

**OPINION
69-73**

November 21, 1969 (OPINION)

Mr. Calvin N. Rolfson

Pembina County State's Attorney

RE: Civil Procedure - Juvenile Court - Confiscation of Property

This is in reply to your letter of November 13, 1969, with regard to jurisdiction of the juvenile court over confiscations pursuant to Chapter 20-10 of the North Dakota Century Code.

Your question is stated as:

"Is the Juvenile Court considered a 'court of competent jurisdiction' so as to enable that court to confiscate property illegally used in the commission of an offense against the game and fish laws of the State of North Dakota, as set out in Section 20-10-03 of the North Dakota Century Code? Also, referring to the two sections above quoted, would the juvenile courts of the State of North Dakota in any way be prevented from exercising the confiscation provisions of Chapter 20-10 of the North Dakota Century Code?"

We note the provision of section 20-10-01 of the North Dakota Century Code, which section is quoted in your letter that:

"* * * All property so seized shall be held subject to the order of a court of competent jurisdiction. * * *."

We note in regard to this sentence the statement of our Supreme Court in Shaide v. Brynjolfson, 50 N.W.2d. 500, 78 N.D. 531 (at pages 538 and 539 of the North Dakota Reports) that:

"* * * Until such order of a court of competent jurisdiction was duly made and entered, the rifle in question, being held subject to the making of such order, was 'in custodia legis' and plaintiff could not maintain an action in claim and delivery for the return of the rifle to him.

"In view of the facts in this case and the provisions of the statute above referred to, it is not necessary for this court to determine the appearance and personal presence of the defendant, Guy Shaide, at the hearing in connection with the disposition of the gun, was a voluntary appearance or not, or whether his actual presence and participation of the hearing waived the provisions of Section 20-1003 as to the proper notice and proper findings.

If it be conceded, as it must be, that there was no proper notice of hearing to Mr. Shaide, and that there was no due or proper findings made by the court, and that his personal presence and participation in the hearing was not a waiver of the requirements of the statute, yet the plaintiff could not

maintain his action in claim and delivery on the date it was commenced for the reason that he was not entitled to the immediate possession of the rifle at that time.

"Assuming that the proceedings with reference to the disposition of the gun were wholly null and void and of not effect, the Commissioner would still be entitled to the possession of the gun even under the plaintiff's theory of the case, to wit, that the confiscation does not take place until an order is made by the court."

On such basis we are constrained to the viewpoint, that once the game warden has properly seized the property, in question, it will properly remain in the hands of the game and fish department until a court order is secured either directing its return or other disposition, (unless, of course, the receipt provided for in section 20-01-01 of the North Dakota Century Code is given under the circumstances there provided for).

We note further that the statutory provision predicates the seizure upon the fish or game being taken, killed, or possessed, or transported contrary to law, and the other property seized being unlawfully used, or held with intent to be unlawfully used, in pursuing, taking or attempting to take, concealing, or disposing of wild birds, wild animals or fish of any part thereof. While it might be conceivably argued that at appropriate age a child being subject only to the jurisdiction of the juvenile court could not be convicted of crime, this would appear to be irrelevant to the only question raised in said section 20-10-01, i.e., whether the action of the child was "unlawful." Section 20-10-03 with regard to the order of sale is predicated upon action contrary to law, or use in violation of any of the provisions of Title 20 of the North Dakota Century Code, not on the premises of a conviction of crime.

While in the usual instance the judicial determination that there was action contrary to law or use in violation of any of the provisions of title 20 would be predicated upon proceedings to determine the guilt or innocence of crime, there is not express provision in said Chapter 20-10 requiring that such determination be so predicated.

Chapter 27-20 of the 1969 Supplement to the North Dakota Century Code definitely does make provision for the determination of whether the child has committed a "delinquent act" as that term is defined in subsection 2 of section 27-20-02 of the 1969 Supplement to the North Dakota Century Code. We find no reason to distinguish between such determination that the child has or has not committed a delinquent act and the determination that an individual has or has not committed a crime, for purposes of Chapter 20-10 of the North Dakota Century Code, in arriving at the ultimate conclusion thereunder that the property was taken, killed, possessed or transported contrary to law, or was being used or had been used in violation of any of the provisions of Title 20 of the North Dakota Century Code.

We do not feel that allowing this consequence to attach to the actions of the child would constitute applying any taint of criminality or consequence of criminal behavior to the child within the meaning of section 27-20-01 of the 1969 Supplement to the North

Dakota Century Code, though this consequence might be quite similar to consequences suffered by persons guilty of crime. Also, in this regard, permanent removal of the proceeds of unlawful actions, or equipment used in unlawful actions, by the means provided in said Chapter 20-10 would appear to be a very appropriate part of a program of treatment, training and rehabilitation of a delinquent child as provided for in said Chapter 27-20.

On such basis it is our opinion that while we are not familiar with any adjudicated cases finally determining this question the juvenile court can be considered a "court of competent jurisdiction" so as to enable that court to order sale or return of property used unlawfully in the commission of an offense against the game and fish laws of the State of North Dakota as set out in section 20-10-02 of the North Dakota Century Code and that the juvenile courts of the State of North Dakota may not in any way be prevented from acting as a court of competent jurisdiction in either returning property to the person from whom it was seized or in ordering the Commissioner to sell such property.

HELGI JOHANNESON

Attorney General