

PROSECUTING ATTORNEYS:- Prosecuting Attorney may only be removed under Section 7929 when notice to institute suit has been given by a road overseer, county or state highway engineer.

February 16, 1934.

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Mr. Joseph L. Gutting,  
Prosecuting Attorney,  
Kahoka, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Calling your attention to section 7929, R. S. Mo. 1929, I wish to make the following statement of facts and would like to have your opinion on the following questions:

The County Court of this County ordered me to give the owners of hedge fences along or near a public road before January 1, 1934. This was in the month of October, I think, and I immediately published the notice in all of the county papers and quoted section 7929.

Now several of the hedge owners have trimmed their fences so that the air and sun can get to the road. I, as well as the County Court, think that this is sufficient and should be good, however, the law plainly says that they must be cut to a height of five feet.

Question No. 1. Will I have to see that these hedge owners cut these hedge posts and make the entire height of said fence five feet or be ousted from office by the Governor?

Question No. 2. Do I have to file the suit required by that section upon the complaint of any person, or do I only have to act when notified by a road overseer, county or state highway engineer, including the County Court, as set forth in the statute?

We would like to let these hedge owners

save their posts as long as they trim them to a good height, and the main question is, can I do this without being ousted from office by the Governor. It would be complying with the intent of the statute (that of keeping the hedge from shading the road and thereby keeping it wet) but would not be complying strictly with the said statute."

Section 7929, R. S. Mo. 1929, provides as follows:

"Every person owning a hedge fence situated along or near the right of way of any public road shall between the first days of May and August of each year cut the same down to a height of not more than five feet, and any owner of such fence failing to comply with this section shall forfeit and pay to the capital school fund of the county wherein such fence is situated not less than fifty nor more than five hundred dollars, to be recovered in a civil action in the name of the county upon the relation of the prosecuting attorney, and any judgment of forfeiture obtained shall be a lien upon the real estate of the owner of such fence upon which same is situated, and a special execution shall issue against said real estate and no exemption shall be allowed. Any prosecuting attorney who shall fail to or refuse to institute suit as herein provided within thirty days after being notified by any road overseer, county or state highway engineer, that any hedge fence has not been cut down to the height herein required within the time required, shall be removed from office by the governor and some other person appointed to fill the vacancy thus created. The cutting of any such fence after the time herein required shall not be a defense to the action herein provided for."

Under the foregoing section it is the duty of each person owning a hedge fence situated along a public road to cut the same down to a height of not more than five feet, and the failure so to do makes the owner liable to forfeit the sum of not less than \$50.00 nor more than \$500.00. The section further provides that if the prosecuting attorney refuses to institute the suit to collect the above forfeit within thirty days after being notified by any road overseer, county or state highway engineer, such failure on the part of the prosecuting attorney would make him liable to be removed by the Governor.

As we interpret the section it is only the failure to institute suit after the prosecuting attorney has received notice from the road overseer, county or state highway engineer that makes him liable to forfeiture of office by the Governor. We do not understand that the Governor may remove the prosecuting attorney from office unless the notice has been given by the road overseer, county or state highway engineer. In other words, if the notice of the failure to cut the hedge is given by some private individual, the failure of the prosecuting attorney to institute suit would not entitle the Governor to remove him under the above section.

It is therefore the opinion of this Department that the prosecuting attorney can only be removed by the Governor for failure to comply with this section when he has failed to institute suit within thirty days after being notified by any road overseer, county or state highway engineer. A notification by some private individual would not lay the foundation for a removal from office by the Governor, although such notice might impose a duty to act upon the prosecuting attorney.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

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