

CONSERVATION : Anyone operating a device consisting of gas motor
COMMISSION : operating a generator producing electric current
FISH AND GAME: connected to submerged wires injuring or killing
CRIMINAL LAW : fish is ^{not} subject to prosecution under Section
252.220, RSMo 1949.

October 23, 1951

11-13-51

Honorable H. F. Owen, Jr.
Prosecuting Attorney
Taney County
Forsyth, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

"Request Official Opinion of your Department regarding whether or not prosecution may be had under section 252.220, R. S. 1949, as to the taking of fish by means of an electrical device.

"This device consists of a gasoline motor operating a generator that produces a current of approximately 110 volts, with the wires being strung from one boat to another boat through the water and across the stream.

"This device is as effective, if not more so, than explosives prohibited under the above section, in taking fish in very great numbers."

Your request requires a construction of Section 252.220, RSMo 1949, which reads:

"1. It shall be unlawful for any person to place any explosive substance or preparation in any of the waters of this state, whereby any fish which may inhabit said waters may be killed, injured or destroyed; and no person, by any such means, shall kill, catch or take any fish from said waters; provided, however, that explosive substances or preparations may be used in said waters, but only with the permission and under the supervision of the commission.

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"2. Any person violating any of the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be fined not less than two hundred dollars, nor more than one thousand dollars, or by imprisonment in the state penitentiary for not more than two years, or by both such fine and imprisonment for each such offense."

The question you present is whether anyone operating a device consisting of a little gas motor operating a generator which produces current in an amount equal to 110 volts connected to submerged wires strung from one boat to another boat carrying the electricity is violating Section 252.220, supra, and subject to prosecution thereunder. It is conceded that such a device so operated will injure and kill fish.

A primary rule of statutory construction is to ascertain from the language of the act the intent of the Legislature, if possible, and give it that meaning (see *Meyering v. Miller*, 51 S.W. (2d) 65, 330 Mo. 885.).

Section 252.220, supra, to a great extent, is taken from old Sections 8926 and 8927, RSMo 1939, which were outright repealed by the Legislature in the bill containing Section 252.220, supra. Those statutes read as follows:

"The use of dynamite or explosives in any of the waters of this state is prohibited except by the special permission and under the supervision of the state game and fish commissioner, and then only for mining or mechanical purposes, or to recover the bodies of persons. Any person, firm or corporation offending against any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars for each offense."

"No person shall place or use in any of the waters of this state any medical drug, any coccus indicus, or fish berry, or any other poisonous thing or substance, calculated to poison, kill, or injure any fish, nor shall by such means kill, catch or take any fish that may be in said waters, and no person shall place any dynamite, giant powder, nitroglycerin, or any explosive substance

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of which nitroglycerin composes a part, or any other explosive substance or preparation in any of the waters of this state, whereby any fish that may be in said waters may be killed, injured, or destroyed, and no person by any such means shall kill, catch or take any fish from said waters. Any person who shall violate any of the provisions of this section, shall on conviction be adjudged guilty of a felony and punished by imprisonment in the penitentiary for a term not exceeding two years, or by imprisonment in the county jail not less than thirty days, or by fine not less than one hundred dollars (\$100.00), or by both such fine and imprisonment."

It is well established that the presumption is that the Legislature, in changing a statute, does so with full knowledge of the court's construction of said statute. State ex rel. Kelsey v. Smith, 75 S.W. (2d) 832, 335 Mo. 1125. Also, the words used in a statute must be read in light of amendments to the original enactment. Wallace v. Woods, 102 S.W. (2d) 91, 340 Mo. 452. Furthermore, it has been held in determining the meaning of doubtful terms in a statute that the court may be aided by the legislative use of terms in other statutes. 50 Am. Jur., Section 265, page 255. In view of the above, it appears that the General Assembly was more or less attempting to consolidate Sections 8926 and 8927, supra, providing one penalty in lieu of a misdemeanor and graduated felony as it was prior to the enactment of Section 252.220. Sections 8926 and 8927, supra, dealt almost entirely with explosives. It specifically provided that no person shall place any dynamite, giant powder, nitroglycerin or any explosive substance of which nitroglycerin composes a part, or any other explosive substance or preparation in any waters of this state. Had the Legislature intended Section 252.220 to cover fishing with a generator connected to submerged wires, it could have left out "explosive substance" and used in lieu thereof "any preparation whatsoever," which would have been all inclusive. Certainly the legislative intent was to confine Section 252.220 to explosives and nothing more, and where it reads "explosive substance or preparation," it means an explosive preparation, and such a device cannot possibly be construed as an explosive preparation.

In Henderson v. Massachusetts Bonding & Insurance Co., 85 S.W. (2d) 922, 1.c. 924, 925, the court cited many authorities

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in defining explosives and held that a public liability policy covering a variety store, excepting liability for explosives kept or sold on the premises, did not exempt the insurer from liability for death caused by explosion of fireworks in the store, as fireworks were not included in the classification with explosives. In so holding, the court said:

" * * * Generalities usually make ambiguities. The insurer can always prevent the necessity of strict construction against it, or any construction at all, by stating the terms of any provision so clearly, definitely, and specifically as to make its meaning so plain that no room is left for construction. This, appellant here did not do in the statement that 'no explosives are made, sold, kept or used on the insured premises.' Is there not a difference between 'explosives,' as used and sold commercially, and articles which are not ordinarily designated as 'explosives,' but which do contain some explosive material? What would the average business man think this meant when reading it in his policy? Shotgun shells, rifle cartridges, firecrackers and Roman candles? We think not. There is no doubt that gunpowder is an explosive. Shotgun shells and rifle cartridges contain gunpowder, but would any merchant consider that such a prohibition against explosives would prohibit him from carrying in his store rifle cartridges and shotgun shells? Is not the same thing true of fireworks? Fireworks have been given the following definition: 'A contrivance of inflammable and explosive materials combined of various proportions for the purpose of producing in combustion beautiful or amusing scenic effects, or to be used as a night signal on land or sea or for various purposes in war.' 2 Bouv. Law Dict. 1232. An explosive is 'a compound or mixture susceptible of explosive chemical reaction, as gunpowder or nitro glycerine.' Webster's Dictionary."

We are also confronted with the rule of statutory construction that statutes penal in nature must be strictly construed. That is to say, they will not be regarded as including anything not clearly or intelligently described in the words thereof and

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manifestly intended by the Legislature. In other words, they are to be liberally construed in favor of the defendant and strictly against the state as to the charge and proof. See State ex inf. Collins v. St. Louis-San Francisco Railway Co., 142 S.W. 279, 238 Mo. 605, and State v. Taylor, 133 S.W. (2d) 336, 345 Mo. 325. In view of the foregoing, we cannot believe it was ever the legislative intent in passing Section 252.220, supra, to make that apply to persons fishing in the manner prescribed in your request.

CONCLUSION

Therefore, it is the opinion of this department that no person can be prosecuted under Section 252.220, RSMo 1949, for fishing with such equipment.

Respectfully submitted,

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Assistant Attorney General

APPROVED:



J. E. TAYLOR
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