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BIRDS, GAME, WILD, PLUMAGE—SECTION 1408 GENERAL CODE PROHIBITS POSSESSION, NON-GAME BIRDS, NATIVE TO OHIO AND THOSE WHICH MIGRATE ACROSS THE STATE.

SYLLABUS:

Section 1408, General Code, prohibits the possession of only those non-game birds which are native to Ohio, and those which cross the State at regular intervals in their migration.

Columbus, Ohio, October 4, 1941.

Hon. Don Waters, Commissioner,
Division of Conservation and Natural Resources,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion as follows:

"We respectfully request your opinion on Section 1408 of the General Code as to whether or not it prohibits from possession and sale the plumage of any and all wild birds other than game birds, or whether it prohibits the possession and sale of plumage of only wild birds other than game birds, which are native to the State of Ohio, or use the State regularly in their migration from year to year."

Section 1408, General Code, provides in part as follows:

"No person shall catch, kill, injure, pursue or have in possession, either dead or alive, at any time, or purchase, expose for sale, transport or ship to a point within or without the state, or receive or deliver for transportation any bird other than a game bird, nor shall any part of the plumage, skin or body be had in possession, except as permitted in this chapter, nor shall any person disturb or destroy the eggs, nests or young of such birds; but nothing in this section shall prohibit the lawful taking, killing, pursuing or possession of any game bird during the open season for such bird, or the killing of any hawk or owl doing damage to property."

It will be noted from the foregoing section that the possession of any part of the plumage of any bird other than a game bird, except as expressly authorized by law is prohibited.

The exact question you have presented was before the Court in the case of *State v. Abt*, 15 C.C. (N.S.) 26, wherein the Court discussed, inter alia, Section 1409, General Code, which at that time provided:

"No person shall catch, kill, injure, pursue or have in his possession either dead or alive, or purchase, expose for sale, transport or ship to a point within or without the state a turtle dove, mourning dove, sparrow, nut-hatch, warbler, flicker, vireo, wren, American robin, catbird, tanager, bobolink, blue jay, oriole, grosbeck or redbird, creeper, redstart, waxwing, woodpecker, humming bird, killdeer, swallow, bluebird, blackbird, meadow-lark, bunting, starling, redwing, purple martin, brown thrasher, American goldfinch, chewink or ground robin, pewee or phoebe bird, chickadee, fly-catcher, gnat catcher, mousehawk, whip-poorwill, snowbird, titmouse, gull, eagle, buzzard, or *any wild bird other than a game bird*. No part of the plumage, skin or body of such birds shall be sold or had in possession for sale." (Underscoring the writers.)

It will be observed that the foregoing section is substantially the same as present Section 1408, General Code, insofar as the instant question is concerned. The court, in the *Abt* case, said at page 27:

"It also fully appears from the evidence in this case that the snowy heron is not a native bird of Ohio; that it is a habitant of southern waters, and is never seen in a wild state in Ohio except very rarely. So that if it is found in the state at all it is only as a vagrant individual of a species, and is not a native bird. We think these statutes are designed to protect the native birds and migratory birds that find a home in this state during certain seasons of the year, as well as other migratory birds that cross the state at regular intervals of each year; and not merely a transient or vagrant individual of a class whose habits are not to migrate either to this state or across it."

In the case of *Solomon v. State*, 11 N. P. (N.S.) 525, the Court construed Section 1408, General Code, as above quoted. The headnotes of the *Solomon* case read:

1. "The phrase 'any wild bird' as used in Section 1408, General Code, as amended, means any wild bird native of Ohio and also migratory birds which cross the state at regular intervals.

2. "The white heron is a wild bird but not a game bird under the amended statute; it does not have its habitat in Ohio, and is never seen here unless it be a vagrant specimen at rare intervals, and it is therefore not protected by the statute and to have its plumage for sale is not a violation of law.

3. "A construction of Section 1409 which would make it prohibit the sale or having in possession for sale plumage of the white heron would render the statute unconstitutional in that it would be in violation of the Fourteenth Amendment of the Federal Constitution."

The Court said at pages 527 and 528:

"I have already held, on the stipulation and evidence in the case, that the white heron is not a native bird of Ohio; that it is never seen in a wild state in Ohio, except rarely; and that, when seen, it is only as a vagrant individual of the species. It is conceded by counsel for plaintiff in error that if Section 1409, in its general scope, is limited to the birds mentioned therein, and to other birds native of Ohio, or habitually therein during some portion of the year, it is a valid exercise of the public power."

"Laws in many states, making it a penal offense for one to have in his possession, for sale, game purchased from another state during the closed season, have been upheld on the ground that they protect the home supply; and also on the ground that such laws prevent perjury and fraud in the enforcement of the laws which prohibit the killing of game in the closed season."

“Justice Day, in the case of *Silz v. Hesterberg*, 211 U.S., 40, lays down the principle involved in the case at bar.”

“There is no home supply of the white heron in Ohio which calls for protection.”

Justice Day says:

“The object of such laws is not to affect the legality of the taking of game in the other state, but to protect the local game in the interest of food supply of the people of the state.” See also 51 O. S., 209.

“It can not be seriously contended, if Section 1409 is held to include within its terms the white heron, that it was intended to protect the home supply of the white heron for any purpose, as there is no home supply of the white heron in this state.”

“If the white heron is to be protected, it should be protected in its native country, and is not, in my opinion, a proper subject for legislation in this state.”

The foregoing case was affirmed by the Court of Appeals in 14 C. C. (N.S.) 590.

The theory behind all fish and game laws is the protection of the home supply of such animals. Therefore, as indicated in the cases above cited, unless there is a home supply of the particular animal in question, such laws are not applicable. It is obvious that no beneficial results would follow so far as Ohio is concerned, if Section 1408, General Code, were construed to prohibit the possession of the plumage of a bird which does not exist in this state. Such a construction would, in no manner, further the intent and purpose of fish and game laws.

In view of the fact that the decisions of the Courts above referred to still constitute the law of Ohio, with respect to the proper interpretation of the language contained in Section 1408, General Code, I deem it proper to follow the conclusions set forth in those cases.

Therefore, in specific answer to your inquiry I am of the opinion that Section 1408, General Code, prohibits the possession of only those non-game birds which are native to Ohio, and those which cross the State at regular intervals in their migrations.

Respectfully,

THOMAS J. HERBERT,
Attorney General.