

HEDGE FENCES: (1) Sec. 8578, R.S. Mo. 1939, is not violated
PROSECUTING ATTORNEYS: merely by permitting a hedge to shade a road.
(2) It is discretionary with the prosecuting attorney as to whether he shall institute action upon receipt of complaint by a private citizen regarding a hedge fence which allegedly violates this section.

November 23, 1949

Honorable Ted A. Bollinger
Prosecuting Attorney
Shelby County
Shelbyville, Missouri



Dear Mr. Bollinger:

We have your recent letter in which you request an opinion of this office. Your letter is as follows:

"In connection with opinion No. 25-49 rendered recently to Ralph H. Duggins, Prosecuting Attorney, I would like an opinion of your office in regard to whether or not a private citizen may complain of a hedge fence which adjoins a public roadway, on the ground that such hedge shades the road and prohibits drying.

"Is it then the duty of the Prosecuting Attorney to commence an action upon such complaint or should the complaint be made duly by the county officers set out in the statute?"

The opinion referred to construed a portion of Section 8578, R. S. Mo. 1939, and held that said portion was within the police power of the state and that the phrase "along or near" was not so indefinite or uncertain as to render the statute unenforceable for indefiniteness or uncertainty of application. Section 8578 is 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 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."

Your first question then is whether it is the duty of the prosecuting attorney to commence an action upon the complaint of a private citizen, on the ground that a hedge fence shades the road and prevents drying. There is no violation on the grounds of shading alone, for no where in this penal statute is shading mentioned.

As to commencing an action upon a private complaint, it is always the duty of the prosecuting attorney to initiate action where he believes the law is being violated. State ex inf. McKittrick v. Wallach, 182 S.W. (2d) 313, 353 Mo. 312, wherein the court said:

"In determining whether to institute prosecution in a particular case, prosecuting attorney must exercise in good faith the sound discretion conferred by law upon him as a prosecuting officer to act officially in such circumstances and upon each separate case according to the dictates of his own judgment and conscience uncontrolled by judgment or conscience of any other person."

Thus, if you, as prosecuting attorney, have called to your attention a hedge fence, the owner of which in your opinion is

violating Section 8578, supra, then regardless of the source of your information it would be your duty to institute proceedings against said owner. On the other hand, if it is your opinion that the hedge growth in question does not bring its owner under the provisions of Section 8578, supra, the complaint of a private citizen would not require you to institute proceedings. State v. Wallach, supra.

It will be observed that the statute in question is in two parts, that is, a period separates that portion establishing the hedge owner's duty and setting the penalty to be applied to individuals who violate its provisions from that portion which provides a penalty to be imposed upon the prosecuting attorney under certain conditions, i.e., his failure to act after being notified of a violation of said section by certain designated officials. We must then further analyze the section to ascertain if the Legislature intended that it should be treated as two sections, separated by a period but united for convenience because of a certain similarity of subject matter. In Illinois Bell Telephone Co. v. Ames, 364 Ill. 362, the court announced this rule:

"Punctuation is to be considered and given weight in construction of statute unless from inspection of whole act it is apparent that it must be disregarded to arrive at the Legislature's intention."

Although no cases dealing with the exact effect of a period in a statute have been found, a case holding that "in a statute semicolons have effect of separating with more distinctness than commas" (Town of West Hartford v. Faulkner Co., 10 Atl. (2d) 592) would indicate, a fortiori, the pronounced effect of a period.

The wording of the section is, of course, of prime significance in determining the intent of the Legislature. Section 8578, supra, provides that "any owner * * * failing to comply * * * shall forfeit and pay * * * in the name of the county upon the relation of the prosecuting attorney * * *," thus setting out the duty, a penalty for violation, and naming the prosecuting attorney as the enforcing officer. It is important that there is no provision that notice of such violation shall be brought to the attention of the prosecutor by any particular person.

The second portion following the period provides: "Any prosecuting attorney who shall fail or refuse to institute suit * * * after being notified by any road overseer, county or state highway engineer * * * shall be removed from office by the governor * * *." Thus, the statute announces separate duties,

distinct penalties, and two different enforcing authorities. As was said in *Cairo Bridge Commission v. Mitchell*, 352 Mo. 1136:

"Statutes are to be construed, if possible, so as to harmonize and give effect to all their provisions, which requires that in determining the meaning of a particular section of an act all other parts should be considered."

The case of *Hanover Importing Society v. Gagne*, 92 F. (2d) 888, demonstrates the significance to be attached to one penalty for the public at large (hedge owners) and another separate one for prosecuting attorneys:

"Where a statute defines separate classes on which benefits are to be conferred or burdens imposed, provisions relating to any single class will ordinarily be regarded as applying to such class alone * *"

Thus, where separate penalties are provided, one for the hedge owners and another for the prosecuting attorney, the elements constituting a violation are to be treated as separate also, that is, the provision for notice by certain officials, which could make the prosecutor liable, has no relation to the liability of various offending hedge owners. Construction of this statute calls forth an application of the doctrine "expressio unius est exclusio alterius," for certainly by specifically requiring notice by certain officials before the prosecutor is to become liable the statute excludes the idea that the same notice shall be given before the hedge owners could be considered as violating the section. "The expression of one thing is the exclusion of another in the construction of statutes." *Crevisour v. Hendrix*, 234 Mo. App. 1012.

To sum up then, Section 8578, supra, provides a penalty to be imposed only upon hedge fence owners who fail to comply with certain specific provisions regarding the height of the fence at a certain time of the year. Said section also provides those violating these aforesaid specific provisions. Up to this point this statute is like the great majority of penal statutes which create a duty, set out a penalty for violation thereof, and provide for enforcement by certain officials. What distinguishes this statute from the usual one of its kind is that it then goes on to further provide a penalty for the prosecuting attorney if he fails or refuses to bring an action should certain named

officials call his attention to a violation of the duty created in the first portion of the statute. But, for all the various reasons heretofore set out, it clearly appears that the portion relating to the penalty to be applied to prosecuting attorneys is not necessary to, is separate from, and does not alter, the meaning of the first portion of the statute relating to the owners of hedge fences.

CONCLUSION

It is the opinion of this office that:

1. Section 8578, R. S. Mo. 1939, is not violated merely because a hedge fence shades a road, thus preventing drying, but before there is a violation the hedge must in fact exceed the maximum height set out in the statute during certain months as prescribed in said statute;

2. The initiation of an action under Section 8578, R. S. Mo. 1939, upon the complaint of a private citizen is discretionary with the prosecuting attorney;

3. This office does not, however, in so holding, pass upon the validity of that portion of the statute relating to the institution of action upon the complaint of certain officials designated therein and the removal of the prosecuting attorney for refusal or failure to do act.

Respectfully submitted,

H. JACKSON DANIEL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General