

4572.

APPROVAL, BONDS OF CITY OF CLEVELAND, CUYAHOGA
COUNTY, OHIO, \$5,000.00.

COLUMBUS, OHIO, August 22, 1935.

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

4573.

CONSERVATION—FISH CAUGHT IN PRIVATE POND—SALE
THEREOF—STOCKING PRIVATE POND WITH FISH.

SYLLABUS:

1. *Black bass caught in a private pond in the closed season, and four-inch blue gills caught in a private pond may be legally had in possession either on or off the premises of the owner of such private pond.*

2. *With the exception of carp, sheephead, mullet and grass pike, no fish caught in a private pond may be sold.*

3. *Persons engaged in fishing by angling with reel and rod in a privately owned lake, pond or other body of water which has no communication with any other body of water, through which fish are accustomed to pass, are not required to procure a rod and reel license.*

4. *The stocking of a private pond with fish by the state of Ohio does not give the public the privilege to catch fish therefrom.*

COLUMBUS, OHIO, August 23, 1935.

HON. L. WOODDELL, *Commissioner, Conservation Division, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, requesting my opinion as follows:

“I should appreciate receiving your opinion on the following questions:

1. At the present time there seems to be some question as to whether or not it is legal for a person to have a black bass in his possession which was caught in a private pond in May, if such bass is taken off the premises of the private pond where caught.

2. The same question applies to a four-inch bluegill caught in a private pond, in the possession of a person off the premises of the private pond.

3. If undersized fish or if legal fish are caught in a private pond, can such fish be sold for propagation or other purposes?

4. Is the State rod and reel license required for those who fish in private ponds if a rod and reel are used to take fish in such a pond?

5. How can a State Game Protector determine whether or not a man fishing in a pond with a rod and reel is required to have a rod and reel license?

6. If the state of Ohio stocks a private pond with State fish, does such a pond become public water and subject to the laws governing public fish in Ohio?"

Pertinent to your first three questions is section 1412, General Code, which reads as follows:

"a. Open season. In the inland fishing district of the state black bass may be taken and possessed by angling only from the sixteenth day of June to the thirtieth day of April, both inclusive, and in the Lake Erie fishing district they may be thus taken and possessed only from the fifteenth day of July to the twenty-fourth day of May, both inclusive.

b. Method of taking. Black bass, less than eleven inches in length, calico or strawberry bass and crappie less than six inches in length, rock bass and blue gills less than five inches in length may not be taken in either of the fishing districts of this state; but if any of the fish named in this section are caught unintentionally in any net or with hook and line and are released alive in such manner as not to injure them, such taking shall not be considered an offense.

c. Limit. A person shall not take in any one day to exceed twelve black bass, twenty-five rock bass or blue gills, or forty calico or strawberry bass or crappies, nor have in possession at any time more than two days' legal catch of any of the above named varieties.

d. Sale. No person, firm or corporation, shall buy, sell or offer for sale, barter, give away, or have in possession for any such purpose any fish, caught in the inland fishing district of this state, except carp, sheephead, mullet and grasspike, or any black bass, rock bass, calico or strawberry bass, crappie, blue gill or sunfish caught in the Lake Erie fishing district of this state, or outside of the state or have in possession any such fish unlawfully caught, and each fish so bought, sold, offered for sale, exposed for sale, bartered or given away, had in possession unlawfully caught, or for the purpose of sale, or of a less length than herein required shall constitute a separate offense."

Section 1391, General Code, provides that the ownership of and title to all fish in the state of Ohio, not confined and held by private ownership, legally acquired, is in the state of Ohio, which holds it in trust for the benefit of all the people.

In unnavigable streams though a riparian owner has an exclusive right to fish, nevertheless, by the above provisions, the fish, until reduced to the actual possession of such owner, remain the property of the people of the state of Ohio. However, it appears to be different in the case of private ponds when there is no means by which fish can escape from the waters of a private owner, and in such case the courts have held that such person is the absolute owner of the fish while they are uncaught. In the case of *Limbeck vs. Nye*, 47 O. S., 336, it was held, as disclosed by the first branch of the syllabus:

“A non-navigable inland lake is the subject of private ownership and where it is so owned, neither the public, nor an owner of adjacent lands, whose title extends only to the margin thereof, have a right to boat upon, or take fish from, its waters.”

To the same effect is the case of *Beckman vs. Kreamer*, 43 Ill., 47, wherein it was held:

“The owner of land entirely surrounding a small lake, including the land covered thereby is also the owner of the fish in such lake and has the exclusive right of fishing therein.”

It is stated in *Ruling Case Law*, Vol. II, page 1033, as follows:

“It is perhaps true, that if the boundaries of a single owner comprehend the entire surface of an inland pond and if there are no means of passage by which fish can migrate to the waters of other owners, such single owner will be deemed the proprietor of the fish as well as the fishing rights in the pond.”

From the above, it would therefore appear that an owner of a private pond may legally take therefrom at any time and in any number the fish confined therein. By terms of Paragraph D of Section 1412, General Code, supra, the offense consists of having in possession fish unlawfully caught. It would seem, therefore, that fish taken from a private pond, being lawfully caught, may be had in possession, regardless of whether or not such possession is on the premises of the owner of the pond or not.

