

3551.

MINNOWS—DEALERS MUST BE LICENSED—RESTRICTIONS IN SALE
AND EXPORTATION OF MINNOWS.

SYLLABUS:

1. Minnows lawfully taken and exported from another state or foreign country can not be sold in Ohio without a minnow dealer's license, as provided by section 1414-1, General Code.

2. A dealer in minnows for bait can not possess more than 4000 minnows, either alive or otherwise, at one time, and can not sell more than 100 minnows to one person in one day.

3. Minnows, either alive or otherwise, can not be exported from the state of Ohio, regardless of the source from whence they are secured.

COLUMBUS, OHIO, September 9, 1931.

HON. J. W. THOMPSON, *Conservation Commissioner, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date, which reads as follows:

“During the past few months we have had several letters pertaining to the importation, sale and canning of minnows to be used for bait purposes and I should appreciate receiving from you as soon as possible, rulings on the following points:

1. If minnows are legally taken and exported from Canada or from a state in this country, either alive or preserved, can they be legally sold in Ohio without a minnow dealers' license?

2. If a license is required how many preserved minnows may a dealer have in possession at one time, and will such dealer in turn be required to purchase a license?

3. How many preserved minnows can a retailer sell to one person in a day?

4. Can these minnows be shipped outside of Ohio, either alive or preserved in jars?

5. If minnows are legally taken or exported from Canada into Ohio, how can we prove that they are legal minnows if the same species of minnow is found in Ohio, unless the container is labeled?”

The following sections of the General Code are pertinent to your inquiry. Section 1391 reads in part as follows:

“The ownership of, and the title to all fish, wild birds and quadrupeds in the state of Ohio, not confined and 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, and only in accordance with the terms and provisions of this act shall individual possession be obtained. No person shall at any time of the year take, in any manner, number or quantity, fish, wild quadrupeds or birds protected by law, or buy, sell, offer or expose for sale, the same or any part thereof, transport or have

the same in possession, except as permitted by this act; and this prohibition shall be construed as part of each permissive section or part thereof."

Section 1414 reads as follows:

"In the inland fishing district seining for minnows is prohibited from the first day of May to the fourteenth day of June, both inclusive, except in streams, in which the average width of water at the time seined does not exceed twelve feet for a distance of fifty yards above and below the point seined. In such districts no person shall take, catch, buy or sell minnows, except for bait and the taking, transporting or shipping of minnows out of the state is prohibited. In the inland fishing districts of the state no minnows shall be taken or caught except with a minnow seine not exceeding four feet in depth and eight feet in length and in the Lake Erie fishing district no minnows shall be taken with a minnow seine exceeding thirty feet in length. No person at any time, in the inland fishing district, shall have in his possession either alive or otherwise more than one hundred (100) minnows, excepting persons, firms, associations or corporations buying, selling or dealing in bait, which person, firms, association or corporations must be licensed as provided in section 1414-1."

Section 1414-1 provides as follows:

"Each person, firm, partnership, association or corporation who buys, sells or deals in minnows is required to obtain, annually, from the conservation commissioner a permit and operate under such rules and regulations as the conservation council is hereby empowered to prescribe. Such permit shall be issued upon application and the payment of a fee of five dollars. It is further provided that such dealers shall not have in possession more than four thousand minnows at any one time, nor sell to any one persons more than one hundred minnows in any one day."

Section 1391, General Code, is merely declaratory of the general rule of law that the state in her sovereign capacity has title to all fish and game within its boundaries in trust for the inhabitants of the state. By reason of such ownership the state may prescribe upon what conditions such fish and game may be taken, possessed or transported from the state.

Your inquiry raises the question of whether or not the state, by reason of its police power, can regulate the importation of minnows from another country or state. It has been held by numerous courts that if a statute enacted as a police regulation has real relation to the suitable protection of the people of the state, and it is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce provided it does not conflict with legislation enacted by congress pursuant to its constitutional authority. The rule is stated in 12 C. J. 61, as follows:

"The states may also constitutionally regulate or prohibit the exportation to points outside the state of fish and game caught or killed within state limits, and *to prevent the evasion of the state fish and game laws may restrict or prohibit the free importation and sale of fish and game from outside the state.*" (Italics the writer's).

In other words, prohibitions of this nature are not condemned as being in violation of the interstate commerce clause of the federal constitution even though indirectly interfering with the free commerce of fish and game from other states. The reason for sustaining such legislation is apparent since the state, in order to effectively prevent a depletion of its own stock and to enforce the prohibitions or regulations contained in its laws, has found it necessary to prohibit the possession and sale of imported fish and game within the state in order to prevent the evasion of its laws.

The authorities are many which hold that as a means of preventing evasions of fish and game statutes the state may pass a statute prohibiting the sale or the possession of fish and game at any or at a specified time, the same to apply to fish and game obtained either within or without the state. See 6 R. C. L. 698; *Silz vs. Hesterberg*, 211 U. S. 31; *Geer vs. Conn.*, 161 U. S. 519; *People vs. O'Neil*, 33 L. R. A. 696; *State vs. Schuman*, 47 L. R. A. 153; *Roth vs. State*, 51 O. S. 209; *Ex Parte Phoedonis*, 170 Pac. 412. Thus, if the state can regulate the importation of fish and game without being in violation of the interstate commerce clause of the federal constitution, it may a fortiori regulate such importation as to the number that may be sent into or possessed in this state.

The provisions of sections 1414 and 1414-1, General Code, must be construed as applying to minnows either alive or preserved, inasmuch as the legislature has provided in section 1414 that no person in the inland fishing district shall have in his possession, either *alive or otherwise*, more than 100 minnows, excepting dealers who must be licensed as provided by section 1414-1 and who may not possess at one time more than 4000 minnows. There is no proviso in section 1414 or section 1414-1 which excepts minnows that are canned or preserved from the provisions of these sections.

It therefore follows from what I have said that a dealer who buys, sells or deals in minnows either imported from outside the state of Ohio or obtained in the state of Ohio, must have a dealer's license before such dealer can engage in that business. Having obtained the license, such dealer may not at any time possess more than 4000 minnows, regardless of whether they are preserved or alive, or imported from without the state or obtained from within the state. I am further of the opinion that a retailer can not sell more than 100 minnows, alive or otherwise, to a person in one day. The above statements are made on the assumption that your inquiry is directed to a sale of minnows which actually takes place in the state of Ohio.

The fourth question of your inquiry raises a question which involves the construction of that part of section 1414, General Code, which reads as follows:

"In such districts no person shall take, catch, buy or sell minnows, except for bait and the taking, transporting or shipping of minnows out of the state is prohibited."

On reading the proviso just quoted it is rather difficult to decide whether or not the prohibition against the taking, transporting or shipping of minnows out of the state applies to minnows obtained both within and without the state of Ohio. However, upon reference to other sections within the fish and game chapter, I am led to the conclusion that it applies to minnows regardless of whether they are obtained within or without the state of Ohio.

The legislature, in the following sections, specifically provided as follows:

Section 1393. " * * * No person shall receive for transportation,

transport, cause to be transported, or have in his possession with intent to transport or secure the transportation of beyond the limits of this state any bird mentioned in this chapter or a squirrel, which has been killed in this state. * * * .”

Section 1429. “ * * * All fish taken or caught from Ohio waters by any licensee shall be brought into an Ohio port for the purpose of inspection and it shall be unlawful for any person to ship or carry any fish taken or caught from Ohio waters direct from nets to a point outside the state. * * * .”

If it is argued that the legislature merely intended by section 1414 to prohibit the exportation of minnows taken from the waters of this state, it would have enacted a provision similar to that contained in sections 1393 and 1429.

It is commonplace knowledge that it is a very difficult thing today to trace the source from whence fish and game are obtained and to interpret the exportation proviso in section 1414 to apply solely to minnows taken within the state would defeat the very purpose of the legislation enacted.

