

attorney to employ his own time or that of his assistants in conducting prosecutions in courts lower than the common pleas court when in his opinion it is necessary and in the furtherance of justice.

Respectfully,
EDWARD C. TURNER,
Attorney General.

252.

MIGRATORY GAME BIRDS—OPEN SEASON MUST NOT BE IN CONFLICT
WITH FEDERAL MIGRATORY-BIRD TREATY-ACT REGULATIONS.

SYLLABUS:

The provisions of House Bill No. 459 with suggested amendments (to amend Section 1403, General Code,) relative to dividing the State of Ohio into zones and changing the dates of the hunting season for certain game birds, are in conflict with the Federal Migratory-Bird Treaty-Act Regulations and said Bill, if enacted into law, would be ineffective and inoperative. No determination of effect of Article II, Section 26, Ohio Constitution.

COLUMBUS, OHIO, March 29, 1927.

HON. FERD. J. BING, *Chairman, Fish and Game Committee, Ohio House of Representatives, Columbus, Ohio.*

DEAR SIR:—This acknowledges receipt of your letter of March 23, instant, wherein you request my opinion as to the constitutionality of House Bill No. 459 and the proposed amendments thereto. Your letter reads in part as follows:

“Kindly advise as to the constitutionality of the enclosed bill if same were amended to zoning Ohio.

The National road out of Columbus, north part of the State, open season 16th day of September to the 31st day of December both inclusive and south of National road, 16th day of October to January 31st, both inclusive.”

The purpose of House Bill No. 459 is to amend Section 1403 of the General Code, relative to open season on ducks. Section 1403 of the General Code now provides that ducks and other enumerated game birds may be taken only from the sixteenth day of September to the thirty-first day of December, both inclusive. No provision is made therein for the dividing of the state into zones. House Bill No. 459 seeks to extend this time limit to the thirty-first day of January and the proposed amendments to this bill seek to divide the state into two zones, with a different open season for each zone. As the law now stands the open season on these game birds covers a period of three and one-half months, from September 16th to December 31st. If the proposed bill in question, with the amendments proposed, be enacted into law, the state will be divided into two zones, and the open season in the northern part of the state will be from September 16th to December 31st and in the southern part from October 16th to January 31st.

Since all of the birds enumerated in Section 1403, *supra*, are migratory birds, in order correctly to pass upon the effectiveness of these proposed amendments to Section 1403, it is necessary to consider the federal laws and regulations relating to migratory birds.

On December 8, 1916, a treaty between the United States and Great Britain was

proclaimed by the President. It recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, and were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and it was agreed that the two powers would take or propose to their law making bodies, the necessary measures for carrying the treaty into effect. (39 Stat. 1702.)

In pursuance of this treaty, Congress passed an act entitled "An Act to give effect to the convention between the United States and Great Britain for the protection of migratory birds." This Migratory-Bird Treaty Act was approved July 3, 1918. (40 Stat. 755.)

The constitutionality of the above treaty and act of July 3, 1918, was sustained by the United States Supreme Court in a decision rendered April 19, 1920, in the case of the state of Missouri vs. Ray P. Holland, 252 U. S., 416.

Article I of said Treaty reads in part as follows:

"The high contracting powers declare that the migratory birds included in the terms of this convention shall be as follows:

1. Migratory game birds:

- (a) Anatidae or water fowl, including *brant, wild ducks, geese and swans.*
- (b) * * *.
- (c) Rallidae or rails, including *coots, gallinules* and sora and other rails."

Article II of the Treaty reads in part as follows:

"The high contracting powers agree that, as an effective means of preserving migratory birds there shall be established the following close seasons during which no hunting shall be done except for scientific or propagating purposes under permits issued by proper authorities.

1. The close season on migratory game birds shall be between March 10 and September 1, except * * * (here are enumerated certain sections of the United States, none of which lie in Ohio). *The season for hunting shall be further restricted to such period not exceeding three and one-half months, as the high contracting powers may severally deem appropriate and define by law and regulation.*"

The Migratory-Bird Treaty Act reads in part as follows:

"Sec. 2. That unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful to hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time or in any manner, any migratory bird, included in the terms of the convention between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, or any part, nest, or egg of any such bird.

