No. 466

WEEDS—NOXIOUS WEEDS—AGRICULTURE—FARMING—CONSTITUTIONAL LAW—DUE PROCESS

Held: Under the provisions of Chapter 195, Laws of 1939, as amended by Chapter 90, Laws of 1941, the supervisors of a weed control district may take possession and control of any infested tract of land in a weed district for such period of time as may be necessary to destroy and exterminate the noxious weeds thereon.

August 18, 1942.

Mr. John D. Stafford
County Attorney
Cascade County
Great Falls, Montana

Dear Mr. Stafford:

You have asked this office, if, under the provisions of Chapter 195, Laws of 1939, as amended by Chapter 90, Laws of 1941, the supervisors of a weed control district may take possession and control of land in a weed district for such period of time as may be necessary to carry out a thorough weed control program.

Chapter 195, Laws of 1939, and the partial amendment thereof by Chapter 90, Laws of 1941, set up the procedure to be followed in the extermination of noxious weeds and weed seed within this state. Section one of

the act defines the terms used in the act. Section two makes it unlawful to permit noxious weeds to go to seed on lands within the area of any weed control and weed seed extermination district. Section three authorizes an embargo against the importation into the county of farm products and seeds which the supervisors have reason to believe will cause the spread of noxious weeds. Section four places a duty upon the Governor, under certain cirmustances, to proclaim an embargo against the importation into the state of any grain, plants, tubers, nursery stock, seed or fruit which he has reason to believe contains noxious weed seed or plants dangerous or inimical to the horticultural or agricultural industries. Section five establishes the procedure for petitioning for a weed control and weed seed extermination district. Section six provides for mailing of notice of hearing on such a petition to each landowner within the proposed district and also for posting of such notice in three public places and publication in a newspaper for two weekly issues. Section seven permits any landowner to file written objections to creation of the district at the hearing, and provides the commissioners shall—if fifty-one per cent of the landowners within the proposed district file written consent and if the commissioners judge the creation of the district desirable and for the best interest of all persons interested—declare the district created and set forth the name and boundaries of the district and the lands contained therein. Section eight provides for such districts within corporate limits of cities and towns. Section nine authorizes the county commissioners to appoint a board of weed control and weed seed extermination supervisors, provides for their duties, term of office and compensation. Section ten provides that, when complaint has been made and the supervisors have reason to believe noxious weeds are present upon the lands within the district, the supervisors shall inspect the premises; and—if such weeds are found—they shall cause written notice to be served on the person permitting the presence of such noxious weeds, directing him to comply with the provisions of the act within a period of time specified in the notice.

Section eleven of the act (Chapter 195, Laws of 1939, as amended by Chapter 90, Laws of 1941) provides as follows:

> "If the notice be not obeyed within the time specified in the notice, the supervisors shall forthwith destroy and exterminate such weeds and make report thereof to the county clerk, with a verified, itemized account of their services, and expenses in so doing, and a description of the lands involved, and shall include in said account the necessary cost and expenses of chemicals, man hours of labor and equipment employed, at a rate paid, in the immediate vicinity, for farm labor per day and for equipment used for an eight (8) hour day. Such expenses shall be paid by the county out of the 'noxious weed fund,' and unless the sum, to be repaid by the owner or occupant, is not repaid before October 15th next ensuing, the county clerk shall certify the amount thereof, with the description of the premises to be charged, and shall extend the same to the assessment list of the said county, as a special tax on said land, but if the land for any reason be exempt from general taxation, the amount of such charge may be recovered by direct claim against the State or the county for state or county owned lands. When such taxes are collected, they shall be credited to the 'noxious weed fund.' **In destroying and exterminating such weeds, the supervisors are authorized to take possession and control of any infested tract of land, within their districts, together with any fences or ditches thereon, and to move any fence or ditch where necessary in order to better conduct the control work and process of extermination as may be necessary. . . .**" (Emphasis mine.)

The act obviously authorizes the supervisors to take possession and control of any infested tract for the purpose of destroying and exterminating the noxious weeds thereon. Hence, the question which arises is whether such an enactment of the Legislative Assembly conflicts with the provisions of the Constitution.

That noxious weeds constitute a menace to crops and the agricultural prosperity of this state, if allowed to spread uncontrolled, is a fact plain and evident to anyone acquainted with the problems of agriculture. It is a proper exercise of the police power of the state for the Legislative Assembly to enact laws designed to protect farming from the dangers and ravages of noxious weed growth. (Wedemeyer v. Crouch, 68 Wash. 14, 122 Pac. 366, 43 L. R. A. (N. S.) 1090; State v. Boehm, 92 Minn. 374, 100 N. W. 95; and the note contained in 12 A. L. R. 1143.)

