

become when in his active period. But this fact in no way relieves him of his quality as a pest. His scalp is valueless for bounty at this time. He is still a nuisance and he is not recognized by the game code as a game quadruped. The killing or taking of such an animal is not hunting in the usual and ordinary way intended by the legislature to require a hunter's and trapper's license for such taking or killing.

Persons who go upon the lands of another with permission for the purpose of killing or taking groundhogs, are doing what the statute, by offering a bounty for a time, encourages them to do to aid in ridding the state of what it deems a pest.

The broad general purpose of the game code in requiring sportsmen to take out a license to hunt and trap is the preservation of the wild life of the state from extinction securing in that way from the public, who find pleasure and profit in hunting and trapping, the funds with which to oversee, propagate and protect the wild animals usually considered desirable or valuable as game or fur. The groundhog is not so considered in this general view of the law but on the other hand is placed with the English sparrow, the owl and the hawk, for whose destruction a bounty may be paid.

For reasons before stated herein it is the opinion of this department that it is not necessary to secure a hunter's and trapper's license before pursuing, capturing or killing groundhogs on the lands of another when such person has the consent of the one in control of the land so to do.

Respectfully,  
C. C. CRABBE,  
*Attorney-General.*

796.

APPROVAL, BOND, \$5,000.00 FOR FAITHFUL PERFORMANCE OF DUTIES BY GEORGE E. CARR, AS RESIDENT DEPUTY HIGHWAY COMMISSIONER, DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS, DIVISION OF HIGHWAYS—BOND EXECUTED BY THE AETNA CASUALTY AND SURETY COMPANY.

COLUMBUS, OHIO, October 8, 1923.

HON. THAD H. BROWN, *Secretary of State, Columbus, Ohio.*

797.

FINES—COURT HAS NO STATUTORY AUTHORITY TO TAKE A NOTE  
—A BOND IS PROPER INSTRUMENT TO SECURE A FINE.

**SYLLABUS:**

*A defendant sentenced to jail or workhouse under a sentence providing "until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged," may be released at any time by payment of such fine or giving security therefor. Such fine should be secured by a bond, as a note would not be security therefor.*

COLUMBUS, OHIO, October 9, 1923.

HON. GEORGE D. DUGAN, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—In your communication of September 17th you make the following inquiry:

"Kindly let us have your opinion as to whether a prisoner confined to a workhouse may be released by giving a note with sufficient sureties to the satisfaction of the magistrate for the payment of the balance due on his fine."

Section 12387, General Code, reads as follows:

"In cases where a fine may be imposed in whole or part in punishment of an offense, or for a violation of an ordinance of a municipality and such court or magistrate could order that such person stand committed to the jail of the county or municipality until the fine and the costs of the prosecution are paid, the court or magistrate may order that such person stand committed to such workhouse until such fine and costs are paid, or until he is discharged therefrom by allowing a credit of sixty cents per day on the fine and costs for each day of confinement in the workhouse, or until he is otherwise legally discharged."

Section 13717, General Code, is as follows:

"When a fine is the whole or a part of a sentence, the court or magistrate may order that the person sentenced remain imprisoned in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs at the rate of sixty cents per day for each day's imprisonment."

The last part of section 6212-17, General Code, as amended, contains the following language:

"No fine or part thereof imposed hereunder shall be remitted, nor shall any sentence imposed hereunder be suspended in whole or in part thereof."

You will note that section 12387 provides that a person committed to a workhouse may be ordered committed until "fine and costs are paid—or until he is otherwise legally discharged."

Section 13717 gives the court authority to sentence a defendant to jail "until such fine and costs are paid or secured to be paid or he is otherwise legally discharged."

The court having the right to send defendant to a workhouse instead of to jail section 13717 would apply as to his right to take security for the fine or any part thereof.

A release of a defendant under such circumstances is not a suspension of sentence, but simply provides a way of collection. Nor is it a release under the probation statutes, as part of the sentence is that defendant be confined until such fine is secured to be paid, and the statute gives him the right to secure its payment at any time, that being one way he may be legally discharged.

However section 6212-17 prevents courts from releasing defendant from payment entirely.

Section 6212-19 makes provision for the payment of *fin*es and forfeited *bonds*, and seems to be the only statutory law governing monies due under the Crabbe Act.

Swan's Treaties, 683, gives the rule as follows:

The taking of a negotiable instrument made by the debtor, or by a third person, on account of a pre-existing debt, does not imply a discharge or extinguishment of the demand for which it is taken, nor prevent the cred-

itor from proceeding on the original cause of action, unless such was the understanding of the parties."

2 Am. L. Cas.	179
39 O. S.	57
46 N. Y.	637
22 O. S.	485
30 CYC	1194
7 CYC	1011
30 CYC	1199
40 O. S.	431
21 O. S.	485
34 O. S.	142
1 Cinci. Sup. Court	257
22 O. S.	516
24 O. C. C.	407
21 O. C. C.	732
12 O. C. D.	34
3 O. S. & C. Pl. Decisions	218
2 O. N. P.	71

This was the law previous to 1903 when section 8289, General Code, was passed, reading as follows:

"Within the meaning of this chapter a negotiable promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. When a note is drawn to the maker's own order, it is not complete until indorsed by him."

This statute takes a note out of the rule laid down in *Swan* and the decisions above mentioned, and makes it *payment of the debt* for which it is given, thus creating a new contract. Hence, it would not be a security within the meaning of section 13717, General Code.

"Secured is not a word of description; it implies an act. A creditor who takes a note for his debt is never understood to be a secured creditor. A bond, which carries nothing more than a promise to pay, is no more a security than a promissory note."

*Stickel v. Atwood*, 25 R. I. 461, 56 Atl. 687.

"Secured"—Implies the actual giving of security."

*Pennel v. Rhodes*, 9 O. B. 114, 130, 58 E. C. L. 114.

In the absence of statutory authority other than the meager language of section 13717, I fail to see how a court can take a note payable to the state or a subdivision thereof, for a fine.

Your question would, therefore, have to be answered in the negative.

In my opinion, a bond conditioned for the payment of a fine is a proper instrument to secure a fine due the state or a subdivision thereof, as it would clearly secure the payment of such fine, and not be a payment thereof.

Respectfully,

C. C. CHABBE,

Attorney-General.