

ANIMALS RUNNING
AT LARGE:

Where there is a County wide stock law and an injunction has been decreed by Circuit Court against a Constable therein for taking up animals thereunder, such decree would restrain only the party to the record and his privies.

June 29th, 1939.

Hon. Charles T. Bloodworth, Jr.,
Prosecuting Attorney
Butler County
Popular Bluff, Missouri.



Dear Sir:

We desire to acknowledge your request for an opinion on March 3rd, which is as follows:

"Enclosed please find a copy of a judgment rendered in the case of George Collins and Charles Irby, against Sam Pennell. The following is a statement of facts on which this judgment was rendered:

"In the last general election, the people of this county voted an improved county wide stock law. In a few days thereafter, George Collins and Charles Irby brought a law suit against Sam Pennell, alleging that he was threatening to put up, and restrain their cows and live stock from running at large, and asking that Sam Pennell be enjoined from doing those acts because they alleged that the election was invalid, and that the county court was not authorized to call said election.

"This suit was not contested by Sam Pennell, the Defendant Constable of Black River Township. A Change of

Venue was applied for in January term of Butler County Circuit Court, and granted, and sent to the Wayne County Court. The Wayne County Circuit Court Judge rendered the enclosed judgment as set out by the copy which I am sending you. It is the contention of several lawyers in this city, that there is no stock law in this county, by reason of the rendition of the enclosed judgment.

"Several County officials have requested me to write and ask you for a ruling on this matter, as some of the officials believe that the stock law is only effected in Black River Township, and that Sam Pennell is the only one enjoined from enforcing it.

"The question about which we want information, is whether or not the stock law is in force in other parts of this county, or whether this judgment prevents enforcement of the stock law in all parts of this county."

The decree of court is as follows:

"Now on the 14th day of February, 1939, this cause coming on to be heard, come the plaintiffs in person and by their attorneys, Byron Kearbey and Lawrence E. Tedrick, but the defendant, Sam Pennell comes not but makes default. The plaintiffs herein announce ready for trial, thereupon said plaintiffs adduced evidence in support of the

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allegations in their petition. And the Court being informed of said facts and being fully advised in the premises and having considered said petition and the evidence adduced thereon, finds the following facts:

"(1) That the County Court of Butler County, Missouri, called an election to submit to the voters of Butler County, Missouri, the proposition of restraining horses, mules, assess, cattle, swine, sheep and goats from running at large in Butler County, Missouri, on the 15th day of May, 1938, and that at the time of making the order calling said election there was no petition filed requesting said County Court to call same, authorized by Sec. 12805, R. S. Mo. 1929, and that the County Court was therefore without jurisdiction to make its order of May 15, 1938, calling said election.

"(2) That the petition filed requesting the County Court of Butler County, Missouri, to submit to the voters of said Butler County, the question of restraining horses, mules, assess, cattle, swine, sheep and goats from running at large in Butler County was filed on July 15, 1938, and no order of the County Court calling said election was ever made based on said petition so filed.

"The Court therefore finds that said election so held, on the 8th day of November, 1938, by virtue of the order made by the County Court on May 15, 1938, was made without legal authority and is void.

"IT IS THEREFORE considered, ordered, adjudged and decreed by the Court that said election so held on November 8, 1938, is void and of no force and effect and that the defendant, Sam Pennell be and he is, hereby perpetually restrained and enjoined from taking up or attempting to take up plaintiffs' cattle, hogs and other live stock and restraining them from running at large in Black River Township, Butler County, Missouri."

Section 1519 R. S. Mo. 1929, is as follows:

"The remedy by writ of injunction or prohibition shall exist in all cases where a cloud would be put on the title of real estate being sold under an execution against a person, partnership or corporation having no interest in such real estate subject to execution at the time of sale, or an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages."

Section 1513 R. S. Mo. 1929, is as follows:

"If any person disobey or violate an injunction after it is served on him, the circuit court to which it is returned, or any judge thereof in vacation, shall issue an

attachment against him for a contempt; and unless he shall disprove or purge the contempt, if in vacation, the judge may commit him to jail until the sitting of the court in which the injunction is pending, or take bail for his appearance in said court at the next term thereof, to answer for the contempt, and abide the order of the court, and in the meantime to observe and obey the injunction. "

The question presented by your inquiry is whether or not the injunction mentioned in your letter has the effect of binding all officers of your county.

There are cases where parties may bring an action in their own behalf and on behalf of all others similarly situated. However, your letter does not indicate that the injunction suit was so brought. The plaintiffs in the injunction suit did not pretend to act for other people similarly situated and the decree merely restrained the defendant Constable from taking up the stock of the two plaintiffs and restrain them from running at large in Black River Township.

There are also cases holding that a judgment against certain officers in certain matters is conclusive upon the governmental agencies which said officers represent. For instance, in Freeman on Judgments, Vol. 1 (5th Ed.), p. 1095, it is said:

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"A judgment for or against a state or municipal officer or agency in matters as to which they are entitled to represent the city or state in litigation is conclusive for or against the city or state and their other agencies. It is conclusive upon the other officers of the governmental body represented in the first action."

Again in the same work at page 1096, it is said:

"An officer that has been authorized by law to sue or be sued with respect to the public matters in their control is such a representative."

We do not believe, however, that a Constable is such a representative of the county that a judgment against him would be binding upon all of the people of the county. While it is the duty of the Constable to enforce the stock law, yet he does not act for nor represent the county as a governmental agency. The stock law is a state law, and when the people of a county by a vote adopt the law, it is none the less a state law. The Constable derives his authority and his directions from the statutes enacted by the state Legislature. The county as a governmental agency does not vest the Constable with any authority to enforce the stock law, nor does the county have anything to do with directing the Constable in the enforcement of the stock law. Neither does the Constable have any authority to represent the county as a governmental body. The Mayor of a city is by law the legal representative of a city in many respects. The county court of a county represents generally the county as a governmental body. In view of these facts, we do not think the Constable of a township stands in such relation to his county that a judgment against him is binding on the entire county.

Furthermore, the rule as to judgments being binding upon all persons who may be said to be privies to the suit in which the judgment was rendered is subject to the exceptions that if the matters involved in the suit were not actually adjudicated the judgment will not bind the public. In Freeman on Judgments, p. 958, it is said:

"And where it appears that the merits of the matter were not actually adjudicated because of compromise or consent judgment, the public is not bound thereby."

There is nothing in the data submitted with your request which justifies the conclusion that there was a consent judgment or even a compromise, but it would appear there was no contest by the defendant and, consequently, the merits were not actually contested in the case. It would be a rather harsh rule to bind the entire public by a judgment in a case in which some officer did not even make a pretense of contesting the issues.

CONCLUSION

It is, therefore, the opinion of this office that the injunction mentioned in your inquiry is binding only upon the defendant in the case in which the injunction was granted, but is not binding upon other officers of the county. If the defendant has deputies, they are, of course, bound as well as the Constable himself, but officers of

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of other townships in the county would not be bound.

Very truly yours,

HARRY H. KAY
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:RV