



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

October 15, 1975

ATTORNEY GENERAL OPINION NO. 75- 391

Mr. Douglas J. Walker, Jr.
Assistant County Attorney
Douglas County Courthouse
Lawrence, Kansas 66044

Re: Forestry, Fish and Game Commission--Game Protectors--
Trespass

Synopsis: State game protectors do not incur criminal liability for trespass when they enter and remain upon private property without the owner's permission while in the pursuit of their statutory duties.

* * *

Dear Mr. Walker:

You inquire whether a state game protector subjects himself to liability for trespass when he enters and remains upon private property without the permission of the owner thereof, yet while in the pursuit of enforcing the fish and game laws of this state.

It has been generally concluded that law enforcement officers in pursuit of their statutory duties do not commit acts of trespass when they enter upon private property without permission from the owner. 75 Am.Jur.2d. *Trespass* § 43. In *United States v. Capps*, 435 F.2d 637 (9th Cir. 1970), the court concluded:

"When the performance of his duty requires an officer of the law to enter upon private property, his conduct, otherwise a trespass, is justifiable."

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This rule has often been applied without resort to lengthy rationale; e.g., Judge Seth writing for the court in *Schindler v. Michaud*, 411 F.2d 80, 82 (10th Cir. 1969), stated:

"We must conclude that Mr. Erb as a police officer and town marshal had authority to go upon the appellant's property since he was engaged in the performance of his official duties. He was therefore not a trespasser." [*Clews v. People*, 151 Colo. 219, 377 P.2d 125 (1962).]

See also, *Giacona v. United States*, 257 F.2d 450, 456 (5th Cir.), cert. denied, 358 U.S. 873, 79 S. Ct. 113, 3 L. Ed. 2d 104 (1958). Accord, *U.S. v. Stirling*, 369 F.2d 799, 803 (3rd Cir. 1966); *Foster v. U.S.*, 296 F.2d 65 (5th Cir. 1962).

While the rule appears well settled some concern has developed over the application of Kansas' criminal trespass statute. Earlier this office issued an opinion dated September 6, 1963, addressed to Mr. Noel Mulledore, examining ostensibly the same issue but in light of a then existing statute broadly proscribing certain conduct related to trespass, K.S.A. 32-142; repealed chapter 180, Laws of 1969. However, criminal trespass is now defined in K.S.A. 21-3721:

"Criminal trespass is entering or remaining upon or in any land, structure, vehicle, aircraft or watercraft by one who knows he is not authorized or privileged to do so, and

(a) He enters or remains therein in defiance of an order not to enter or to leave such premises or property personally communicated to him by the owner thereof or other authorized person; or

(b) Such premises or property are posted in a manner reasonably likely to come to the attention of intruders, or are fenced or otherwise enclosed.

Criminal trespass is a class C misdemeanor." [Emphasis supplied.]

The above emphasized phrase manifests an obvious distinction between the authorized individual and one who is not, a distinction which ultimately becomes the key to your question: is the

game protector authorized to enter private property without the owner's permission thereof.

The statute does not provide a definition for "authorized." Absent such provision we resort to the normal or generally understood meaning as defined by *Webster's New Third International Dictionary* (1966):

"authorized":

"1a: to endorse, empower, justify or permit by or as if by some recognized or proper authority;

4a: to endow with authority or effective legal power, warrant, or right: appoint, empower, or warrant regularly, legally or officially;"

In conjunction with this definition it becomes necessary to examine exactly what power the legislature conferred upon the game protector. K.S.A. 1974 Supp. 74-3302 in pertinent part provides:

"State game protectors, sheriffs and deputy sheriffs shall have the power and authority:

(a) To enforce all the laws of the state relating to state parks, recreational and game management areas, game, fish, furbearers, wild birds and wild animals and the rules and regulations of the forestry, fish and game commission relative thereto; (b) to serve warrants and subpoenas issued for the examination, investigation or trial of all offenses against the laws and regulations relating to game, fish, furbearers, wild birds and animals; (c) to carry firearms or weapons concealed or otherwise, in the performance of their duties."

Without question the duties of the game protector anticipate and realistically demand his presence upon all lands within this state¹ wherein "game, fish, furbearers, wild birds and

1. Qualified as to Indian reservations: *Antoine v. State of Washington*, ___ U.S. ___, 43 L. Ed. 2d 129, 95 S. Ct. ___, 43 U.S.L.W. 4257 (February 19, 1975); See also, Kansas Attorney General Opinion No. 75-209, dated May 12, 1975, and addressed to Governor Robert F. Bennett.

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wild animals" may be found. And to this end we opine that the legislative intent to empower game protectors with such authority as will meet the above definition for "authorized" becomes at once patently clear. Accordingly, it is the opinion of this office that the legislature has granted to game protectors that statutory authority which effectively renders K.S.A. 21-3721 by its own terms inoperative. This, coupled with the general rule as outlined, *supra*, leads this office to the conclusion that game protectors in pursuit of their statutory duties do not subject themselves to criminal liability for trespass where they enter and remain upon private property without the consent of the owner thereof.

Yours very truly,



CURT T. SCHNEIDER
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