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# DAMAGES RECOVERABLE ON INJUNCTION BONDS IN MISSOURI

## I. INTRODUCTION

Prior to the enactment of statutory provisions relating to injunction bonds, the only remedy available in Missouri to a person wrongfully restrained by a writ of injunction was a common law action for malicious prosecution.<sup>1</sup> To maintain such an action the wrongfully restrained party had to establish that the injunction writ had been sued out with malice and without probable cause.<sup>2</sup> Because of the inherent difficulty in proving the necessary elements for malicious prosecution, the defendant was left without an effective remedy against the plaintiff, even though the plaintiff's injunction had been dissolved and the merits of the controversy decided against the plaintiff. For example, a plaintiff acting without malice could restrain the defendant from conducting a foreclosure sale of the plaintiff's property. If the fair market value of the property declined substantially during the period of restraint, the defendant had no legal recourse against the plaintiff even if it was subsequently determined that the temporary injunction was improperly issued. In an attempt to ameliorate the harshness of this situation, the legislature enacted the first Missouri statute relating to injunction bonds in 1825.<sup>3</sup> The present Missouri Rule of Civil Procedure 92.09, which is derived from Mo. Rev. Stat. section 526.070 (1969) provides:

No injunction or restraining order, 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 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 or restraining order to the parties enjoined, or any party interested in the subject

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1. *City of St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349 (1884); *R.A. Vorhof Constr. Co. v. Black Jack Fire Protection Dist.*, 454 S.W.2d 588 (St. L. Mo. App. 1970); *Hamilton v. Hecht*, 299 S.W.2d 577 (St. L. Mo. App. 1957); *Toothaker v. Pleasant*, 9 S.W.2d 670 (K.C. Mo. App. 1928); *Losee v. Crawford*, 222 Mo. App. 683, 5 S.W.2d 105 (K.C. 1928); *Teasdale v. Jones*, 40 Mo. App. 243 (K.C. 1890); *Campbell v. Carroll*, 35 Mo. App. 640 (St. L.), *appeal dismissed*, 159 U.S. 248 (1894); *Iron Mt. Bank v. Mercantile Bank*, 4 Mo. App. 505 (St. L. 1877); *Keber v. Mercantile Bank*, 4 Mo. App. 195 (St. L. 1877).

2. *City of St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349 (1884); *Teasdale v. Jones*, 40 Mo. App. 243 (K.C. 1890); *Campbell v. Carroll*, 35 Mo. App. 640 (St. L.), *appeal dismissed*, 159 U.S. 248 (1894); *Iron Mt. Bank v. Mercantile Bank*, 4 Mo. App. 505 (St. L. 1877); *Keber v. Mercantile Bank*, 4 Mo. App. 195 (St. L. 1877).

3. MO. LAWS 1825, at 441, § 4.

matter of the controversy, conditioned that the plaintiff will abide by 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 or restraining order be dissolved.<sup>4</sup>

Federal Rule of Civil Procedure 65(c) provides similar protection for a defendant restrained by a temporary injunction issued by a federal court. The federal rule will be examined in more detail below.<sup>5</sup>

In Missouri an injunction bond is not required in order to obtain a permanent injunction.<sup>6</sup> Missouri Rule of Civil Procedure 92.09 specifically excepts a permanent injunction from the bond requirement, stating that no injunction or restraining order shall issue in any case "unless on final hearing or judgement."<sup>7</sup> A temporary injunction or restraining order which is issued without the requisite bond is inoperative and void, and disobedience of such injunction by the defendant is not punishable contempt.<sup>8</sup>

## II. SUBSTANTIVE CONSIDERATIONS AFFECTING RECOVERY: ACCRUAL OF THE CAUSE OF ACTION ON THE BOND

A plaintiff's liability on an injunction bond depends initially upon whether a temporary injunction is granted by the trial court. Generally, a temporary injunction is issued if it appears from the plaintiff's petition that the plaintiff seeks to protect some substantial right from actual or threatened invasion by the defendant.<sup>9</sup> The plaintiff must show that he has no adequate remedy at law,<sup>10</sup> and that irreparable injury will result if the injunction is not issued.<sup>11</sup> The temporary injunction must be directed

4. MO. R. CIV. P. 92.09. Unless otherwise indicated, textual references to the Missouri rule on injunction bonds shall pertain to Rule 92.09. For the purpose of determining the damages recoverable on injunction bonds in Missouri, no distinction is made between temporary injunctions and temporary restraining orders.

5. See Part VI *infra*.

6. Davison v. Hough, 165 Mo. 561, 65 S.W. 731 (En Banc 1901); R.A. Vorhof Constr. Co. v. Black Jack Fire Protection Dist., 454 S.W.2d 588 (St. L. Mo. App. 1970); Toothaker v. Pleasant, 9 S.W.2d 670 (K.C. Mo. App. 1928).

7. MO. R. CIV. P. 92.09.

8. State *ex rel.* American Bankers Assurance Co. v. McQuillin, 260 Mo. 164, 168 S.W. 924 (En Banc 1914); State *ex rel.* Thrash v. Lamb, 237 Mo. 437, 141 S.W. 665 (En Banc 1911); State *ex rel.* Missouri Pacific Ry. v. Williams, 221 Mo. 227, 120 S.W. 740 (En Banc 1909); State *ex rel.* George v. Mitchell, 230 S.W.2d 116 (Spr. Mo. App. 1950); Aetna Ins. Co. v. Security Printing Co., 196 S.W. 93 (St. L. Mo. App. 1917); 2 J. HIGH, INJUNCTIONS 1429 (4th ed. 1905).

9. Humphreys v. Dickerson, 216 S.W.2d 427 (Mo. 1948); Higday v. Nickolaus, 469 S.W.2d 859 (K.C. Mo. App. 1971); Howe v. Standard Oil Co., 150 S.W.2d 496 (St. L. Mo. App. 1941).

10. State *ex rel.* Phillips v. Yeaman, 451 S.W.2d 115 (Mo. En Banc 1970); State *ex rel.* St. Louis County v. Jones, 498 S.W.2d 294 (Mo. App., D. St. L. 1973).

11. The phrase "irreparable injury" is closely related to the "substantial right" mentioned in the cases cited note 9 *supra*. However, "irreparable injury" is

against actual or threatened conduct of the defendant which would render judgment by the trial court ineffective.<sup>12</sup>

Once a bond is posted and a temporary injunction granted, the plaintiff's liability on the bond accrues and the defendant's cause of action comes into existence at the time the trial court determines that the temporary injunction was wrongfully issued.<sup>13</sup> Upon a final hearing on the merits, the trial court ordinarily will make a specific finding whether the temporary injunction was properly issued. In such a case, the defendant's cause of action on the bond accrues upon the court's finding that the temporary injunction was not properly issued.<sup>14</sup> In some instances, however, the suit may be dismissed and the temporary injunction dissolved as the result of a voluntary dismissal by the plaintiff, settlement by the parties, or by the plaintiff's failure to prosecute. Where there has been no such adjudication, it has often been stated that the termination of the suit adversely to the party procuring the injunction is sufficient to give the defendant a right to damages on the bond.<sup>15</sup> This proposition has not been uniformly applied in Missouri.

#### A. *Voluntary Dismissal by the Plaintiff*

After a temporary injunction has been issued, voluntary dismissal of the suit by the plaintiff without the consent of the defendant operates as a judicial determination that the temporary injunction was improperly issued.<sup>16</sup>

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specifically required for injunctive relief under § 526.030 RSMO 1969, which provides:

The remedy by writ of injunction or prohibition shall exist in all cases where . . . 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.

12. MO. R. CIV. P. 92.02 authorizes the court to issue a temporary injunction to restrain acts of the defendant which:

during the litigation, would produce injury to the plaintiff, or when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, some act in relation to the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual . . . .

13. *Holloway v. Holloway*, 103 Mo. 274, 15 S.W. 536 (1891); *Cohn v. Lehman*, 93 Mo. 574, 6 S.W. 267 (1887); *Lowry v. Northwestern Sav. & Loan Ass'n*, 542 S.W.2d 546 (Mo. App., D. St. L. 1976); *Goad v. Mister Softee*, 380 S.W.2d 493 (St. L. Mo. App. 1964); *Waterman v. Waterman*, 210 S.W.2d 723 (St. L. Mo. App. 1948); *J.J. Newberry Co. v. Baker*, 239 Mo. App. 1130, 205 S.W.2d 935 (St. L. 1947); *Hecht Bros. Clothing Co. v. Walker*, 279 S.W. 1059 (St. L. 1926); *Pierce v. Campbell*, 217 Mo. App. 179, 274 S.W. 875 (St. L. 1925).

14. *Waterman v. Waterman*, 210 S.W.2d 723 (St. L. Mo. App. 1948); *Hecht Bros. Clothing Co. v. Walker*, 279 S.W. 1059 (St. L. Mo. App. 1926).

15. See cases cited note 13 *supra*.

16. *Alliance Trust Co. v. Stewart*, 115 Mo. 236, 21 S.W. 793 (1893); *Kelder v. Dale*, 313 S.W.2d 59 (R.C. Mo. App. 1958); *Waterman v. Waterman*, 210 S.W.2d 723 (St. L. Mo. App. 1948); *Price Baking Powder Co. v. Calumet Baking*

An exception to this rule was established in *Kelder v. Dale*,<sup>17</sup> in which resident taxpayers of the City of St. Joseph sought a temporary injunction to prevent the city from entering into a street lighting contract with an electric company on the ground of illegality. The defendant city thereafter rejected all bids on the proposed contract and requested new bids. As a consequence, the temporary injunction was no longer necessary, and the plaintiffs voluntarily dismissed the action. The court denied the city recovery on the injunction bond and stated that the defendant was precluded from recovering damages because it had by connivance eliminated the necessity for the temporary injunction prior to a judicial determination of the propriety of the issuance of the injunction. In the absence of such connivance on the part of the defendant, voluntary dismissal by the plaintiff without the defendant's consent would give rise to a cause of action on the injunction bond in favor of the defendant.<sup>18</sup> If the defendant consents to a voluntary dismissal he waives the right to damages on the bond.<sup>19</sup>

#### B. *Settlement Between the Parties*

If a suit is dismissed as the result of a settlement between the parties, the dismissal and dissolution of the temporary injunction is *not* treated as a judicial determination that the temporary injunction was improperly issued.<sup>20</sup> The rule that a voluntary dismissal by the plaintiff gives rise to a cause of action on the bond is inapplicable to a settlement because the defendant has consented to the dismissal.<sup>21</sup> Submission of a suit to arbitration after a temporary injunction has been issued yields the same result as does a settlement.<sup>22</sup> Thus, even if the board of arbitrators finds for the defendant and awards that the plaintiff's bill be dismissed and the temporary injunction is thereafter dissolved, such arbitration award does not constitute an adjudication that the plaintiff was not entitled to the temporary injunction. The defendant is precluded from recovering on the injunction bond in this situation because of his consent to a settlement through the arbitration process.

