

ENTOMOLOGIST: (1) Section 263.040, V.A.M.S. 1949, does not mean  
MISSOURI PLANT LAW: that there must be rules and regulations promul-  
OFFER OF SALE: gated for the enforcement of those sections of  
Chapter 263, V.A.M.S. 1949, which do not need such  
rules and regulations for their enforcement; (2) "Offering for sale"  
would be the exhibiting of something that may be taken or received or  
not, the taking or receiving of which would constitute a sale; (3)  
Section 263.120, supra, would be applicable to any person or truck  
driver in this state who is the recipient, while in this state, of any  
plant products brought from within or without this state which do not  
comply with the requirements of Section 263.100 and 263.110. It would  
not be applicable to any person who receives the plant or plant products  
while outside the State of Missouri when they bring the said plant  
products into this state.

March 11, 1960

Honorable Julius R. Anderson  
State Entomologist  
Department of Agriculture  
Jefferson City, Missouri



Dear Mr. Anderson:

This is in response to your request for an opinion of  
January 15, 1960, which we quote in part:

"In Section 263.040, does this mean that there  
must be rules and regulations made before the  
provisions and requirements of the Law can be  
carried out, or can the statutes be carried out  
even though there may not have been a specific  
regulation to cover that point in the statutes?

"In Section 263.070, paragraph 4, mention is  
made regarding a nursery dealer selling or offer-  
ing for sale nursery stock. What constitutes  
'offering for sale'? If a nursery dealer has this  
material set out in a yard where it is displayed  
for the purpose of customers to look over and  
choose the varieties they want, would this be a  
case of offering for sale, even though there was  
no price list on the individual items?

"Under Section 263.120, it mentions any person  
who received nursery stock from without this state,  
etc., would this include a truck driver or other  
transporting officials, or individuals who have  
received this nursery stock for delivery to  
customers who have previously ordered the stock,  
even though it had been ordered from out-of-state?  
In the case, the point here is that the nursery  
stock came into the state without correct certi-  
fication when found on the truck. Can the truck  
driver be required to hold this material for inspec-  
tion or other disposal as mentioned in Section 263.132?

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"Would the police force of one municipality have the authority to make an arrest upon the request of the State Entomologist or one of his assistants, even though the violation had occurred in another municipality. Such as, a violation was spotted in Creve Coeur, but the interception was in Olivette. Could the Olivette police force make the arrest even though the violation had occurred in Creve Coeur?"

Section 263.040, V.A.M.S. 1949, is as follows:

"The state entomologist shall, from time to time, make rules and regulations for carrying out the provisions and requirements of this law, including rules and regulations under which inspectors and other employees shall;

(1) Inspect places, plants and plant products, and things and substances used or connected therewith;

(2) Investigate, control, eradicate and prevent the dissemination of insect pests and diseases; and

(3) Supervise or cause the treatment, cutting and destruction of plants and plant products infested or infected therewith."

Black's Law Dictionary, De Luxe Fourth Edition, defines the word "shall" in part as follows:

"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. *McDunn v. Roundy*, 191 Iowa 976, 181 N.W. 453, 454; *Bay State St. Ry. Co. v. City of Woburn*, 232 Mass. 201, 122 N.E. 268; *U.S. v. Two Hundred and Sixty-Seven Twenty-Dollar Gold Pieces*, D. C. Wash., 255 F. 217, 218; *Baer v. Gore*, 79 W. Va. 50, 90 S.E. 530, 531, L.R.A. 1917B, 723.

"In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has

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always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears. *People v. O'Rourke*, 124 Cal. App. 752, 13 P.2d 989, 992. \* \* \*

Considering the definition set forth above, Section 263.040 is mandatory, by the use of the word "shall", but only to the extent that the rule to be made is necessary to the proper carrying out of the specific law in question. The fact that rules and regulations shall be made does not preclude the enforcement, by appropriate authorities, of those statutory laws which are enforceable without rules and regulations. It is conceivable that the legislature might enact a section of a law in which it requires rules and regulations to be issued before the law itself would become effective, but this is not involved in Chapter 263. Section 263.040, supra, is specific in that it states rules and regulations shall be made for carrying out the provisions and requirements of this law. Therefore, when the provisions and requirements of this law may be validly carried out without a rule or regulation, it would appear obvious that no rule or regulation need be made.

With respect to your second question, we again turn to the Fourth Edition of Black's Law Dictionary for the purpose of defining the term "sale". You will see therein that it is defined as:

"A contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer,' (or purchaser,) by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property. *Pard. Droit. Commer.* §6; 2 *Kent Comm.* 363; *Poth. Cont. Sale*, §1; *Butler v. Thomson*, 92 U.S. 414, 23 L.Ed. 684. *In re Frank's Estate*, 277 N.Y. S 573, 154 Misc. 472."

