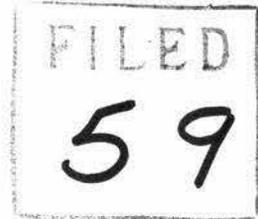


STATE HISTORICAL SOCIETY:

State Historical Society is an agent of the state and not subject to suit.

December 9, 1950



Honorable Allen McReynolds
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Dear Senator McReynolds:

We are in receipt of your recent request for an opinion concerning the liability, if any, of the State Historical Society of Missouri because of an alleged infringement of copyright in the publication of two songs in the four-volume set of Ozark Folk Songs published by the Society. You enclose with your inquiry correspondence from persons claiming to be the owners of the copyright of these two songs.

Your inquiry presents the question:

Assuming that there was an infringement, is the State Historical Society liable in an action brought by the holders of the copyright?

You suggest the further question as to whether the publication in fact constitutes an infringement of the copyright.

In view of the conclusion reached as to the question of law presented, it seems unnecessary to attempt to answer the question as to whether there was an infringement further than to say that from the available evidence this seems very doubtful.

The State Historical Society of Missouri is an agency of the state created by statute (Sections 14902, 14903 and 14904, R. S. Mo. 1939). Its rights and duties are prescribed by statute and it is supported by appropriations of state funds. Among its duties is

". . . to publish, from time to time, reports of its collections and such other matters as may tend to diffuse information relative to the history of this region"

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In pursuant of this duty it published the four-volume collection of Ozark Folk Songs. The publication was not for profit and we are informed that the receipts from sales will pay only a small part of the cost of the publication.

The general doctrine of the immunity from suit of the state and its agencies is well settled.

In the Article on States in Corpus Juris, it is said:

"A state, by reason of its sovereignty, is immune from suit and it cannot be sued without its consent, in its own courts, the courts of a sister state, or, by an individual, in the federal courts." (59 C. J. 300)

Further quotation from this work is:

"SUITS AGAINST STATE OFFICERS AND AGENCIES -- (a) IN GENERAL. While a suit against state officials or agencies is not necessarily a suit against the state, the general rule that a state cannot be sued without its consent cannot be evaded by making an action nominally one against the servants or agents of a state when the real claim is against the state itself, and it is the party vitally interested. Accordingly it is well settled, as a general proposition, that, where a suit is brought against an officer or agency with relation to some matter in which defendant represents the state in action and liability, and the state, while not a party to the record, is the real party against which relief is sought so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the state, will operate to control the action of the state or subject it to liability, the suit is in effect one against the state and cannot be maintained without its consent." (59 C. J. 307)

The Supreme Court of this State has passed on this question and in *Zoll v. St. Louis County*, 343 Mo. 1031, 124 S. W. (2d) 1168, the Court said:

"The courts of this state have consistently held that, absent consent of the state, its

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agencies can not be sued in damages from whatever source caused, except when acting in a private or proprietary capacity as was the case in *Hannon v. St. Louis County*, supra [62 Mo. 313] It is the prerogative of the state to determine when suit may be maintained against it or its agencies and when not."

In this case the Court cites numerous cases holding the state and its agencies not subject to suit and holding that Section 21 of Article II of the Constitution of 1875 and Section 26 of Article I of the Constitution of 1945 are not a consent by the state to be sued.

The case of *Lias v. Harmony Society Historical Association*, 88 Pennsylvania Superior Court 534, involves action against a historical society with duties similar to those given by law to the State Historical Society of Missouri. In that case the Court said (1. c. 541):

"We are clear that under the undisputed facts in this case the defendant was engaged in rendering service of 'a public character, for a high order of public benefit,' for the state and is entitled to the benefit of the rule of law exempting agencies of the state from liability for negligence in the performance of functions of government delegated to them by the state."

The case of *Zoeller v. State Board of Agriculture*, 173 S.W. 1143 (Kentucky), was an action for damages for personal injuries sustained by plaintiff at the State Fair which was conducted by the defendant Board of Agriculture. The injury was sustained because plaintiff was struck and injured by a mounted musician who was employed by the State Board of Agriculture to furnish music at the Fair. The court held that the State Board was not liable and said (1. c. 1144, 1145):

"It is an elementary principle of the law, however, that the state cannot be sued for the negligent or malicious acts of any servant of any agencies of the state which perform governmental functions, nor can such agencies be sued for torts of its servants. The question for determination seems to be as to whether or not the State Board of Agriculture, in conducting the Kentucky State

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Fair, exercises a governmental function. If it does, it is then not liable for the torts of its officers, agents, or employes. If it does not exercise a governmental function, then it is liable for the torts of its officers and agents.

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"The State Board of Agriculture is not a corporation for a pecuniary profit, and no person connected with it has any pecuniary interest in it. Such a corporation as this is not subject to the rules prescribed by law for private corporations, created and maintained for the benefit of their stockholders. The fact of its charging a fee for admittance to the exhibitions at the State Fair is far from being conclusive upon the subject of its public character. The asylums for the insane, in this state, as said in the case of *Leavell v. Western Ky. Asylum*, supra, are corporate bodies, with power given to them by the statute to sue and be sued, to contract and be contracted with, and they, likewise, receive patrons from other states, and charge therefor, and charge the estate of such citizens of the state, as may be confined therein, for their maintenance while there; yet this court has undeviatingly held that they, and other such as they, are not liable for the tortious acts of their officers or servants. This court, in the case supra, saying:

'We are of the opinion therefore that the right given appellee by the statute to sue, and to others to sue it, is to be taken in a qualified sense, and should not be so construed or extended, as to make it responsible to persons injured by reason of the misconduct or negligence of its inmates or employes.'

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CONCLUSION

It is our opinion that the State Historical Society of Missouri is an agency of the state and not subject to suit because of alleged infringement of copyright in its publications.

Respectfully submitted,

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APPROVED:

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