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1. FOX—STATE GAME LAWS DO NOT PROHIBIT HUNTING, TAKING OR KILLING OF FOX AT ANY TIME—SECTION 1390 ET SEQ., G. C.
2. LAW ENFORCEMENT OFFICERS—DIVISION OF CONSERVATION AND NATURAL RESOURCES—NO DUTY OR AUTHORITY RESPECTING VIOLATIONS OF LAWS OTHER THAN GAME LAWS.

Columbus, Ohio, February 27, 1946

Hon. H. A. Rider, Conservation Commissioner, Division of Conservation and Natural Resources
Columbus, Ohio

SYLLABUS:

1. The game laws of this state, Section 1390, at seq., General Code, do not prohibit the hunting, taking or killing of fox at any time.
2. The law enforcement officers of the Division of Conservation and Natural Resources have no duty or authority respecting violations of laws other than game laws.

Dear Sir:

This will acknowledge receipt of your communication which reads as follows:

“Section 1391 of the General Code of Ohio reads in part as follows:

‘Hunting a wild bird or wild quadruped on Sunday and the use at any time of a rifle in taking migratory game birds is prohibited.’

House Bill No. 41, passed June 28, 1945 and approved July 10, 1945, amended Section 1390 of the General Code of Ohio by removing fox from the definition of fur-bearing animals. It also amended Section 1396 by removing fox from the fur-bearing animal classification. Section 1396 was also amended to read in part as follows:

‘Nothing in this act shall be construed as making lawful the destruction of fox dens or the hunting, taking or killing of fox on Sunday.’

This new legislation has resulted in a difference of opinion among the personnel of our Law Enforcement Section as to whether it is now lawful or unlawful to hunt, take or kill fox on Sunday.

For the purpose of clarifying this misunderstanding, your formal legal opinion is requested, setting forth the section of law which would be violated in case the above mentioned Sunday hunting is unlawful, and whether or not the law enforcement officers of this Division would have authority to make arrests for such Sunday hunting."

As indicated in your inquiry, the questions asked by you have arisen because of the amendment of Section 1390 and Section 1396, General Code, by House Bill No. 41, enacted by the Ninety-sixth General Assembly. This act contained an emergency clause, and by reason thereof became effective July 10, 1945.

Section 1390, General Code, defines various terms used in the statutes comprising Chapter 28 of Part 1, Title I (Division of Conservation) of the laws of Ohio, and the only amendment of that section by House Bill No. 41 was the elimination of the term "fox" in the definition of "fur-bearing animals." That term is now defined as including "mink, weasel, raccoon, skunk, opossum, muskrat and beaver."

Section 1396, General Code, was amended by House Bill No. 41 in three particulars, only two of which are of importance to our inquiry. One of the amendments was the insertion of the paragraph reading:

"Nothing in this act shall be construed as making lawful the destruction of fox dens or the hunting, taking or killing of fox on Sunday."

The other amendment of importance was the elimination of any reference to the fox from the schedule in part "C" of Section 1396, General Code. As it stood prior to this amendment that section had provided an open season for Red Fox from November 15 to January 15 in both the Inland and the Lake Erie Trapping districts, and had provided that there be no closed season on Grey Fox. 120 Ohio Laws, 219.

It is within the legislative power to define the sense in which words are employed in a statute, and whenever that power is exercised the lawmaking body's own construction of its language, by means of defini-

tions of the terms employed, should be followed in the interpretation of the act or section to which it relates and is intended to apply. See 37 O. Jur., 526 and 536. Therefore, in construing the language of the paragraph evoking your inquiry, we give each word or phrase therein the meaning ascribed it by the Legislature.

Furthermore, it should be borne in mind that the violation of the game laws of this state is a misdemeanor, and penal statutes are always strictly construed.

Taking, then, the language of the first mentioned amendment to Section 1396, General Code, and applying to each phrase thereof the meaning prescribed by the enacting body, we can deduce the legislative intent of the enactment.

The paragraph begins with the words, "Nothing in this act shall be construed as making lawful." The obvious meaning of this wording is not to prohibit the acts, specified, but simply to say that this enactment shall not be construed as abrogating or nullifying any other statute which makes the enumerated acts unlawful.

The first act mentioned in the paragraph is "the destruction of fox dens * * * on Sunday." The destruction of dens is defined and prohibited by subparagraph "g" of Section 1396, General Code, and that paragraph was not changed by House Bill No. 41. It reads:

"Destruction of dens: No person shall at any time or in any manner take a *wild bird* or a *wild quadruped* from its nest, house, den or burrow, or destroy such nest, house, den or burrow, or with a spear hunt, pursue, injure or kill any *wild bird* or *wild quadruped* except as otherwise provided in this chapter or commission order then in effect." (Emphasis added.)

That paragraph is applicable to "wild birds" and "wild quadrupeds" as is indicated by the emphasis I have placed upon those terms in the quotation.

Section 1390, General Code, defines those terms as follows:

"Wild birds: Game birds and non-game birds.

Game birds: Pheasants, ruffed grouse, sharptailed grouse, pinnated grouse, Hungarian partridge, Chukar partridge, woodcock, black-breasted plover, golden plover, Wilson's snipe or

jacksnipe, greater and lesser yellowlegs, rail, coot, gallinule, duck, goose and brant.

Non-game birds: All other wild birds not included and defined as game birds.