Our Supreme Court—in the case of Colvill v. Fox, 51 Mont. 72, 75, 149 Pac. 496, 497—had before it the question of whether the protection of the horticultural industry from the ravages of insect pests was within the police power of the state. The Court said:

> "It cannot be contended successfully that the protection of the horticultural industry from the ravages of insect pests or dangerous, contagious fruit diseases is not well within the limits of the police power of the state. In Noble State Bank v. Haskell, 219 U. S. 104, Ann. Cas. 1912A, 487, 32 L. R. A. (N. S.) 1062, 55 L. Ed. 112, 31 Sup. Ct. Rep. 186, the court said: 'In a general way . . . the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' This language was quoted with approval in Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 Pac. 554.
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> "In Cooley's Constitutional Limitations, seventh edition, 829, the author announces the same doctrine as follows: 'The police of a state, in a comprehensive case, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order an to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with the like enjoyment of rights by others.'
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> "The definition of Chief Justice Shaw has become a legal classic. In Commonwealth v. Alger, 7 Cush. (Mass.) 53, he said: 'We think it is the settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it . . . shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, . . . is . . . held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain—the right of a government to take and appropriate private property . . . whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.' . . ."

Does Chapter 195, Laws of 1939, as amended by Chapter 90, Laws of 1941, conflict with Section 14 of Article III of the Montana Constitution?

Section 14 of Article III of the Constitution provides as follows:

> "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner."

Our Court—in Colvill v. Fox, supra—held as follows in connection with the destruction of diseased fruit:

> "The mere fact that other orchardists may profit by the destruction of this menace to their fruit and trees does not convert the act of destruction from its character as one for the public welfare into one for the private use or benefit of such people."

Likewise, in the extermination of noxious weeds and noxious weed seed, the private interests of adjacent landowners are served as an incident to the public benefit which results, but in no way can it be said the property of the landowner is subjected to the private use of the other owners adjacent. And the weeds and weed seed are exterminated to serve a public purpose and need, with no taking of any private property for a public use.

Section 27 of Article III of the Montana Constitution provides:

> "No person shall be deprived of life, liberty, or property without due process of law."

The Supreme Court of Montana—in the case of City of Butte v. Roberts, 94 Mont. 482, 486, 23 Pac. (2nd) 342, 344—had before it the question of whether a city ordinance conflicted with Section 27 of Article III of the Constitution. The court said:

> "If the ordinance can reasonably be said to be a proper exercise of the police power, then it is of no consequence that it affects property rights or rights based upon existing contracts, for . . . property rights and contracts are subject to and must yield to the common welfare."

We have already shown above that legislation designed to exterminate noxious weeds and noxious weed seed is within the proper exercise of the police power of the state; and, hence, I am of the opinion there is no violation of due process clause of our Constitution.

The authority given the weed supervisors to take possession and control of any infested tract of land for the purpose of destroying and exterminating noxious weeds is broad, and places great responsibility upon the supervisors. They must exercise caution and discretion in the use of such authority in order to afford protection to both themselves as public officers and to the landowners whose property they must treat.

Webster's New International Dictionary, Second Edition, 1941, defines the word "destroy" as meaning "to ruin the structure, organic existence, or condition of" and the word "exterminate" as meaning "to destroy utterly." Hence, when the statute employs such words, it contemplates the complete annihilation of noxious weeds and weed seed. It is not for this office however, to attempt to state how long a period of time is required for the extermination of noxious weeds and weed seed in any given area. That is a question of fact, and not of law.

It must be noted the statute authorizes the supervisors, in exterminating the weeds, to take control of "any infested tract of land," within their districts. Webster defines "tract" as "a region or stretch not definitely bounded." (Webster's New International Dictionary, Second Edition, 1941.) In other words, the entire agricultural land owned by a farmer could not be taken into the possession of the weed supervisors merely

because a small portion of the land was infested with noxious weeds, but only that part which was actually infested could be taken into possession for the purposes of the act with the least possible inconvenience to the owner.

It must be noted also, although the act provides the amount of charges for noxious weed and weed seed extermination may be recovered against the state or the county for state or county owned lands, such payment may not be made by the state until provided in an appropriation by the legislature and in the case of a county may not be made without the provision of the board of county commissioners.

It is therefore my opinion that, under the provisions of Chapter 195, Laws of 1939, as amended by Chapter 90, Laws of 1941, the supervisors of a weed control district may take possession and control of any infested tract of land in a weed district for such period of time as may benecessary to destroy and exterminate the noxious weeds thereon.

Sincerely yours,

R. V. BOTTOMLY
Attorney General