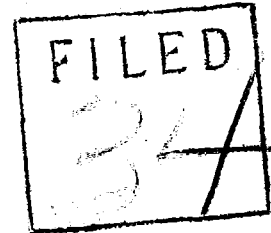


LIQUOR - State or county not liable for costs
(INJUNCTION) - or damages where injunction suit
is dismissed by prosecuting attorney.

February 18, 1941

Hon. Arthur U. Goodman, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
dated February 18, 1941, which reads as follows:

"Some time ago a suit was instituted
in the Circuit Court here entitled
State ex rel McKay, Prosecuting
Attorney, vs. Frank Werner, et al.,
being an action for injunction
against an alleged public nuisance.
A temporary injunction was granted
and the business closed. Later the
cause was dismissed by the Prose-
cuting Attorney.

"My inquiry is whether the County
is liable for the costs of this case,
and, if so, must they pay all the
costs? The defendant I understand
left here before the cause was dis-
missed by my predecessor and I don't
think any costs could be made off
him if he were liable."

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We assume from the above statement of facts that this injunction was brought under Section 4943 and 4944 R. S. Missouri, 1939, under the Liquor Control Act.

Section 4944 R. S. Missouri, 1939, reads in part as follows:

"Sec. 4944. Action to enjoin nuisance - procedure. - That an action to enjoin any nuisance defined in this act may be brought in the name of the state of Missouri by the attorney general of the state of Missouri, or by any prosecuting attorney or circuit attorney of any county or city of the state of Missouri. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. * * * No bond shall be required in instituting such proceedings.
* * * "

Section 1671 R. S. Missouri, 1939, provides:

"No injunction, unless on final hearing or judgment, shall issue in any case, except in suits instituted by the state in its own behalf, until the plaintiff, or some responsible person for him, shall have executed a bond with sufficient surety or sureties

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to the other party, in such sum as the court or judge shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction to the parties enjoined, or to any party interested in the subject matter of the controversy, conditioned that the plaintiff will abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him if the injunction shall be dissolved."

In reading the aforesaid two sections it will be noted that these sections provide that the State shall not be required to file a bond before the temporary writ of injunction is granted by the judge of the circuit court in which the injunction suit is brought.

In the case of Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505, 1. c. 506, the Court had this to say:

"The Circuit Court erred in overruling the demurrer of defendant, and the judgment cannot be sustained. There can be no recovery of damages arising from an injunction, except in an action on the bond, unless it be averred and shown that the process of the court was abused maliciously and without probable cause."

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In the case of The City of St. Louis v. The St. Louis Gaslight Company, 82 Mo. App. 349, l. c. 354-357, the Court had this to say:

"* * * In Palmer v. Foley, 71 N. Y. 106, Judge Folger expresses this condition of the law:

"' It seems that without some security given before the granting of an injunction order, or without some order of the court or a judge, requiring some act on the part of the plaintiff which is equivalent to the giving of security such as a deposit of money in court -- the defendant has no remedy for any damages which he may sustain from the issuing of the injunction, unless the conduct of the plaintiff has been such as to give ground for an action for malicious prosecution.'

* * *

"* * When a suitor procures a writ or order of injunction upon a fair presentation of facts to the court in good faith he has never been regarded as responsible in damages therefor, either in law or equity, unless he has made himself so by some voluntary undertaking. In such case he stands before the law like a suitor in any other process or proceeding. This I understand to be the rule, as universally recognized and approved. (Cases Cited) If, therefore, the plaintiff, in the absence of an undertaking

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to indemnify, is exempt from damages consequent upon an interlocutory order of injunction when dissolved, a fortiori he will be exempt in the absence of such undertaking, when the injunction issues only after a final hearing upon the merits of the case. In this case there was no promise or undertaking of any kind to indemnify the defendant in the event of a dissolution of the injunction by reversal on appeal.

* * *

"* * A suit in which no bond or undertaking is provided for by law or exacted by the court, as to any damages resulting to the defendant from a legitimate prosecution thereof, presents an instance of damnum absque injuria, and is like any ordinary suit which leaves the defendant heir to much inconvenience and pecuniary loss, notwithstanding a final judgment in his favor.* * "

We do not find where the Legislature has ever passed any specific statute placing the obligation upon the State or the county to pay the costs, or to be liable for damages where an injunction suit is instituted by the State, and where these statutes specifically provide that the State shall not be required to give bond, it is our opinion that even though this suit was dismissed after the temporary writ was granted by the Court, that no costs or damages can be collected, for the reason that, as

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was said in the Iron Mountain Bank case, supra, there can be no recovery of damages arising from an injunction, except in an action on the bond. There being no bond or any specific statute we see no way whereby the State or county could be held liable for the costs or damages.

Respectfully submitted,

E. RICHARDS CREECH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

BRC:RW