

changes are made by a specified time, there being no record of any official action by the department with reference to such matter, and showing no authority conferred upon the chief of the division of factory inspection relative thereto, is not an order of the department whereon may be predicated action of a board of education to issue and sell bonds of the district for the erection of a new school building, pursuant to the provisions of section 7630-1, General Code."

It will therefore be observed that the order upon which this issue of bonds is based has not been issued in compliance with the statute and in accordance with the decision of the Supreme Court of Ohio, and you are therefore advised not to accept said bonds.

Respectfully,
C. C. CRABBE,
Attorney General.

3108.

FISH AND GAME LAWS RELATING TO PHEASANTS, DISCUSSED.

SYLLABUS:

The exception in section 1436 of the General Code, as to shooting pheasants is not intended to restrict licensed game propagators to killing said pheasants by shooting only during the open season.

In exercising the right secured by a license to breed and raise pheasants as a commercial enterprise, such licensee must comply with each specific regulation of said section 1436 of the General Code.

COLUMBUS, OHIO, January 29, 1926.

HON. D. O. THOMPSON, *Chief, Department of Agriculture, Division of Fish and Game, Columbus, Ohio.*

DEAR SIR:—I have your request for an opinion of this department construing section 1436 of the General Code, to which request you attach a letter received by you upon the same subject. At about the same time a request was received from the prosecuting attorney of Clark county, Ohio. Both requests are quoted in part herein and this opinion is intended to answer both inquiries.

The request from the prosecuting attorney reads as follows:

"By reason of a number of complaints that have come to this office with reference to the shooting of pheasants by the holders of breeder's license and persons having written permission from such licensees, we are asking your department to determine from section 1436, General Code, the limitations, if any, upon such killing.

Under subdivision B of the section the law reads, 'any licensee or person having written permission may kill, etc., the birds herein enumerated, etc., at any time.'

"Farther down in the section there is this provision: 'No pheasant, etc., shall be killed by shooting, except during the open season for such birds, or except as provided by this section.'

"There is an apparent conflict in the two parts of the section and we

would appreciate an opinion from your department in the matter. It is of vital interest to the sportsmen of this county for apparently there are some grave abuses by those holding the so-called breeders' license."

From the letter which you enclosed with your request the following statements are taken:

"On October 17th, 1925, I found three men shooting ring-neck pheasants over well trained bird dogs. An owner of some four hundred acres of land has a breeder's license for raising pheasants. He has given written permission to a Dayton, Ohio, man to shoot pheasants upon said four hundred acre tract. The Dayton man had invited two of his Dayton friends out to shoot with him. These three men shot and killed five pheasants, three cocks and two hens. They claimed the right to shoot on the licensed breeders' permission allowing them so to do on his said four hundred acre tract of land.

The pheasants are not confined but are wild birds and roam over this four hundred acre tract of land. The owner of the land leases the shooting privileges to one who is the licensee and who breeds the pheasants. A number of pheasants have been liberated by the Fish and Game Division near this land. It may be that these men may have killed some of the pheasants liberated by the state.

Section 1391 says all birds in the state not confined and held by private ownership, are held in trust for the benefit of all the people and section 1392 of the General Code, says a person may take birds with the aid of a dog during the open season therefore unless specifically prohibited by this act.

When I asked the man having the permission to shoot how he could tell visiting pheasants from adjoining farms from those on this tract, he replied if he killed such a bird he would put a tag upon it just as he would the others he shot."

Section 1436 of the General Code, reads as follows:

"PHEASANT AND WILD DUCK PROPAGATION AND SALE. a. It shall be lawful for any citizen of the State of Ohio to engage in the business of raising and selling domesticated English ring neck or Mongolian or Chinese pheasant, mallard or black ducks, on the lands on which he is the owner or lessee. Any citizen desiring to engage in the propagation of the birds herein mentioned, shall make application in writing to the secretary of agriculture for a permit, and when it shall appear that such application is made in good faith, and upon the payment of a fee of five dollars shall be granted a breeder's license, permitting such applicant to breed and raise for commercial purposes the birds above enumerated, under the regulations herein set forth. Such license shall expire on the last day of December of each year at midnight.

b. Killing and sale. Any licensee or person having written permission may kill or sell either dead or alive the birds herein enumerated in accordance with the provisions set forth, at any time, and the birds so killed may be bought and sold as hereinafter stated. Before selling any such birds as provided, there shall be securely attached to the leg of each bird, a metal tag bearing the name, initials or registered trademark of the licensee producing such bird. Each licensee must have on file with the secretary of agriculture a copy of the trademark, name or initials appearing on the metal band, which is required on each bird produced and sold by him, or any person acting under

his authority, and it shall be unlawful for any person, firm or corporation to buy, sell, offer for sale, or have in possession for the purpose of sale, any bird named in this section, not bearing the metal tax (tag) as herein required. No pheasant, mallard or black duck shall be killed by shooting except during the open season for such birds, or except as provided by this section. No mallard or black duck killed by shooting shall be bought or sold, unless each bird before attaining the age of four weeks shall have had removed from the web of one foot a portion thereof in the form of a V large enough to make a permanent, well-defined mark, which shall be sufficient to identify it as a bird raised in domestication under a written permit.

