

THE MATTER OF CONTINUANCES

INTRODUCTION

A continuance is a postponement of a cause, and in particular, a grant of delay in the hearing of a cause to a future time in the same or a later term. There are two broad classifications of continuances, those granted by law and those authorized by court order. The former class includes those cases remaining undisposed of at the end of a term for which no court order for a continuance to the next term of court is necessary. The latter class of continuance falls in one of three categories: (1) those sanctioned by the court upon application by both parties to a cause, (2) those granted by a court on its own motion, and (3) those granted for cause upon application by one of the parties, and with or without objection by the other party. The last named category is the concern and scope limit of this article since it is in this field of the subject that most contested grounds arise.

It is a well settled point of law that the power of a court to refuse or grant a continuance upon application of one of the parties is an inherent discretionary power independent of statute, and incident to the court's power to hear and determine causes.¹ In conjunction with this settled rule it is quite uniformly held that a continuance properly requested, where the ends of justice require it, cannot be refused. On the other hand, it is also uniformly held that an abuse of discretion in granting or denying a continuance is grounds for reversal.

Broad policy principles intervene to assist the court in the exercise of its discretion in certain types of cases. The rules evolved to govern the granting of continuances in civil and criminal cases are generally the same. However, the delay of a criminal case will occasion closer scrutiny of the asserted grounds by the court because of the stronger motive ordinarily existing to induce a defendant to seek delay. On the other hand, a continuance of a divorce proceeding is more liberally viewed by the court due to the strong public and state interest in the matter, especially where children are involved. Continuances within term are more likely to be granted than continuances requested which will carry over to another term of court. A request for an additional continuance is not favorably viewed except under such circumstances that refusal to continue would thwart justice.

STATUTORY CONTROL OF CONTINUANCES IN OHIO

Although there are a few statutes in Ohio dealing with the subject of continuances, it is well settled law in Ohio, as elsewhere, that the power of courts to grant continuances in the exercise of sound discretion is independent of statute. Probably the leading Ohio case is *State ex rel Buck v. McCabe*,² in which the common pleas court of Lucas County on

¹ Norton v. Norton, 111 Ohio St. 262, 266, 145 N. E. 253 (1924); Frohwerk v. United States, 249 U. S. 204, (1919).

² 140 Ohio St. 535, 45 N. E. 2d 763 (1942).

the motion of defendant's counsel continued an action for damages arising out of an automobile striking the plaintiff pedestrian. The continuance was for the duration of the war. The defendant, a minor at the time of the accident, enlisted in the Canadian military service prior to the time the action was brought, and service was made upon his mother personally. Answer was made by the mother and motion to continue was made before the date set for hearing. The motion was sustained. The Court of Appeals refused plaintiff's petition for a writ of mandamus, and the Supreme Court held that this refusal was not error.

The code provisions regulating continuances in Ohio seem to recognize the inherent power of the courts in this field.³ While there does appear to be some statutory control of the courts' power to grant continuances, and while courts have adopted some rules covering the subject, by and large the statutory and rule directives are sparse and tend to conform generally with practices which grew independent of legislation. The dearth of legislation on the subject indicates the difficulty of codifying to any great degree the multitude of grounds and circumstances which may at any given time allegedly exist to support the grant of a continuance. Only one statute exists in Ohio which controls the court's exercise of discretion in granting a continuance.⁴ This section provides that in an action for recovery of money an offer to confess judgment is not grounds for continuance or postponement of the trial. The reason for this is obvious and the statutory admonition is believed unnecessary since it is apparent that a court would not grant a continuance in such circumstances in any event. Other statutes, while mentioning a possible ground for continuance, leave the decision to the courts in the final analysis by using such language as, "the court may for good cause shown", or "when the court is satisfied by affidavit or otherwise the court may" etc.⁵ While the exercise of the court's discretion is possibly liberalized by this type of statute, there is no law on the subject until the grounds are passed on by the court.

COURT RULES IN OHIO

The rules of practice in the Ohio Courts furnish some guidance for the judges in exercising their discretion, though the only rules adopted to date deal with the single situation where continuances are requested on the ground that testimony of an absent witness is needed. The rules are as follows:

Rule XXV of the Supreme Court of Ohio.—In all applications for the continuance of a cause in the Court of Appeals, and for a second continuance in the Court of Common Pleas, on the ground of inability to procure the testimony of an absent wit-

³ See Ohio Rev. Code §§1911.73, 1911.74 (continuances in justice court); 2305.02, 2309.61 (continuances in common pleas court).

⁴ Ohio Rev. Code §2311.19.

