HEDGE FENCES: Sec. 8578, R.S. Mo. 1939, requiring anyone owning a hedge fence along or near the right of way to keep it trimmed to a height of five feet, is valid and enforceable.

October 16, 1949

10/24/49

FILED
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Hon. Ralph H. Duggins
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Duggins:

We have your request for an opinion by this department upon the enforceability of Section 8578, R. S. Mo. 1939, relating to the trimming of hedge fences. Your letter is as follows:

> "The undersigned has been requested by our County Court to ask for an opinion on the following matter:
>
> "Section 8578 entitled Regulation of Hedged fences provides for the failure to comply with the cutting of a hedge along or near the right-of-way of any public road, shall cause a forfeiture, etc.
>
> "The County Court, to co-operate and comply with the King Road Law, has endeavored to supervise and maintain county roads for the purpose of placing rock on said roads. Persons owning fences along said right-of-way have failed and refused and still fail and refuse to cut the hedge, brush or growth which has interfered with the maintenance of these roads.
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> "The question was asked 'Can the County Court, at the relation of the Prosecuting Attorney, file a civil action against the property owner for such failure to cut the hedge, brush or growth and obtain a conviction and forfeiture.' In some instances, it is not entirely a hedge fence but barbed wire, brush and other growth have prevented the roads from being maintained.

> "An opinion is requested as to whether or not it would be possible for this section of the statute to be enforced and what requirements are necessary before said section is enforceable."

We understand the substance of your inquiry to be whether or not the section in question is enforceable, that is, whether it would be possible for the county court to prevail in a civil action, filed by the county at the relation of the prosecuting attorney, against a violator of this section. Section 8578, R. S. Mo. 1939, 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 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 determining the validity of the above section two principal questions must be answered. First, whether the regulation and penalties involved are violative of the Constitution of Missouri, Article I, Section 10 (Due Process), as constituting an unreasonable exercise of the police power.

In the case of Lashly v. State, 236 Ala. 28, the Supreme Court, in response to a certified question, summed up the relation of the police power and due process as follows:

> "Due process does not interfere with the police power of the state to make reasonable traffic and safety regulations."

In 11 Am. Jur. 1066, this general statement appears:

> "It is an established rule that laws are not rendered unconstitutional by reason of their imposing burdens on persons or property, since the right to impose such burdens is an essential quality or incident of the police power."

Kansas City v. Holmes, 274 Mo. 159, shows the specific application of the above general statements, an application that bears a substantial similarity to the question at hand. In that case a city ordinance requiring owners and occupants of real property to remove snow from adjoining sidewalks, with a fine for violation thereof, was held not to conflict with the Missouri Constitution, Article I, Section 10, providing that no person shall be deprived of life, liberty or property without due process of law.

Similarly, a city ordinance prohibiting certain types of signs over sidewalks was held valid in Mallory, Inc. v. City of New Rochelle, 295 N. Y. 712, even though the owner in question had previously erected an expensive sign under authority of a permit.

In Santa Barbara County v. Moore, 176 Cal. 6, the court held that statutes regulatory of when and under what circumstances trees, on a highway, subserving useful, as well as ornamental purposes, may be destroyed, do not take the property of abutting owners without due process of law.

Conceding that the statute in question is not an unusual, and in fact a rather mild, exercise of the police power, the second and more difficult question of interpretation of the words, "hedge fence situated along or near the right of way" must be answered, and at some length, before the validity of the statute as a whole can be definitively settled.

Before examining the instances in which expressions similar to the above have been used in the statutes which subsequently were judicially construed, a few observations about statutory

construction in general where the issue was, as it is here, the necessity for definiteness. In State ex rel. Crow v. West Side St. R. Co., 146 Mo. 155, the court said:

> "A statute cannot be held void for uncertainty if any reasonable or practical construction can be given to its language. The fact that it is susceptible to different interpretations will not render it nugatory."

In Bergeson v. Mullinix, 399 Ill. 470:

> "The failure of a statute to specify every detail, step by step, and action by action, will not render the statute vague, indefinite, or uncertain from a constitutional viewpoint."

Similarly, in Adams v. Greene, 206 S.W. 759:

> "A statute will not be held void for uncertainty if any sort of practical or sensible construction may be given to it."

