MAGISTRATE COURTS: Procedure in cases where parties fail to appear.

December 3, 1949

12/7/49

FILED
86

Honorable Alex T. Stuart.
Judge of the Magistrate Court
Monroe County
Paris, Missouri

Dear Judge Stuart:

This is in reply to your request for an opinion which reads as follows:

> "I request your written opinion on the following matter.
>
> "A civil suit pending in the Magistrate Court, as shown by record entry, continued by agreement of parties to a certain date. On date to which same was continued by agreement, neither party appeared, and neither party appearing court was not opened and no order of continuance made. No other entry or other action has been had in said cause, and the matter ever since, for more than one year, has remained in that same status.
>
> "Question. Does the Magistrate Court lose jurisdiction of the case so that same cannot be reset at this date for trial?
>
> "a. Would there be any difference concerning the continuance by agreement of parties and on continuance obtained on application of plaintiff or defendant, without consent or agreement?
>
> "b. Does the Magistrate need to make an order of continuance where same is set by agreement and neither party appears, and would it be necessary to continue each time same is set and neither party appears?"

The procedure to be followed when a duly notified defendant fails to appear on the day set for trial of a cause

is set out in Laws of Missouri, 1947, Volume 1 at page 244, and is as follows:

> "Section 71. When a defendant who has been duly served with process, or when a defendant who has once appeared to the suit, the trial of which has been adjourned, shall neglect to appear according to the process or at the adjourned time, the magistrate shall proceed in the cause in the following manner: First, if the suit be founded upon an instrument of writing, which, or a verified copy of which, has been filed with the magistrate at the commencement of the action, and purporting to have been executed by the other party, and the demand of the plaintiff is liquidated by such instrument, the magistrate shall, whether the plaintiff appear or not, render judgment with costs against the defendant by default, for the amount which shall appear by such instrument to be due to the plaintiff, after allowing the proper discounts for all payments indorsed thereon; second, if the suit be not founded on an instrument of writing, as is declared in the preceding clause of this section, and the plaintiff appear in person or by his attorney, the magistrate shall proceed to hear his allegations and proofs, and shall determine the cause as the very right thereof shall appear from the testimony, and if it appears from such testimony that the plaintiff is entitled to recover, judgment shall be rendered by default against the defendant for so much as the testimony shows the plaintiff is entitled to, together with costs; and if it does not appear that the plaintiff ought to recover, judgment shall be given for the defendant as upon a verdict against the plaintiff; third, if the plaintiff fail to appear, except where the suit is founded on an instrument of writing as declared in the first clause of this section, the magistrate may render judgment of nonsuit against the plaintiff, with costs."

Thus, it is seen that if a suit is founded upon an-strument of writing which has been filed with the magistrate

at the commencement of the action, and the plaintiff's demand is liquidated by such instrument, the magistrate should proceed with the cause regardless of the absence of plaintiff or defendant. If the plaintiff fails to appear, except where the suit is founded on an instrument of writing, the above section provides that the magistrate may render judgment of nonsuit against the plaintiff. This section is substantially the same as Section 2635, R.S. Mo. 1939. However, the Legislature has substituted the word "may" for the word "shall" in the clause concerning the plaintiff's failure to appear if the action is not based upon a written instrument.

In the case of Bohle vs. Kingsley, 51 Mo. App. 389, the St. Louis Court of Appeals interpreted the language of Section 2635 to mean that the justice had no other authority to proceed in a suit except to nonsuit the plaintiff. That Court determined that the use of the word "shall" made it mandatory that such judgment of nonsuit be entered. In view of the fact that the section now uses the word "may" we believe that it will be construed to be discretionary with the magistrate to nonsuit the plaintiff, or not, as he sees fit. However, under the facts in the instant case, we believe that another provision of the Magistrate Law is applicable.

In Laws of Missouri, 1945, page 786, it is provided as follows:

> "Sec. 65. No suit shall be deemed discontinued or abated by reason of the failure of the magistrate to hold court at the appointed day, nor by reason of any adjournment before the business pending in such court is disposed of; but the same shall be continued and proceeded upon as if no such failure or adjournment had happened."
>
> * * * * * * * * * * * *

There is a general statute concerned with powers and duties of courts of record which reads as follows:

> Section 2022, R.S. Mo. 1939:
>
> "No writ, process or proceedings whatsoever, civil or criminal, shall be deemed discontinued or abated by reason of the failure of any term or session of any court, nor by reason of any adjournment in the cases mentioned in this chapter,

> or otherwise, before the business pending in such court is disposed of, but the same shall be continued and proceeded upon as if no failure or adjournment had happened."

The St. Louis Court of Appeals in the case of Hays vs. Dow, 166 S.W. (2d) 309, set out this section and following thereafter used the following language, l.c. 313:

> "Under the above statute, a suit properly commenced is automatically continued from term to term until finally disposed of. Alexander v. Haffner, 323 Mo. 1197, 20 S.W. 2d. 896. (Emphasis ours.)"

In the case of Alexander vs. Haffner, supra, the Supreme Court considered the question of continuance from term to term. In that case the Court said, l.c. 1204:

> "* * * A civil action under our Code is not commenced by the suing out and service of a writ, but by the filing of a petition 'and suing out of process therein.' After a suit is so commenced it is automatically continued from term to term by statute until finally disposed of by some order or judgment of the court. (Sec. 2354, R.S. 1919.) Consequently no formal entry of continuance is necessary to keep the case in court. With us, and in modern practice generally, the term 'discontinuance' is used as indicating merely that plaintiff has taken a nonsuit, or that there has been a dismissal. (Thurman v. James, 48 Mo. 235, 236; Ferber v. Brueckl, 7 S.W. (2d) 279; English v. Dickey, 128 Ind. 175, 182; Germania Fire Ins. Co. v. Francis, 52 Miss. 457, 467; Parsons v. Hill, 15 App. Cas. (D.C. )532; 9 R.C.L. sec. 2, pp. 191-2.) The ruling in Weaver v. Woodling, supra, was disapproved in Ferber v. Brueckl, 322 Mo. 892, 17 S.W. (2d) 524."

In the case of Hasler, et al. vs. Schopp, et al., 70 Mo. App. 469, the Court held that a justice of the peace who had acquired jurisdiction of an attachment suit in which defendants did not appear could continue the cause under the

authority of Sections 2645 and 2646, R.S. Mo. 1939, which sections are continued in substantially the same language in the present Magistrate Code and found in Laws of Missouri, 1945, page 791, Said sections are as follow:

Section 81:

> "Upon the return day, if a jury be required, of if the magistrate be actually engaged in other official business, or in any case when it shall be necessary, the magistrate may continue the trial to another day without the consent of either party."

Section 82:

> "The trial may be continued upon the application of either party, for good cause shown, to a day certain, not exceeding twenty days from the return day of the writ: Provided, that the magistrate may continue the cause for a longer time whenever he shall be satisfied that it is necessary to do so, to enable the party to obtain testimony, or when both parties consent to such continuance. Every such continuance shall be at the cost of the party applying therefor, unless otherwise ordered by the magistrate."

The St. Louis Court of Appeals in the case of Lawyers Co-Operative Pub. Co. vs. Sleater, et al., 130 S.W. (2d) 192, reviewed the sections which we have set out above and concluded that none of these sections authorized an indefinite continuance. In that case the facts show that the action was continued four times to duly specified dates. On the date to which the fourth continuance was granted the justice made and entered in his docket an order as follows:

> "'Now, on May 24, 1929, the said cause again coming on for hearing, no disposition is made thereof, said cause is left open and undisposed of and at this date still remains open, undisposed of, and pending in this court.'"

After reviewing the above sections, the Court said further, l.c. 194:

> "None of these sections authorizes an indefinite continuance, and we see no reason why the general rule that an indefinite continuance ousts the justice of jurisdiction should not apply here, particularly in view of the fact that a period of eight and a half years has elapsed without any steps whatever being taken by either of the parties or the justice to bring the action to trial. A discontinuance of the action thus clearly appears, so that it is obvious that defendants will not be subjected to the annoyance of a trial of it."

However, it appears that the Court's ruling was based, at least in part, upon the fact that a period of eight and one-half years had elapsed without any steps being taken by either of the parties or the justice to bring the action to trial. We believe that in view of the position taken by the Supreme Court in the case of Alexander vs. Haffner, supra, the proper rule applicable to the present set of facts is that the magistrate retains jurisdiction of the cause so that it may now be re-set for trial.

We do not see that there would be any difference whether the continuance was by agreement of parties or upon application of either.

You ask further if the magistrate need to make an order of continuance where same is set by agreement and neither party appears. We call your attention again to Section 71, Laws of Missouri, 1947, page 244, which has been set out above. This section provides a procedure to be followed by a magistrate in several instances wherein parties failed to appear. Where the facts of a case indicate, this section should be followed because it is the procedure provided for Magistrate courts by the Legislature. We realize that the practice is not always to this effect. However, since the Legislature has expressed its will in the matter the statute should be followed insofar as it applies.

CONCLUSION.

Therefore, it is the opinion of this department that:

1) Where neither party to a suit appears and Court is not opened, the magistrate retains jurisdiction of the cause;

When a suit is founded upon an instrument of writing which liquidates the plaintiff's claim, the magistrate should enter judgment for plaintiff when neither party appears. If a suit is not of this nature, and plaintiff fails to appear, it is discretionary with the magistrate to nonsuit the plaintiff;

2) There is no difference in legal effect of continuances where the parties subsequently fail to appear whether the continuances were by agreement or upon application of either party;

3) It is not necessary for the magistrate to continue a cause each time the same is set and neither party appears but he should follow the procedure set out in Section 71, Laws of Missouri, 1947, page 244.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB:ir