1942.

MUSKRAT FARM—WHAT CONSTITUTES SAME—SECTION 1398, GENERAL CODE, CONSTRUED.

SYLLABUS:

1. *What constitutes a muskrat farm or enclosure, within the terms of Section 1398, General Code, is a question of fact to be determined from all the facts and circumstances in each particular case.*

2. *In determining what constitutes a muskrat farm or enclosure, the following facts, among others, should be considered:* (1) *whether or not the land, on which the "farm" or enclosure is situated be owned or leased or otherwise under the control of the proprietor of such "farm;"* (2) *whether or not a bona fide intent exists to utilize such land for the purpose of raising and propagating muskrats;* (3) *whether or not a suitable fence surrounds the farm, although a fence is not absolutely essential;* (4) *whether or not adequate provision, either natural or artificial, be made for feeding;* (5) *whether or not the land on which the farm is situated, either in its natural state or with such improvements as may be placed thereon by the owner of the farm, is adapted to use as a muskrat farm;* (6) *whether or not the owner thereof restocked his "farm," if necessary, with new animals;* (7) *whether or not the owner thereof held himself out to the public as a breeder and raiser of muskrats, and* (8) *whether or not the owner thereof regularly marketed his product.*

COLUMBUS, OHIO, April 7, 1928.

Department of Agriculture, Division of Fish and Game, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your letter of recent date which reads as follows:

> "We have had considerable complaints among the sportsmen in Wayne County in reference to a certain tract of land which was represented to me as being a bona fide muskrat farm, stating it had been considered so and farmed as such for a number of years.
>
> In order to satisfy myself and the sportsmen of Wayne County, I requested our game protector, Mr. D. L. Stalter, Supervisor of District No. 5, Sycamore, Ohio, to make an investigation of this and report to me and I am enclosing you a copy of his letter together with a copy of a letter signed by George Denny and Jake Wood.
>
> The question is what constitutes a muskrat farm as the explanation is very meager in our laws. I will kindly ask you to give me your opinion as to what constitutes a muskrat farm, and if the farm in question could be considered a bona fide muskrat farm?"

Your attention is directed to the following sections of the General Code, which, in so far as pertinent, provide:

> Section 1391. "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. * * *"

Section 1398, General Code, as amended 112 vs. 137,

"(a) * * * Skunk, fox, raccoon and opossum may be taken and possessed only from the fifteenth day of November to the first day of February, both inclusive; * * * muskrat * * * in the inland trapping district only from the fifteenth day of November, to the first day of March, both inclusive. * * * *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* * * * *muskrat* * * * *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.*"

By the express terms of Section 1398, supra, "nothing in this section shall * * * prohibit the owner of a farm or enclosure used exclusively for the breeding and raising of muskrat therein, * * * from taking or killing the fur-bearing animals herein enumerated, or any of them at any time."

Your attention is directed to the case of *State* vs. *Evans*, 21 Ohio App. 168, decided October 24, 1925, the headnotes of which read:

"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 muskrat.

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."

Judge Richards, who wrote the opinion of the Court, used the following language:

"The defendant in error was convicted and sentenced before a justice of the peace on a charge of unlawfully killing muskrats in the latter part of March, 1924. Error was prosecuted to the court of common pleas, and that court reversed the judgment of conviction. This proceeding in error is brought to secure a reversal of the judgment of the court of common pleas.

The prosecution was under Section 1398, General Code, as amended in 110 Ohio Laws, 285, which was in force at the time of the alleged offense.

That section enacts that the open season for muskrats shall be only from the 15th day of November to the 1st day of March, both inclusive, and contains the following provision:

'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.'

The trapping of muskrats at the time charged was not controverted by the accused, but it is claimed on his behalf that the act came within the exception quoted, and was, therefore, not in violation of the statute. It is insisted in his behalf that he was, at the time, an employe of one John N. Magee, who, it is claimed, was the owner of a farm and inclosure used exclusively for the breeding and raising of muskrats, and that the muskrats were trapped on said premises.

The material facts in the case are not controverted. They show that Magee was, at the time, and had been for many years, the owner of a tract of about 3,000 acres of swamp land situated largely in Ottawa County, and devoted to the breeding and raising of muskrats. Whether this land was devoted exclusively to the breeding and raising of muskrats within the meaning of the statute, is the question for the determination of the court. The evidence discloses that Magee had expended something like $175,000 in fitting the farm for that purpose, having constructed about 17 miles of dykes and canals, which surround, or nearly surround, the entire tract of land, and having erected pumping machinery for pumping great quantities of water into the marsh at the dry season of the year, often running the pumps to capacity for the entire 24 hours in the day, that capacity being 1,000 barrels per minute. The evidence shows that it is necessary to maintain the water at substantially a given height in order to make the premises desirable as a habitation for muskrats and to conserve their food. The defendant contends that these premises are inclosed by the canals and dykes, but it is not claimed that the muskrats cannot, if they choose, readily swim across the canals and travel over or through the dykes; it being claimed that the statute does not require such an inclosure as shall be impassable to the animals. It appears that from this large investment he has received from pelts sold an annual income ranging from $3,750.00 to about $38,000, and that the number of muskrats caught has varied from 5,600 up to nearly 10,000 annually.