Similar statements appear in State v. LeBlond, 108 Ohio St. 41:

> "Legislation otherwise valid will not be judicially declared null and void on the ground that the same is unintelligible and meaningless unless it is so uncertain and indefinite as not to indicate the matter or thing to which it relates or the purpose to be served."

The section in question has never been construed, and a search fails to reveal any statute using exactly the same words. However, there is a Texas case which considers the exact point here in question and discusses it in a logical and reasonable manner, at the same time convincingly upholding the constitutionality of the statute. I refer to Moore v. State, 133 Tex. Crim. App. 330. Here follows a quotation of a large part of the opinion, word for word, because of its very substantial application to the question before us:

> "Appellant next complains relative to the indefiniteness and vagueness of the statute under which he was prosecuted, because the same prohibits the possession of whiskey

> at or near the premises wherein wine and beer are legally sold, and contends that the phrase 'or near' renders the statute so uncertain as to offend against Article 6 of the Penal Code of 1925, which reads as follows: 'Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be understood, such law shall be regarded as wholly inoperative.'
>
> "The word 'near' is defined by Webster as 'within a little distance from; close or upon.' In our opinion the word 'near,' if too indefinite, could be eliminated, and we would still have left the possession of whiskey 'at' the premises. We do not think the addition of the words 'or near' would render the article herein proceeded under as in contravention of the Constitution."

Thus, with the exception of the word "along," we have before us a judicial construction of the phrase "along or near." The cases which are set out below conclusively show that the word "along" means in general the same as the word "at" or the word "near." For example, People v. Astle, 337 Ill. 253:

> "The word 'along' is defined as being upon or at or near the side of."

Benton v. Horsley, 71 Ga. 619, held that the word "along" as used in the sentence, "along a line," etc., is equivalent to "up to" or "reaching to."

Nicolai v. Wisconsin Power & Light Co., 277 N.W. (Wisc.) 674, 678:

> "The word 'along' in 'along the road' is used as a preposition meaning by the length of, lengthwise of, or at or near the side of, according to the context."

Hipp v. State, 97 S.W. (Texas) 90:

> "'At' a private residence means 'nearby' or 'in proximity to.'"

Thus, by following the reasoning outlined above, it clearly appears that "at" or "along" is by itself sufficiently certain

to sustain the constitutionality of Section 8578, and the addition of the words "or near" should be treated either as mere surplusage and thus of no consequent detrimental effect, or as having the same meaning as either "at" or "along" and neither adding to nor subtracting from the meaning and, therefore, the validity of the statute.

Some other cases, not as closely in point but serving to further point out the unlikelihood of a statute, such as Section 8578, being declared unconstitutional because of the use of the expression "or near," are:

Fall River Iron Works Co. v. Old Colony & Fall River R. R. Co., 87 Mass. 221, 226, wherein the phrase "at or near" used in a statute was construed by the court as follows:

> "In seeking for a correct and just exposition of this clause of the statute, the first and most obvious suggestion is that the legislature did not intend to fix with absolute certainty and precision the point of departure for the new road defendants were trying to build. In using language which was so vague and indefinite as to leave open for future determination the location of this point, it is clear that owing to the nature of the ground or for some other sufficient reason it was not deemed expedient or necessary to fix it with accuracy."

Manis v. State, 50 Tenn. 315, the statute provides:

> " * * * nor shall any person give or sell (on election day) intoxicating liquor to any person, for any purpose, at or near an election ground."

The court construed the above statute as follows:

> "The purpose of these enactments is to preserve good order and conserve peace. To make these objects more certain of attainment, the words 'at or near' an election ground are used. If the giving or selling is not at the election ground, but at a place not distant or remote, but of reasonably easy or convenient access, the party so giving or selling is guilty."

Williams et al. v. Board of Commissioners, 84 P. 1109 (Colo.), the court said:

> "A notice posted more than one mile from the nearest point of the line of the proposed road is certainly not a compliance with the statutory requirements that the notices should be posted along the proposed new road. We think the adverb, 'along' as used in this connection means 'by the side of,' or near."

CONCLUSION.

This office is, therefore, of the opinion that Section 8578, R. S. Mo. 1939, insofar as it requires that the owner of a hedge fence must trim the same and providing for the enforcement of this provision, is a valid exercise of the police power of the state and may be enforced as provided in the statute.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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