c. Report and tags. Every licensee by whom pheasants are sold or shipped under authority of this statute shall, within five days after selling or shipping same, make and file with the secretary of agriculture a written report thereof which report shall contain a statement of the number and kinds of birds sold or shipped and the name and address of the person, firm or corporation to whom they were sold or shipped and date thereof. Blanks for making the report herein required shall be furnished by the secretary of agriculture to each licensee. The secretary of agriculture shall also, at nominal cost, supply licensee with the necessary metal tags. Such tags shall bear a distinctive mark and it shall be unlawful for any person, firm or corporation to use any other tag than that provided by the secretary of agriculture; it shall be unlawful for any person, firm or corporation, to attach to any birds or fowls mentioned in this bill, or otherwise use a tag belonging to any other licensee.

d. Marking for transportation. It shall be unlawful for any person, firm or corporation, or transportation company to receive for transportation or transport a package, box or other receptacle containing a pheasant, mallard or black duck, unless such package bears a label on the address side, containing the name and address of the owner or consignor and a list showing the number and kinds of birds contained therein."

This section is a part of the Game Code of Ohio and is entitled: "Propagation and Sale of Wild Duck and Pheasant." It is divided into (a) "license;" (b) "killing and sale;" (c) "report and tags;" (d) "marking for transportation."

These points are called to your attention because the rule is in the interpretation of all statutory provisions that "a statute should be construed with reference to its spirit and reason;" and be so construed that its intent and purpose be effectuated. *Black on Interpretation of Laws*, 48.

Answer to your inquiry is concerned only with those provisions of this section relating to ring-neck or Mongolian or Chinese pheasants. These terms are descriptive of a pheasant indigenous to Asia, semi-domesticated and imported originally from China and Tibet to England where they are bred in game preserves and where they had become naturalized prior to 1039 A. D. Century Dictionary under "pheasant."

The Division of Fish and Game of this state spends much money each year to breed these birds. It maintains a farm of two hundred acres near Wellington, Ohio, where these pheasants are hatched and it also buys many eggs for hatching from other sources which it distributes to persons in Ohio, who will undertake to raise and liberate the birds in the territory near their places of residence.

Section 1402 of the General Code provides an open season for ruffed grouse, Hungarian partridge, and pheasants from November 15th to November 25th, both inclusive, at which time cock pheasants only may be taken, limiting the number that may be taken in a day to three such birds. This section contains the following: "and except as permitted to game propagators," indicating that its provisions apply only to those who take pheasants not raised by a licensed propagator.

Section 1403 of the General Code provides for an open season for the taking of wild geese, brant, coot and wild duck and contains no exception similar to that found in section 1402 of the General Code, notwithstanding that section 1436 of the General Code also provides for the licensing of propagators of mallard and black duck who may "engage in the business of raising and selling" these birds just as they may in the case of pheasants.

It thus appears that the Game Code intends to provide an open season when the purchasers of hunters' and trappers' licenses, who provide the money used by the state in raising pheasants, may hunt for and take the pheasants these funds have provided and liberated in the various counties of the state; while at the same time the Game Code also allows certain licensed persons to engage in the business of raising and selling the pheasants that they may raise. Both provisions intend to provide opportunity for sport in the open for all the citizens of the state who care for the same and further to maintain, increase and preserve these birds.

Those pheasants liberated by the state become game or wild birds which, in the open season, any licensed hunter having written permission from the owner upon and over whose lands he hunts, may take in the number and kind allowed by the statute.

Licensed propagators of pheasants are engaged in a business of commercial enterprise limited by certain statutory provisions regarding the killing, selling, and taking for purposes of identification, such pheasants as come into possession of persons who patronize the licensed propagators.

Section 1436 of the General Code under part (a) provides that any citizen on proper showing may become a licensed propagator of pheasants. Under (b) any licensee "may kill or sell, either dead or alive at any time," pheasants in accordance with the provisions set forth in said section that are his property as such licensee. Under (b) it is further provided that:

"No pheasants * * * shall be killed by shooting, except during the open season for such birds, or except as provided by this section."

It is believed that the provision for killing by shooting during the open season for pheasants must refer to the limitation placed upon those licensed hunters who seek pheasants as provided in section 1402 of the General Code, because section 1436, specially provides that persons who are licensed may engage in the business of raising and selling domesticated pheasants. Being a special provision, section 1436 of the General Code, may be considered as an exception to the general statutory provisions of the Game Code, on the subject-matter contained therein.

It is provided in section 1436 of the General Code that a licensee or a person having his written permission may kill or sell, either dead or alive, the birds therein enumerated in accordance with the provisions set forth at any time and the birds so killed may be bought and sold as hereinafter stated. This seeming conflict may be harmonized by taking the above view of the statute and may be explained that it is evident that the section intends a commercial enterprise in raising pheasants, and must intend to permit those persons engaged in said business to succeed in the same and the killing of these birds in a manner most feasible, economical and appropriate, and at any time, in order to further their efforts in such an enterprise.

It is stated in *Sutherland on Statutory Construction* that:

"In the consideration of the provisions of any statute, they ought to receive such a reasonable construction, if the words and subject matter will admit of it, as that the existing rights of the public, or of individuals, be not infringed."

To license one to engage in a business of raising and selling pheasants and then to restrict the manner of killing by shooting to eleven days in the year, would, it seems to me, be infringing the right of the licensee sought to be conferred by the license previously secured.

The Game Code is a series of statutes which concern the public good or the general welfare, and as such may be liberally construed, although strict construction will apply to its penal provisions.

It is a general rule that the intent of a statute must be found within the language employed: and in the instant case, where a public enterprise is created by license, provisions that would hamper or destroy the success of the same where conflict exists, should be resolved to favor the licensee in the exercise of the property right which his license intends to confer.

A breeder's license is a permit to "breed and raise for commercial purposes the birds above enumerated."

It is to be observed further that a licensee may raise and sell pheasants "on the lands of which he is owner or lessee."

The lessee or a person having written permission from him may kill and sell at any time such pheasants, whether they be living or dead. Necessarily, such permit to a person other than the lessee must be confined to those birds that are on the premises of the licensee. To pursue pheasants beyond the limits of the lands of the licensee, if such pheasants are the birds that have been raised by said licensee, presents a question of some difficulty. However, it seems clear that the owner of a bird would have the right to pursue and take his property, wherever it may be found. Yet, under the Game Code, the manner of taking such property seems restricted and could easily, in certain instances, result in entangling the owner thereof in circumstances requiring clear and convincing evidence to evade punishment.

It will be observed that the statute does not require that pheasants when young shall be marked in any way by a breeder thereof, as it does ducks, and it is apparent that some pheasants raised by a propagator may wander beyond the confines of his premises, while it is fair to say, pheasants on adjoining lands liberated by the state on such lands, may come within the boundaries of the lands upon which he maintains his business.

The exception in section 1436 of the General Code above set forth, uses this phrase, "except as provided in *this section*," and allows a propagator to kill at any time and does not specify the means, manner or instruments that may be used.

Section 1392 of the General Code, describing the manner of taking game, in part provides:

"A person may take quadrupeds and birds during the open season therefor with the aid of a dog, unless specifically prohibited by this *act*."

Section 1436 of the General Code provides a complete scheme for the conducting of a business enterprise, the purpose of which is to breed, kill, sell and transport pheasants, mallard and black duck.

Under section 1394 of the General Code on "sale" there appears the phrase "except as permitted duly authorized game breeders." Duly authorized game breeders are provided for in section 1436 of the General Code, and no other section.

Section 1393 of the General Code provides for transportation and uses under (a) practically the same words and phrases that are found in section 1436 in (d), to wit:

"Unless such package bears a label * * * containing the name and address of the owner or consignor and a list showing the number and kinds of birds contained therein."

A licensed propagator who sells pheasants must put the required tag on each bird and make the required report of each sale on blanks that are furnished to him for that purpose and if he consigns these pheasants for transportation he must mark the package as required in said section. Where he conducts this licensed business, observing each provision of the section creating the same, it seems his right to engage in such enterprise is fully protected. If he intends to profit as such propagator of pheasants by selling permits to others to hunt the birds he receives, allowing those permitted to hunt the same to take the game away with them, he must properly tag and report such birds as required by section 1436 of the General Code.

Any other construction of these provisions would mean that a licensed propagator could take, sell and transport only live pheasants, except during the eleven day open season from November 15th, to November 25th. Such a construction does violence to the plain intent of the section and the statements therein contained.

From what has been said herein it follows as a necessary conclusion that the exception in section 1436 of the General Code, stating:

"No pheasants * * * shall be killed by shooting, except during the open season for such birds, or except as provided by this section,"

does not intend to restrict licensed propagators, or those having their written permit to take, on the lands owned or leased by the licensee, to killing said pheasants, by shooting only during the open season from November 15th to November 25th.

Propagation of pheasants by persons licensed so to do since it is a permit "to breed and raise for commercial purposes," under specific regulations, requires such licensees to comply with each regulation of the statute in exercising the right to conduct said enterprise.

Respectfully,
C. C. CRABBE,
Attorney General.

3109.

ABSTRACT, STATUS OF TITLE, TO PREMISES IN BENTON TOWNSHIP,
PIKE COUNTY.

COLUMBUS, OHIO, January 29, 1926.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—Examination of an abstract of title and other documents submitted by you for examination and opinion, discloses the following:

The abstract under consideration was prepared and certified under date of November 10, 1925, and pertains to the following premises:

67½ acres of land located in Benton township, Pike county, and being a part of Surveys Nos. 16161 and 16164, and being more particularly described in the caption of the abstract to which this opinion is attached.

Upon examination of said abstract, I am of the opinion same shows a sufficient title to said premises in John Mathew, subject to the following:

So far as appears in the abstract, the taxes for the year 1925 have not been de-