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AUSTIN

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ATTORNEY GENERAL

Honorable T. J. Tucker
County Attorney
Hopkins County
Sulphur Springs, Texas

Opinion No. 0-7056

Re: Construction of Section
3, Article 879a-5, P.C.

Dear Sir:

We acknowledge receipt of your request for an opinion of this Department on whether a man who has been arrested for hunting with a twelve-gauge shotgun that was not plugged has violated Article 879a-5, Sec. 3, P. C.

Said Article reads as follows:

"Sec. 3. It shall be unlawful to hunt or shoot mourning doves, white-winged doves, or any migratory bird, or any other game bird of this State, with a shot gun larger than ten-gauge, and that is capable of holding more than three (3) shells at one loading, including the shell that may be held in the chamber of such gun, and providing that if a magazine-loading is used and the magazine of such gun would otherwise hold more than two (2) shells, before such gun is used it shall be permanently plugged so that such magazine will be rendered incapable of holding more than two (2) shells."

In construing statutes it is always permissible and required that the legislative intent be determined. Hence, the aim and object of construction is to ascertain and enforce the legislative intent, and not to defeat,

Honorable T. J. Tucker - page 52

nullify or thwart it. 39 Tex. Juris. 167. The intent should first be sought from a reading of the whole statute, but if the intent remains obscure after reading the entire act, the court may consider other laws and circumstances indicating the legislative intent, and may resort to certain aids for construction, such as the history of legislation, and the necessity or occasion for the enactment of the statute in question. 39 Tex. Juris. pages 177-178.

A reading of Article 279a-5 does not give any assistance in determining just what type of shotgun is forbidden to be used. The act was originally passed by the 45th Legislature, 2nd Called Session, on October 12, 1937. That act had the identical provisions, except that the word "gun" is included after the words "magazine loading". While that omission was evidently a clerical omission, it neither adds to or takes from the acts prohibited.

It is well settled that the emergency clause of an act may be considered if it sheds light upon the inquiry and will aid the court in ascertaining the legislative intent. Interstate Forwarding Co. v. Vineyard, 49 . . . (2d) 403.

In looking to the original act as passed in 1937, we find in the emergency clause the following language: "The fact that the mourning dove and white-winged dove regulations for the year 1937 are in conflict with the Federal Regulations . . . creates an emergency . . ." From this language it is clear that the Legislature intended that the act be in harmony with the Federal regulations thereon.

It is proper to reach out and to follow the true intent of the Legislature, and to adopt that sense which harmonizes with the content and promotes, in the fullest

manner, the apparent policy and object of the legislature. Thompson v. M.M.T. Ry. Co., 126 S. W. 257.

On July 30, 1937, the President approved Proclamation No. 2245, found in 2 Fed. Reg. at page 1355, which provided among other things that, first, migratory game birds may not be taken with a shotgun larger than No. 10 gauge; and, second, they may not be taken by means of any automatic-loading or hand operated repeating shotgun capable of holding more than three shells at one time in the chamber and magazine.

When necessary to arrive at the legislative intent, it is permissible to construe the conjunction "and" as though it were the disjunctive "or". Gilman's Reciprocal Ass'n v. Coe, 68 S. W. (2d) 1046-1047. It is, therefore, our opinion that the word "and" as used in Article 879a-5, P.C., immediately after the words "larger than ten-gauge" should be used in its disjunctive sense.

It is a matter of common knowledge that a twelve-gauge shotgun is smaller than a ten-gauge.

You are, therefore, advised that a person who hunts with a twelve-gauge shotgun that is not plugged so that it will hold not exceeding three shells is violating Article 879a-5, P.C.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By: /s/ Richard H. Cooke
Assistant

Approved Feb 14, 1946
Carlos C. Ashley
First Assistant
Attorney General

Approved: Opinion
Committee

By: BWB
Chairman

RHC: /djm