#### C. *Dismissal for Failure to Prosecute*

Missouri case law does not clearly indicate whether the dismissal of a suit for failure to prosecute is equivalent to a judicial determination that the temporary injunction was improperly issued. In *Max v. Spaeth*<sup>23</sup> the

Powder Co., 82 Mo. App. 19 (K.C. 1899); *Sharpe v. Harding*, 65 Mo. App. 28 (St. L. 1896); 2 J. HIGH, *supra* note 8, § 1649a.

17. 313 S.W.2d 59 (K.C. Mo. App. 1958).

18. See cases cited note 16 *supra*.

19. See cases cited note 16 *supra*.

20. 2 J. HIGH, *supra* note 8, § 1649a. See Annot., 91 A.L.R.2d 1312 (1963).

21. See cases cited note 16 and accompanying text *supra*.

22. 2 J. HIGH, *supra* note 8, § 1649a.

23. 349 S.W.2d 1 (Mo. 1961).

Missouri Supreme Court held that dismissal with prejudice for failure to prosecute constituted an adjudication on the merits which barred a second suit between the same parties on the same cause of action. This decision was based on Mo. Rev. Stat. section 510.150 (1949) which specified that a dismissal with prejudice operated as an adjudication upon the merits. Pursuant to section 510.150, it became the prevailing view that where a trial court dismissed for failure to prosecute but did not specify whether the dismissal was with or without prejudice, such dismissal was to be treated as a dismissal with prejudice, provided the plaintiff was given reasonable notice of the court's intended dismissal and reasonable opportunity to be heard.<sup>24</sup> In effect, dismissal in this situation was treated as an adjudication on the merits. In some states, this "adjudication on the merits" applied not only for res judicata purposes, but was also treated as a judicial determination that a temporary injunction issued prior to the dismissal was improperly granted.<sup>25</sup> A dismissal without prejudice did not operate as an adjudication on the merits, thereby precluding the defendant from recovering on the bond even under this theory.

Because the Missouri cases do not involve claims for injunctive relief, they appear to leave unresolved the question whether "adjudication on the merits" for res judicata purposes also should be treated as an adjudication that a temporary injunction was improperly issued. There is some indication in *Denny v. Mathieu*<sup>26</sup> that this question should be answered in the negative. In *Denny* the supreme court concluded that "adjudication on the merits" was intended only to serve as a mechanism for the termination of the litigation rather than adjudication of the issues presented in the controversy. The *Max v. Spaeth* decision was expressly overruled to the extent of its holding that a dismissal with prejudice amounted to an adjudication on the merits. As a result of *Denny* the words "adjudication on the merits" were deleted from Missouri Rule of Civil Procedure 67.03 (which has incorporated the provisions of Mo. Rev. Stat. section 510.150 (1949)).<sup>27</sup> Moreover, because a dismissal for failure to prosecute is no longer treated as an adjudication on the merits, *Denny* supports the proposition that such dismissal cannot be treated as a determination of the impropriety of a temporary injunction. Consequently, it appears that a defendant cannot recover damages on an injunction bond if the temporary injunction is dissolved and plaintiff's suit is dismissed for failure to prosecute.

The foregoing result is inconsistent with the basic premise that a defendant ought to be compensated for damages caused by a temporary injunc-

24. *Shirrell v. Missouri Edison Co.*, 535 S.W.2d 446 (Mo. En Banc 1976); *Levee Dist. No. 4 v. Small*, 281 S.W.2d 614 (Spr. Mo. App. 1955).

25. See Annot., 54 A.L.R.2d 473 (1957).

26. 452 S.W.2d 114 (Mo. En Banc 1970).

27. Because the amended rule 67.03 has been effective only since 1973, there is presently no case law interpreting the effect of the amendment upon a defendant's cause of action on an injunction bond.

tion, if the temporary injunction is dissolved without the consent of the defendant. Without question, the defendant is given a cause of action on an injunction bond upon dissolution of a temporary injunction resulting from voluntary dismissal by the plaintiff.<sup>28</sup> There is no logical reason why a voluntary dismissal by the plaintiff should be differentiated from a dismissal for failure of the plaintiff to prosecute his claim. To do so would encourage the plaintiff to choose the latter alternative if he wanted to terminate litigation but avoid liability on the bond. In both situations the plaintiff is responsible for the dismissal of the suit and the dissolution of the temporary injunction; in both the plaintiff should be held liable on the bond. For the limited purpose of determining whether the defendant has a cause of action on the bond, dismissal for failure to prosecute should be treated as an adjudication on the merits, *i. e.*, as an adjudication that the temporary injunction was improperly issued.

#### D. *Temporary Injunction Dissolved Due to Defendant's Conduct After Lawful Issuance*

As previously stated, the plaintiff's liability on an injunction bond accrues either when the trial court finds that the temporary injunction has been improperly issued, or when the suit is otherwise terminated adversely to the party procuring the injunction.<sup>29</sup> The Missouri rules provide simply that damages are to be assessed upon the dissolution of a temporary injunction, but the Missouri courts usually give the defendant a right to recover on the bond only after an adjudication that the injunction was *wrongfully issued*.<sup>30</sup> Thus, a cause of action does *not* exist upon dissolution of a temporary injunction if the trial court finds the merits of the case in favor of the plaintiff and finds that the temporary injunction was properly issued in the first instance, but the necessity for the injunction is removed because of the conduct of the defendant after the injunction is issued. This rule is analogous to that advanced in *Kelder v. Dale*,<sup>31</sup> but is distinguishable. *Kelder* involved the dissolution of a temporary injunction resulting from voluntary dismissal by the plaintiff, whereas in the present situation the dismissal of plaintiff's suit is court-ordered and usually occurs at a later stage in the proceeding. In *Pierce v. Campbell*<sup>32</sup> plaintiff sought

28. See cases cited note 16 and accompanying text *supra*.

29. See cases cited note 13 and accompanying text *supra*.

30. MO. R. CIV. P. 92.09 specifies only that the bond is to secure such damages as "may be occasioned by such injunction or restraining order." MO. R. CIV. P. 92.11 provides only that damages shall be assessed upon the dissolution of the injunction. *Cf.* FED. R. CIV. P. 65(c) (injunction bond is to secure the payment of such damages as may be incurred by any party who is found to have been "wrongfully" enjoined or restrained).

31. 313 S.W.2d 59 (K.C. Mo. App. 1958). See also *Pierce v. Campbell*, 217

Mo. App. 179, 274 S.W.2d 875 (St. L. Mo. App. 1955).

32. 217 Mo. App. 179, 274 S.W. 875 (St. L. 1925).

a temporary injunction against three defendants to enjoin the use of a private residence as a public boarding house. Two of the defendants moved out of the house after the temporary injunction was granted. The injunction was thereafter dissolved as to those two defendants. However, they were denied recovery on the injunction bond because they failed to show either that the injunction was wrongful at its inception or was continued due to some wrong of the plaintiff. Under this decision, it is clear that a defendant who is in fault at the time the injunction is issued, and whose fault created the need for the injunction, cannot recover on the bond.

#### E. *Dissolution of Temporary Injunction for Mootness*

A question remains whether the defendant is entitled to damages on the bond where the propriety of the temporary injunction becomes moot for reasons other than the consent or connivance of the defendant. The ultimate issue is which party should bear the risk of loss if *neither* party is at fault in the dissolution of the temporary injunction. This question has not arisen often in Missouri, but was given some consideration in *Kelder v. Dale*. One of the defendants, the City of St. Joseph, rectified the complained of situation after the temporary injunction was issued, thereby eliminating the need for the injunction. The co-defendant, an electric company, did not by its conduct cause or contribute to the mootness created by the city. The court disallowed the city damages on the bond because of its connivance, but permitted the electric company to recover on the bond. Neither the plaintiff nor the electric company were at fault for the dissolution of the temporary injunction (there was no adjudication that it was improperly issued), yet the plaintiff was held accountable to the electric company.

This holding indicates that the plaintiff and his sureties must bear the risk that the merits of the controversy will become moot, or that the injunction will be dissolved through no fault of the plaintiff. To make the fault of the plaintiff the controlling consideration in determining his liability on the bond could result in a defendant being uncompensated for substantial damages suffered due to the temporary injunction procured by the plaintiff. Because the injunction bond is designed primarily to compensate and protect the defendant against spurious or unwarranted claims, it is proper that the plaintiff assume the risk that the injunction will be dissolved without a specific finding that it was improperly issued.

#### F. *Reversal on Appeal*

One question which has arisen infrequently but which remains a relevant and significant subject of inquiry is whether the defendant has a cause of action on an injunction bond if the trial court determines that the temporary injunction was properly issued, but the plaintiff's judgment is reversed on appeal. The answer depends on whether the appellate court



makes a specific finding on the propriety of the temporary injunction, and the extent to which the grounds for the temporary injunction are intertwined with the merits of the plaintiff's overall claim.

