

OPINION
48-72

August 18, 1948 (OPINION)

GAME AND FISH

RE: Form of License

I am in receipt of your letter dated August 17, 1948, relative to the issuance of certain types of licenses under the provisions of chapter 20-03 of the North Dakota Revised Code of 1943.

In your letter it is stated:

"The county auditor or his agent will be asked for a nonresident fishing license, and in the event that he is out of them will accept the out-of-state license fee and issue a resident fishing license, writing across the top of it 'Nonresident.' There is no question of the honesty of the agent as in every case that we know of, he collects the prescribed fee for the nonresident license and marks it as a nonresident license remitting the money that he collects.

"It does present a problem for our bookkeeping department and is abhorrent to the State Board of Auditors when they come to check our records.

"The question that I raise is that of whether or not a resident license changed by an agent to read 'Nonresident' is a legal license. We are willing to provide these agents with regularly printed nonresident license books at any time and in any quantity that they desire. We have cautioned them about doing this, but apparently we are going to have to do more to stop this practice.

"If in your opinion the agent's changing of resident licenses would make them invalid, I am sure that their being appraised of that fact would stop this practice."

The particular statute with which we are here concerned is section 20-0309 of the North Dakota Revised Code of 1943, and it provides in part as follows:

"A nonresident hunting, trapping, or fishing license shall not be transferable. Each such license shall:

1. * * *
2. * * *
3. * * *
4. Have printed upon it in large letters the words 'nonresident license';
5. * * *

6. * * *

7. * * *

The first question to be determined is whether or not the statute above quoted is mandatory or merely directive, for if it should be determined that it was a mandatory statute then the failure to comply strictly with its provisions would render the action absolutely void. However, without hesitation, we hold that the statute is directive only and by way of explanation it might be well to point out that a "mandatory" provision of a statute is one, the omission to follow which renders the action to which the provision relates illegal and void, and a "directory" provision is one the observance of which is not necessary to the validity of the action.

By "directory provision" is meant that they are to be considered as giving direction which ought to be followed and statutory requirement for the guide of officers in the conduct of business and designated to secure order and system are "directory." Furthermore, it has been held by the courts that such statutory provisions should be construed as "directory" where no injury will result.

There is not other aspect which should be taken into consideration in arriving at a logical conclusion and that is the holding of the courts to the effect that there the holder of a license is without fault, he is entitled to protection in equity in the exercise of the conferred privileges for the period of his permit.

In this case the people who would be concerned are nonresidents who in good faith have paid the required fee and received from a duly authorized person a license for a certain privilege. The nonresident has fully complied with the law. He is without fault and should not thereafter be taken by surprise to find the license he holds is void because the form used by the agent does not strictly comply with the statute. Equity would uphold and protect him and rightfully so.

Hence, it is the opinion of this office that a form for a resident license when changed by an agent to read "nonresident" is a legal license and confers upon the holder thereof all the rights and privileges he is entitled to as the holder of a nonresident license.

NELS G. JOHNSON

Attorney General