

3070.

APPROVAL, BONDS OF CUYAHOGA COUNTY, OHIO—\$158,000.00.

COLUMBUS, OHIO, August 22, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3071.

APPROVAL, BONDS OF CITY OF DAYTON, MONTGOMERY COUNTY,
OHIO—\$60,000.00.

COLUMBUS, OHIO, August 22, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3072.

APPROVAL, BONDS OF VILLAGE OF FAIRVIEW, CUYAHOGA COUNTY,
OHIO—\$37,100.00.

COLUMBUS, OHIO, August 22, 1934.

Industrial Commission of Ohio, Columbus, Ohio.

3073.

MUSKRAT FARM—DEFINITION OF UNDER SECTION 1398, GENERAL
CODE.**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. *A tract of land whether the same be enclosed to prevent migration or not, which either in its natural state, or with improvements placed thereon, is adapted to the breeding, raising and habitation of muskrats, is, when used by the owner, lessee or proprietor thereof for no other purpose than the raising and breeding of muskrats or as a hunting ground for other game and re-stocked with new muskrats when necessary, a muskrat farm.*

COLUMBUS, OHIO, August 22, 1934.

HON. WM. H. REINHART, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your request for my opinion which reads as follows:

“As we are having considerable difficulty in Holmes and Wayne counties pertaining to the definition of the muskrat farm, we are asking you for an opinion as to what constitutes a muskrat farm according to law.

Former Attorney General's Opinion No. 1942 rendered in 1928 is not clear. We would like a more clear definition of this problem.”

Sections 1391 and 1398 of the General Code in so far as they are pertinent to your inquiry, contain the following provisions:

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. 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. A person doing anything prohibited, or neglecting to such fish, quadrupeds or birds, shall be deemed to have violated this section. A person who counsels, aids or assists in the violation of a provision of this act (G. C. Sections 1390 to 1454), or knowingly shares in any of the proceeds of such violation by receiving or possessing either a fish, quadruped or bird shall be deemed to have violated this section. Hunting or taking a wild bird or wild game on Sunday is prohibited.”

Section 1398:

“* * * * 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, or in addition to such use, used as hunting grounds for other game, from taking or killing the fur-bearing animals herein enumerated. * * * *”

By the express terms of Section 1398, *supra*, nothing therein shall 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 a hunting ground for other game or taking or killing the fur-bearing animals herein enumerated.

The first branch of the syllabus of the case of the *State of Ohio vs. Evans*, 21 O. App. 168 reads as follows:

"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."

In the above case the defendant in error was convicted before a Justice of the Peace on a charge of unlawfully killing muskrat in the latter part of March, 1924, in violation of Section 1398, which provides that the open season for muskrat shall be only from the 15th day of November to the first day of March, both inclusive. Error was prosecuted to the Court of Common Pleas and that court reversed the judgment of conviction. The trapping of muskrats at the time charged was not controverted by the accused but it was claimed by him that the act came within the exception quoted, and was, therefore, not in violation of the statute.

The defendant in error was at the time an employe of one John N. Magee, who, it was claimed, was the owner of a farm and enclosure, used exclusively for the breeding and raising of muskrats and that the muskrats were trapped on said premises. The question for the determination of the court was whether or not the land owned by Magee was in fact a muskrat farm. The material facts in the case showed 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, devoted to the breeding and raising of muskrats, and that Magee had expended large sums of money in fitting the farm for that purpose, had constructed dykes and canals and had erected pumping machinery for pumping water into the marsh at the dry season.

It also appeared from the evidence that canals and dykes which enclosed the premises were not impassable to the muskrats. The court, in affirming the judgment of the Court of Common Pleas, stated, "We have no difficulty in arriving at the conclusion that Magee was the owner of a farm or enclosure used for the breeding and raising of muskrats." In the matter before me it would, therefore, appear that whether or not a farm or enclosure constitutes a bona fide muskrat farm, is a question of fact which can only be determined from all the facts and circumstances in each particular case.

I would deem it pertinent in considering what constitutes a bona fide muskrat farm, to consider:

1. Whether or not the land on which the farm or enclosure is situated is 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 the land on which the farm is situated, either in its natural state or with such improvements as may be placed thereon, is adapted to use as a muskrat farm.
4. Whether or not adequate provision, either natural or artificial be made for feeding.
5. Whether or not the farm is re-stocked with new animals when necessary.
6. Whether or not the owner or proprietor thereof regularly trapped muskrats thereon and marketed his product.

In specific answer to your question I am, therefore, of the opinion that a tract of land whether the same be enclosed to prevent migration or not, which either in its natural state, or with improvements placed thereon, is adapted to

the breeding, raising and habitation of muskrats, is, when used by the owner, lessee or proprietor thereof for no other purpose than the raising and breeding of muskrats or as a hunting ground for other game and re-stocked with new muskrats when necessary, a muskrat farm.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

3074.

TEACHER—TEMPORARY CERTIFICATE VALID WHEN—FIXING TIME
 FOR HOLDING EXAMINATION FOR TEACHERS' CERTIFICATES—
 UNLAWFUL TO ANTEDATE CERTIFICATE OF TEACHER.

SYLLABUS:

1. *The fixing of the time for holding regular examinations for the certification of school teachers in city school districts is a matter which is within the discretion of the City Board of School Examiners, limited only by the provision that two examinations must be held in each school year.*

2. *A temporary teacher's certificate granted by a City Board of School Examiners between regular examinations, is valid from the date of issue until the next regular examination.*

3. *By virtue of the provisions of Section 7847 General Code, the provisions of Section 7817, General Code, with respect to the holding of special examinations, with the consent of the Director of Education, applies to city boards of school examiners.*

4. *A temporary teacher's certificate, valid until the next regular examination, cannot lawfully be granted under any circumstances by a County or City Board of Examiners by authority of Section 7826 or 7849 General Code, with or without the consent of the Director of Education, to an applicant who had formerly held such a certificate, granted by the same Board of Examiners.*

5. *Temporary teachers' certificates may be issued to an applicant by a city or county board of school examiners by authority of Section 7826 or Section 7849 General Code as the case may be, whether or not the applicant is eligible under the law to take a regular examination for a teacher's certificate, and the granting of such a temporary certificate has nothing whatever to do with the eligibility of the person to whom it was granted, to take a regular examination. The granting of a temporary certificate does not in and of itself make the person to whom it was granted eligible to take a regular examination.*

6. *County and City Boards of School Examiners are not authorized under the law to antedate any teacher's certificate.*

COLUMBUS, OHIO, August 22, 1934.

HON. B. O. SKINNER, *Director of Education, Columbus, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your request for my opinion which reads as follows:

"By your Opinion No. 2557, dated April 23, 1934, several matters of administrative practice of long standing in this department seem necessary