

OPINION
51-69

May 14, 1951 (OPINION)

GAME AND FISH

RE: Procedure on Seizure of Property Unlawfully Used in Taking Game

Your letter of May 10 re above matter has come to my desk.

You ask for the proper procedure of a warden on seizure of property unlawfully taken or used in the taking of fish or game, especially in view of H.B. 694, which amends section 20-1001 N.D.R.C.

Section 20-1001 as amended sets forth particularly what may be seized, so there is no reason to set the same forth herein. This part of the section remains as it was before the amendment. The amendment relates only to the disposition to be made of the offender and the property seized.

The amendment provides that the officer making the confiscation "shall forthwith bring the person possessing or transporting" the property seized before a court of competent jurisdiction for the purpose of determining the disposition of the property seized. Since the penalty for violation of game laws, unless specifically otherwise provided, is a fine of not to exceed \$100, or imprisonment in the county jail not more than thirty days, or both, such fine and imprisonment (section 20-0124 N.D.R.C.), the court having jurisdiction before whom the offender and property seized must be taken forthwith is any justice court of the county wherein the seizure is made, since the offense is within the jurisdiction of such court (section 33-0108 N.D.R.C.).

The amendment further provides that "if it is not feasible to bring such person before the court forthwith, the property shall not be seized or confiscated if the person possessing or transporting the same will give a receipt to the officer assuring delivery before the court at such time as the matter may come up."

It would seem that this section gives the warden the discretion as to whether the offender and the property seized shall be taken forthwith before the justice court, or whether he shall take the receipt provided for by the amendment and allow the offender his liberty until required to appear at the time and place fixed by the receipt. Probably, in most cases, it would be preferable to take the receipt, as otherwise the warden would be taken from the field and might be unable to apprehend other violations in the same locality.

Of course, no confiscation can occur unless and until the offender has actually been convicted, either by plea of guilty, or upon trial. Therefore, the first thing for a warden to do when taking the offender before the court forthwith after his apprehension, or upon meeting him before the court at the time fixed by the receipt, is to make a formal complaint before the court of the violation. The procedure of trial is the ordinary procedure in justice court in

other criminal cases. Since the justice has jurisdiction over these violations, he must proceed to trial in the ordinary way. The question of confiscation may not be inquired into unless the offender is adjudged to be guilty, and sentence has been imposed.

If a judgment of guilty is entered, the warden should formally state to the court that he found the seized property in the possession of the offender and that the same is subject to confiscation as provided by chapter 20-10 N.D.R.C.

As section 20-1003 provides that an order of confiscation may be made only after a hearing duly had upon proper notice to the owner and after due and proper finding by the court that such property:

1. Was taken, killed, possessed, or being transported contrary to law by the person from whom it was seized;
2. Was being used in violation of any of the provisions of this title (title 20 N.D.R.C.) at the time it was seized;
or
3. Had been used in violation of any of the provisions of this title (title 20 N.D.R.C.) within six months previous to the time it was seized.

This section is rather vague and we can only surmise the proper procedure required by it. The essentials of a confiscation are:

1. A conviction of the alleged offender against the game laws.
2. An allegation that the property seized was unlawfully used.
3. Notice to the offender that a hearing will be had to determine the right to confiscation and the disposition of the property. Such notice must fix the time and place of hearing.
4. A due and proper finding by the court that the property was subject to confiscation for some reason prescribed by section 20-1003.
5. An order that the same be confiscated, and sold or otherwise disposed of as provided by said chapter 20-10.

It is our opinion that the matter of confiscation be handled by the justice as a wholly separate matter from the trial and conviction. He should make a docket entry in an informal manner that the warden charges that the property (describing it) was used illegally by the person convicted. He shall then inform the offender of such charge, and by an order entered in his docket and then and there orally communicated to the offender that the matter of confiscation will be heard by the court at a time and place fixed by such order. The offender should be informed that he may have time to procure an attorney to represent him if he so desires. The docket should show that such information was given the offender.

At the time and place fixed by such order the court should hear

evidence concerning the matter and from such evidence enter such order in his docket as may be found by him to be just. Such order, if for confiscation, should describe the property to be confiscated and the disposition to be made thereof. The manner of sale is provided by section 20-1004, which is specific as to procedure.

Section 20-1005 provides that perishable property seized maybe sold without an order of court. It would seem, then, that the warden should sell game or fish seized for "the highest price obtainable" and that he should deposit the proceeds in the court where the matter is pending. And, of course, the warden should retain possession of the game or fish seized to enable him to make sale. The proceeds would be held by the court pending his final disposition of the matter. The court should give the warden a copy of his final order as his authority to proceed with the carrying out of the order.

If the offender fails to appear as required by the receipt, a formal complaint of the game violation should be made, a warrant issued, and the offender brought before the court. Then would follow the proceedings outlined above.

It is our opinion that by the amendment of section 20-1001, section 20-0337 is not in any way affected. Upon entry of a judgment of conviction, the court should also enter an order forfeiting the license violated.

We suggest that you have a proper form of receipt prepared for use by your wardens in making seizures.

ELMO T. CHRISTIANSON

Attorney General