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PHEASANT SHOOTING PRESERVE — COMMERCIAL — UNLAWFUL TO HUNT ON SUNDAY—SECTION 1391 GC—GAME BIRDS—NON-GAME BIRDS.

SYLLABUS:

It is unlawful, by the force of Section 1391, General Code, to hunt on a commercial pheasant-shooting preserve on Sunday.

Columbus, Ohio, January 27, 1953

Hon. A. W. Marion, Director
Department of Natural Resources
Columbus, Ohio

Dear Sir:

I am in receipt of your letter of recent date reading as follows:

“Section 1391 provides in part as follows:

“Hunting a wild bird or wild quadruped on Sunday

and the use of a rifle in taking migratory game birds is prohibited.'

"I respectfully request a formal opinion from your office as to whether or not the above provision applies to 'commercial pheasant-shooting preserves' licensed in accordance with 1437-2 and 1437-4, Ohio General Code. Specifically, is it legal or illegal to hunt pheasants on a commercial pheasant-shooting preserve on Sunday."

Section 1391, in its entirety provides :

"The ownership of and the title to all wild animals in the state of Ohio, not legally confined or held by private ownership, legally acquired, is hereby declared to be in the state, which holds it in trust for the benefit of all the people. Only in accordance with the terms of the General Code, or council orders, then in effect, shall individual possession be obtained. No person shall at any time of the year take, in any manner, or possess any number or quantity of wild animals defined in this chapter, except as provisions of the General Code, or the council orders then in effect, may permit to be taken, hunted, killed or had in possession, and only at such time and in such place, and in such manner, as the General Code or the council orders, then in effect, may prescribe, and no person shall buy, sell, offer for sale the same, or any part thereof, transport or cause to be transported, except as permitted by the terms and provisions of the General Code or the council orders then in effect. A person doing anything prohibited or neglecting to do anything required by this chapter, or contrary to any council order then in effect, shall be deemed to have violated this section. A person who counsels, aids or assists, shields or harbors an offender under this chapter or council order then in effect, or who knowingly shares in the proceeds of such violation, or receives or possesses any wild animal in violation of the General Code or council order then in effect, shall be deemed to have violated this section. Hunting a wild bird or wild quadruped on Sunday and the use at any time of a rifle in taking migratory game birds is prohibited."

Commercial pheasant-shooting preserves are licensed by Section 1437-2, General Code, wherein it is provided in pertinent part that :

"(c) A person desiring to operate a commercial pheasant-shooting preserve on lands of which he is the owner or bona fide lessee may apply in writing to the division for a license so to do. The license fee shall be one hundred dollars per annum and the form of the application and license shall be determined by the division.

"The division may, upon payment of such fee, issue to the applicant such a license when it appears that :

"(1) The operation of such commercial pheasant shooting preserve shall not conflict with a prior reasonable public interest ; and

"(2) The applicant shall produce evidence satisfactory to the division that he has released on lands described in the application and license, at least ten female and two male pheasants for the first one hundred acres of land or portion thereof, or a proportionate number of such birds for any acreage in excess of the first one hundred acres, prior to May first in the calendar year for which the license is to be issued ; and

"(3) The applicant shall deliver to the division of wildlife each September, for distribution of lands, other than private hunting preserves, herein established, ten female, two male pheasants for each one hundred acres of land or portion thereof within said preserve : and

"(4) The applicant shall have produced evidence satisfactory to the division that he will raise or purchase for liberation and will liberate on the commercial pheasant shooting preserve at least five hundred pheasants between September first of the year for which the license was issued and the following March fifteenth. The holder or holders of any such license shall be liable for any damage to or destruction of growing crops on lands adjacent to the preserve, caused by pheasants raised on such preserve."

Section 1437-4, General Code, provides :

"Pheasants raised in the wholly enclosed preserve may be killed in any manner. No pheasants shall be sold for food unless the carcass of each pheasant shall have been tagged with a suitable tag or seal supplied by the division. Nothing in sections 1 to 12, inclusive, of this act (G.C. §§ 1437-1 to 1437-12), shall alter or supersede the laws requiring a license to hunt.

"Under a 'commercial pheasant-shooting preserve' license, pheasants may be taken only on lands described in the application and license, without regard to sex and daily bag limit, by duly licensed hunters authorized by the licensee to shoot on said land between September first and the following March fifteenth, both dates inclusive.

"All pheasants liberated on a commercial pheasant-shooting preserve for which a license has been issued shall first be banded with a leg band which shall bear upon it a symbol identifying the shooting preserve, and a description of said band and symbol shall be set forth in the application for license. No pheasants shall

be possessed or transported outside of the licensed area, unless each bird shall have been tagged with a suitable tag or seal supplied by the division, and no licensee shall receive from the division, during any year of operation, more tags to be affixed to the bodies of pheasants than four times the number of female pheasants released prior to May first in each year, in addition to one tag for each pheasant liberated during the shooting period hereinbefore specified. Provided further that if a pheasant without a band is shot within the confines of a commercial pheasant shooting preserve, the licensee shall immediately replace each such bird with a live banded pheasant. Each replaced pheasant shall be released outside the confines of the preserve under the supervision of the division of wildlife."

It will be seen that the interdict contained in Section 1391, applies only to the hunting of "wild" birds and "wild" quadrupeds. The first question that must be answered, then, is whether pheasants banded and released on a commercial hunting preserve are wild birds within the meaning of this section.

The term "wild" as used in Section 1391 and related sections with reference to animals within this state, is in my opinion used in a generic sense to indicate animals of a species not usually domesticated, and does not refer to their state of existence or to their comparative docility or familiarity with man. Thus wild birds are defined in Section 1390, General Code, as "Game birds and non-game birds". Game birds in turn being defined, in the same section, to include pheasants. However, even if this term is held to refer to the state of existence of particular animals I think in the case under consideration the answer must be the same. Whether purchased or raised these pheasants are wild birds. They have lost none of their natural propensities and when released on the preserve they are living in a natural or unrestrained state.

Next in the order of consideration is the question of whether the legislature intended to include pheasants released on a commercial shooting preserve within the prohibition on Sunday hunting expressed in Section 1391. This question, I believe, must be answered in the affirmative. The provision on its face applies to the hunting of all wild birds and quadrupeds without exception, although in the same statute the legislature gave recognition to the fact that some live wild animals might be owned by private persons as distinguished from the state of Ohio. This would seem to indicate that the legislature, with complete awareness, intended as expressed to for-

bid hunting on Sunday of all wild birds and quadrupeds regardless of ownership. This is not to be taken as meaning that in my opinion these pheasants are necessarily privately owned. I merely point out that the question of property interests or ownership is immaterial to the issue before me.

It will also be noted that in Section 1437-4, *supra*, it is specifically provided that two types of restrictions applying to hunting in general are not to apply to hunting on commercial pheasant-shooting preserves. I refer to the removal of restrictions on sex and daily bag limits. It would seem from this that the legislature intended other restrictions or limitations on hunting, not specified, to apply to hunting on these preserves. This rule of interpretation finds expression in the maxim "expressio unius est exclusio alterius." The provision in the same paragraph wherein it is provided that the hunting season on pheasant preserves is to run "between September first and the following March fifteenth, both dates inclusive," does not, to my way of thinking, dictate that a different conclusion be reached. This particular provision merely defines the duration of the open season on commercial pheasant-shooting preserves in general; restrictions on hunting within the season being left for more specific legislation. In the same manner, Section 1396, General Code, sets out the beginning and ending dates of the open seasons on game throughout Ohio in general. This does not, however, give license to hunt at all times during the open seasons as evidenced by the very prohibition under consideration.

Based on the foregoing considerations and in specific answer to your question, it is my opinion that it is unlawful, by the force of Section 1391, General Code, to hunt on a commercial pheasant-shooting preserve on Sunday.

Respectfully,

C. WILLIAM O'NEILL
Attorney General