

ROETZEL *v.* STATE.

Opinion delivered December 15, 1900.

FISH—SIZE OF SEINES.—Construing the act of June 26, 1897, *held*:

- (1) It is not unlawful to use a seine of any length in any of the waters of this state to catch fish where the meshes of such seine are four or more inches square in width.
- (2) One may use a seine not over sixty feet in length, regardless of the size of the meshes, in any unnavigable stream or lake to catch fish for family use or for picnics, and not for sale.
- (3) One may catch minnows to be used for bait or stocking other waters, but for no other purpose, with a seine not to exceed fifteen feet in length. (Page 489.)

Appeal from White Circuit Court.

HANCE N. HUTTON, Judge.

Grant Green, for appellant.

Jeff Davis and *Chas. Jacobson*, for appellee.

WOOD, J. The indictment charges that Frank Roetzel "on the 22d day of December, 1899, in the county of White aforesaid, then and there unlawfully did catch fish with a net in the waters of this state, to-wit: Horseshoe lake, said fish not then and there being caught for family use, nor for a picnic."

There was proof from which the jury might have found that defendant assisted in seining Horseshoe lake with a seine over 60 feet in length, and the meshes of which were less than 4 inches apart; that fish were taken from said lake; and that defendant took two of them home with him. There was evidence also to the effect that the meshes of the seine were 4 inches or over.

The court read to the jury the act of June 26, 1897, and gave the following instructions:

"1. The material allegations in the indictment are that the defendant, Frank Roetzel, in the county of White, on or about the time alleged in the indictment, or within one year next before the filing of the indictment, which was filed in this court on the 23d day of January, 1900, unlawfully caught fish, or aided and abetted or assented to the unlawful catching of fish, in Horseshoe lake.

"2. The first thing for the jury to determine is, did the defendant take fish from Horseshoe lake unlawfully, or aid or assist in doing so? The next question, did the defendant use a seine 60 feet in length? If you so find beyond a reasonable doubt, then the defendant would be guilty.

"3. Meshes 4 inches square applies to a lawful seine, and 60 feet is a lawful seine. Over that length is unlawful.

"4. The jury are instructed that one may use a seine not to exceed 60 feet in length, with meshes not less than 4 inches square, to catch fish for family use, or for picnics, or for stocking other waters or ponds.

"5. The jury are instructed that the use of a seine of more than 60 feet for taking or catching fish is unlawful without regard to the size of the meshes. To the giving of each of which instructions, the defendant excepted separately."

The defendant asked, but the court refused, to instruct the jury, as follows:

"1. Before the defendant, Frank Roetzel, can be convicted of the offense charged in this indictment, it must appear to the jury from the testimony, beyond a reasonable doubt, that the defendant caught fish with a net in Horseshoe lake, in White county, Arkansas, not for family use or picnic, and that the net used by him was so made that the meshes of the net were less than 4 inches square, or that he was aiding or abetting in such fishing."

"2. The court instructs the jury that it is not unlawful to catch fish in the waters of this state by use of a seine with meshes not less than 4 inches square."

The first section of the act of 1897 is as follows: "No person shall be allowed to place, erect, or cause to be placed or erected, or maintained in any of the waters of this state, * * * any seine, net, etc., or by any such means to take or catch any fish in the waters of this state. * * * Provided, further, it may be lawful to use a very small seine not to exceed 15 feet, for catching very small fish, usually called minnows, which may be thus caught to be used for bait or for stocking other waters with fish, but for no other purposes. * * * Provided, further, it shall not be unlawful for any person or persons to use a seine with meshes not less than 4 inches square in width, and any person using a seine with meshes less than 4 inches in width shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than twenty-five dollars nor more than fifty dollars, etc.* * * Provided, further, it shall not be unlawful for any person or persons to use a seine or net not exceeding 60 feet in length in any unnavigable stream or lake in this state to catch fish for family use, or for picnics, and not for sale," etc.

The circuit court erred in its charge. It is not unlawful to use a seine of any length in any of the waters of this state to catch fish where the meshes of such seine are 4 or more inches square in width. One may use a seine not over 60 feet in length, regardless of the size of the meshes, in any unnavigable stream or lake to catch fish for family use, or for picnics, and not for sale. One may catch minnows to be used for bait or stocking other waters, but for no other purpose, with a seine not to exceed 15 feet in length.

The court should have granted appellant's prayer for instruction numbered two.

Reversed and remanded for a new trial.

BATTLE and HUGHES, JJ., not participating.