I come now to your third question. It will be observed from reading Paragraph D of Section 1412, General Code, that the sale of all fish caught in the inland fishing district, except carp, sheephead, mullet and grasspike, is prohibited. In other words, fish legally taken, with the exceptions noted in the statute, may not be sold. It would seem, therefore, that even though fish

of any size or kind may be lawfully taken at any time from a private pond, yet by the clear terms of the statute the sale of such fish is prohibited.

The fourth question presented for my determination is whether a rod and reel license is required for those who fish in private ponds, with rod and reel. This precise question was answered by my predecessor on September 3, 1929, in the *Opinions of the Attorney General for 1929*, page 1257, the syllabus of which reads as follows:

“Persons engaged in fishing by angling with reel and rod in a privately owned lake, pond or other body of water which has no communication with any other body of water, through which fish are accustomed to pass, are not required to procure a rod and reel license.”

It is pointed out therein that section 1430 of the General Code, provides that no person shall take or catch any fish with reel and rod in any of the waters of the state of Ohio, without having first procured a license so to do, and section 1411 defines the waters of the state of Ohio as the Lake Erie Fishing District and all other waters over which the state of Ohio has jurisdiction. At page 1258, it is stated:

“In the case of *State vs. Roberts*, 59 N. H. p. 257, the court in the opinion says:

‘The right to have migratory fish pass in their accustomed course up and down river and streams is a public right, which may be regulated and protected by the legislature, and, so far as the waters of this state are common passage-ways for fish, they are of a public character, and subject to legislative control. The taking and killing of certain kinds of fish and game at certain seasons of the year tend to the destruction of the privilege by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and therefore it is within the authority of the Legislature to impose restrictions and limitations upon the time and manner of taking fish and game considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted.’

The court further says as follows:

‘But while the Legislature has power to regulate and limit the time and manner of taking fish in waters which are public breeding-places or passage-ways for fish, it has not assumed to interfere with the privileges of the owners of private ponds having no communica-

tion through which fish are accustomed to pass to other waters. Such ponds, whether natural or artificial, are regarded as private property, and the owners may take fish therefrom whenever they choose, without restraint from any legislative enactment, since the exercise of this right in no way interferes with the right of others.' ”

As hereinbefore stated, in the case of private ponds the authorities are all in accord that where there are no means by which fish can migrate to other waters, the owner of the pond is also the owner of the fish confined therein, and it would appear that the state of Ohio has no interest in such fish and therefore would have no jurisdiction over such pond for the purpose of regulating fishing therein. Therefore, unless such ponds have some means of passage to or connection with another body of water, it is my opinion that persons engaged in fishing with rod and reel therein, are not required to secure a rod and reel license.

I shall now consider your last question. In the case of *Beach vs. Morgan*, 67 N. H., 529, it was declared :

“The stocking of streams with young trout raised at the expense of the state, by the Fishing Commissioner, does not operate as a license to the public for fishing in waters not public nor unnavigable streams in private lands. The ‘public’ benefited by the placing of young trout in the stream in question are the land-owners on their respective lands on the stream from its source to its mouth, its tributaries, and the stream into which it flows.”

The same subject is considered in Ohio Jurisprudence, Volume 19, page 72, wherein it is stated :

“The fact that a private stream has been stocked by the state does not give others than riparian proprietors any right to take fish from the water. Those benefited by the stocking are the landowners along the stream.”

Moreover, if the stocking of a stream or private pond, by the state were thought to give the public a license to catch fish therefrom, they would have no right to pass over the riparian owner’s premises to get to such stream or pond.

Summarizing, it is therefore my opinion that :

1. Black bass caught in a private pond in the closed season, and four-inch blue gills caught in a private pond may be legally had in possession either on or off the premises of the owner of such private pond.

2. With the exception of carp, sheephead, mullet and grass pike, no fish caught in a private pond may be sold.

3. Persons engaged in fishing by angling with reel and rod in a privately owned lake, pond or other body of water which has no communication with any other body of water, through which fish are accustomed to pass, are not required to procure a rod and reel license.

4. The stocking of a private pond with fish by the state of Ohio does not give the public the privilege to catch fish therefrom.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4574.

APPROVAL, LEASE TO LAND IN SHAWNEE TOWNSHIP, ALLEN COUNTY, OHIO, FOR STATE GAME REFUGE PURPOSES—SOLA ADGATE ZURMHELY.

COLUMBUS, OHIO, August 24, 1935.

HON. L. WOODDELL, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a certain lease No. 2312, executed by one Sola Adgate Zurmhely of Shawnee Township, Allen County, Ohio, to the state of Ohio, on a parcel of land in said township and county, as described in said lease, containing 292 acres of land. By this lease, which is one for a term of five (5) years, this land is leased and demised to the state solely for state game refuge purposes; and it is noted in this connection that acting under the provisions of Section 1435-1 and other related sections of the General Code, the Conservation Council, acting through you as Conservation Commissioner, has set this property aside as a state game and bird refuge during the term of said lease.

Upon examination of this lease, I find that the same has been properly executed and acknowledged by said lessor and by the Conservation Council acting on behalf of the state through you as Commissioner.

I am accordingly approving this lease as to legality and form, as is evidenced by my approval endorsed upon the lease and upon the duplicate copy thereof, both of which are herewith returned.

Respectfully,

JOHN W. BRICKER,
Attorney General.