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DEER PERMITS—SPECIAL—DIVISION OF WILDLIFE MAY LAWFULLY ISSUE SUCH PERMITS—SECTION 1431-2 G. C.

SYLLABUS:

The Division of Wildlife may lawfully issue special deer permits under authority of Section 1431-2, General Code.

Columbus, Ohio, August 31, 1950

Hon. A. W. Marion, Director of Department of Natural Resources
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Section 1431-2 approved by the Governor and filed in the office of the Secretary of State on the 21st day of June, 1947 (Amended Senate Bill 177) authorizes the Division of Conservation and Natural Resources to issue special deer permits.

Amended Senate Bill 13 approved by the Governor May 9, 1949 and filed in the office of the Secretary of State May 12, 1949, created the Division of Wildlife within the Department of Natural Resources. This bill (Am. S. B. 13) does not amend Section 1431-2. Therefore, I am herewith requesting your formal opinion as to whether or not a newly created Division of Wildlife may legally issue special deer permits by virtue of the authority of Section 1431-2 which provides such authority to the Division of Conservation and Natural Resources, which Division is now non-existent."

Section 1431, General Code, states in part as follows:

"* * * Nothing herein shall authorize the taking and possessing of deer without first having obtained in addition to the general hunting and trapping license provided for herein, a special deer permit as provided for in section 1431-1, except that the owner, tenant, or manager of lands in this state residing thereon and the children of such owner, tenant, or manager, residing on such lands, may hunt deer thereon without a special deer permit."

Section 1431-2, General Code, states in part, as follows:

"Each applicant for a special deer permit shall pay an annual fee of five dollars ($5.00) for such special deer permit and it shall run concurrently with the hunting and trapping license. The provisions of this section and of sections 1432, 1433 and 1434 of the General Code, in so far as practicable, shall apply to the special deer permit, except it shall be issued by the office of the division of conservation and natural resources at Columbus, Ohio, or by agents of the counties where an open season on deer is provided and except the money received shall be paid into the state treasury to the credit of a fund which is hereby appropriated exclusively for the use of the conservation and natural resources commission in the acquisition and development of land for deer management, for investigating deer problems, for the stocking and management of deer, and for the protection of deer. * * *"

The title of Amended Senate Bill 13, 98th General Assembly, mentioned in your inquiry, reads in part as follows:

"AN ACT

To create a department of natural resources and to bring into that department, as divisions thereof, the various state agencies engaged in conservation of natural resources and to provide for the correlation of the work and activities of all divisions within the department so as to avoid and eliminate unnecessary duplications of effort and overlapping functions; * * *"

It is apparent from this language that it was the legislative intent, in creating the Department of Natural Resources, to consolidate therein all state agencies in which powers and functions had theretofore been placed to promote the conservation of the natural resources of the state. While it would have been possible to provide in general terms that all such state agencies and offices, with their powers and functions, were to be so transferred, the legislative draftsmen chose rather to amend the numerous

individual code sections dealing with conservation of natural resources, deleting from each the name of the old office or agency and substituting therefor the name of the new office or agency. It was thus that powers and functions of the several offices were transferred.

The several offices and agencies (as well as the incumbents of such offices) were transferred to the new department by the enactment of supplemental section 154-10c which reads in part as follows:

> "The incumbents of *those offices which are by this act transferred to the department of natural resources* shall continue to hold their respective offices for the full term for which they were severally appointed, provided, however, that: the state geologist shall become and be chief of the division of geological survey; the chief engineer of the water board shall become and be chief of the division of water; the commissioner of conservation and natural resources shall become and be chief of the division of wild life; and the state forester shall become and be chief of the division of forestry. * * *" (Emphasis added.)

In transferring the powers and functions in the manner above noted the legislature actually amended one hundred and thirty-five sections of the General Code. The task of compiling the sections requiring amendment thus was an enormous one and it should cause little surprise that some sections which would reasonably be expected to be so amended, were omitted. Among such omitted sections, as you point out in your inquiry, was Section 1431-2, General Code, which, as it stands, authorizes the issuance of special deer permits by the Division of Conservation and Natural Resources, a state agency which was transferred to the Department of Natural Resources under the name of the Division of Wildlife.

Since Amended Senate Bill 13 contains no general provision to the effect that the new name of this agency may be substituted for that of the old in other statutory enactments, the authority of the new Division of Wildlife to exercise the powers conferred on the old Division of Conservation and Natural Resources by Section 1431-2, General Code, if it exists at all, must be found by implication in the other provisions of this act.

Before proceeding to examine this act for language which would impliedly transfer to the Division of Wildlife the powers conferred on the office under its prior designation by Section 1431-2, General Code, it is appropriate to observe the rules of statutory construction to be applied in a situation of this sort.

It is a general rule of statutory construction that repeals and amendments by implication are not favored but one of the exceptions is the case in which a later act purports to be a revision, codification or consolidation of all the statute law in a particular field. This rule is stated in 37 O. Jur. 421, as follows:

> "As a general rule, the enactment of revisions and codes, and of statutes manifestly designed to embrace an entire subject of legislation or evidently intended as a substitute for the former enactments, operates to repeal former acts dealing with the same subject, even though there is no repealing clause to that effect. The application of the rule is not dependent on the inconsistency or repugnancy of the new legislation and the old, for the old legislation will be impliedly repealed by the new, even though there is no repugnancy between them. This rule, however, is a general one, and not to be applied so as to defeat the manifest intention of the legislature."

In support of the qualification made in the final sentence quoted above see State v. Wood, 52 O. S. 601.

It is manifest from the title of Amended Senate Bill 13 and from the statement of legislative intent expressed in section 1 of the bill that this act was intended by the legislature to embrace the entire subject of legislation on conservation of natural resources. However, it is equally manifest that the legislature fell short of its objective in this respect.

