

DEPOSITIONS:
NONRESIDENT PLAINTIFF:
EVIDENCE:
MAGISTRATE COURT:

If a plaintiff in a civil action in magistrate court is a nonresident of the State of Missouri and not present at trial, his deposition may be used to prove his case, provided he has complied with the statutory procedural matters relating to the taking of said deposition, as well as to its introduction during trial.

October 9, 1961



Honorable Dwight Beals
Representative 10th District
Jackson County
603 Commerce Building
Kansas City 6, Missouri

Dear Representative Beals:

This is in reply to your opinion request of July 26, 1961, wherein you advise that the magistrate judges in Jackson County will not let a nonresident plaintiff prove his case by deposition. As a result, your opinion request is directed to the following:

"- - - If a plaintiff is a nonresident and complies with the procedural matters required before taking, I cannot see why they cannot be read in a Magistrate Court to prove his case."

It is to be noted that in rendering this opinion, it will be assumed that a nonresident plaintiff of the State of Missouri has complied with the statutory procedural requirements for taking depositions.

Section 492.110, RSMo 1959, establishes the right to obtain a commission to take the deposition of an out of state witness. Said section states:

"When the witness resides out of this state, the party desiring his testimony may sue out of the court in which the suit is pending, or out of the office of the clerk thereof, a commission to take the deposition of the witness."

In addition, Section 492.220, RSMo 1959 (Supreme Court Rule 57.14), confers the right of a party to a suit

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pending in any court of record to obtain a commission to take a deposition. Thus, depositions may be obtained of witnesses in a pending suit in a Magistrate Court because said Court is one of record. This rule was stated in State v. Blocher, 361 Mo. 1107, 238 S. W. 2d 361, l.c. 363:

"Magistrate courts are now courts of record and in pending cases over which they have jurisdiction are expressly empowered under the constitution and the existing statutes. Mo. R.S. 1949, Secs. 492.110, 492.220 to issue commissions to take depositions upon written interrogatories."

An indication that the legislature intended that depositions could be used in magistrate courts is evidenced by the language of Sections 492.130 (Supreme Court Rule 57.05), 492.360 (Supreme Court Rule 57.28), and 517.600, RSMo 1959.

Both Section 492.130 (Supreme Court Rule 57.05), which enumerates the powers and duties of an officer under a commission to take depositions, and Section 492.360 (Supreme Court Rule 57.28), which directs the manner in which the officer taking the depositions and exhibits shall be filed with the court state, in part: "to the court in which or the magistrate before whom the action is pending." Section 517.600 of Chapter 517, RSMo 1959, dealing with Magistrate Court procedure refers to "other witnesses who testify orally or by deposition."

Since a deposition is permissible in an action pending in Magistrate Court, it may be used therein in the same manner that a deposition may be used in Circuit Court. This is due to Section 517.640, RSMo 1959, which states:

"The proceedings upon the trial of suits before magistrates with respect to the examination of witnesses, the submission of evidence and argument, and the order and conduct of the trial, shall, when no other provision is made by law, be governed by the usage and practice in the circuit court, so far as the same may be applicable."

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In *Felks v. Burnett*, 47 Mo.App.564, an action on an oral contract was involved. Defendant's counsel, after first showing defendant was a nonresident of the county wherein the case was tried, and was temporarily absent from the state, offered to read in evidence defendant's deposition. Trial court refused to permit the reading of defendant's deposition on the ground that it was the deposition of one of the parties to the suit. At said time Section 8918, RSMo 1889, was identical to Section 492.080, RSMo 1959.

In holding that the trial court erred in not admitting defendant's deposition, the St. Louis Court of Appeals stated at page 566:

"A party to a suit may obtain the deposition of any witness, and, therefore, his own, as he is a competent witness to be used conditionally. When the witness resides in another county than the one in which the suit is tried, his deposition may be read in evidence."

Furthermore, Supreme Court Rule 57.01 (a) states, in part, as follows:

"Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes."

From the foregoing, it is clear that a plaintiff's deposition may be taken in a pending suit, in magistrate court, and may be conditionally read in evidence at trial in said court.

Since the plaintiff in this matter is a nonresident of the State of Missouri and not present at trial, his deposition may be read in evidence in a civil action in magistrate court to prove his case.

CONCLUSION

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If a plaintiff in a civil action in magistrate court is a nonresident of the State of Missouri and not present at trial, his deposition may be used to prove his case, provided he has complied with the statutory procedural matters relating to the taking of said deposition, as well as to its introduction during trial.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc