

2677.

APPROVAL, NOTES OF FULTON COUNTY, OHIO—\$58,300.00.

COLUMBUS, OHIO, October 5, 1928.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2678.

APPROVAL, NOTES OF LAKE COUNTY, OHIO—\$44,000.00.

COLUMBUS, OHIO, October 5, 1928.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2679.

MUSKRAT—KILLING DURING CLOSED SEASON ON MUSKRAT FARM—
WHAT CONSTITUTES MUSKRAT FARM.

SYLLABUS:

1. *Where lands are enclosed by dykes and canals and the premises within the enclosure are used exclusively for the breeding and raising of the animals mentioned in sub-section a of Section 1398, General Code, the same would constitute an enclosure within the meaning of said section and the animals mentioned in said exception in said section may lawfully be taken or killed at any time, except on Sunday, within said enclosure by the owner thereof.*

2. *Under the authority of the case of State vs. Evans, 21 O. A. R. 168, an employe of the owner of such a farm or enclosure may take or kill the animals mentioned in said exception in said Section 1398, General Code, for his employer, when found within said enclosure belonging to the owner, at any time except on Sunday.*

COLUMBUS, OHIO, October 6, 1928.

HON. CHARLES V. TRUAX, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—I am in receipt of communication from your department, Division of Fish and Game, which reads:

“Herewith please find copy of letter from Mr. W., Supervisor District No. 2, which will be self explanatory.

You will note that Mr. W. is requesting an opinion as to what the meaning of the word 'enclosure' is in reference to Section 1398-a of the Fish and Game Laws.'

The copy of the letter which you enclose is as follows:

"I am writing you, to ascertain an opinion of the Attorney General, just the meaning of Section 1398-A.

The Trappers and Clubs of the large marshes, bordering on the south shore of Lake Erie are waiting with patience for an opinion as how the taking and killing of fur-bearing animals is lawful.

Now as to the first part of the section reading as follows:

Nothing in this section shall be construed as prohibiting a *person* from *pursuing and killing at any time*, except on Sunday, fur-bearing animals which are injuring his property, or which have become a nuisance; this first part is very clear to the trappers and myself as a State Game Supervisor, Dist. No. 2, knowing that the hide, skin or pelt cannot be removed from the carcass if killed as stated above.

The following is where there seems to be a confusion as to the taking or killing of the fur bearing animals at any time of the year and the sale of such at any time of the year.

Or prohibit the *owner of a farm or enclosure* used *exclusively* for the breeding and raising of raccoon, skunk, mink, fox, muskrat or opossum therein, or in addition to such use, used as hunting grounds for other game from *taking or killing* the fur-bearing animals herein enumerated or any of them *at any time*.

Is the *owner* the *only person* permitted to take the fur-bearing animals as it reads, or can the owner employ any other person to take them for him?

How shall it be construed as to the word *enclosure*? This particular word *enclosure* seems to be the confusion. What shall an *enclosure mean*?

Now great many of the owners of the large and small marshes, have spent considerable money in diking their marshes in with dredges, throwing up dikes (earth) that range from 3 to 12 ft. high, surrounded their entire marsh with such a dike and *call this an enclosure* and claim the right to take or kill such fur-bearing animals at any time and are permitted by law to sell the fur-bearing animals at any time of the year.

Now the question is: Can the owner do so as stated above or not?

There is a person whose name is C. R., who has moved and who at present seems to supply all the trappers with what they call live traps, these traps are set and catch alive muskrats and mink, after catching the animals they are sold to R. at \$3.00 a piece and shipped out of the State at any time of the year.

This practice has been going on over a year and if permitted by law will soon exterminate the muskrat and mink.

There are hundreds of traps (live traps) in the possession of the trappers at present furnished by Mr. R.

Now, Mr. T., if we can be furnished with an opinion then the entire situation and matter will be clear to all people at large who are at a stand still as to the language and meaning of the present law as to this particular word *enclosure*.

Again, what shall an enclosure mean, earth or wire fencing or other material?'

The questions presented in your communication were under consideration by the court in the case of *State vs. Evans*, 21 O. A. R. 168. This case contains a comprehensive discussion of what constitutes an enclosure and in fact is based upon facts almost, if not exactly, identical with the facts stated in your communication. The headnotes of that case are as follows:

“1. A large tract of swamp land which the owner has fitted at great expense as a place for breeding and raising muskrats for profit, by constructing dykes and canals, and erecting pumping machinery for use in maintaining the water at the same level, is, when devoted to the purpose for which it is made fit, a muskrat farm.

2. Swamp land, when so fitted and used, does not cease to be used exclusively for breeding and raising muskrats, within the meaning of Section 1398 of the General Code, as amended 110 Ohio Laws, p. 285, by the fact that it is leased to a shooting club under a lease which restricts its use by the lessee to the shooting of wild ducks by members of the club during the season when such birds may be lawfully killed.

3. The words ‘used exclusively for the breeding and raising of * * * muskrat,’ as found in Section 1398, General Code, as amended 110 Ohio Laws, p. 285, have reference to the primary and inherent use, and not to a mere secondary and incidental use, which does not interfere with the exclusive use of the land for breeding and raising muskrats.

4. The division of fish and game of the department of agriculture having held for a long time that the land involved came within the exception in the statute, that interpretation should be followed, unless judicial discretion makes it imperative to construe the statute otherwise.”

In the body of the opinion it is disclosed that Mr. M. was the owner of the farm, whereas the prosecution was instituted against Mr. E., who was an employe of Mr. M. trapping for a share of the catch. The court squarely held that the exemption provided for in Section 1398, General Code, for the owner of the farm is also applicable to the employe. The foregoing opinion related to the status of law as enacted in 110 O. L. 285. The first part of said section as then enacted defined the inland trapping district and further related to the open season for the various fur bearing animals in Ohio, and then provided:

“Nothing in this section shall be construed as prohibiting a person from pursuing and killing, at any time, except on Sunday, fur-bearing animals which are injuring his property, or which have become a nuisance, or prohibit the owner of a farm or enclosure used exclusively for the breeding and raising of raccoon, skunk, mink, fox, muskrat or opossum therein, from taking or killing such animals, or any of them at any time.”

It has been noted that this section was amended in 112 O. L. 137. An examination of the section as amended discloses that the part of said section last quoted was changed only by the addition of the following words “or in addition to such use, used as hunting grounds for other game” which were inserted in connection with reference to the use of such farms.

From the foregoing, it will be seen that there is no essential difference, in so far as your question is concerned, in the status of the law as it existed at the time said decision was rendered.

In my opinion No. 1942, issued to you under date of April 7, 1925, this decision was quoted from extensively and the question of what constitutes a muskrat farm was discussed at length, and need not be repeated herein.

You are advised that it is my opinion that where lands are enclosed by dykes and canals and the premises within the enclosure are used exclusively for the breeding and raising of the animals mentioned in sub-section a of Section 1398, General Code, the same would constitute an enclosure within the meaning of said section and the animals mentioned in said exception in said section may lawfully be taken or killed at any time, except on Sunday, within said enclosure by the owner thereof. It is further my opinion that under the authority of the case of *State vs. Evans*, supra, an employe of the owner of such a farm or enclosure may take or kill the animals mentioned in said exception in said section for his employer, when found within such an enclosure at any time except on Sunday.

Respectfully,
 EDWARD C. TURNER,
Attorney General.

2680.

ROAD IMPROVEMENT—COUNTY COMMISSIONERS—LIMITED BY MAJORITY VOTE TO IMPROVEMENTS AS PETITIONED FOR—CANNOT COMBINE PETITIONS FOR PORTIONS OF ROAD—SUFFICIENCY OF PETITION—ROAD IN ONE COUNTY FOR WHICH LAND IN ANOTHER IS ASSESSABLE.

SYLLABUS:

1. *Where a petition is filed with the board of county commissioners for the improvement of a county road, under authority of Section 6907 of the General Code, the authority of the county commissioners to act by majority vote in favor of such improvement is limited to the improvement as designated in such petition, and there is no authority for combining separate petitions filed for the improvement of contiguous portions of the same road.*
2. *Where the improvement of a road is petitioned for and such road lies wholly within one county, but the assessment area for such improvement includes property located in another county, the improvement must be made in accordance with the provisions of Section 6941 of the Code, and related sections.*
3. *In determining the sufficiency of a petition filed for the construction of a road located wholly within one county but as to which property in another county is to be assessed, the property owners in such other county must be taken into consideration.*

COLUMBUS, OHIO, October 6, 1928.

HON. HOWARD J. SEYMOUR, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

“Will you kindly rule on the following proposition which is before the county commissioners: Three separate road improvement petitions covering the taxpayers one-half mile each side of a road running through the three contiguous, special taxing districts, have been combined into one petition, although the engineer’s estimates show a different per mile cost of the separate sections of this road.