I reach this conclusion for the reason that the legislature, had it intended to withhold from any state conservation agency the powers conferred by Section 1431-2, General Code, could reasonably have been expected to repeal such section. Because it was not repealed and because the legislature effected a transfer of other powers and functions to the new Department of Natural Resources and the several divisions therein by amending over one hundred individual code sections so as to substitute the name of the new agency for that of the old, I must conclude that the omission of Section 1431-2, General Code, in this process was inadvertent and unintentional.

Moreover, there is abundant language in Amended Senate Bill 13 which evinces a legislative intent that the Division of Wildlife should succeed to the powers conferred by Section 1431-2, General Code, on the old Division of Conservation and Natural Resources. Section 1438-1, General Code, reads in part:

> "It is the purpose of this act and the policy of the state of

Ohio to provide an adequate and flexible system for the proper management of the clams, or mussels, crayfish, aquatic insects, fish, frogs, turtles, birds and quadrupeds, to guarantee a future supply of such wild animals and to provide for their present use and development for public recreation and food supply. * * *

The wild life council shall have authority to regulate:

(a) Taking and possessing clams or mussels, crayfish, aquatic insects, fish, frogs, turtles and *game,* at any time and place or in any number, quantity or length, and in any manner or way, and with such devices as it may prescribe. * * *".

Bearing in mind that a *flexible* system of game management was intended by the legislature and that the wild life council is given specific authority to regulate the taking and possessing of game, both as indicated clearly by the language above quoted, we find the provisions of paragraph (b) of Section 1396, General Code, more readily understandable. This provision reads as follows:

"b. Game birds and game quadrupeds: All species of game birds and game quadrupeds throughout the state may be taken and possessed only according to the following schedule or as otherwise provided in this chapter or council order then in effect.

Name	Open Season	Bag Limit	Possession Limit
Pheasant (Cockbirds only)	Nov. 15-Nov. 30	2	4
Ruffed Grouse	Nov. 15-Nov. 30	2	4
Hungarian Partridge	Nov. 15-Nov. 30	4	4
Sharptailed Grouse	No open season		
Pinnated Grouse	No open season		
Woodcock	Oct. 10-Oct. 24	4	8
Wilson's or Jack Snipe	Oct. 16-Dec. 14	15	15
Rail and Gallinule	Sept. 1-Nov. 30	15	15
Black Breasted Plover	No open season		
Golden Plover	No open season		
Greater and Lesser Yellow legs	No open season		
Coot	Oct. 16-Dec. 14	25	25
Duck	Oct. 16-Dec. 14	10	20
Geese and Brant	Oct. 16-Dec. 14	3	6
Hare or Rabbit	Nov. 15-Jan. 1	4	4
Gray, Black & Fox Squirrel	Sept. 25-Oct. 10	4	8
Red or Pine Squirrel	No closed season		
Groundhog or Woodchuck	No closed season		
Deer	No open season		
Bear	No open season"		

Having in mind the notion of a flexible system and the express authority of the Wildlife Council to regulate the taking of game, I must conclude that the language in paragraph (b) of Section 1396, General Code, "according to the following schedule or as otherwise provided in this chapter or council order then in effect", was intended to prescribe a temporary schedule of game seasons to be effective only until such time as the council should by appropriate orders, direct a different schedule.

From this it follows that the council could, if it deemed proper, declare an open season on the taking and possessing of deer and other game for which the temporary schedule provides no open season.

In this situation it is clear beyond doubt that the legislature must have intended to repose in some state conservation agency the authority to issue permits to take and possess deer. This view is amply supported by the provisions of Section 1432, General Code, as reenacted in Amended Senate Bill 13. This section reads in part as follows:

> "Hunting and trapping licenses shall be issued by the clerk of the common pleas court, village and township clerks and other authorized agents designated by the chief of the division of wild life, * * *"

Because it would be a legal absurdity for the legislature to authorize the Chief of the Division of Wildlife to designate agents to perform a function which that official did not himself possess, I can only conclude that it was the legislative intent that such official should succeed to and exercise those powers and functions which were reposed in him in his former capacity of Commissioner of Conservation and Natural Resources by Section 1431-2, General Code.

There is, of course, abundant authority for the extension of the literal language of statutes by implication to make the legislative intent effective. Thus, in Clark v. Mitchell, 41 Del. 225, it is said in paragraph 6 of the syllabus:

> "Courts are not compelled to follow the letter of the statutes when it bears away from the true intent and to conclusions inconsistent with the general purpose of the act."

Again, in Fleischmann Construction Company et al. v. United States, 270 U. S. 349, it is said in branch 6 of the syllabus:

> "The strict letter of an act must yield to its evident spirit

and purpose, when this is necessary to effectuate the intent; and unjust or absurd consequences are to be avoided if possible."

In Johnson v. United States, 163 Fed. 30, Circuit Justice Holmes in discussing the implications in a statute requiring its extension beyond the strict literal interpretation said at page 32:

> "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however, indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not a discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

Following these rules, it requires no great effort to ascertain "what the legislature is driving at", viz., a consolidation of the state offices and agencies of conservation and natural resources, together with the current personnel therein, and the powers and functions of such offices and agencies, in one department and to harmonize and make effective and efficient the operations of such department.

In the face of this intent, the extension of the literal language of Amended Senate Bill 13 to include the transfer of the powers conferred by Section 1431-2, General Code, to the new Division of Wildlife is both authorized and necessary to give effect to such intent.

Accordingly, in specific answer to your inquiry, it is my opinion that the Division of Wildlife may lawfully issue special deer permits under authority of Section 1431-2, General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General.