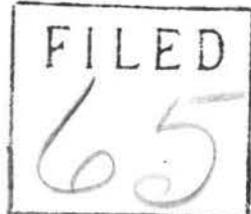


INTOXICATING LIQUOR : Prosecuting Attorney may bring  
BOND: suit on liquor bond to recover  
fine adjudged against licensee

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November 8, 1937



Honorable Charles E. Murrell, Jr.  
Prosecuting Attorney  
Adair County  
Kirksville, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"I would like an opinion from your office, of the construction and application of Section 19 of the Intoxicating Liquor Laws passed by Missouri Legislature at the Extra-Session 1933-34, page 83. Also section 13-a found on page 82 of the same session acts, particularly the last paragraph of 13-a. I particularly want the following information: Can the fine and costs assessed for the violation of any section of the intoxicating liquor laws be collected from the bond that is required in the above mentioned sections?"

"The case that I am inquiring about, is one where the defendant sold intoxicating liquor to a minor. He has a surety bond on file in the Supervisor's office. If I can bring suit in this County to collect the fine, please advise me the procedure to be taken."

The bond referred to and which said licensee is required to furnish before he shall be granted a license is by virtue of Sections 13a and 19 of Laws of Missouri,

Extra Session, 1933-34, pages 82-83, respectively, which said sections read as follows:

"Any person who possesses the qualifications required by this act, and who meets the requirements of and complies with the provisions of this act, and the ordinances, rules and regulations of the incorporated city in which such licensee proposes to operate his business, may apply for and the Supervisor of Liquor Control may issue a license to sell intoxicating liquor, as in this act defined, by the drink at retail for consumption on the premises described in the application. Provided, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand (20,000) inhabitants, until the sale of such intoxicating liquor, by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city. Such authority to be determined by an election to be held in said cities having a population of less than twenty thousand (20,000) inhabitants, under the provisions and methods set out in this act. The population of said cities to be determined by the last census of the United States completed before the holding of said election. Provided further, that for the purpose of this act, the term 'city' shall be construed to mean any municipal corporation having a population of five

hundred (500) inhabitants or more. Provided further, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, outside the limits of such incorporated cities. In each instance, a bond in the sum of two thousand (\$2,000.00) dollars, with sufficient surety, to be approved by the Supervisor of Liquor Control, must be given for the faithful performance of all duties, imposed by law upon the licensee, and for the faithful performance of all the requirements of this act, and any violation of such conditions, duties or requirements shall be a breach of said bond and shall automatically cancel and forfeit the license granted hereunder; provided, that no person financially interested in the sale of intoxicating liquor at wholesale shall be accepted as surety on any such bond."

"Application for license to manufacture or sell intoxicating liquor, under the provisions of this act, shall be made to the Supervisor of Liquor Control. Before any application for license shall be approved the Supervisor of Liquor Control shall require of the applicant a bond, to be given to the state, in the sum of Two Thousand Dollars, with sufficient surety, such bond to be approved by the Supervisor of Liquor Control, conditioned that the person obtaining such license shall keep at all times an orderly house, and that he will not sell, give away or otherwise dispose of, or suffer the

same to be done about his premises, any intoxicating liquor in any quantity to any minor, and conditioned that he will not violate any of the provisions of this act and that he will pay all taxes, inspection and license fees provided for herein, together with all fines, penalties and forfeitures which may be adjudged against him under the provisions of this act."

Section 19, supra, provides that before any application for a liquor license shall be approved the Supervisor of Liquor Control shall require of the applicant a bond to be given to the State. Therefore, the bond runs in the name of the State, a copy of which we are herewith inclosing.

The sureties are liable only in case said licensee fails to perform all duties imposed by law upon him. Section 19, supra, also provides that said bond is conditioned that he will pay all taxes, inspection and license fees provided for herein, together with all fines, penalties and forfeitures which may be adjudged against him under the provisions of this Act.

In *City of St. Louis v. Senter Commission Co.*, 85 S. W. (2d) 21, 1. c. 24, the court held the primary rule of construction was to determine the legislative intent, and said:

"The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent. *Meyering v. Miller*, 330 Mo. 885, 51 S. W. (2d) 65; *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S. W. (2d) 920. This should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose."

Therefore, while the law provides that the bond shall run in the name of the State, it is apparent that the legislative intent while enacting the liquor control act was that when a breach of the bond occurred, as in the instant case, whereupon a conviction and fine was adjudged against said licensee who had furnished the State with a bond and was unable to pay said fine, that the prosecuting attorney of the county wherein the violation was committed and fine adjudged, could sue on the bond for the amount of the fine. In support of this we refer you to the underlined portion of Section 19, supra.

