

"When a clerk of the common pleas court deposits money placed with him as security for costs and moneys received for fines, etc., in a bank until his regular monthly settlement, and if before such funds are withdrawn such bank is taken over by banking authorities for the purpose of liquidation the clerk of the common pleas court is liable for any loss of funds suffered thereby."

The state's protection is the treasurer's bond and the liability of the treasurer himself. There is no statutory authority to take other securities to protect the state, and I am therefore unable to say that the securities mentioned by you are any protection "under the law," so far as the state is concerned.

What, if any, securities such treasurer should take for his own protection is a matter for him to decide, and whether the mortgages you mention would sufficiently protect him would, of course, depend on the real estate market in the localities where the real estate covered by said mortgages is situated, taking into consideration the reduced price such real estate would probably bring in the event of foreclosure sales. I am not, however, passing upon the question of the right of a bank to give securities to protect such deposits.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4200.

FOX—MAY BE KILLED FROM NOVEMBER 15 TO JANUARY 1—MAY
BE PURSUED AT ANY TIME WHERE NO INTENT TO HARM AND
NO ACTUAL KILLING.

SYLLABUS:

1. *The restrictions provided in Section 1398, General Code, with respect to when a fox may be "taken or possessed," are restrictions as to when a fox may be killed.*

2. *Fox may be pursued with dogs at any time, providing there is no intent to kill or injure such animals and further providing that such animals are not in fact killed or injured.*

COLUMBUS, OHIO, March 29, 1932.

HON. CAMERON MEACHAM, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"Section 1398, General Code of Ohio and paragraph 'A' thereof, provides that fox can be taken and possessed from the 15th day of November to the 1st day of January, both inclusive. I understand from reading this section that this provision applies to the entire State of Ohio. I should like to have an opinion as to whether the words 'taken and possessed,' means killing and also as to whether this section would prohibit or bar the chasing of fox with dogs when such fox are not killed and with no intent to kill or injure such animals."

I shall consider your first question as one of whether or not the provision in Section 1398, General Code, that fox may be "taken and possessed" only from the fifteenth day of November to the first day of January, both inclusive, means that fox may be killed only during that time. The pertinent portion of Section 1398, General Code, reads:

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(a) Skunk, raccoon and opossum may be taken and possessed only from the fifteenth day of November to the first day of January, both inclusive; mink only from the fifteenth day of November to the first day of March, both inclusive; muskrat only in the Lake Erie trapping district from the first day of December to the fifteenth day of March, both inclusive, and in the inland trapping district only from the fifteenth day of November, to the first day of March, both inclusive. Provided that no person shall catch, kill, injure or pursue, with such intent a raccoon, except from 6 o'clock p. m. to 6 o'clock a. m., and except at field trials, and be it further provided that at no time shall a raccoon be taken from its den.

Nothing in this section shall be construed as prohibiting a person from pursuing and killing, at any time, except on Sunday, furbearing 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, or in addition to such use, used as hunting grounds for other game, from taking or killing the fur-bearing animals herein enumerated.

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The word "take" is defined in Section 1390, General Code, as follows:

"Take or taking: Includes pursuing, shooting, hunting, killing, trapping, snaring and netting fish, birds and quadrupeds, and all lesser acts, such as wounding, or placing, setting, drawing, or using any net or other device commonly used to take fish, birds or quadrupeds, whether they result in taking or not; includes also every attempt to take and every act of assistance to every other person in taking or attempting to take fish, birds or quadrupeds, provided, that whenever taking is allowed by law, reference is had to taking by lawful means and in a lawful manner."

Obviously the restriction in Section 1398, supra, as to when a fox may be "taken and possessed" is a restriction as to when a fox may be killed, subject, of course, to the provision with reference to a fox farm or enclosure.

Specifically answering your first question, it is my opinion that the restrictions provided in Section 1398, General Code, with respect to when a fox may be "taken and possessed," are restrictions as to when a fox may be killed.

You next inquire as to whether or not Section 1398, General Code, prohibits the chasing of fox with dogs when such fox are not killed and when there is no intent to kill or injure such animals. I assume your inquiry is as to pursuing fox in such a manner outside of the open season.

In so far as the use of dogs is concerned for the purposes which you mention, such use is not prohibited. In fact fox may be killed during the open season

with the aid of dogs. Section 1392, General Code, provides that a person may take quadrupeds during the open season with the aid of a dog unless specifically prohibited. There is no prohibition with respect to hunting fox in this manner.

Since fox may be taken only during the open season as provided in Section 1398, *supra*, and since the word "take" includes pursuing as provided in Section 1390, *supra*, it would appear that fox may be pursued during the open season only and this construction would necessarily have to be adhered to in the absence of any ambiguity in the statute. I find, however, that to construe the word "take" in all instances as including the pursuing of an animal, results in a decided ambiguity in the so-called Conservation Law.

