Boarding House Keepers, Liability Of for Furnishing Venison to Boarders. Hotel Keepers, Liability Of for Furnishing Venison to Guests. Game and Fish, Liability for Selling. Fish and Game, What Constitutes Sale Of.

1. A boarding house keeper or a hotel keeper who furnishes venison to his boarders or guests, as a part of the meal, for which they pay, is guilty of violating the law prohibiting the sale of the animal "or any part thereof."

2. A person is not an accessory to the crime of killing deer out of season for merely aiding to bring in a deer which someone else has killed.

Helena, Montana, Jan. 17, 1908.

W. F. Scott, Esq.,
State Game Warden,
Helena, Montana.

Dear Sir:—

I am in receipt of your favor of January 11th, in which you submit for the consideration of this office the following propositions:

> "A killed deer out of season, and B sent his son, C with A to bring in this deer, which B served in his boarding house at his regular meals to his boarders who paid a stipulated price per week or month for such board; Is B guilty of violating the law prohibiting the selling or offering for sale the animal in question, and are B and C guilty as accessaries to the crime of killing deer out of season?"

1. Section 19 of the Act of March, 1897, Laws 1897, page 249, provides in part:

> "Every person who shall sell, or offer for sale, any of the birds or animals or any part thereof, mentioned * * * is punishable" etc.

Where the boarder gives his order for the venison, whether from a bill of fare, or otherwise, which order is filled, this constitutes a sale of the animal or a "part thereof" within the meaning of the law, and the proprietor of the boarding house is liable for a violation of the law.

In State vs. Beal, 75 Maine, 289, the Supreme Court, in considering the question as to the liability of an inn-keeper for selling trout said:

> "A hotel keeper * * * having received from a friend some trout * * * which were cooked and served to the guests of the hotel at the regular table, as part of the common bills of fare. It is not denied and there can be no doubt, that these facts include possession of the trout by the landlord with intent to sell them, offering them for sale, and a sale completed."
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> Groves vs. Kilgore, 72 Maine 489.
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> 19 Cyc. 1010, Note 23.

But if by virtue of an agreement between the boarder and the proprietor, the boarder pays a stipulated sum per meal, week or month, for his board, and the meal is served without any previous knowledge, order or understanding on the part of the boarder of what it shall consist until it is brought to the table, and a part of such meal so served is venison, does this constitute a sale of the animal or "any part thereof" within the meaning of the law? This proposition presents a different question, or rather a different phase of the same question. There is no specific agreement between the proprietor and the boarder as to the sale and delivery of the venison, and the same is likewise true of every other part of the meal. If the boarder does not pay for the venison because no specific order was given therefor, why should he pay for the bread or potatoes or any part of the meal, for he did not give any specific order for any of these? Then why should he pay for the meal at all, and what, if anything does he pay for? The meal may consist wholly of venison. The price paid is not merely for the service, but for the meal served, and this includes everything which goes to make up the meal, and if venison is one of the parts, it is paid for along with the other viands. It is true that the minds of the parties must meet in order to make a contract, but here the minds of the parties do meet, for it is agreed between them that (a) the proprietor shall select the meal, and, (b) the boarder shall pay an agreed price for the meal so selected. And if the proprietor selects venison as one of the parts of the meal, he receives pay for it in the price that is paid for the meal, for the venison is part of the meal. He thus parts with the venison for a consideration, and by virtue of a previous agreement, and this constitutes a sale. Some argument can be made against this conclusion, but it seems to be supported by reason and by authorities.

In State vs. Lotti, (Vermont) 47 Atl. 392, the Supreme Court in passing upon the liability of a boarding house keeper for selling ale and wine, said:

> "The respondent kept a boarding house, with sixteen boarders and lodgers, and two or three boarders. At dinner and sup-

per he furnished them with ale and wine, and they were accustom to drink it. The boarders and lodgers paid the respondent sixty cents per day for their board and lodging. The furnishing of the ale and wine by the respondent to his boarders, as a part of their meals, was, in effect, a sale to them of so much ale and wine as they drank."

23 Cyc. 180. Note 23.

2. Our criminal code makes no provisions relative to the accessories after the fact in misdemeanor cases such as violating said Section 19, Laws 1897. Section 42 of the Penal Code relates to the felony actions and section 1225 relates only to counseling, aiding or abetting in the commission of a misdemeanor, and killing deer out of season is prosecuted as a felony (Sec. 17 Penal Code and Chap. 124 Laws 1907), and to make one guilty as accessory after the fact the crime must be concealed "from the magistrate" or the person charged must have been harbored or protected. The mere fact of bringing in, or aiding in bringing in, a deer that someone else had killed would not of itself be sufficient to sustain a conviction as accessory. Previous agreement or understanding that A. should kill deer out of season and that B. and C. should profit thereby, when an inducement to the killing, or a wilfull concealing of the crime, or concealing the perpertrator, or in anyway purposely aiding him to make his escape, would make B and C accessories to the felony. Hence, under your statement of facts B. and C. are not liable as accessories in the case stated.

Very truly yours,

ALBERT J. GALEN,

Attorney General.