Sec. 3. That subject to the provisions and in order to carry out the purposes of the convention, the *Secretary of Agriculture is authorized and directed*, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what

extent, if at all, and by what means, it is compatible with the terms of the convention to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, *and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.*

* * * * *

Sec. 7. That nothing in this act shall be construed to prevent the several States and Territories from making or enforcing laws or regulations *not inconsistent* with the provisions of said convention or of this act, or from making or enforcing laws or regulations which shall give *further protection* to migratory birds, their nests, and eggs, *if such laws or regulations do not extend the open seasons for such birds beyond the dates approved by the President in accordance with section three of this act.*"

The Migratory-Bird Treaty-Act Regulations, as approved and promulgated by the President, July 31, 1918, and since amended, the last amendment being on April 22, 1926, read in part as follows:

"Regulation 4. Open seasons on and possession of certain migratory game birds.

For the purpose of this regulation, each period of time herein prescribed as an open season shall be construed to include the first and last days thereof.

The open seasons for water fowl (except wood duck, cider ducks and swans), coot, gallinules and Wilson snipe or jack snipe shall be as follows:

In * * * *Ohio* * * * the open season shall be from September 16 to December 31."

You will note that Paragraph 1, Article II, of the above Treaty limits the open season, *on such birds as are enumerated in House Bill No. 459*, to such period *not exceeding three and one-half months*. You will further note that Section 3 of the Migratory-Bird Treaty Act provides that the Secretary of Agriculture of the United States, subject to the provisions of the Treaty and to the approval of the President, is authorized and directed to adopt suitable regulations pertaining to the zoning of the limited states and to the *time limits* for open seasons within these zones. In compliance with this direction the Secretary of Agriculture of the United States, with the approval of the President, has caused to be promulgated Regulation 4, supra, wherein the *entire* state of Ohio has been designated as a *part* of a certain zone whose open season begins on the sixteenth day of September and closes on the thirty-first day of December, a period limited to three and one-half months. The bill which you have now under consideration, with the amendments suggested, changes the dates and the duration of the open season for the state of Ohio as a whole, and after dividing this state into a North and South zone, changes the dates of the open season for the Southern zone.

Section 7 of the Migratory-Bird Treaty Act, supra, provides that no state may make regulations inconsistent with the provisions of the Treaty or of said Act, and while it gives a state the authority further to protect migratory birds, it specifically limits that authority to such laws or regulations as do not extend the open season for such birds beyond the dates approved by the President in accordance with section three of said Act. This authority lies with the Secretary of Agriculture of the United States, subject to the approval of the President.

Article VI of the Constitution of the United States reads in part as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made,

under the Authority of the United States, shall be the Supreme Law of the Land; and the Judge in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is therefore my opinion that since these proposed amendments to Section 1403, supra, are in conflict with the above mentioned Treaty, the Migratory-Bird Treaty Act, and the Migratory-Bird Treaty-Act Regulations, if they be enacted into law they will be in direct violation of the Constitutional Federal Enactments in regard to migratory birds, and therefore inoperative and invalid.

Having arrived at the foregoing conclusion, I do not deem it necessary to determine whether the proposed amendment would be unconstitutional under Section 26 of Article II of the Constitution of Ohio, which provides in part as follows:

"All laws of a general nature shall have a uniform operation throughout the state."

Respectfully,
EDWARD C. TURNER,
Attorney General.

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APPROVAL, BONDS OF VILLAGE OF GRANVILLE, LICKING COUNTY,
OHIO—\$25,800.00.

COLUMBUS, OHIO, March 29, 1927.

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

254.

APPROVAL, BONDS OF MT. ORAB VILLAGE SCHOOL DISTRICT, BROWN
COUNTY, OHIO—\$39,000.00.

COLUMBUS, OHIO, March 29, 1927.

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

255.

APPROVAL, BONDS OF CITY OF COSHOCTON, COSHOCTON COUNTY,
OHIO—\$1,068.20

COLUMBUS, OHIO, March 29, 1927.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.