Wild quadrupeds: Game quadrupeds and fur-bearing animals.

Game Quadrupeds: Hare or rabbit, gray squirrel, black squirrel, fox squirrel, red squirrel, ground hog or woodchuck, deer and bear.

Fur-bearing animals: Mink, weasel, raccoon, skunk, opossum, muskrat and beaver."

I have pointed out above that the term "fox" was deleted from the definition of fur-bearing animals by House Bill No. 41. Since the fox is not within the prohibition of subparagraph "g" of Section 1396, General Code, we must seek other specific prohibitions in order to find that the destruction of fox dens on Sunday, or for that matter on any week day, is unlawful. An examination of the entire Chapter 28 discloses the only other reference to Sunday is that mentioned in your inquiry. It appears in Section 1391, General Code, and is as follows:

"Hunting a wild bird or wild quadruped on Sunday and the use at any time of a rifle in taking migratory game birds is prohibited.

We have already seen that the fox is not included within the definition of wild bird or wild quadruped and it therefore follows that the provision of Section 1391, General Code, just quoted, is not applicable because, like the provisions of subparagraph "g" of Section 1396, *supra*, it is limited to the enumerated subjects.

Furthermore, such limitation appears in the application of the other terms used, namely, "hunting" and "taking." Those terms are defined by Section 1390, General Code, in the following words:

"Hunting: Pursuing, shooting, killing or capturing wild birds or wild quadrupeds and all other acts such as placing, setting, drawing or employing any device commonly used to kill or capture wild birds or wild quadrupeds whether they result in such killing or capturing or not; every attempt to kill or capture and every act of assistance to any other person in killing or capturing or attempting to kill or capture wild birds or wild quadrupeds."

“Take or taking: Includes pursuing, shooting, hunting, killing, trapping, angling, fishing with a trot line, or netting any clam, mussel, crayfish, aquatic insect, fish, frog, turtle, wild bird or wild quadruped, and any lesser act, such as wounding, or placing, setting, drawing, or using any other device for killing or capturing any such wild animal, whether it results in such killing or capturing or not; includes also every attempt to kill or capture and every act of assistance to any other person in killing or capturing or attempting to kill or capture any such wild animal.”

In connection with the definitions contained in House Bill No. 41, it is interesting to note that there was attached to said act an emergency clause, reading as follows:

“This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety. The reason for such necessity lies in the fact that the increased numbers of red and grey fox have made them a public menace. Therefore this act shall go into immediate effect.”

This description of the fox as a “public menace” is now the only description of such animal in the entire chapter.

Therefore, in answer to the first part of your inquiry, you are advised that in my opinion the fox being neither a wild quadruped nor game quadruped, a fur-bearing animal nor a wild animal, as those terms are defined in Section 1390, General Code, there is no provision in Chapter 28 of the laws of this state relating to the Division of Conservation and Natural Resources which makes it unlawful to pursue or kill a fox at any time, including Sundays.

The latter part of your inquiry relates to the enforcement of any other law respecting the pursuing or killing of a fox on Sunday. Section 1441, General Code, prescribes the powers and duties of the Division of Conservation and Natural Resources. That section reads in part:

“The law enforcement officers of the division of conservation and natural resources shall be known as game protectors. The commissioner, game protectors, and such other employes of the division as the commissioner may designate, and other officers as are given like authority, shall enforce all laws pertaining to the taking, possession, protection, preservation, management and propagation of *wild animals* and all commission orders then in effect.”

(Emphasis added.)

A wild animal is defined by Section 1390, General Code, as follows :

“Clam or mussels, crayfish, aquatic insects, fish, frogs, turtles, wild birds and wild quadrupeds.”

As I have already pointed out, the fox is not a wild animal within the purview of Section 1390, General Code, and since the law enforcement officers of your division have only such authority as is specifically delegated to them by law, it of course follows that they have no duties or authority relating to violations other than those pertaining to the taking, possession, protection, preservation, management and propagation of wild animals, and valid commission orders then in effect.

While it is conceivable that one engaged in the eradication of fox or the attempt to do so, or one engaged in simply running of fox, by use of dogs or otherwise, might during such occupation violate some law of this state such for example as committing a trespass, yet we must bear in mind that it is not the act of eradication or running of the fox that would be punishable, but the act of committing the trespass, or other violation. Since, as stated above, the law enforcement officers of the Division of Conservation have no duties or authority respecting violation of laws other than those pertaining to wild animals as defined in Section 1390, General Code, I do not feel it would be proper for me in this opinion to speculate upon what offenses might or might not arise under other provisions of law as simply incidental to the eradication or running of fox.

This reasoning is particularly applicable to those statutes appearing under the heading of Desecration of the Sabbath, Section 13044, et seq., General Code. Whether or not the eradication of a “public menace” on Sunday is a violation of law is a matter not necessary to be considered here. Suffice it to say that I find no authority in law for the game protectors to proceed against any person violating these statutes.

Therefore, in specific answer to your inquiry you are advised that in my opinion nothing in Sections 1390, 1396 and related sections of the General Code makes it unlawful to eradicate or run fox at any time, including Sundays.

Furthermore, that since the fox is no longer afforded the protection of the game laws of this state, the law enforcement officers of the

Division of Conservation have no duties or authority respecting violations of laws, other than game laws, which may incidentally arise by reason of the act of eliminating or running of fox.

Respectfully,

HUGH S. JENKINS.
Attorney General.