

Opinion No. 185.

**Fish and Game—Game Warden—
Deputy Game Wardens, Powers of—
Search and Seizure—Arrest—Viola-
tions of Game Laws.**

HELD: 1. Before he may stop a vehicle on the public highway for the purpose of checking same for game, a deputy game warden must have reasonable cause to believe that the game laws have been violated. He may, in such a case, act without a search warrant.

2. The deputy may use such reasonable physical force as may be necessary and may pursue the vehicle and bring it to a halt, but he may not seriously injure or endanger the life of the fleeing misdemeanant except in self defense.

October 9, 1935.

Mr. Kenneth F. MacDonald
State Fish and Game Warden
The Capitol

You have submitted the following:

(1) What authority has a deputy game warden to stop a car on the public highway for the purpose of checking same for game; (2) what authority has a deputy in the event a party driving a car or truck refuses to stop at command, where there is reasonable belief that said party is in illegal possession of fish or game.

In regard to your first question, I call your attention to Section 3659 R. C. M. 1921, as amended by Section 5, Chapter 192, Laws of 1925, which provides: "* * * deputy state fish and game wardens * * * shall have authority to make a search, when they

have reasonable cause to believe that any of the game, fish, birds, or quadrupeds, or any parts thereof, have been killed, captured, taken or possessed, in violation of the laws of this State, and without search warrant, to search any tent not used as a residence, boat, car, automobile, or other vehicle, box, locker, basket, creel, crate, gamebag, or other package and the contents thereof to ascertain whether any of the provisions of the laws of this State or the rules and regulations of the Fish and Game Commission for the protection, conservation or propagation of game and fish or game birds or fur-bearing animals have been violated, * * *." It will be observed that the condition upon which such search may be made is that a deputy state game warden shall have reasonable cause to believe that the game laws as stated in said section have been violated and that he may then act without search warrant.

In regard to your second question, said Section 3659, as amended, also provides that deputy game wardens shall have the power "to arrest without warrants any persons committing in their presence any offense against the Fish and Game Laws of the State of Montana, or against any orders, rules and regulations of the Commission violation of which has been made a misdemeanor by the provisions of this Act, and to arrest without warrant any person who they have reasonable and probable cause to believe has committed any such offense and to take such person immediately before a magistrate having jurisdiction of the same, and to exercise such other powers of peace officers in the enforcement of the Fish and Game Laws of the State, and the orders, rules and regulations of the Commission, or of judgments obtained for the violation thereof, not herein specifically provided."

In making such search and such arrest, as provided for in this section, a deputy game warden may use such reasonable physical force as is necessary to accomplish such purpose, but since the offense is a misdemeanor they do not have the right, except in self-defense, to seriously injure or kill the one attempted to be arrested,

merely to prevent his escape. (People v. Lathrop, 49 Cal. App. 63, 192 Pac. 722; Wharton's Criminal Law, 12th Ed. Vol. 1, Section 532; State v. Phillips, 119 Iowa 652, 67 L. R. A. 292 and case note p. 298; 5 C. J. 426, Section 62.)

It has been said that since the taking of human life in the name of the law is the punishment inflicted after conviction of the highest grade of felony, it would ill become the law to justify such a sacrifice to avoid a failure of justice in not arresting one charged with a misdemeanor, when, if taken and convicted, a sentence of fine and imprisonment only could be imposed. (Commonwealth v. Rhoads, 23 Pa. Super. Ct. 512; State v. McClure, 166 N. C. 321, 330, 81 S. E. 458; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854, 29 Am. St. Rep. 68, 15 L. R. A. 558.)

It has been held by some courts that a peace officer in attempting to make an arrest for an offense less than a felony has no right to discharge firearms, where such may jeopardize the life of the person sought to be arrested, or the lives of innocent bystanders, unless the offender places the officer in danger of his own life or great bodily harm. (Pamplin v. State, 21 Okla. Cr. 136, 205 Pac. 521; Graham v. State, 31 Okla. Cr. 125, 237 Pac. 462; Whitford v. State, 35 Okla. Cr. 22, 247 Pac. 424; North Carolina v. Gosnell, 74 Fed. 734, 738; State v. Cunningham, (Miss.) 65 So. 115, 117, 51 L. R. A. (n. s.) 1179.) In the latter case the court said: "The officer owes to the fugitive the duty to exercise care and precaution not to injure him. He must not intentionally shoot a misdemeanant who is a fugitive, nor must he discharge a fire arm while in pursuit, in such a manner as to cause such fugitive injury."

If a deputy game warden has reasonable cause to believe that the law is being violated as stated in Section 3659, as amended, and set out herein, he would have the right to pursue the automobile in question, so long as he does not endanger life, and upon bringing the fleeing automobile to a halt to make the necessary search. (U. S. v. Kaplan, 286 Fed., at page 974; Cornelius on Search and Seizure, 132, 210.)

The rules above stated apply in cases of misdemeanor where an arrest is made without a warrant. Where an arrest is made by an officer under authority of a warrant, Section 11760 R. C. M. 1921 applies. This section reads: "When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest."