# STATE OF MAINE

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# REPORT

OF THE

# ATTORNEY GENERAL

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for the calendar years

1943--1944

statute are subject to the individual order or request of Joseph H. McGillicuddy, Treasurer of State?

The answer to this must be in the affirmative. The Treasurer of the State of Maine is sole custodian of its funds. He has the power and responsibility of depositing said funds, and of changing such place of deposit as his judgment dictates.

Very truly yours,

FRANK I. COWAN
Attorney-General

October 14, 1943

Hon. Sumner Sewall, Governor — Executive
Attention: Miss Whelpley

*Incompatibility of Certain Offices*

*Question.* Is the office of deputy sheriff incompatible with the holding of a commission as notary public, under the Constitution of the State of Maine?

*Answer.* It is.

The office of deputy sheriff is a part of the executive division of our government. The holder of a commission as notary public exercises some of the functions of the judiciary under the judicial branch of our government. Therefore, it being expressly stated in the Constitution of Maine that there shall be separate and distinct branches of government, the exercise of the functions of more than one branch of our government by one individual is incompatible.

JOHN G. MARSHALL
Deputy Attorney-General

October 29, 1943

Daniel T. Malloy, Chief Warden — Inland Fisheries and Game

You have inquired about the rights of the wardens to use certain methods to stop cars on the highways, the owners, operators or occupants of the same being under suspicion of having violated the fish and game laws of the State. The officers would be taking considerable personal risk if they undertook to obstruct the highway by placing any object in the highway which might be struck by a person, and particularly a person who himself had not violated any law.

At the outset, it should be stated that the officer is always liable for civil wrong committed in exceeding his authority in making arrests, whether it be for making the arrest in the first place, without the use of force, or in making a perfectly proper arrest, but in the latter instance, of using excessive force. In a government of this kind in which we live, the rights and liberties of citizens are jealously guarded, and one court has written that it is better that a hundred culprits escape than that the rights and liberties of one individual should be illegally abused. Yet officers of the law are charged with the specific duty, and of course, they must take some risks themselves in the exercise of this duty. The manner in which they attempt to enforce the law is dependent, in the first instance, on whether the offense committed is a misdemeanor or a felony.

Our courts are bound by the acts of the legislature in determining whether or not an act is a felony or a misdemeanor. The legislature has said that any offense punishable by imprisonment for less than twelve months is a misdemeanor, and all offenses, the punishment for which is for a longer period than twelve months, are felonies.

Generally speaking, violations of the fish and game laws would be classified as misdemeanors, except in those cases where the violation of the fish and game laws also involves a violation of law which might be a felony, and the latter type of case would be that in which life and limb were involved.

Except in cases of self-defense, an officer has no right to proceed to the extremity of shedding blood in arresting, or in preventing the escape of one whom he has arrested, for an offense less than a felony, even though the offender cannot be taken otherwise. This gives rise to the question: What could a warden rightfully do in a case where he was attempting to investigate a fish and game violation and was confronted with danger on the part of the violator to the warden's own life and limb? If the violator of the law attacks the warden to the point where it amounts to assault with a criminal intent to inflict bodily harm upon the warden, then the case comes out of the classification of a violation of the fish and game laws and becomes a different offense, which would then give the warden the right to use such force as is reasonably necessary to subdue and arrest the violator.

In cases of misdemeanors, or cases where the warden reasonably believes that an offense is being committed in his presence, such as hunting at night, illegally transporting game, and other similar cases, the warden is entitled to make an arrest without a warrant; but in cases where violations involving the fish and game laws are reported to him and, after a reasonably prudent investigation, the warden believes that such a violation can be proved in court, he should then obtain a warrant before making the arrest, as the misdemeanor was not committed in his presence.

In cases involving the use of automobiles by alleged violators of the law, the statute now provides that it is a misdemeanor on the part of the operator to refuse to stop when signalled by the warden. If the operator does not stop when so signalled, and the warden believes that only a misdemeanor has been committed, the only thing a warden can do is to obtain the number of the registration of the car, and from there undertake to determine the name of the operator and proceed under that statute. The warden would not be entitled to use force such as would endanger the life and limb of either the operator or the occupants of the vehicle, in attempting to stop the car; but if the violation of the operator of the car reasonably appeared to be a felony in the mind of the warden, then he could use force to overtake the violator and arrest him or otherwise prevent his escape.

This brings us to the question: What is reasonable belief that a felony has been committed? It must not be a guess, nor idle supposition. The opinion of the warden must be based upon such facts in his possession as would lead him to believe that any reasonable man would

also believe that a felony had been committed. A great deal could be written on this last subject, but probably a discussion with the wardens from time to time would serve in better stead to clarify the meaning of "reasonable belief."

*Self-defense on the part of the warden.* If the officer is assaulted he is not bound to fly to the wall (this means to retreat): but, if necessary to save his own life or to guard his person from great bodily harm, he may even kill the offender; this rule applies, even though the arrest is being made for a misdemeanor.

Aside from the law, in cases involving arrest, the tendency has been to strive to accomplish this end, not by force, but by skill on the part of the officer or investigating authorities. Of course, there have been instances where officers were confronted with dangerous persons, and the danger was so great that all likelihood of arrest was in doubt, to the point that officers knew in advance of the imminent danger occurring when their presence was discovered; but aside from those cases, the officers have been, by constant work and diligent thinking, able to develop and prepare a much better case against the violator than they were with the use of force alone in the first instance.

I realize that this is a very brief discussion of this problem, and, as when we discussed the matter the other day, I believe it would be better to have a discussion with the wardens on this subject at such time or times as small groups of them can get together.

JOHN G. MARSHALL
Deputy Attorney-General

November 3, 1943

Honorable George S. Brown
Brunswick, Maine

Dear George,

I have your letter of October 28th in regard to the Brunswick common. R. S. Chapter 2, section 10, authorizes the federal government to acquire "by purchase, condemnation or otherwise any land in this state required . . . for any of the purposes of government."

It is apparent from this that the government can acquire title to land in the State by condemnation in any case and by purchase where there is authority to give a deed. My feeling in regard to Brunswick Common land is that it has the properties of park land. If so, the Town of Brunswick cannot convey it without specific authority from the legislature, inasmuch as lands dedicated to the public are the property of the whole public, that is, the whole State, and not the exclusive property of the municipality in which they lie.

I find that Ruling Case Law (which is a good law text), volume 20, page 645, section 13, classes squares, parks and commons together and states that they cannot be sold or leased by the municipality, stating further that the legislature has no power "as against the dedicators" to authorize such disposal.