For instance, Section 1390, General Code, defines "bag limit" as "the number of any kind of game or fish permitted to be taken in a specified time." It is provided in Section 1397, General Code, that in one day a person may not take more than four squirrels. Section 1403, General Code, provides that a person may "take" in the open season in any one day except Sunday not more than 25 wild ducks, etc. Obviously, the legislature did not intend that all the various and sundry things which are included in the term "take" as provided in Section 1390, *supra*, shall be definitive of that term in each and every place where it is used in the act. If such a construction must be adhered to, absurd consequences and ambiguities necessarily follow. To illustrate,—it would be unlawful to shoot at more than four squirrels in a day although every shot were a miss. Section 1390, *supra*, defines "take" as any attempt to take. The statute has never been so construed. The definitive language of Section 1390, *supra*, is not in my judgment subject to such a construction, and therefore I find that the definition of the word "take" as including pursuing, under all circumstances regardless of the intent of the pursuer, to be ambiguous. It is stated in Lewis' Sutherland Statutory Construction, Vol. II, p. 914, that: "The courts will hesitate to place such a construction upon its (an act's) terms as will lead to manifestly absurd consequences, and impute to the General Assembly total ignorance of the subject with which it undertook to deal." The inhibition against taking a fox except in the open season is accordingly subject to construction.

The assumption that the intent of a person pursuing a fox is material in determining whether or not such pursuit is unlawful, is not only reasonable but is substantiated by the very language of paragraph "a" of Section 1398, here under consideration. The last sentence of this paragraph contains the proviso "that no person shall catch, kill, injure or pursue, with such intent a raccoon," etc. There is no reference in the preceding portion of the section to the matter of intent; notwithstanding this fact, the legislature has used the phrase "such intent." The conclusion is inescapable that the legislature must have had in mind the idea that the intent to catch or kill was a pertinent element in construing the section.

I have little doubt but that "taking" a quadruped would clearly include the pursuing of such quadruped if the pursuing were done with the intent to kill or possess. Section 1398, however, which is the body of the law on the subject, does not make the pursuing of a fox a crime in the absence of the element of intent to kill. This is true since the section specifically recognizes this matter of intent. Under these circumstances, the section defining words may not, in my judgment, be interpreted to increase the scope of the crime.

Mention should be made of the fact that Section 1398 limits the time when fox may be "taken *and* possessed." This does not mean taken *or* possessed. Section 1390 provides that "'and' may be read 'or' * * * if the sense requires it." In view of what has been said, the sense does not require that "and" be read

as "or" under the circumstances here under consideration, but on the contrary, I think the sense precludes such a reading.

In the last analysis, the purpose of the fish and game laws is to conserve the wild life of the state. The practice of pursuing fox with dogs when the fox are not killed or injured and when there is no intent to kill or injure such animals, but rather to take the best of care of them as in the case of the average riding club which engages in this pastime, is not detrimental to the conservation of the wild life of Ohio, but is, on the contrary, a practice in pursuance of that policy.

It is, accordingly, my opinion that fox may be pursued with dogs at any time, providing there is no intent to kill or injure such animals and further providing that such animals are not in fact killed or injured.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4201.

ADJUTANT GENERAL—CONSTRUCTION AND MAINTENANCE OF
SIDETRACKS BY RAILROAD ON STATE PROPERTY—MAY NOT
AGREE TO INDEMNIFY SUCH COMPANY FROM DAMAGE CLAIMS.

SYLLABUS:

The Adjutant General of Ohio is without authority to enter into a sidetrack agreement with a railroad company, on behalf of the State of Ohio, wherein it is provided that the state shall indemnify the railroad company and save it harmless from all loss or damage to persons or property resulting from the construction or maintenance of such sidetracks on state property.

COLUMBUS, OHIO, March 29, 1932.

HON. F. D. HENDERSON, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

"The New York Central Railroad, at my request, extended siding facilities at Camp Perry on property owned by the State of Ohio, during the summer of 1931. The enclosed private side track agreement has been submitted by the Company for my signature as Adjutant General. I am informed by the New York Central officials that the agreement submitted is similar to a previous agreement dated July 25, 1916.

In view of certain clauses relative to the responsibility of the State, an opinion is requested as to whether the Adjutant General of Ohio possesses the authority to enter into said agreement."

The Private Side Track Agreement which you have submitted to me in which the New York Central Railroad Company, as one of the parties, is termed the "Railroad," and the State of Ohio, as the other party, is termed the "Industry," contains the following paragraphs: