

ROADS AND BRIDGES: It is not necessary to notify landowners to cut hedge fence before bringing civil action under section 7929 R. S. Missouri, 1929.

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Mr. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of July 13th, 1939, which reads as follows:

"I would like your opinion on certain provisions of Section 7929, R. S. of Missouri for 1929, pertaining to the regulation of hedge fences. This section provides that the owner of hedge fences situated along or near the right of way of a public road shall cut these fences down to a height of not more than five feet between May 1st and August 1st of each year. It provides a penalty for any owner failing to comply with this section. The section also provides that any prosecuting attorney who shall fail or refuse to institute suit within thirty days after being notified by any road overseer, county or state highway engineer that any hedge has not been cut down to the height required shall be removed from office.

"In accordance with provisions of this section I did, on the first of May send out notices to every township board in Bates County suggesting that the township board should order and authorize the township road overseer to notify all hedge fence owners whose fences bordered a public road to cut the same down by August 1st.

I suggested that these notices be given by the road over-seer on the 28th day of June which would make the thirty days notice before August 1st which I construed the statutes contemplate. There has been a great deal of objection to cutting the hedge fence and most of the farmers take the position that July is their busiest month and that they can't afford to drop harvesting to cut hedge. This law has never been enforced in Bates County to any extent and I expect it is true a majority of the farmers did not know that there was a law requiring them to cut their hedge fences each year. Upon a basis of that I have taken the liberty of telling some of these farmers who came in my office to complain that if they would cut part of their hedge by August 1st I would agree to extend the time to October 1st by which time all of the hedge must be cut. I realize the statute does not give me that right but inasmuch as this is the first time the law has been brought to the attention of the people I felt that justice demand that I allow that extension.

"Another matter has arisen, however, which is not covered by the statute. Some of these townships do not have road over-seers. I would like your opinion as to whether or not a notification by a township board member is in sufficient compliance with the statute in those townships where there is no road over-seer. In other words, just who must notify the land owner to cut the hedge? Also, the township board and the road over-seer refuses to notify the land-owners to cut their hedges. Would a complaint filed in my office by a private citizen of a township be sufficient authorization for me to bring a suit under the terms of this section?"

Section 7929 R. S. Missouri, 1929, partially reads as follows:

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"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. * * * * *

Under this section it does not require any notice from anyone or notice from any road over-seer, county or state highway engineer before the prosecuting attorney can file a civil action in the name of the county, upon the relation of the prosecuting attorney, for the forfeiture of a sum of money not less than fifty nor more than five hundred dollars, for the violation of the hedge fence law. This part of the section is very clear, and is not ambiguous. All that is necessary is for the prosecuting attorney to file the civil action and it does not require notice from any of the above officers set out, or notice to the landowners, before the civil action is filed. According to 59 C. J., page 952, it is well settled that the intention of the legislature should be taken into consideration for the construction of statutes. The above citation reads as follows:

"The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction.

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Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning." citing *Cendron v. Dwight Chapin & Co.*, (App.) 37 S. W. (2d) 486; *Betz v. Kansas City So. R. Co.*, 284 S. W. 455, 314 Mo. 390; *Crier v. Kansas City, C. C. & St. J. Ry. Co.*, 228 S. W. 454, 286 Mo. 523.

In taking the whole of section 7929 R. S. Missouri, 1929, it does not require notice to the land owners before a suit is instituted by the prosecuting attorney.

The notice which you refer to in your request only applies to the latter part of section 7929 R. S. Missouri, which reads as follows:

"Any prosecuting attorney who shall fail 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."

In taking into consideration the intention of the legislature it saw fit to include in section 7929 R. S. Missouri, 1929, a provision that where the prosecuting attorney shall fail or refuse to institute the suit after receiving thirty days' notice from the road overseer, county or state highway engineer, that the hedge fence has not been properly cut down, he is subject to removal by the Governor. This part of section

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7929, supra, requiring a notice, does not prevent the prosecuting attorney from instituting a civil suit without notice.

As to the construction of a statute, 59 C. J. at page 961 says:

"In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used," citing *Betz v. Columbia Telephone Co.*, (App.) 24 S. W. (2d) 224.

Again referring to your request, in which you say the main question upon which you desire an opinion is who must notify the land owners to cut the hedge, as said before, this section does not require a notice to the land owners, but should be considered the same as any other law in which notice is not required.

CONCLUSION

In view of the above authorities, it is the opinion of this department that under section 7929 R. S. Missouri, 1929, it is not necessary to notify the landowners to cut a hedge fence to the proper height, as described in said section, but it is necessary for the road overseer, county or state highway engineer to give notice to the prosecuting

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attorney of any hedge fence which has not been cut down to said height, and then if the prosecuting attorney fails to institute a civil action, as provided in section 7929 R. S. Missouri, 1929, then the prosecuting attorney shall be removed from office by the Governor. In other words, unless the prosecuting attorney receives the thirty days' notice as set out in section 7929, supra, he is not subject to removal by the Governor for failure to institute the civil action in regard to the forfeiture for not cutting the hedge fence to the proper height.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

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