

795.

FISH AND GAME—KILLING OF GROUND HOGS—HUNTER'S AND TRAPPER'S LICENSE NOT NEEDED—SECTIONS 1390 AND 1431 G. C. CONSTRUED.

SYLLABUS:

Killing of groundhogs is not hunting game quadrupeds within the meaning of Sections 1390 G. C. and 1431 G. C. for which a Hunter's and Trappers's License is required.

COLUMBUS, OHIO, October 8, 1923.

Department of Agriculture, Division of Fish and Game, HON. D. O. THOMPSON, Chief, Columbus, Ohio.

DEAR SIR:—You request the opinion of this department on the following question:

Is it necessary under the fish and game code for a person, who is killing groundhogs on premises other than those which he controls by ownership, lease or rental, to have a hunter's license?"

The fish and game laws were amended, revised and codified in an act passed March 10, 1919, 108 O. L., Part I, 577.

Section 1390 G. C. defines many terms as they shall be applied in the fish and game code. Game is defined as "Loth game quadrupeds and game birds;" game quadrupeds as "hare or rabbit, gray squirrel, fox squirrel and deer;" quadrupeds, as game quadrupeds and fur-bearing animals;" and fur-bearing animals as "fox, mink, raccoon, skunk, muskrat, opossum." Hunting is defined as "pursuing, shooting, killing, capturing and trapping game birds or quadrupeds, etc."

The groundhog or woodchuck does not come within the definitions found in Section 1390 G. C. no: do the sections of the fish and game code otherwise mention it, although section 1410 G. C. provides a bounty for certain other animals when killed. Section 5824 G. C. under the sub-title "Pests" reads:

"Whoever kills a woodchuck or groundhog, between the first day of March and the first day of November, on taking the scalp of such animal to the clerk of the township wherein it was killed, shall receive a certificate of ten cents for each scalp so produced."

This statute regards this animal as a pest. It places the open season on it of sufficient length to cover its normal period of activity. The groundhog or woodchuck is the North American marmot, and hibernates, laying up in his burrows, which are quite extensive, dry grasses on which he feeds until his hibernating torpor begins. The legend or folk lore story making him prognosticate the continuance of winter by his returning to his burrow to continue his torpor upon seeing his shadow at noon on the second day of February, is an interesting bit of superstition of primitive America.

Section 1431 G. C., provides:

"No person shall hunt, pursue or kill with a gun any wild bird or wild animal, or take, catch, or kill any fur-bearing animals, by the aid or use of any trap or other device, within the state, without first having applied for and received a hunter's and trapper's license as required herein. * * *

The phraseology here quoted as found in this section was copied into the code from the former statute, but the terms used in this sentence of the statute must now be given the construction required by the definition found in section 1390.

Hunting is defined to mean, pursuing, shooting, killing, capturing and trapping game birds or quadrupeds. Quadrupeds as defined, leaves out many four footed common wild animals found in Ohio. Among those excluded are the weasel, the rat, the mouse, the groundhog and the ground mole.

A license to hunt and trap is a permit to lawfully do, within the time or open season fixed in the code, an act that would otherwise be illegal.

From what has been said it seems certain that no license is required to make killing of the groundhog lawful from March 1 to November 1, or perhaps at any, time of the year. It would be a queer circumstance if one were to pay a fee to lawfully do what the statute may require the public treasury to pay him for doing; that is, require a person to pay a license to kill groundhogs for whose scalps that person may collect 10 cents each from the township in which he killed the groundhogs as pests.

In a case reported in Ohio Law Abstract of date May 16, 1923, entitled *Fenner v. State* in the Court of Appeals, Fourth District, Pike County, decided April 17, 1923 the first and second part of the syllabus reads as follows:

"1. A hunter's license, as required by section 1431, is intended to apply only to one who hunts in the usual and ordinary acceptance of the meaning of hunting as contemplated by a hunter's license, and which is ordinarily and usually understood to mean one who hunts for sport, pleasure or profit, and that the legislature did not intend that one should be required to purchase a hunter's license before he could pursue and kill a fur-bearing animal that was injuring property or had become a nuisance.

2. Under section 1398, a person can pursue and kill, at any time, except Sunday, fur-bearing animals which are injuring his property, or which have become a nuisance."

Fenner was charged in the affidavit with shooting fox without first procuring a hunter's license. The affidavit discloses that Fenner had lost several lambs and chickens which had been carried off by foxes, various neighbors had lost chickens in the same manner. Fenner discovered a fox den on an adjoining farm owned by Jones. Jones not only authorized Fenner to kill the fox for him but also offered to pay Fenner for killing this destructive animal. Fenner was tried and convicted in the Justice's Court and judgment was affirmed by the Court of Common Pleas and both were reversed in the Court of Appeals.

It is important to note that the fox is one of the fur-bearing animals named in the game code, which by being destructive of property may be killed at any time, except Sunday; while the groundhog is denominated a pest upon whose head between March 1st and November 1st a bounty is placed to be paid out of the public treasury when a fund is on hand for that purpose. The fox puts himself outside the protection afforded by the game code only when he is destructive of property, while the groundhog from March 1st to November 1st of each year is considered a pest. The word pest is defined in the dictionary as "plague," "nuisance."

Section 5824 G. C. calls the groundhog a pest or "nuisance" and encourages his destruction from March 1st to November 1st, by payment of a bounty for his scalp taken between those dates. In the security of his extensive burrows, during his hibernation, often under frozen earth, in the season from November 1st to March 1st, he is rarely if ever seen and not easily then killed or taken. His torpor in winter or from November 1st to March 1st, prevents his destroying property during that time, thus eliminating to some extent the nuisance he is, without preventing the nuisance he will

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: