prescriptions compounded by him; in other words, the druggist and pharmacist is licensed or commissioned by the state, and, after being so licensed or commissioned, the same power that licenses or commissions him also requires him to preserve all prescriptions compounded by him; that is, he must keep a record of his official acts, so to speak. These prescriptions or public records do not belong to the druggists; they are the property of the state, and when the state calls for these prescriptions or public records they should be produced. * * * * * * * * * * * * * * *"

In Jones vs. State, 294 Pacific 210, l. c. 211, the court held that the defendant's consent to search of automobile by officers dispenses with necessity of a search warrant. In so holding the court said:

> "He argues at length that the evidence was inadmissible, for the reason that the officers searched the defendant's car without a search warrant. This argument would have merit were it not for the fact that the officers and the defendant testify that the defendant gave them permission to search his car. It is not necessary after the defendant gave the officers permission to search his car that they have a search warrant. The defendant by his action waived his right to require the officers to have a search warrant before searching his car."

In State vs. Bennett, 315 Missouri 1267, l. c. 1275, the court in holding Conservation agents may inspect permit and count of game of any permittee for the reason he consented to same when he purchased a permit, said:

> "* * * * *and furthermore, that the defendant

> cannot play fast-and-loose; that by accepting a hunter's license and exercising the privilege under the restrictions and limitations of the statute, one of which was his duty to submit to the inspection and count of the quail in his possession by the game warden, he waived the constitutional rights invoked so far as applicable to the facts in this case."

In the following case we find similar facts with this exception, the law in this case is different from the case at Bar in that in this case the law required the Conservation agent to have probable cause to believe the law had been violated or was about to be violated before such search could be made. In People vs. Hill, 227 NYS 285, l. c. 287, the Conservation officers attempted to stop an automobile on the highway to search same and determine if the Conservation Law had been violated, or was about to be violated, and said defendant continued to drive on without stopping. An indictment was returned for violating another section, "resisting and obstructing an officer." The defendant was acquitted for the reason it did not indicate that said officers had probable cause to believe the law had been violated, or was about to be violated. The Conservation Law provided for such search of an automobile when upon having reasonable cause to believe game is unlawfully possessed in violation thereof.

Not only do we have regulations and laws whereby the licensee agrees to permit Conservation agents to inspect and count wildlife at any time and check hunting and fishing permits at any time, but the permit on its face reads:

> "Not valid until signed in ink by permittee. Signature constitutes acceptance by permittee of laws and regulations pertaining to this permit, of conditions set forth on reverse side hereof, and his certification that he is a bona fide citizen of the United States and a resident of Missouri."

and on the reverse side further reads:

> "OBLIGATIONS OF PERMITTEE:
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> "1. To exhibit this permit for inspection to any transportation company or postal employee to whom wildlife is presented for

transportation and upon demand to any agent or officer authorized to enforce the laws and regulations pertaining to wildlife.

"To permit any such agent or officer to inspect and count any wild life in permittee's possession and to ascertain whether requirements of said laws and regulations are being complied with.

"3. Acknowledges this permit to be subject to suspension or revocation by the Conservation Commission, for cause, as provided in the regulations."

Therefore in view of the foregoing authorities holding that the title to all wildlife is in the State of Missouri, that authority is granted to Conservation agents to inspect permits and count game of all persons possessing hunting and fishing permits under statute and regulations to determine if the law is being violated, the written waiver of persons possessing hunting and fishing permits of their constitutional right to immunity from search, it is the opinion of this Department that Conservation agents may at reasonable times stop motor vehicles on the highways and inquire if the driver possesses a hunting or fishing permit and further if he has been hunting and fishing, if the answer is in the negative and there is nothing to indicate he has been hunting or fishing he should not be restrained longer. If his answer is in the affirmative or there is evidence that he has been hunting or fishing then the Conservation agent has a legal right to inspect the permit and count whatever game he may have in his possession. There should be no great delay to anyone on the highway and at any time such inspection should be made and conducted in a manner so as to prevent congestion and hazardous conditions. However, in case any person driving upon the highway does not have a hunting or fishing permit and has not violated any provision of the Wildlife Code then said person has violated no law by failing to stop for such inspection.

Respectfully submitted

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APPROVED:

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