Section 9 of the Liquor Control Act specifically prohibits the sale of intoxicating liquor to a minor and no penalty is provided for such violation. Said Section 9 provides as follows:

"No person or his employee shall sell or supply intoxicating liquor or permit same to be sold or supplied to a habitual drunkard or to any person who is under or apparently under the influence of intoxicating liquor. Intoxicating liquor shall not be given, sold or otherwise supplied to any person under the age of twenty-one years, but this shall not apply to the supplying of intoxicating liquor to a person under said age for medicinal purposes only, or by the parent or guardian of such person or to the administering of said intoxicating liquor to said person by a physician, No person under the age of twenty-one years shall sell or assist in the same or dispensing of intoxicating liquor."

While there is no penalty for a violation of the above provision of the Liquor Control Act, Section 43 of the Laws of 1935, page 282, provides a penalty for the violation of any provision of the Liquor Control Act where

there is no specific penalty given. Section 43, supra, provides:

"Any person violating any of the provisions of this Act, except where some penalty is otherwise provided, shall upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than Fifty (\$50.00) Dollars, nor more than One Thousand (\$1,000.00) Dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence."

In view of the foregoing, the sale of intoxicating liquor to a minor is a violation of the Liquor Control Act for which there is a penalty of a fine or imprisonment in the county jail, or both, as provided by Section 43, supra.

Therefore, in view of Section 19, supra, providing the bond is conditioned that the licensee will pay all fines and penalties which may be adjudged against him under the provisions of this Act, and Section 9, supra, holding the sale of intoxicating liquor to a minor a violation of said Act, and Section 43, supra, making the penalty for such a violation, there is no doubt but what the bond may be sued on upon conviction for a violation of the Liquor Control Act when a fine is adjudged against the licensee and he is unable to pay same.

The courts have held that even though a bond may run to the State and no provision is made as to who may sue on same, that where one suffers from a breach of the bond and to whom the obligation is owed may sue thereon.

In *Thomas v. Kindley*, 27 N. W. 231, 1. c. 233, the court held that even though the bond should have been taken out in the name of the State, as provided by statute, instead of taking same out in the name of the village of Hebron, State of Nebraska, the bond was held valid and was

for the use of any person who may sustain injuries by reason of the sale of intoxicating liquors and any injured party may sue upon it as provided by statute.

In the above case there was a suit on a bond, the bond being much more specific than the bond in question, setting forth the fact that the licensee shall pay all damages, fines and forfeitures which may be adjudged against him under the provisions of the statutes of the State of Nebraska. A reversal was sought on the ground that the bond ran in the name of the village of Hebron, State of Nebraska, instead of the State of Nebraska, as required by statute, and the court said:

While the statute requires the bond to be payable to the State of Nebraska, yet it provides that it 'may be sued upon for the use of any person or his legal representatives who may be injured by reason of the selling or giving away any intoxicating liquor by the person licensed or is adjudged,' so that the bond is not for the use of the state but for persons who may sustain injuries by reason of the sale of intoxicating liquors. The state, therefore, is merely a nominal party, a trustee, but there is no provision that if another obligee is named the bond will therefore be void. In the absence of such a provision we must hold the bond to be valid and available to any person who may have sustained injuries by the sale of liquors by the principal in the bond."

In like manner our statute, Section 19, provides the bond required herein shall be given to the State but further provides said bond shall be conditioned that said licensee will pay all fines and penalties which may be adjudged against him under the provisions of this Act. The bond also specifically makes said bond null and void if said principal shall faithfully perform all the duties imposed by law.

Section 698, Revised Statutes Missouri 1929, reads as follows:

"Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next preceding section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."

In *Lynch v. Brennan, et al.*, 154 N. W. 795, the court said:

"There can be no question that the facts alleged are sufficient to charge defendant Brennan with liability at common law. *Curran v. Olson*, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517. The liability of defendant Surety Company is a different matter. Its liability, if any exists, is contractual and is predicated upon its bond. The bond must be construed in connection with the statutes which prescribe the terms to be contained in the bond and prescribe its scope and effect. There are two such statutory provisions."