### 1. Injunctive Relief as the Primary Object of the Plaintiff's Suit

If the main objective of the plaintiff's suit is to secure injunctive relief, the procedural steps can be characterized as follows: (1) issuance of the temporary injunction, (2) issuance of a permanent injunction after a hearing on the merits, and (3) dissolution of the permanent injunction on appeal. It is easiest to resolve the case in which the appellate court makes a specific finding that the temporary injunction was improperly issued by the trial court. In accordance with the general rule that the defendant's cause of action accrues upon an adjudication of the impropriety of the temporary injunction,<sup>33</sup> the defendant in this situation would have a right to recover on the bond for damages incurred from the time the temporary injunction was issued until the time the permanent injunction was granted.<sup>34</sup> No damages attributable to the permanent injunction are recoverable; an injunction granted upon final hearing does not come within the scope of protection afforded to the defendant under the Missouri rules governing injunction bonds.<sup>35</sup>

In a second type of case, an appellate court may make no determination of the propriety of the temporary injunction, but instead may simply declare that the *permanent* injunction was improperly issued. As a practical matter, where injunctive relief is the primary object of the plaintiff's suit, the merits relating to the grounds for both the temporary injunction and the permanent injunction will be substantially the same. Thus, it can be fairly assumed that an adjudication of the impropriety of the permanent injunction will also operate as an adjudication that the temporary injunction was improperly issued. In several Missouri cases the defendant was allowed to recover on the temporary injunction bond where it was determined that the permanent injunction was improperly issued, presumably upon this ground.<sup>36</sup>

In a third situation, an appellate court may dissolve the permanent injunction without *any* determination of the propriety of the permanent or temporary injunctions. This may occur if the basis for the permanent injunction has become moot, or if a change in circumstances warrants the

33. See cases cited note 13 and accompanying text *supra*.

34. R.A. Vorhof Constr. Co. v. Black Jack Fire Protection Dist., 454 S.W.2d 588 (St. L. Mo. App. 1970); Hamilton v. Hecht, 299 S.W.2d 577 (St. L. Mo. App. 1957).

35. See cases cited note 6 and accompanying text *supra*.

36. R.A. Vorhof Constr. Co. v. Black Jack Fire Protection Dist., 454 S.W.2d 588 (St. L. Mo. App. 1970); Hamilton v. Hecht, 299 S.W.2d 577 (St. L. Mo. App. 1957).

dissolution of the injunction. For reasons discussed in Part II (E), *supra*, policy considerations dictate that the risk of loss in these situations should fall on the plaintiff, though in fact neither party is at fault for the dissolution of the permanent injunction.<sup>37</sup>

## 2. Injunctive Relief Incidental to the Plaintiff's Main Cause of Action

The procedural steps of injunctive relief incidental to the plaintiff's main cause of action could arise in the following sequence: (1) issuance of the temporary injunction, (2) determination of the merits of the main cause of action in favor of the plaintiff, (3) dissolution of the temporary injunction resulting from disposition of the main cause of action, (4) appellate reversal of the main cause of action on the merits. As above, if the appellate court makes a specific finding that the temporary injunction was improperly issued, the defendant clearly has a right to recover on the injunction bond.<sup>38</sup> However, because the temporary injunction is incidental to the main issues, such an adjudication is often omitted from the findings of the appellate court.

A temporary injunction is incidental to the main action if it is not designed to preserve the subject matter or benefit sought in the main suit.<sup>39</sup> For example, in *Brown v. Baldwin*<sup>40</sup> the plaintiff brought an ejectment action to compel the defendants to surrender possession of plaintiff's land. The plaintiff also secured a temporary injunction to restrain the court from assessing the value of improvements on the land in favor of the defendants until the title question was finally resolved. The primary object of the main case was to oust the defendants from possession. The temporary injunction was incidental to that purpose because it was not directed toward securing or protecting the plaintiff's right to possession.

A temporary injunction which is designed solely to preserve the status quo pending a determination of the plaintiff's main cause of action is to be

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37. See *Kelder v. Dale*, 313 S.W.2d 59 (K.C. Mo. App. 1958). It may be appropriate in some situations to cut off the defendant's right of recovery on the bond where a change of circumstances results in the dissolution of a permanent injunction long after the appellate decision has been rendered. The obvious inequity of holding the plaintiff liable on the temporary injunction bond after a ten-year lapse of time is ample justification for discharging the plaintiff from the usual rule governing risk allocation.

38. See cases cited note 14 and accompanying text *supra*.

39. *Richardson Lubricating Co. v. Bedell*, 209 Mo. App. 238, 237 S.W. 192 (K.C. 1921).

40. 121 Mo. 106, 25 S.W. 858 (1894). In *Brown*, the temporary injunction was held incidental to the main case, but the court defined incidental more broadly than the definition urged in the text. See cases cited note 106 *infra*, in which attorney's fees for defending against the plaintiff's entire case were not recoverable by the defendant because the temporary injunction was merely incidental to the plaintiff's main cause of action.

treated as an inseparable part of the plaintiff's claim, and a determination of the merits of the main case in favor of the defendant gives the defendant a right to damages on the injunction bond.<sup>41</sup>

If the temporary injunction bears no substantial relation to the plaintiff's main cause of action, the defendant encounters much greater difficulty in establishing that the determination of the merits of the main cause of action also amounts to a determination that the temporary injunction was improperly issued. Indeed, in this situation a finding of the merits of the main cause of action in favor of the defendant is not necessarily inconsistent with a finding that the temporary injunction was properly issued. A number of Missouri courts have nonetheless resolved this problem by concluding that the termination of the suit adversely to the plaintiff is sufficient to give the defendant a cause of action on the bond.<sup>42</sup> Under this rule it appears that one of the consequences of the plaintiff's loss on the merits is a concomitant liability on the injunction bond, but this rule also appears to circumvent the universally recognized rule that liability on the bond accrues when there is an *adjudication* that the temporary injunction was improperly issued. The issue remains whether an adjudication of the main cause of action is also an adjudication of the propriety of the unrelated temporary injunction.

### III. PROCEDURAL PREREQUISITES TO RECOVERY ON THE BOND

#### A. *Terms of the Injunction Bond*

An injunction bond which does not use the language specified in the rule is nonetheless valid if it substantially complies with the rule's requirements.<sup>43</sup> If the terms of the bond impose conditions upon the plaintiff which are not required by the rule or which tend to undermine the protection of the defendant, such terms are void because they are contrary to the manifest policy of the law.<sup>44</sup> Thus, the bond is valid to the extent it conforms to the essential provisions of the rule, but any additional undertaking will be stricken by the court.<sup>45</sup> In *Rubelman Hardware Co. v.*

41. *Richardson Lubricating Co. v. Bedell*, 209 Mo. App. 238, 237 S.W. 192 (K.C. 1921).

42. See cases cited note 13 *supra*.

43. *Rubelman Hardware Co. v. Greve*, 18 Mo. App. 6 (St. L. 1885). See also *State ex rel. Lafayette County v. O'Gorman*, 75 Mo. 370 (1882) (construction of statutory attachment bond); *State v. Thomas*, 17 Mo. 503 (1853) (statutory bond for public official); *Grant v. Brotherton*, 7 Mo. 458 (1842) (statutory bond for public official).

44. *C.H. Albers Comm'n Co. v. Spencer*, 236 Mo. 608, 139 S.W. 321 (1911); *Rubelman Hardware Co. v. Greve*, 18 Mo. App. 6 (St. L. 1885).

45. *Rubelman Hardware Co. v. Greve*, 18 Mo. App. 6 (St. L. 1885). In *Rubelman* the additional language of the bond required that the obligor pay "all damages that may be occasioned by said restraining order or injunction." This language is clearly imposed on an undertaking not required by the rule, which specifies only that the obligor pay "all sums of money, damages and costs that

*Greve*<sup>46</sup> it was argued that a bond which was intended to comply with the injunction bond statute (which was the predecessor to the present rule) but which failed to meet the statutory requirements was a voluntary agreement to that extent, and would be enforceable only according to the law of contracts, subject to any express restrictions embodied in the injunction bond statute. The court foreclosed this possibility on the ground that an extra-statutory undertaking is without any consideration cognizable at law, and is therefore unenforceable.

### B. *Deposit in Lieu of an Injunction Bond*

There is some indication that a deposit of money or other security in court prior to the issuance of the temporary injunction will be treated as a proper substitute for a statutory bond. In *Aetna Insurance Co. v. Security Printing Co.*<sup>47</sup> the plaintiff did not file an injunction bond, but was required to deposit \$13,400 into the registry of the court as a condition to granting a temporary injunction. The court held that the deposit was not an adequate substitute for a statutory bond because there was no indication in the record that the deposit was intended to be in lieu of the bond. The court further stated that its denial of a motion to require a statutory bond after the deposit was made was insufficient to establish that the court considered the deposit as security in lieu of the bond. In spite of the court's refusal to decide the question, it appears that a deposit of money or security may be an adequate substitute for a statutory bond, provided the judge indicates on the record, *i.e.*, upon the face of the order granting the temporary injunction, that the deposit has been accepted in lieu of the bond. There is a scarcity of case law in this area, and the factual situation which existed in the *Aetna* case is an aberration from the traditional requirement of a statutory injunction bond. Even if a deposit of money is treated as an acceptable substitute for the usual bond, in order to remain a valid substitute the court must administer the bond in compliance with the same conditions imposed upon statutory bonds, *i.e.*, the plaintiff must be required to pay all sums of money, damages and costs that shall be adjudged against him if the injunction is dissolved.<sup>48</sup>

### C. *Execution of the Bond*

An injunction bond binds the plaintiff and sureties only if it is signed by the plaintiff or some responsible person for him.<sup>49</sup> Where the bond is

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shall be *adjudged* against him . . . ." MO. R. CIV. P. 92.09 (emphasis added). See also *Barrett v. Stoddard County*, 183 S.W. 644 (Spr. Mo. App. 1916); cases cited note 43 and accompanying text *supra*.

46. 18 Mo. App. 6 (St. L. 1885).

47. 196 S.W. 93 (St. L. Mo. App. 1917).

48. *Aetna Ins. Co. v. Security Printing Co.*, 196 S.W. 93 (St. L. Mo. App. 1917).

49. *Monterey v. City of Missouri*, 192 S.W. 2d 105 (K.C. 1928); *Teasdale v. Jones*, 40 Mo. App. 243 (K.C. 1890).

not executed in compliance with this requirement, it is void and cannot be enforced against either the principal or surety, by estoppel or otherwise.<sup>50</sup> If the bond is signed by the surety and not by the plaintiff, it is void unless it expressly provides that the surety has executed the bond on behalf of the plaintiff.<sup>51</sup> Most injunction bonds recite that the surety signs the bond "as surety for the principal named in the bond," thereby negating any inference that the surety has signed the bond on the plaintiff's behalf. An injunction bond is clearly binding only upon the plaintiff when the plaintiff alone has executed the bond.

#### D. *Accrual of the Cause of Action on the Bond*

As stated above, the defendant's cause of action on the bond generally accrues upon a final determination that the temporary injunction was improperly issued.<sup>52</sup> Once this determination is made, the defendant is entitled to make a motion to assess damages on the bond.<sup>53</sup>

#### E. *Motion to Assess Damages on the Bond*

The plaintiff and his sureties are bound to pay all damages that shall be adjudged against the plaintiff if the temporary injunction is dissolved.<sup>54</sup> If no sum is adjudged against the plaintiff upon the dissolution of the injunction, neither the plaintiff nor the sureties are bound to pay damages.<sup>55</sup> In order to recover on the bond, the defendant must file a motion to assess damages against the plaintiff in the court in which the judgment on the merits is rendered.<sup>56</sup> In the absence of an appeal from the circuit court's final judgment on the merits, the motion to assess must be filed at the same term of court in which the final judgment is rendered, but the damages need not be actually assessed by the court within that term.<sup>57</sup> If the final

50. North St. Louis Bldg. & Loan Ass'n v. Obert, 169 Mo. 507, 69 S.W. 1044 (1902); Losee v. Crawford, 222 Mo. App. 683, 5 S.W.2d 105 (K.C. 1928); Teasdale v. Jones, 40 Mo. App. 243 (K.C. 1890).

51. Losee v. Crawford, 222 Mo. App. 683, 5 S.W.2d 105 (K.C. 1928).

52. See cases cited note 14 and accompanying text *supra*.

53. City of St. Louis v. St. Louis Gaslight Co., 82 Mo. 349 (1884); Price Baking Powder Co. v. Calumet Baking Powder Co., 82 Mo. App. 19 (K.C. 1899).

54. MO. R. CIV. P. 92.09.

55. Dorriss v. Carter, 67 Mo. 544 (1878); Corder v. Martin, 17 Mo. 41 (1852); Campbell v. Carroll, 35 Mo. App. 640 (St. L. 1889).

56. J & P Trust v. Continental Plants Corp., 541 S.W.2d 22 (Mo. App. D., St. L. 1976); Wabash Ry. v. Sweet, 110 Mo. App. 100, 84 S.W. 95 (K.C. 1904); Moore v. Mexico Savings Bank, 58 Mo. App. 469 (St. L. 1894); Teasdale v. Jones, 40 Mo. App. 243 (K.C. 1890).

57. Language in Moore v. Mexico Savings Bank, 58 Mo. App. 469 (St. L. 1894) and Hoffelmann v. Franke, 96 Mo. 533, 10 S.W. 45 (1888) suggests that the assessment of damages by the court must be made in the same term in which the final judgment dissolving the temporary injunction was rendered. However, these cases did not deal with the time within which the court was required to assess damages, but instead dealt with the time within which the defendant was

judgment has been appealed, the defendant need not file his motion to assess until the affirmance of the judgment by the appellate court; the appeal suspends hearing on the motion until the appeal is finally determined.<sup>58</sup> This rule is applicable even though the appellate decision is rendered during a term subsequent to the term in which the circuit court judgment was rendered.<sup>59</sup>

As a general rule, damages cannot be assessed until liability accrues on the injunction bond.<sup>60</sup> No liability can arise on the bond prior to a final decree in the court in which the bond is given. On final hearing the court may conclude that the temporary injunction was properly issued, thereby rendering any prior assessment of damages ineffective.<sup>61</sup> Even though a temporary injunction is dissolved at a show-cause hearing, a motion to assess damages at that time is premature because that determination may be overturned at the final hearing on the merits.<sup>62</sup> On the other hand, the motion to assess can be properly heard at the same time as the final hearing of the case on the merits.<sup>63</sup> A motion to assess which is filed at the same time the circuit court judgment is appealed is not premature because the appeal merely suspends hearing upon the motion until the case is finally decided on appeal.<sup>64</sup> An injunction plaintiff may waive the objection that a motion to assess is premature or tardy by expressly consenting to a trial of the untimely motion, or by appearing at the trial and proceeding with the hearing without objection.<sup>65</sup>

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required to file his motion to assess. *See Fears v. Riley*, 147 Mo. 453, 48 S.W. 828 (1898) and *Loehner v. Hill*, 19 Mo. App. 141 (St. L. 1885), in which the time limitation was more clearly defined as the time within which the defendant's motion to assess was required to be filed. In *Sutliff v. Montgomery*, 115 Mo. App. 592, 92 S.W. 515 (K.C. 1906) the court finally resolved the matter, stating that a court could properly assess damages at a term subsequent to the term in which the injunction was dissolved, provided that the defendant's motion to assess was made during the term of the judgment.

58. *Houston v. Welch*, 211 Mo. App. 300, 241 S.W. 991 (K.C. 1922); *Wabash Ry. v. Sweet*, 110 Mo. App. 100, 84 S.W. 95 (K.C. 1904); *Neiser v. Thomas*, 46 Mo. App. 47 (St. L. 1891).

59. Cases cited note 58 *supra*.

60. *See* cases cited note 56 and accompanying text *supra*.

61. *Cohn v. Lehman*, 93 Mo. 574, 6 S.W. 267 (1887); *Goad v. Mister Softee*, 380 S.W.2d 493 (St. L. Mo. App. 1964); *J.J. Newberry Co. v. Baker*, 239 Mo. App. 1130, 205 S.W.2d 935 (St. L. 1947); *Price Baking Powder Co. v. Calumet Baking Powder Co.*, 82 Mo. App. 19 (K.C. 1899).

62. *Goad v. Mister Softee*, 380 S.W.2d 493 (St. L. Mo. App. 1964).

63. *C.H. Albers Comm'n Co. v. Spencer*, 236 Mo. 608, 139 S.W. 321 (1911); *Wabash Ry. v. Sweet*, 110 Mo. App. 100, 84 S.W. 95 (K.C. 1904).

64. *Joplin & W. Ry. v. Ft. Smith & M. Ry.*, 135 Mo. 549, 37 S.W. 540 (1896), *overruling Pacific R.R. v. Burger*, 32 Mo. 578 (1862); *Wabash Ry. v. Sweet*, 110 Mo. App. 100, 84 S.W. 95 (K.C. 1904).

65. *Sutliff v. Montgomery*, 115 Mo. App. 592, 92 S.W. 515 (K.C. 1906); *Price Baking Powder Co. v. Calumet Baking Powder Co.*, 82 Mo. App. 19 (K.C. 1899).

Where multiple defendants have been enjoined by the plaintiff, it has been held that the failure of all of the defendants to join in the motion to assess renders the motion fatally defective, unless good cause is shown for the nonjoinder of all of the defendants.<sup>66</sup> This holding rests upon the premise that an obligation which is made to several persons jointly necessitates the joinder of all such persons in an action to enforce the obligation.<sup>67</sup> This principle has been rejected by the Missouri courts subsequent to the 1889 amendment to the Missouri injunction bond statute, which provided for the recovery on the bond of "any party interested in the subject matter of the controversy." The 1889 amendment created an independent cause of action on the bond which could be asserted with or without the joinder of other obligees.<sup>68</sup> At least one Missouri court has sustained a motion to assess which was made by less than all of the obligees on the ground that the principal and surety were "estopped" to deny the capacity of a single obligee to sue on the injunction bond.<sup>69</sup>

#### F. *Assessment of Damages by the Court or Jury*

Under the Missouri rule, upon the dissolution of the temporary injunction and upon the filing of defendant's motion to assess, damages shall be assessed by a jury, or if neither party requests a jury, by the court.<sup>70</sup> A court cannot assess damages unless a jury is first waived by the failure of a party to appear, by written consent, or by oral consent entered upon the record.<sup>71</sup> A judgment upon the motion to assess is invalid if the record fails to affirmatively show that the right to a jury has been waived.<sup>72</sup>

#### IV. LIABILITY OF THE SURETIES ON THE BOND

Judgment cannot be rendered against the sureties on an injunction bond until damages have been assessed against the plaintiff and the plaintiff has refused to pay the damages assessed against him.<sup>73</sup> A condition of an injunction bond is that the plaintiff will pay all sums adjudged against him.<sup>74</sup> Only upon his failure to pay such damages is there a breach of the bond for which the sureties are liable.<sup>75</sup> The Missouri rule does not provide

66. *Ohnsong v. Turner*, 33 Mo. App. 486 (St. L. 1889).

67. *Id.*

68. *C.H. Albers Comm'n Co. v. Spencer*, 236 Mo. 608, 139 S.W. 321 (1911); *Helmkamp v. Wood*, 84 Mo. App. 261 (St. L. 1900).

69. *Jones v. Mastin*, 60 Mo. App. 578 (K.C. 1895).

70. MO. R. CIV. P. 92.11.

71. *Batterton v. Sims*, 73 Mo. App. 351 (K.C. 1898).

72. *Id.*

73. *Dorriss v. Carter*, 67 Mo. 544 (1878); *Konta v. St. Louis Stock Exchange*, 150 Mo. App. 617, 131 S.W. 380 (St. L. 1910); *Coates v. Elliott*, 27 Mo. App. 510 (K.C. 1887); *Nolan v. Johns*, 27 Mo. App. 502 (K.C. 1887); 2 J. HIGH, *supra* note 8, §§ 1635, 1640.

74. MO. R. CIV. P. 92.09.

75. *Richardson Lubricating Co. v. Bedell*, 209 Mo. App. 238, 237 S.W. 192 (K.C. 1921). See also cases cited note 73 and accompanying text *supra*.

for assessing damages against the sureties—only the plaintiff can be assessed.<sup>76</sup> After the plaintiff's refusal or failure to pay the damages, the defendant may then institute an independent action on the injunction bond against the sureties.<sup>77</sup>

Because the execution and filing of the bond gives the court jurisdiction over the sureties, the court may properly assess damages against the plaintiff (upon defendant's motion to assess) without first giving notice to the sureties of such assessment.<sup>78</sup> However, the sureties cannot be held liable on an assessment against the plaintiff unless the plaintiff himself has received notice of the assessment.<sup>79</sup> This is true because an assessment without notice to the plaintiff is invalid, and if the plaintiff is not bound by an assessment, neither can his sureties be held liable.<sup>80</sup> If the motion to assess is filed and heard at the same term of court in which the judgment is rendered on the merits, notice of the motion to the plaintiff's attorney of record is binding upon both the plaintiff and sureties. The attorney-client relationship is presumed to continue until the termination of the litigation and the end of the term at which final judgment is rendered.<sup>81</sup> On the other hand, if the defendant seeks to assess damages at a term after the term of the original judgment, the attorney-client relationship is presumed to be discontinued, and neither the plaintiff nor sureties are bound by the assessment without actual notice to the plaintiff.<sup>82</sup>

Sureties are not entitled to appeal the judgment of the propriety of the issuance of the temporary injunction because they are not parties to that judgment, nor are they interested parties within the meaning of the rule.<sup>83</sup>

76. See cases cited note 73 and accompanying text *supra*.

77. Terminal R.R. Ass'n v. Schmidt, 353 Mo. 79, 182 S.W.2d 79 (1944); Stine v. Southwest Bank, 108 S.W.2d 633 (St. L. Mo. App. 1937); Laumeier v. Sammelmann, 218 Mo. App. 468, 279 S.W. 249 (St. L. 1925); Nolan v. Johns, 27 Mo. App. 502 (K.C. 1887).