The bill of exceptions contains much interesting testimony relating to the habits and characteristics of muskrats, and from this testimony it appears that they construct domeshaped houses or cabins, composed of reeds and rushes mixed with clay or other earth, which they inhabit in the winter time. These cabins have a large chamber above the level of the water, and are frequently made of cattails, which they cut and drag to the point at which the cabins are being constructed. Indeed, the evidence discloses that their architectural skill is nearly, if not quite, equal to that of the beaver. They are very prolific, producing ordinarily six to ten young at a birth, and often breed from three to six times in a season, the first two litters sometimes producing young during the same season. The evidence discloses clearly that the land was fitted at great expense as a place for breeding and raising muskrats, and may, in every sense of the word, be denominated a muskrat farm within the definition contained in Webster's dictionary, which is broad enough to include

a tract of land devoted to the raising of domestic or other animals, like a chicken farm or a fox farm. We have no difficulty in arriving at the conclusion that Magee was the owner of a farm or inclosure used for the breeding and raising of muskrats, but it is insisted that it was not used exclusively for that purpose.

The evidence which it is claimed shows that the muskrat farm was not used exclusively for the purpose of breeding and raising muskrats consists of a lease of the premises from Magee to a shooting club, which permits the members of that club to shoot wild ducks on the premises during the season when such birds may be lawfully killed. This lease provides for the payment of an annual rental to Magee of $5,000 for the privilege named. It is difficult to see how the use of the canals for punting boats used in duck hunting, and the shooting of ducks, as they rise from the canals and lagoons, can be inconsistent with the use of the premises for breeding and raising muskrats. Little light can be obtained from adjudicated cases construing the words 'used exclusively,' as so much depends upon the context of the statute where the words appear. It is said in *State ex rel. Spillers* vs. *Johnston,* 214 Mo. 657, 113 S. W., 1083, 21 L. R. A. (N. S.), 171, where the statute contained the words 'used exclusively for schools,' that the words 'exclusively used' have reference to the primary and inherent use as over against a mere secondary and incidental use, and that, if the incidental use does not interrupt the exclusive operation of the building for school purposes, but dovetails into, or rounds out, that use, the use may be said to be an exclusive school use. For all practical purposes, permitting the use of the premises for duck hunting, during the brief season when such hunting is made lawful, in nowise interferes with the breeding and raising of muskrats, but rather dovetails into the use of the premises for that purpose, and the rights given by the lease for hunting ducks do not prevent the premises from still being, within the language of the statute, 'a farm or inclosure used exclusively for the breeding and raising of * * * muskrat.'"

Whether or not a farm or enclosure comes within the exception referred to is a question of fact which can only be determined from all the facts and circumstances in each particular case. In order to determine whether or not a farm or enclosure constitutes a bona fide muskrat farm, the following facts, among others should be considered:

1. Whether or not the land, on which the "farm" or enclosure is situate, be owned or leased or otherwise under the control of the proprietor of such "farm."

2. Whether or not a *bona fide* intent exists to utilize such land for the purpose of raising and propagating muskrats.

3. Whether or not a suitable fence surrounds the farm, although as will be seen from the Evans Case, supra, a fence is not absolutely essential.

4. Whether or not adequate provision, either natural or artificial, be made for feeding.

5. Whether or not the land on which the farm is situated, either in its natural state or with such improvements as may be placed thereon by the owner of the farm, is adapted to use as a muskrat farm.

In addition to the foregoing I would deem it pertinent in determining what constitutes a bona fide muskrat farm to consider whether or not the owner thereof re-

stocked his "farm," if necessary, with new animals; whether or not the owner thereof held himself out to the public as a breeder and raiser of muskrats; and whether or not the owner thereof regularly marketed his product.

Whether or not the "farm" about which you inquire is a bona fide muskrat farm is a question of fact determinable from all the facts and circumstances as shown by the evidence that might be adduced from witnesses qualified to testify. From the above discussion, it is believed that your department will be in a position to decide the question under consideration; however, if any difficulty be experienced in finally deciding the question, when all the facts shall have been ascertained, this department will afford such assistance as is desired.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1943.

POUNDAGE—SHERIFF'S FEES—SECTION 2845, GENERAL CODE, CONSTRUED.

SYLLABUS:

The fees of a sheriff for poundage provided by Section 2845, General Code, are allowed and given as a compensation to the sheriff for the risk incurred in handling and disbursing money actually received by him in his official capacity. Where no money is received and no risk incurred, no compensation by way of poundage is earned.

COLUMBUS, OHIO, April 7, 1928.

HON. W. S. PAXSON, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—This will acknowledge your letter dated April 2, 1928, which reads:

> "In our Court of Common Pleas the holder of a second mortgage, amounting to $3,727.91, filed suit in foreclosure. There was a first mortgage of $18,002.33. The property sold for $22,297.74 and was bid in by the holder of a third mortgage amounting to $7,650.00. The property was sold subject to the first mortgage which will be assumed by the purchaser, but the holder of the second mortgage who brought the foreclosure proceeding is to be paid. The sheriff desires to know whether or not he is entitled to charge poundage under Section 2845, General Code. We shall appreciate receiving your opinion on this question at your earliest convenience."

Section 2845, General Code, to which you refer, in so far as pertinent, provides:

> "For the services hereinafter specified when rendered, the sheriff shall charge the following fee, and no more, which the court or clerk thereof shall tax in the bill of costs against the judgment debtor or those legally liable therefor; * * * poundage on all moneys actually made and paid to the sheriff on execution, decree or sale of real estate, on the first ten thousand dollars, one per cent; on all sums over ten thousand dollars, one-half of one per cent, but when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage except on the amount over and above the claim of such party, * * *."