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Considering the definition of "sale", we now turn to the definition of the term "offer" also set forth in the Fourth Edition of Black's Law Dictionary:

"To bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a proposal to; to exhibit something that may be taken or received or not. *Morrison v. Springer*, 15 Iowa 346; *People v. Ah Fook*, 62 Cal. 494."

It is our opinion that the significant part of this definition of the term "offer" would be that part which states "to exhibit something that may be taken or received or not." It would seem only logical that an offer of sale could be made by a nursery dealer who has displayed his material for sale in a yard so that prospective customers might look over and choose the varieties they want. It would appear to be essential, however, that it is his intention to have them set forth for sale, and that they were set forth for the acceptance or rejection of a prospective buyer. It would seem that the presence of a price list would not necessarily be necessary to an offer of sale. It might, however, be considered as evidence of one's intention to offer for sale. This should not be conclusive. Therefore, it might well be considered that a nursery dealer has offered his stock for sale when this stock has been set out in a yard where it is displayed for customers to look over and choose the varieties they want.

You will observe that the reasoning set forth above is not inconsistent with statements made by the Supreme Court of Oregon in the case of *State v. Dunbar*, 11 Pac. Rep. 298, 299. The court therein states in part:

"\* \* \* Laws are usually enacted with some reference to the common understanding and customs of men in respect to subject-matters which concern their business transactions; so that, when goods or merchandise are exhibited from the show windows or shelves of a store, we have a right to presume, sanctioned by common usage and understanding, that he who puts them there offers them for sale, and if the fact is otherwise, let him show it. Goods, therefore, may be offered for sale without any overt act of solicitation. \* \* \*"

At page 300 the court also states, with reference to an offer of sale, that:

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" \* \* \* It may be done by general advertisements in the press, or by exhibitions of signs or symbols in the vicinity of the place of the alleged business, or by having the article on sale, with intent to dispose of it, to any offering to purchase. \* \* \*"

Section 263.120, V.A.M.S. 1949, states:

"Any person in this state, who receives from without this state any plant or plant product as to which the requirements of section 263.100 have not been complied with, or who receives any plant or plant product sold, given away, carried, shipped, or delivered for carriage or shipment within this state as to which the requirements of section 263.110 have not been complied with, shall immediately inform the state entomologist or an inspector thereof, and isolate and hold the said plant or plant product unopened or unused, subject to such inspection and other disposition as may be provided for by the state entomologist."

We believe in answer to your third question that the clause "any person in this state" as used in Section 263.120, supra, would appear to be all-inclusive. However, in considering the entirety of this section of the law, we do not believe that it refers to any person in this state who has brought the plant products into Missouri from another state. We believe that it refers to, and is only applicable to, any persons within the State of Missouri who have received from within or without the state, while that person is in the State of Missouri, a shipment of plant products. It would thus not be applicable to a situation in which a person goes from Missouri to another state and subsequently returns to Missouri bringing the plant products with him.

Our position above, we feel, is substantiated by the fact that Section 263.100 makes it unlawful for any person to bring or cause to be brought into this state any plant products listed in the rules and regulations made pursuant to this law, unless the proper packaging and tagging has been completed. It would appear that any person violating the provisions of Section 263.100 would be subject to the penalty provisions set forth in Section 263.180, and that it is the appropriate section which may be enforced against those persons bringing or causing to be brought into this state any plant products in violation of this chapter.

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With respect to your specific question, "Can the truck driver be required to hold this material for inspection or other disposal as mentioned in Section 263.120", our answer would be that he could not, unless he had received the plant products while he was in the State of Missouri. Should he be the recipient of the plant products brought into the state from another state, in violation of this chapter, it would then be his responsibility to report to the State Entomologist, and those plant products would be subject to inspection and other disposition by the State Entomologist pursuant to Section 263.120.

With respect to your last question, our office rendered an opinion to the Honorable Edward Garnholz, Clayton, Missouri, on December 27, 1955, which we believe answers your question. We are enclosing a copy of that opinion for your study, and in it you will note that in St. Louis County a person may not be arrested for a misdemeanor without a warrant unless the arresting officer saw the misdemeanor committed.

#### CONCLUSION

It is the opinion of this office that:

(1) Section 263.040, V.A.M.S. 1949, does not mean that there must be rules and regulations promulgated for the enforcement of those sections of Chapter 263, V.A.M.S. 1949, which do not need such rules and regulations for their enforcement;

(2) "Offering for sale" would be the exhibiting of something that may be taken or received or not, the taking or receiving of which would constitute a sale;

(3) Section 263.120, supra, would be applicable to any person or truck driver in this state who is the recipient, while in this state, of any plant products brought from within or without this state which do not comply with the requirements of Section 263.100 and 263.110. It would not be applicable to any person who receives the plant or plant products while outside the State of Missouri when they bring the said plant products into this state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON  
Attorney General

JBS/mlw  
Enclosure