Inasmuch as the state, by reason of its police power, may prohibit or regulate the importation of fish and game in order to prevent the evasion of its fish and game laws and the same is not considered as being in violation of the interstate commerce clause of the federal constitution, it would seem to me that to prevent the exportation of such fish and game, also would not be a violation of the interstate commerce clause. This prohibition is of such a nature that it is within the domain of the police power of the state. Though it may indirectly affect interstate commerce, it certainly falls within the general rule which holds that a state may regulate the shipment and disposition of fish and game within its borders. The obvious intention of this statute forbidding the exportation of minnows is to prevent a depletion of minnows within the state and thus protect and insure the interests of citizens of this state to the use and enjoyment of fishing both as a sport and as a means of food supply.

As a means of preventing evasion of sections 1414 and 1414-1, General Code, the state, under its police power, has deemed it advisable to prohibit the exportation of minnows. It would be both difficult and burdensome and no doubt useless to attempt to enforce the provisions contained in these sections if it is to be held that the state can not prevent the exportation of minnows obtained in Ohio or elsewhere, since fraud and evasion could easily be perpetrated upon the law enforcing officers of the state. In the case of *Silz vs. Hesterberg*, supra, the court, in the body of its opinion, in sustaining the game legislation in that case, said as follows:

“Owing to the likelihood of fraud and deceit in the handling of such game the possession of the classes named is likewise prohibited, whether it is killed within or without the state.”

The minnow sections would become nugatory if we are to construe them as applying to the exportation of domestic minnows only, since minnows could be imported from neighboring states and it would be impossible to show, in most instances, where the minnows were caught. While the statute in question was no doubt intended only for the protection of game in this state, the intention was to accomplish that very end by prohibiting the sale of not more than 100 minnows to a person and by prohibiting a dealer to possess not more than 4000

at any one time, and by prohibiting the exportation of such stock, regardless from where it came or was obtained. As a means to accomplish that end the statute does not confine itself in terms or by implication to minnows taken in this state. However, it is to be understood that the state can not prevent the passage through the state of Ohio in interstate commerce of minnows lawfully taken in another state and destined for shipment through Ohio but to a point outside of Ohio.

In view of what has been said, I am of the opinion that minnows in this state can not be shipped out of Ohio by a person or dealer, either alive or preserved in jars, regardless of the source from which they came.

Your fifth question is answered by the provisions contained in section 1438-1, General Code, wherein it is provided, among other things, that the conservation council may make and establish such rules and regulations not inconsistent with law governing its organization and procedure and administration of the division of conservation, as it may deem necessary or expedient, as well as having the authority and control in all matters pertaining to the protection, preservation and propagation of fish, subject to certain restrictions. Inasmuch as your department is far more qualified than this office in the matter regulating the importation of minnows, it becomes unnecessary for me, in view of the provisions of section 1438-1, General Code, to advise you as to how to prevent the illegal importation or excessive importation of minnows from without the state of Ohio.

It is therefore my opinion that:

1. Minnows lawfully taken and exported from another state or foreign country can not be sold in Ohio without a minnow dealer's license, as provided by section 1414-1, General Code.

2. A dealer in minnows for bait can not possess more than 4000 minnows, either alive or otherwise, at one time, and can not sell more than 100 minnows to one person in one day.

3. Minnows, either alive or otherwise, can not be exported from the state of Ohio, regardless of the source from whence they are secured.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3552.

NURSERY STOCK—DEALERS NOT REQUIRED TO HAVE CERTIFICATE FOR EACH PLACE OF BUSINESS—EACH SOLICITOR MUST HAVE AGENT'S CERTIFICATE—SECTION 1138, GENERAL CODE, CONSTRUED.

SYLLABUS:

1. *Dealers in nursery stock are not required, by virtue of the provisions contained in section 1137, General Code, to take out a dealers' certificate for each store or place wherein they offer to sell or sell nursery stock. However, persons engaged in soliciting orders for or selling nursery stock in stores controlled by a dealer are required to take out agents' certificates costing one dollar.*

2. *Persons selling nursery stock on consignment are required, by virtue of section 1138, General Code, to procure agents' certificates, providing the consign-*