78. Fears v. Riley, 147 Mo. 453, 48 S.W. 828 (1898), *questioned on other grounds*, State v. Green, 230 Mo. App. 805, 76 S.W.2d 432 (St. L. 1934); St. Louis Zinc Co. v. Hesselmeyer, 50 Mo. 180 (1872); Barrett v. Stoddard County, 183 S.W. 644 (Spr. Mo. App. 1916); Konta v. St. Louis Stock Exchange, 150 Mo. App. 617, 131 S.W. 380 (St. L. 1910); Sutliff v. Montgomery, 115 Mo. App. 592, 92 S.W. 515 (K.C. 1906); Nolan v. Johns, 27 Mo. App. 502 (K.C. 1887); Loehner v. Hill, 19 Mo. App. 141 (St. L. 1885).

79. Pegram v. William H. Lee & Co., 199 S.W. 433 (St. L. Mo. App. 1917); Konta v. St. Louis Stock Exchange, 150 Mo. App. 617, 131 S.W. 380 (St. L. 1910); Sutliff v. Montgomery, 115 Mo. App. 592, 92 S.W. 515 (K.C. 1906).

80. Cases cited note 79 *supra*.

81. Southern Surety Co. v. Young, 197 Mo. App. 640, 198 S.W. 476 (St. L. 1917); Sutliff v. Montgomery, 115 Mo. App. 592, 92 S.W. 515 (K.C. 1906).

82. Cases cited note 81 *supra*.

83. St. Louis Zinc Co. v. Hesselmeyer, 50 Mo. 180 (1872). Cf. Ritchie v. Carter, 89 Mo. App. 290 (St. L. 1901), in which the court held that the sureties, though not named parties to the suit, were parties of record, and were entitled to the benefit of a judgment of restoration in favor of the plaintiff. However, the sureties in that case were denied recovery from the defendant because the court



Once an action is instituted against the sureties on the injunction bond, they then become parties and may appeal from the judgment entered against them.<sup>84</sup> The sureties may plead the defenses of improper execution of the bond, payment, release, and any other procedural defects which absolve them from liability.<sup>85</sup> However, the sureties cannot assert that the temporary injunction was improperly dissolved on the ground that the merits of the case favored the plaintiff.<sup>86</sup>

A surety may be released from liability on the bond by the defendant, but only after there is an adjudication of damages against the plaintiff.<sup>87</sup> A motion to discharge the surety which is coincidental with the dismissal of the injunction suit is premature for the lack of a prior assessment of damages against the plaintiff.<sup>88</sup> Although no reason has been specified for this rule, it is probably founded upon the view that the defendant cannot make a knowing and intelligent waiver of his right to damages against a surety without first ascertaining the measure of damages against the plaintiff.

## V. EXTENT OF LIABILITY ON THE BOND

### A. Damages Generally Recoverable

As a general rule the defendant is entitled to recover damages which are actually sustained by reason of the issuance of the injunction, and which are the natural and proximate result of the restraint wrongfully imposed upon the defendant by the temporary injunction while it is effective.<sup>89</sup> The defendant's damages are limited to the amount of the injunction bond,<sup>90</sup> although he may move to increase the amount of the bond prior to a final determination of the case on the merits.<sup>91</sup>

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found that the payment by the sureties was "voluntary" because it was made under threat of execution by a constable who had no actual or apparent authority to levy.

84. *St. Louis Zinc Co. v. Hesselmeyer*, 50 Mo. 180 (1872). *See also* *Konta v. St. Louis Stock Exchange*, 150 Mo. App. 617, 131 S.W. 380 (St. L. 1910); *Sutliff v. Montgomery*, 115 Mo. App. 592, 92 S.W. 515 (K.C. 1906); *Nolan v. Johns*, 27 Mo. App. 502 (K.C. 1887); *Loehner v. Hill*, 19 Mo. App. 141 (St. L. 1885).

85. *Terminal R.R. Ass'n v. Schmidt*, 353 Mo. 79, 182 S.W.2d 79 (1944); *Stine v. Southwest Bank*, 108 S.W.2d 633 (St. L. Mo. App. 1937); *Laumeier v. Sammelmann*, 218 Mo. App. 468, 279 S.W. 249 (St. L. 1925).

86. *St. Louis Zinc Co. v. Hesselmeyer*, 50 Mo. 180 (1872).

87. *O'Reilly v. Miller*, 52 Mo. 210 (1873); *J.J. Newberry Co. v. Baker*, 239 Mo. App. 1130, 205 S.W.2d 935 (St. L. 1947).

88. *J.J. Newberry Co. v. Baker*, 239 Mo. App. 1130, 205 S.W.2d 935 (St. L. 1947).

89. *C.H. Albers Comm'n Co. v. Spencer*, 236 Mo. 608, 139 S.W. 321 (1911); *Alliance Trust Co. v. Stewart*, 115 Mo. 236, 21 S.W. 793 (1893); *Holloway v. Holloway*, 103 Mo. 274, 15 S.W. 536 (1891).

90. *Davison v. Hough*, 165 Mo. 561, 65 S.W. 731 (1901); *R.A. Vorhof Constr. Co. v. Black Jack Fire Protection Dist.*, 454 S.W.2d 588 (St. L. Mo. App. 1970); *Hamilton v. Hecht*, 299 S.W.2d 577 (St. L. Mo. App. 1957).

91. *See note 90 supra*.

Damages incurred prior to the issuance of the temporary injunction are not recoverable.<sup>92</sup> Thus, damages occasioned by the injunction necessarily follow from the time it is granted.<sup>93</sup> In accordance with this rule, attorney's fees and expenses incurred in resisting the plaintiff's application for the temporary injunction are not recoverable.<sup>94</sup> Similarly, if the injunction is dissolved by the trial court on the merits and an appeal is taken without a supersedeas bond, expenses incurred to prevent the reestablishment of the injunction on appeal cannot be assessed against the plaintiff.<sup>95</sup> Ordinarily, a supersedeas bond is filed upon appeal under Missouri Rule of Civil Procedure 81.09 and is designed to compensate the appellee for costs, interest, and damages caused by the delay occasioned by appeal in the event that the appeal is dismissed. As a consequence, if the temporary injunction is dissolved by the trial court and the plaintiff appeals, the defendant can recover damages incurred during the pendency of the appeal under the supersedeas bond if the defendant prevails on appeal. Several early Missouri decisions indicated that when the plaintiff filed the supersedeas bond, the temporary injunction which had been dissolved by the trial court was revived, and the successful defendant-appellee could recover under the temporary injunction bond for damages sustained during the appeal.<sup>96</sup> This view was subsequently questioned<sup>97</sup> and finally rejected by the Missouri Supreme Court.<sup>98</sup> It is now recognized that the filing of a supersedeas bond by the plaintiff does not revive the injunction dissolved below.<sup>99</sup> As a result, damages arising after a judgment of the trial court dissolving the temporary injunction cannot be recovered on the injunction bond, but are recoverable only under the supersedeas bond. Should no supersedeas bond be required by the court, the defendant cannot recover any damages occasioned by the plaintiff's appeal.

If a temporary injunction is sustained by the trial court and a permanent injunction granted to the plaintiff, the defendant who is successful on

92. *C.H. Albers Comm'n Co. v. Spencer*, 236 Mo. 608, 139 S.W. 321 (1911); *Neiser v. Thomas*, 46 Mo. App. 47 (St. L. 1891); *Teasdale v. Jones*, 40 Mo. App. 243 (K.C. 1890); 2 J. HIGH, *supra* note 8, § 1687.

93. See cases cited note 92 *supra*.

94. *C.H. Albers Comm'n Co. v. Spencer*, 236 Mo. 608, 139 S.W. 321 (1911).

95. *Id.*

96. See, e.g., *Lewis v. Leahey*, 14 Mo. App. 564 (St. L. 1884).

97. *Neiser v. Thomas*, 46 Mo. App. 47 (St. L. 1891).

98. *C.H. Albers Comm'n Co. v. Spencer*, 236 Mo. 608, 139 S.W. 321 (1911); *State ex rel. South Missouri Pine Lumber Co. v. Dearing*, 180 Mo. 53, 79 S.W. 454 (En Banc 1904); *Teasdale v. Jones*, 40 Mo. App. 243 (K.C. 1890). See also 2 J. HIGH, *supra* note 8, §§ 1536, 1636, 1665.

99. Cases cited note 98 *supra*. In *C.H. Albers* the court indicated that if a trial court ordered the continuance of a dissolved injunction pending the appeal, costs incurred on appeal would be recoverable on the injunction bond, citing *Hovey v. McDonald*, 109 U.S. 150 (1883). As a practical matter, it would be impossible to determine the Missouri rule of an injunction which Repository, 1979 was improperly issued.

appeal can recover only those damages arising from the time the temporary injunction was issued until the permanent injunction was issued.<sup>100</sup> Thus, whether the plaintiff or defendant is the appellant, the defendant who prevails on appeal can never recover on the temporary injunction bond for damages occasioned by the appeal.

## B. *Particular Items Recoverable*

### 1. Attorney's Fees

It is well settled in Missouri that the defendant can recover damages on the injunction bond for reasonable attorney's fees for necessary services rendered in an attempt to procure the dissolution of the temporary injunction.<sup>101</sup> In order to recover attorney's fees, the defendant need not show that the fees were actually paid, but need only establish that he has incurred liability for the fees.<sup>102</sup> The amount of attorney's fees recoverable must be fair and adequate compensation for the services rendered.<sup>103</sup> There is no precise rule for determining the reasonableness and size of the attorney's fees which may be awarded, but the court may properly consider the character and extent of the services, the intricacy and novelty of the case, the amount of time required in preparing and defending the suit, the amount of the matter in controversy, and the ability of counsel.<sup>104</sup> The defendant may not employ an unreasonable number of attorneys, nor compel the plaintiff to pay for a duplication of legal services.<sup>105</sup>

In some cases the plaintiff will combine his petition for a temporary injunction with additional legal or equitable claims. In such cases, the defendant is normally entitled to recover attorney's fees only for those services which were necessary to defend against the temporary injunction.<sup>106</sup> The defendant can recover fees for services rendered in defense of the *entire* suit only if the trial on the merits is essential to a determination that the injunction was improperly granted, or if the court is unable to separate the

100. See cases cited note 34 and accompanying text *supra*.

101. Terminal R.R. Ass'n v. Schmidt, 353 Mo. 79, 182 S.W.2d 79 (Mo. 1944); C.H. Albers Comm'n Co. v. Spencer, 236 Mo. 608, 139 S.W. 321 (1911); Kelder v. Dale, 313 S.W.2d 59 (K.C. Mo. App. 1958); Waterman v. Waterman, 210 S.W.2d 723 (St. L. Mo. App. 1948); Hecht Bros. Clothing Co. v. Walker, 279 S.W. 1059 (St. L. Mo. App. 1926); Price Baking Powder Co. v. Calumet Baking Powder Co., 82 Mo. App. 19 (K.C. 1899); Loehner v. Hill, 19 Mo. App. 141 (St. L. 1885).

102. Waterman v. Waterman, 210 S.W.2d 723 (St. L. Mo. App. 1948); Richardson Lubricating Co. v. Bedell, 237 S.W. 192 (K.C. Mo. App. 1921).

103. Terminal R.R. Ass'n v. Schmidt, 182 S.W.2d 79 (Mo. 1944).

104. *Id.*

105. *Id.* See also Neiser v. Thomas, 46 Mo. App. 47 (St. L. 1891).

106. Louisville Banking Co. v. M.V. Monarch Co., 68 Mo. App. 603 (K.C. 1897); Brown v. Baldwin, 121 Mo. 106, 25 S.W. 858 (1894); Lewis v. Leahey, 14 Mo. App. 584 (St. L. 1884), questioned on other grounds, Neiser v. Thomas, 46 Mo. App. 47 (St. L. 1891).

services required to defend against the injunction from the services for defending the entire suit on the merits.<sup>107</sup> In some states, attorney's fees cannot be recovered in this type of case unless the attorney takes specific action on the injunction which is separate and distinct from the defense on the merits, *e.g.*, at least a motion to dissolve the temporary injunction in the main action.<sup>108</sup> In Missouri, however, attorney's fees can be assessed even in the absence of a formal motion to dissolve the injunction.<sup>109</sup>

An examination of the Missouri cases is necessary to determine under which circumstances a court will consider the temporary injunction merely incidental to the main suit, and in which cases a court will deem the temporary injunction inseparable from the object of the main suit. In some cases, the purpose of the temporary injunction is totally distinguishable from the purpose of the main suit. In those situations, attorney's fees for services directed against the temporary injunction are clearly separable from fees for services in defending the main suit; only the former are recoverable by the defendant. *Louisville Banking Co. v. M. V. Monarch Co.*<sup>110</sup> exemplifies this situation. The plaintiff sued the defendant to have certain chattel mortgages declared void and to recover payment of the plaintiff's claim as a creditor of the defendant from the assets in the defendant's possession. In addition, the plaintiff sought a temporary injunction to prevent the defendant from using the trademark and goodwill of an insolvent corporation pending final hearing of the case. The defendant's attorney took depositions relating to defendant's good faith in executing the chattel mortgages, and prepared and argued the demurrer to plaintiff's petition. Upon dissolution of the temporary injunction, the defendant was denied recovery of attorney's fees because there was no showing that any legal services were incurred by reason of the temporary injunction.

In other cases, the purposes of the main suit and of the temporary injunction have been so inextricably intertwined that the courts were compelled to award the defendant attorney's fees for services rendered in defending the entire case. In *Houston v. Welch*<sup>111</sup> the plaintiff sued to res-

107. *Holloway v. Holloway*, 103 Mo. 274, 15 S.W. 536 (1891); *Hammerslough v. Kansas City Bldg. Loan & Sav. Ass'n*, 79 Mo. 80 (1883); *Bertig Co. v. Wampler*, 180 S.W.2d 760 (Spr. Mo. App. 1944); *Farasay v. Hindert*, 110 S.W.2d 785 (St. L. Mo. App. 1937); *Linneman v. Hawkins*, 27 S.W.2d 1046 (K.C. Mo. App. 1930); *Houston v. Welch*, 211 Mo. App. 300, 241 S.W. 991 (K.C. Mo. App. 1922); *Richardson Lubricating Co. v. Bedell*, 237 S.W. 192 (K.C. Mo. App. 1921); *Sutliff v. Montgomery*, 115 Mo. App. 592, 92 S.W. 515 (K.C. 1906). When the issue is whether the attorney's services in defending the main case are separable from his services in defending against the temporary injunction, it appears that the Missouri courts tend to find the services inseparable, thereby awarding the defendant attorney's fees for defense of the entire suit.

108. See *Farasay v. Hindert*, 110 S.W.2d 785 (St. L. Mo. App. 1937); *Richardson Lubricating Co. v. Bedell*, 237 S.W. 192 (K.C. Mo. App. 1921).

109. Cases cited note 108 *supra*.

110. 68 Mo. App. 603 (K.C. 1897).

111. 211 Mo. App. 300, 241 S.W. 991 (K.C. 1922).

cind a contract to purchase stock from the defendant on the ground of mistake and to compel the defendant to return the amount of the purchase price to the plaintiff. The plaintiff also sought a temporary injunction to prevent the defendant from disposing of the money the defendant received from the sale. Because the plaintiff's sole object with respect to both the main action and the temporary injunction was to recover the money paid to the defendant, the defendant was permitted to recover attorney's fees for defending the entire case.

In some instances the cases are in apparent conflict, and offer no identifiable means of reconciliation. In *Holloway v. Holloway*<sup>112</sup> the plaintiff sought to set aside two deeds on the ground that they were made with the intent to defraud creditors. He also sought to enjoin sale of the land under partition proceedings. Upon dissolution of the temporary injunction, the defendant was entitled to recover attorney's fees for defending the entire case because the determination that the temporary injunction was improperly granted also amounted to a determination that ownership of the property in question was properly vested in the defendants. On the other hand, it has been stated that if the principal purpose of a suit is to adjudicate a question of title to property and a temporary injunction is obtained to prevent the defendant from securing possession of such property, attorney's fees for defending the title question are not recoverable on the injunction bond after dissolution of the temporary injunction.<sup>113</sup> In *Brown v. Baldwin*,<sup>114</sup> the plaintiff sued to eject the defendants from his land. He also requested a temporary injunction to prevent the court from assessing the value of improvements to which the defendants were entitled until the main issue could be determined. Employing questionable reasoning, the court concluded that the temporary injunction was merely incidental to the main action because the defendants would have been compelled to employ counsel regardless of the temporary injunction. It is clear that this reasoning cannot serve as a viable test to distinguish between incidental and inseparable claims; in the case of multiple claims, the defendant's attorney will always be required to defend the main action irrespective of the temporary injunction.<sup>115</sup>

In *Richardson Lubricating Co. v. Bedell*<sup>116</sup> the court attempted to define the term incidental (also referred to in the cases as ancillary). The court indicated that a temporary injunction was merely incidental to the main action if it was not designed to preserve or protect the subject matter or benefit sought in the main suit, should a judgment be obtained in the main action. Irrespective of whether the *Richardson* definition is controlling in this area, it appears that the difficulty in gauging the relationship

112. 103 Mo. 274, 15 S.W. 536 (1891).

113. *Brown v. Baldwin*, 121 Mo. 106, 25 S.W. 858 (1894).

114. *Id.*

115. See note 40 and accompanying text *supra*.

116. 237 S.W. 192 (K.C. Mo. App. 1921).

between multiple claims arises because the defendant's right of recovery is based upon the purpose of the *plaintiff* with respect to each claim. It is the *plaintiff's* principal object which ultimately determines whether the temporary injunction is incidental to the main case. Instead, perhaps the courts should focus upon the purpose of the *defendant* in defending the main action. If the defendant's attorney engages in a defense on the merits for the primary purpose of procuring a dissolution of the temporary injunction, attorney's fees should be recoverable for those services, in addition to the services aimed directly at attacking the injunction. The burden should rest upon the defendant to establish this primary purpose to the court's satisfaction. It appears more logically consistent to approach the multiple claim situation with a primary emphasis upon the purpose of the defendant, rather than the purpose of the plaintiff.

## 2. Additional Items of Damage Recoverable

In addition to attorney's fees, any other item of damages which is proximately caused by the operation of the temporary injunction is recoverable on the injunction bond. Legal interest from the date of the injunction's issue until the time of its dissolution is recoverable.<sup>117</sup> The expenses of taking out-of-state depositions in procuring witnesses whose testimony is necessary to obtain the dissolution are allowed.<sup>118</sup>

If an injunction is granted to enjoin a foreclosure sale under a deed of trust, several elements of damage are recoverable on the bond. The cost of advertising the sale is a legitimate item of damage because its purpose and effect is defeated by the injunction, and such cost must be reincurred after the injunction is dissolved.<sup>119</sup> If the real estate is sold under a *prior* deed of trust during the period of restraint, the balance due on the note is not recoverable because the foreclosure under the prior deed of trust was not proximately caused by the issuance of the injunction. Moreover, it is speculative whether the defendant could have found a purchaser upon foreclosing his own deed of trust at the time the temporary injunction was issued.<sup>120</sup> In *Kennedy's Administratrix v. Hammond*<sup>121</sup> the court held that the amount of the debt originally secured was recoverable by the defendant after the mortgaged property and improvements were destroyed by fire during the period in which foreclosure was restrained. There was evidence in that case that the value of land after the fire was so negligible

117. *Terminal R.R. Ass'n v. Schmidt*, 182 S.W.2d 79 (Mo. 1944); *C.H. Albers Comm'n Co. v. Spencer*, 236 Mo. 608, 139 S.W. 321 (1911); *Teasdale v. Jones*, 40 Mo. App. 243 (K.C. 1890).

118. *Alliance Trust Co. v. Stewart*, 115 Mo. 236, 21 S.W. 793 (1893); *McKinzie v. Mathews*, 59 Mo. 99 (1875).

119. *Alliance Trust Co. v. Stewart*, 115 Mo. 236, 21 S.W. 793 (1893); *Holthaus v. Hart*, 9 Mo. App. 1 (St. L. 1880).

120. *Union Trust Co. v. St. Louis & N. W. Ry. Co.*, 115 Mo. 236, 21 S.W. 793 (1893).

121. 16 Mo. 341 (1852).

that it was insufficient to pay even the expense of the foreclosure sale. Normally, damaged real estate will have some measurable worth at foreclosure which can be offset against the balance due on the debt. Clearly, the plaintiff's duty to mitigate damages, further discussed in Part V(C) *infra*, requires such an offset. Depreciation is also recoverable by the defendant for the period in which foreclosure is enjoined.<sup>122</sup> Although depreciation is not directly attributable to the temporary injunction, its recovery is allowed because it is an incident of the delay caused by the injunction.<sup>123</sup>

If the temporary injunction restrains the use of land for a particular purpose, the defendant can recover the reasonable rental value of the land.<sup>124</sup> In *Abney v. Turnbough*<sup>125</sup> a temporary injunction compelled the defendant to remove gates to roads passing through his pasture land; the defendant was permitted to recover the reasonable rental value of the land for pasturage purposes. In a more conventional case, such as *Sullivan v. Winer*,<sup>126</sup> the temporary injunction prevented the defendant's lessee from taking possession of the premises, thereby depriving the defendant of rent while the injunction was in effect. In such a case, loss of rents is a proper element of damage recoverable on the injunction bond.<sup>127</sup>

Loss of time and employment also may be considered by the court in assessing damages on the bond if the injunction precludes the defendant from entering into an employment contract with a particular employer.<sup>128</sup> Loss of profits also may be recovered, provided the defendant makes an attempt to minimize the loss by making use of available alternatives.<sup>129</sup> In at least one Missouri case, the defendant recovered medical expenses necessary to establish his own sanity in order to successfully defend against the injunction.<sup>130</sup>

### C. Duty to Mitigate Damages

A defendant has the duty to mitigate damages resulting from the tem-

122. *McKinzie v. Mathews*, 59 Mo. 99 (1875); *Meysenburg v. Schlieper*, 48 Mo. 426 (1871); *Riddlesbarger v. McDaniel*, 38 Mo. 138 (1866).

123. Cases cited note 122 *supra*.

124. *Holloway v. Holloway*, 103 Mo. 274, 15 S.W. 536 (1891); *Abney v. Turnbough*, 464 S.W.2d 509 (St. L. Mo. App. 1971); *Sullivan v. Winer*, 307 S.W.2d 704 (St. L. Mo. App. 1957).

125. 464 S.W.2d 509 (St. L. Mo. App. 1971).

126. 307 S.W.2d 704 (St. L. Mo. App. 1957).

127. *Cf. Holthaus v. Hart*, 9 Mo. App. 1 (St. L. 1880) (the mortgagor's receipt of rents while foreclosure was restrained was included as part of defendant's damages on the bond, where the premises were worth less than the amount of the debt).

128. *Economy Gas Co. v. Bradley*, 472 S.W.2d 878 (Spr. Mo. App. 1971).

129. *McKinzie v. Mathews*, 59 Mo. 99 (1875); *Sullivan v. Winer*, 307 S.W.2d 704 (St. L. Mo. App. 1957) (loss of profits was recognized as recoverable on the injunction bond, but was disallowed because defendant failed to show reasonable mitigation to plaintiff's loss).

130. *Terminal R.R. Ass'n v. Schmidt*, 182 S.W.2d 79 (Mo. 1944).

porary injunction to the extent it is reasonably practicable.<sup>131</sup> Thus, when an injunction restrains a defendant from working for a specific employer, the defendant is not entitled to recover damages for loss of time and employment unless he first establishes that he used reasonable diligence to find other employment during the operative period of the injunction.<sup>132</sup> If a defendant is restrained from planting and growing a particular crop pursuant to an obligation imposed under an existing contract and the temporary injunction is dissolved after the growing season for that crop has passed, the defendant's damages on the bond are reduced by the amount of any profit he could have realized by growing some other crop *after* the dissolution of the injunction.<sup>133</sup> If the defendant fails to establish the amount he could have realized through reasonably available alternatives, his entire claim for loss of profits may be disallowed.<sup>134</sup>

#### D. Ten Percent Statutory Limitation

Missouri Rule of Civil Procedure 92.11 provides that "if payment of money, or any proceedings for the collection of any money or demand shall have been enjoined, the damages thereon shall not exceed ten percent on the amount released by the dissolution, exclusive of legal interest and costs." At first glance, it would appear that the defendant is limited to the recovery of aggregate damages of ten percent of the amount released in an action to enjoin the collection of any money or demand. However, it is the accepted rule in Missouri that this provision merely fixes the defendant's damages at ten percent where no damage is sustained other than the loss of the use of the money. This provision does not preclude the defendant from collecting attorney's fees, expenses, and other items of damage even though the aggregate sum of damages exceeds ten percent of the amount released by the dissolution of the injunction.<sup>135</sup> The Missouri courts have consistently adhered to this rule under principles of fairness and equity. If a plaintiff enjoined a foreclosure sale under a deed of trust and the property subject to the deed of trust was destroyed by fire while the temporary injunction was in effect, it would be manifestly unfair to limit the defendant's damages on the bond to ten percent of the value of the property prior to its destruction.<sup>136</sup> In *Kennedy's Administratrix v. Hammond*<sup>137</sup> the court indicated in dictum that the ten percent clause would

131. Alliance Trust Co. v. Stewart, 115 Mo. 236, 21 S.W. 793 (1893); Economy Gas Co. v. Bradley, 472 S.W.2d 878 (Spr. Mo. App. 1971); Sullivan v. Winer, 307 S.W.2d 704 (St. L. Mo. App. 1957).

132. Economy Gas Co. v. Bradley, 472 S.W.2d 878 (Spr. Mo. App. 1971).

133. Sullivan v. Winer, 307 S.W.2d 704 (St. L. Mo. App. 1957).

134. *Id.*

135. Terminal R.R. Ass'n v. Schmidt, 182 S.W.2d 79 (Mo. 1944); Wabash R.R. Co. v. McCabe, 118 Mo. 640, 24 S.W. 217 (1893); Riddlesbarger v. McDaniel, 38 Mo. 138 (1866); City of St. Louis v. Alexander, 23 Mo. 483 (1856); *Kennedy's Adm'x v. Hammond*, 16 Mo. 341 (1852).

136. See, e.g., *Kennedy's Adm'x v. Hammond*, 16 Mo. 341 (1852).

137. *Id.*



serve as a maximum amount of recovery in an action to enjoin a judgment at law, and that an action to enjoin an equitable proceeding would not be subject to such a limitation. This dictum was disregarded in subsequent cases, and it is now generally held that in *no* case will the ten percent limitation represent a maximum amount of recovery if the defendant can show damages other than the loss of the use of the money.<sup>138</sup>

## VI. FEDERAL RULES GOVERNING INJUNCTION BONDS

Federal Rule of Civil Procedure 65(c) provides:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

In some instances, jurisdiction of the plaintiff's cause of action will be vested exclusively in the federal courts, so that the plaintiff's claim will be governed solely by federal rules. Where state and federal jurisdiction is concurrent, the choice between state and federal forums may be dictated by the differences between federal and state practice. These variations also become significant where the defendant has the alternative of removing a cause of action from state court to federal court.

To a great extent the federal rules governing injunction bonds approximate the state law in Missouri. Federal rule 65(c) appears to differ from the Missouri rule in that the injunction bond is to secure the payment of "such costs and damages as may be incurred or suffered by any party who is found to have been *wrongfully* enjoined or restrained."<sup>140</sup> Missouri rule 92.09 does not specifically require that the temporary injunction be wrongfully issued in order for the defendant to recover on the bond. The rule provides only that the plaintiff shall be liable for money, damages and costs that are adjudged against him if the injunction is dissolved.<sup>141</sup> However, by judicial decision liability of the plaintiff accrues only after an adjudication that the temporary injunction was improperly issued, subject to limited exceptions.<sup>142</sup> Substantially the same considerations are applicable in determining whether a defendant has a cause of action on an injunction bond, whether the federal or Missouri rule is controlling. In addition, federal and Missouri rules do not significantly differ when determining whether an injunction bond has been properly executed, whether the defendant's motion to assess damages has been properly made,

138. See cases cited note 135 and accompanying text *supra*.

139. FED. R. CIV. P. 65(c).

140. FED. R. CIV. P. 65(c) (emphasis added). Federal rule 65.1 governs the procedural requirements for assessing damages against the sureties on the bond.

141. MO. R. CIV. P. 92.09 is derived from RSMO § 526.070 (1969).

142. See cases cited note 13 and accompanying text *supra*. Exceptions to the general rule are discussed in Part II *supra*.

whether the sureties are liable on the bond, or when determining the types of damages which are recoverable on the bond (except for attorney's fees, which are discussed at Part V(B)(2) *supra*).

There are two major areas in which the rules substantially differ. The most compelling question raised at the federal level is whether an injunction bond is mandatory when injunctive relief is sought in federal court. Federal rule 65(c) provides that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant. . . ."<sup>143</sup> The language of the rule appears to be mandatory in nature, but it is generally held that the requirement of an injunction bond in federal court is a matter within the discretion of the district judge.<sup>144</sup> As a practical matter, an injunction bond will be required by the district judge in most cases. There are several factual settings in which federal courts have tended to dispense with the bond, and these situations arise with sufficient frequency to merit further discussion of the basis for these decisions.

The requirement of a bond is often abrogated where the likelihood of damage occasioned by the temporary injunction is only minimal.<sup>145</sup> In *Kalemba v. Turk*<sup>146</sup> members of the American Nazi party were restrained from wearing swastika armbands at a city council meeting. Because the likelihood of measurable monetary damage to the defendants was slight, no injunction bond was required. The "minimal damage" rationale for eliminating the bond requirement does not appear to violate the main objective of injunction bonds to compensate defendants for damages incurred as the result of a wrongfully issued injunction because in this situation there are no measurable damages.

An increasing number of federal courts have waived the bond requirement where the plaintiff or class of plaintiffs is indigent, particularly if the

143. FED. R. CIV. P. 65(c).

144. *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810 (6th Cir. 1954); *Halpert v. Engine Air Service, Inc.*, 212 F.2d 860 (2d Cir. 1954); *Bartels v. Biernat*, 405 F. Supp. 1012 (E.D. Wis. 1975); *Powelton Civic Home Owners Ass'n v. Department of Housing & Urban Dev.*, 284 F. Supp. 809 (E.D. Pa. 1968); *Tennessee Pub. Serv. Comm'n v. United States*, 275 F. Supp. 87 (W.D. Tenn. 1967).

145. The failure of a federal court to require a bond has been held to be harmless error on the ground that the failure of the defendant to object to the issuance of the temporary injunction without the bond evidenced the harmlessness of the temporary injunction to the defendant. *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810 (6th Cir. 1954). This decision indicates that it may be error to excuse a bond without requiring the plaintiff to offer some justification for eliminating the bond requirement. For other cases in which the "minimal damage" rule has excused the bond, see *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir. 1974); *Steward v. West*, 449 F.2d 324 (5th Cir. 1971); *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964); *Orleans Parish School Bd. v. Bush*, 252 F.2d 253 (5th Cir.), *cert. denied*, 356 U.S. 969 (1958).

plaintiffs are challenging the alleged abuse of government programs.<sup>147</sup> There are several legitimate policy reasons for eliminating the injunction bond in cases of this kind. First, because the requirement of a bond precludes indigents from challenging the manner in which a particular government program is implemented, the net effect of requiring a bond may be to discourage the government instrumentality from correcting serious abuses of the program.<sup>148</sup> Second, the injunctive standards of probability of success at trial, irreparable harm, and balancing of the equities provide protection to the defendant against frivolous actions.<sup>149</sup> Third, the bond requirement becomes particularly onerous where the alleged abuses involve substantial monetary sums, and the ability of a class of indigents to challenge such abuses should not be unduly fettered by the absolute requirement to post a bond.<sup>150</sup> On the other hand, it has been asserted that the bond is an absolute necessity in precisely those cases in which the costs and damages resulting from the issuance of a temporary injunction are the greatest. In the absence of an injunction bond, a defendant cannot recover damages except in an action for malicious prosecution.<sup>151</sup> Malicious prosecution is not an effective deterrent against misuse of the temporary injunction because of the burdensome requirements that the defendant show malice and lack of probable cause in order to recover such damages.<sup>152</sup> Though the policies in favor of uniformly requiring a bond are not without merit, the competing interests of society warrant elimination of the bond where a class of indigent plaintiffs seeks to correct alleged abuses by government agencies. In many cases the monetary stakes are so high that elimination of the bond requirement is the *only* means by which an effective challenge can be made.

Finally, a significant number of federal courts have maintained that no injunction bond is required when the temporary injunction is issued by a federal court for the purpose of preserving the court's jurisdiction over the subject matter in controversy.<sup>153</sup> Typically, this fact situation involves

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147. *Bartels v. Biernat*, 405 F. Supp. 1012 (E.D. Wis. 1975); *Brookins v. Bonnell*, 362 F. Supp. 379 (E.D. Pa. 1973); *Bass v. Richardson*, 338 F. Supp. 478 (S.D.N.Y. 1971); *Denny v. Health & Social Services Bd.*, 285 F. Supp. 526 (E.D. Wis. 1968). *See also* *Steward v. West*, 449 F.2d 324 (5th Cir. 1971).

148. *See, e.g.*, *Bass v. Richardson*, 338 F. Supp. 478 (S.D.N.Y. 1971).

149. *Id.*

150. *Id.*

151. *Lodge 2188, Bhd. Ry. & S.S. Clerks v. Railway Express Agency, Inc.*, 200 F. Supp. 253 (E.D.N.Y. 1961); *Benz v. Compania Naviera Hidalgo, S.A.*, 205 F.2d 944 (9th Cir. 1953); *Donnelly Garment Co. v. ILGWU*, 55 F. Supp. 572 (W.D. Mo. 1944), *aff'd*, 147 F.2d 246 (8th Cir.), *cert. denied*, 325 U.S. 852 (1945).

152. *See* cases cited note 151 *supra*.

153. *See* *Powelton Civic Home Owners Ass'n v. Department of Housing & Urban Dev.*, 284 F. Supp. 809 (E.D. Pa. 1968), in which a temporary injunction was sought to prevent the disbursement of federal funds to a city housing authority, in which case such disbursement would have rendered the issues moot. The plain-

the use of a temporary injunction by a bankruptcy court to restrain state court proceedings disposing of property of the bankrupt pending the determination of the validity of creditors' claims to such property by the bankruptcy court.<sup>154</sup> Little justification is given for this rule, and the cases advancing the rule do not purport to weigh the defendant's interest in procedural safeguards against the plaintiff's interest in avoiding the risk of loss. Instead, the cases simply address the interest of the court itself in preserving its jurisdiction over the subject matter. This exception to the normal practice of requiring a bond is limited in scope, yet remains a viable exception under present case law.

The second area in which the federal and Missouri rules substantially diverge involves the recoverability of attorney's fees on an injunction bond. While attorney's fees are clearly recoverable under Missouri law,<sup>155</sup> federal courts have generally prohibited recovery of attorney's fees on the bond except where federal statute expressly permits such recovery.<sup>156</sup> It was argued in several early Missouri cases that attorney's fees are recoverable in a state court proceeding upon an injunction bond given to secure a temporary injunction issued in federal court.<sup>157</sup> In support of this argument it was asserted that the plaintiff and his sureties contracted to pay damages to the defendant independently of any allowance of damages by the federal court, and that because the suit on the bond was brought in a state court the rights of the parties were to be governed by state law.<sup>158</sup> This contention was conclusively rejected in *Pullock v. Mulvane*,<sup>159</sup> in which the United States Supreme Court stated that an injunction bond executed pursuant to the authority granted by the Constitution and laws of the United States must be interpreted with reference to the authority under

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tiffs, residents of the housing project, asserted their right to submit written evidence to the federal agency before eligibility of the project for federal funds was determined. *In re Gissel & Co.*, 238 F. Supp. 130 (S.D. Tex. 1965) involved a temporary injunction to stay a foreclosure proceeding instituted in admiralty court after a bankruptcy petition was filed against the defendant corporation. Similar stay orders were sustained without the requirement of an injunction bond in *Magidson v. Duggan*, 180 F.2d 473 (8th Cir. 1950); *Doyne v. Seatele*, 112 F.2d 155 (8th Cir. 1940); *Swift v. Black Panther Oil & Gas Co.*, 244 F.2d (8th Cir. 1917).

154. See note 153 *supra*.

155. See cases cited note 101 and accompanying text *supra*.

156. *Tullock v. Mulvane*, 184 U.S. 496 (1902); *Missouri, K. & T. Ry. v. Elliott*, 184 U.S. 530 (1902); *Oelrichs v. Spain*, 82 U.S. 211 (1872). See also *W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE* § 1435. See *Donnelly Garment Co. v. ILGWU*, 55 F. Supp. 572 (W.D. Mo. 1944), *aff'd*, 147 F.2d 246 (8th Cir.), *cert. denied*, 325 U.S. 852 (1945) (attorney's fees were expressly recoverable under the provisions of the Norris-LaGuardia Act, which, in its present form, continues to provide for the recovery of attorney's fees, 29 U.S.C. § 107 (1970)).

157. *Wash v. Lackland*, 8 Mo. App. 122 (St. L. 1879); *Hannibal & St. Joseph R.R. v. Shepley*, 1 Mo. App. 254 (St. L. 1876).

158. See cases cited note 157 *supra*.

159. 184 U.S. 496 (1902).

which it was given. Thus, the principles controlling the issue of damages recoverable on a federal injunction bond must be derived from federal law, even if recovery is sought upon the bond in an independent proceeding in a state court.<sup>160</sup>

## VII. CONCLUSION

The injunction bond provided under Missouri Rule of Civil Procedure 92.09 has significantly broadened the relief available to a defendant wrongfully restrained by a temporary injunction beyond that available at common law. Although the defendant's cause of action on the bond usually accrues when the trial court finds that the temporary injunction was wrongfully issued, this rule has sometimes been relaxed to permit the defendant to recover even if the plaintiff was not responsible for the dissolution of the injunction, *e.g.*, dissolution on mootness grounds. Attorney's fees, which often represent the most important part of defendant's damages, have been liberally allowed in Missouri. The case law strongly favors an award of attorney's fees for defending an entire action in cases in which the plaintiff has coupled his demand for a temporary injunction with other legal or equitable claims. The variety and extent of recovery of particular items of damage—ranging from legal interest to medical expenses for establishing the sanity of the defendant—lends further support to the proposition that the defendant will have little trouble recovering any loss proximately caused by the wrongful restraint.

It is clear that the plaintiff must carefully comply with the procedural prerequisites for the bond in order for his temporary injunction to effectively bind the defendant. On the other hand, the defendant can only recover upon making a proper and timely motion to assess damages against the correct party; the procedural rules governing the motion are critical to the defendant's case. Once the procedural requirements are satisfied, the defendant is afforded substantial protection by the Missouri rule on injunction bonds. In the event that the defendant fails to properly proceed under the rule, he may as a last resort proceed against the plaintiff in a common law action for malicious prosecution.

The federal rules governing injunction bonds offer somewhat less protection to the party restrained because the court has discretion whether to require a bond and because in several recurring factual situations the federal courts have tended to excuse the bond. In addition, federal rules generally prohibit recovery of attorney's fees on an injunction bond. These differences are particularly significant if there is a choice between federal and state forums.

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160. *Missouri Pacific Ry. v. Larabee*, 234 U.S. 459 (1914); *Missouri, K. & T. Ry. v. Elliot*, 184 U.S. 530 (1902); *Tullock v. Mulvane*, 184 U.S. 496 (1902); *Local 66, United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co.*, 5