In *State v. Hailer*, 203 S. W. 664, 1. c. 667, the court held that even though the bond was made separate to the State where one suffering a special injury from a breach of the bond and to whom the obligation was owed, may sue thereon:

"In other words, the statute having required a bond for the faithful performance of duty, and relator, as a peaceable, unoffending patron, legally in the dramshop keeper's place of business, is entitled to an observance of that duty, and,

being personally and specially injured by the failure to perform that duty, has a cause of action on the bond. Being the party injured by the breach of the bond, he is the real party in interest, and, as relator, is entitled to have the suit maintained. Section 1729, R. S. Mo. 1909. Frequently statutes provide for the giving of bonds, made payable to the state, for the performance of some duty or obligation concerning which it is not provided who may sue thereon, but 'where there's a right there's a remedy,' and it has been held that one suffering a special injury from a breach of the bond and to whom the obligation is owed may sue thereon. For instance, a recorder of deeds is required to give bond for the faithful performance of his duties, and no provision is made as to who may sue thereon or under what circumstances suit may be brought. And yet a recorder was held liable on his bond for a breach thereof toward one to whom he owed that duty and who was specially injured by the breach thereof. State ex rel v. Green, 124 Mo. App. 80, 100 S. W. 1115. See, also, Scott v. Missouri Pacific R. Co., 38 Mo. App. 523. That a bond inures to the benefit of one entitled to the performance of the duty for which the bond is given, and can be sued on by such an one injured by the breach thereof, is held in Young v. Young, 21. Ind. App. 509, 52 N. E. 776; American Surety Co. v. Thorn-Halliwel Cement Co. 9 Kan. App. 8, 57 Pac. 237; People v. Cotteral, 115 Mich. 43, 73 N. W. 19, 74 N. W. 183; School District v. Livers, 147 Mo. 580, 49 S. W. 507; City of St. Louis v. Von Phul, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695; Devers v. Howard, 144 Mo.

671, 46 S. W. 625.

"In *Squires v. Michigan Bonding Co.*, 173 Mich. 304, 138 N. W. 1062, 43 L. R.A. (N. S.)76, it is held that a saloon keeper's bond, being for the benefit of the public and not strictly contractual in nature, is to be construed according to the purpose, intent, and meaning of the statute pursuant to which it is given, and not according to the strict rules applicable to private contracts of suretyship. Certain it is that if the action in the case at bar cannot be maintained, then individual citizens or members of the body politic have no protection by reason of said bond. If a person is beaten up and abused by the saloon keeper or his agents while in the saloon, then the only redress afforded by the bond is to have two reputable taxpaying citizens to bring suit for the forfeiture thereof, provided they will volunteer to run the risk. We do not think this is the intent and meaning of the statute nor the limit of its purpose in requiring the saloon keeper to give security against the happening of such occurrences. The business engaged in is of a character likely to result in such things, and the saloon keeper gives a bond that he will not permit or suffer them to be done, and his sureties are well aware of the nature of the business they agree to guarantee shall be conducted in an orderly manner, and for a saloon keeper, through his agent and bartender, to beat up an unoffending patron of his place of business and then go free of all liability on the bond because it does not cover such matters is to restrict within too narrow limits the language of the bond and the object and intention of the statute requiring one to be given."

Honorable Charles E. Murrell, Jr.    -11-    November 8, 1937

Section 2-a of the Liquor Control Act makes it the duty of the prosecuting attorney to prosecute anyone violating the provisions of the liquor control act, and reads as follows:

"For the purpose of enforcing the provisions of this act and acts amendatory thereto, the prosecuting attorneys of the respective counties and the circuit attorneys, or at the request of the Governor, the Attorney General shall investigate and prosecute all violations of any provision of this act; \* \* \* \* \*"

Therefore, in view of the foregoing, it is the opinion of this Department that it was the intention of the Legislature in requiring a bond of each licensee to not only protect the State but also the county upon any licensee violating any provision of the Liquor Control Act, and, therefore, the prosecuting attorney of the county wherein the act was committed may bring suit upon the bond.

Relative to the procedure to be taken, we suggest that suit be brought in the same manner as you would on any other bond. Suit should be brought in the name of the State at relation of or to use of the County of Adair. We can furnish you with a certified copy of the bond given for the purpose of filing the petition and forward you the original bond for use in the trial of the lawsuit.

We are inclosing a copy of a petition filed by this Department which may be used as a guide, wherein suit was instituted for the full amount of said bond. However, in the instant case you are only suing to recover the amount of the fine and costs.

Yours very truly,

AUBREY R. HAMMETT, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

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