

thus confined the issue of bonds under said section to the purposes of the district issuing same.

This conclusion is further supported by section 5654, General Code, the first sentence of which reads:

"The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided."

This section clearly provides that the proceeds of a bond issue *shall not be used for any other purpose than that for which the same was issued*. Bonds issued under the provisions of section 7630-1 G. C. must be issued for the purposes of the schools of the district issuing same.

Therefore, having in mind the provisions of section 5654, as well as the provisions of the two sections referred to in your statement (7669 and 7630-1), you are advised that the two school districts in question cannot levy taxes and issue bonds under section 7630-1, General Code, and use the proceeds thereof for the erection of a union high school in one of the now existing districts, as provided in section 7669 G. C.

Respectfully,

C. C. CRABBE,
Attorney General.

158.

LAW EXTENDING HUNTING SEASON FOR CERTAIN GAME BIRDS—
INCONSISTENT WITH "MIGRATORY BIRD TREATY"—INVALID.

SYLLABUS:

The provisions of House Bill No. 413 to amend section 1403 of the General Code, relative to extending the hunting season for certain game birds, are inconsistent with the "Migratory Bird Treaty" concluded between the United States and Great Britain, and also with the laws of Congress and proclamations made thereunder, and said Bill, if enacted into law, would therefore be invalid and inoperative.

COLUMBUS, OHIO, March 19, 1923.

HON. WALTER F. KIRK, *Chairman, Committee on Fish and Game, Ohio House of Representatives, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department a copy of House Bill No. 413, Mr. Wiley, to amend section 1403 of the General Code, relative to extending the hunting season for certain game birds. You ask my opinion as to the constitutionality of said bill.

The answer to your inquiry requires a consideration of the Federal Regulations in regard to Migratory Birds.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited many species of birds in their annual migration 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, but were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out. 39 Stat., 1702.

Article 1 of said treaty says:

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

1. Migratory game birds, * * *

(Here follows an enumeration of birds.)

"(a) Anatidae, or waterfowls, including brant, wild ducks, geese and swans.

(c) Rallidae, or rails, including coot, gallinules, and sora and other rails."

Article II of the treaty says in part:

"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 propagation purposes under permits issued by proper authorities.

1. The close season on *migratory game birds* shall be between March 10 and September 1, * * *. 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 or regulation.*"

The Migratory Bird Treaty Act, to give effect to the treaty, was approved July 3, 1918, 40 Stat., 755, and provides as follows:

"An Act to give effect to the convention between the United States and Great Britain for the protection of migratory birds concluded at Washington, August sixteenth, nineteen hundred and sixteen, and for other purposes."

Section of said bird treaty act (Comp. Stat., Sec. 8837b) provides:

"Unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful to hunt, take, capture, kill * * * 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 sixteenth, nineteen hundred and sixteen, * * *"

" * * * Sec. 5. 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 regulation as approved and promulgated by the President, July 31, 1918, and amended October 25, 1918; July 28, 1919; July 9, 1920; March 3, 1921; May 17, 1921, and March 8, 1922, are 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.

Waterfowl (except wood duck, eider duck and swans), coot, gallinules—

The open season for Waterfowl * * * coot, gallinules, * * * shall be as follows:

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

The constitutionality of this act was sustained by the Supreme Court of the United States in decision rendered April 19, 1920, in the case of *Missouri v. Ray P. Holland*, 252 U. S. 416. The second paragraph of the syllabus is as follows:

"The Treaty of August 16, 1916, 39 Stat. 1702, with Great Britain, providing for the protection, by close seasons and in other ways, of migratory birds in the United States and Canada, and binding each power to take and propose to their law-making bodies the necessary measures for carrying it out, is within the treaty-making power conferred by Art. II, par. 2, of the Constitution; the Act of July 3, 1918, c. 128, 40 Stat. 755, which prohibits the killing, capturing or selling any of the migratory birds included in the terms of the treaty, except as permitted by regulations compatible with those terms to be made by the Secretary of Agriculture, is valid under Art. I, par. 3, of the Constitution, as a necessary and proper means of effectuating the treaty; and the treaty and statute, by bringing such birds within the paramount protection and regulation of the Government do not infringe property rights or sovereign powers, respecting such birds, reserved to the States by the Tenth Amendment. P. 432."

Under the provisions of said treaty and the laws passed in pursuance thereof there is a restriction against the hunting of:

1. Waterfowl, including brant, wild ducks, geese and swans.
2. Rails, including coot and gallinules, during the period between September 16 and December 31 of each year, and further that the season for hunting shall be restricted to such period not exceeding three and one-half months as the high contracting powers may severally determine by law.

House Bill No. 413 provides for extending the open season beyond three and one-half months in each year, and also invades the close season as limited by the treaty aforesaid, and the laws and regulations in regard to said treaty.

You are therefore advised that it is the opinion of this department that said House Bill No. 413, if enacted into law, would be in direct violation of the Constitutional Federal enactments in regard to migratory birds, and therefore invalid and inoperative.

Respectfully,
C. C. CRABBE,
Attorney General.

159.

AUDITOR—STATEMENT TO COUNTY COMMISSIONERS SHOULD
CONTAIN AMOUNT SUFFICIENT TO PAY ALL EMPLOYES OF
AUDITOR'S OFFICE—ONLY IN CASE AMOUNT FIXED BY COUNTY.

SYLLABUS:

It is the duty of the county auditor to include in his detailed statement to the county commissioners an amount sufficient, in his judgment, to pay all the employes of the auditor's office. Only in case the amount fixed by the county commissioners for the auditor's help is insufficient shall the state tax commission prescribe additional employes; but when so prescribed, under section 5366 G. C., they must be paid from the county fund.

COLUMBUS, OHIO, March 19, 1923.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department as follows:

“Application has been made to this Commission by a county auditor under section 5366 for authority to appoint certain employes and pay their compensation out of the general county fund. The duties of these employes will be to distribute to taxpayers the blanks on which to make personal property tax returns.

An identical request was made to and allowed by this Commission in 1921 and 1922.

Will you please advise the Commission:

1. Might not the auditor have included a sufficient amount to meet this expense in his request filed with his Board of County Commissioners under section 2980?

2. Should he not have done so?

3. Has this Commission sole jurisdiction to authorize the appointment by the auditor of the experts and other employes mentioned in the third paragraph of section 5366?