⁵ For examples of this type of statute see Ohio Rev. Code §§2309.61, 2725.16.

ness, the party making the application shall state in his affidavit what he expects to prove by such witness, and also what acts of diligence he has employed to procure the testimony of such witness, and if the court finds the testimony material, and that due diligence has been used, said cause may be continued, unless the opposite party consents to the reading of such affidavit in evidence; in which case the trial may proceed, and said affidavit be read on the trial, and treated as a deposition of an absent witness.

First applications for continuance in the Common Pleas Court shall be subject to such regulations as that court shall adopt.

Rule II of the Rules of Practice of the Court of Appeals.— In all applications for the continuance of a cause in the Court of Appeals on the ground of inability to procure the testimony of an absent witness, the party making the application shall state in his affidavit what he expects to prove by such witness, and also what acts of diligence he has employed to procure the testimony of such witness, and if the court finds the testimony material, and that due diligence has been used, said cause may be continued, unless the opposite party consents to the reading of such affidavit in evidence, in which case the trial may proceed and said affidavit be read on the trial, and treated as the disposition of an absent witness.

Rule of the Court of Common Pleas of Franklin County.—

An application for the continuance of a cause *shall be by motion supported by affidavit*, and if the continuance is asked for on the ground of inability to procure the testimony of an absent witness etc., (see above rules) emphasis added.)

STATUTORY AND RULES CONTROL IN FEDERAL COURTS

Basically, the Supreme Court of the United States under its statutory rule making power controls the motions practice of the federal courts.⁶ In actual practice in federal courts there appears to be a reluctance to grant continuances. The Federal Rules of Civil Procedure provide for a continuance to enable the party objecting to certain evidence to meet the same.⁷ Federal rule 56 (f) makes continuance allowable on proper objection to a motion for summary judgment a matter of discretion. But the matter of continuances in federal courts is regulated by the rules and practices of the individual courts. Consequently, when a continuance is to be sought, care should be taken to comply with the local procedure relative thereto, with such specifications of reason therefor, and such supporting affidavits and exhibits as may be called for.⁸ All federal case rulings examined on the point simply state that continuances are discretionary with the courts and reversible only where the appellate court finds that the trial court abused its discretion.

Perhaps the most frequently cited ground for a continuance is the

⁶ 28 U.S.C.A. 2072 (1948).

⁷ Fed. R. Civ. P. 15(a), and compare Ohio Rev. Code §2309.61.

⁸ SULLIVAN: A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE (1949).

absence of a witness or the testimony the missing witness would offer. There is a substantial uniformity in all courts in the prerequisites of an affidavit submitted in support of a motion to continue the cause on this ground. Further, these prerequisites are deemed essential to a continuance sought on other grounds *i.e.*, absent counsel, absent party and others. It is proper, then, to start with a consideration of these factors.

MATERIALITY

The testimony of the missing witness, or the missing evidence must be material to the issues in the case. This means that the evidence must be germane to the ultimate issues of fact. Thus the District Court, Southern Dist. of Fla. was upheld by the circuit court of appeals in *City of Coral Gables v. Hayes*,⁹ when it denied a continuance sought because defendant had been unable to procure attendance of witnesses where only one witness was alleged to exist, and his testimony if given would have been immaterial to the issues. In Ohio it has been held that a continuance is properly denied where the only effect of the testimony of the absent witness would be to impeach the credibility of some witness offered by the opposing party.¹⁰ A Mississippi holding is illustrative of the necessity for materiality being alleged in submitting a motion for continuance. The Supreme Court of Mississippi said:

There was no error in the action of the (trial) court in refusing appellants application, to either continue the case or delay its trial to another day on account of the absence of the witness Dennis, by whom he expected to prove that the deceased stated to the witness that the reason that he did not shoot the appellant at the time of the difficulty was that his gun was not loaded. In the application for a continuance or delay of the trial, in order to procure the presence of this witness, it was not set out when the deceased said he would have shot the appellant had his gun been loaded, whether before appellant shot him or afterward. As a justification of the homicide the appellant relied on self-defense. He testified that he shot the deceased in order to prevent the latter from taking his life or doing him some great bodily harm; that at the time he shot deceased the latter had his gun trying to shoot appellant. It was most pertinent therefore as to whether deceased meant in his statement to the witness that he would have shot appellant as aggressor or in self-defense. We hold that what appellant desired to prove by the deceased, entirely consistent with the evidence for the state, which showed that the appellant was the aggressor in the difficulty, and not the deceased.¹¹

In another Mississippi case the appellant had moved in trial court for a continuance on the following ground:

That said Mrs. Carrie Weir's testimony is material, in that she

⁹ 74 F. 2d 989 (1935).

¹⁰ Cohen v. Rudnicka, 8 Ohio L. Abs. 13 (1929).

¹¹ Woulard v. State, 137 Miss. 808, 102 So. 781 (1925).

has lived with the defendant continuously day and night since March 16, 1921, and for years prior thereto. That next to himself, Mrs. Weir knows the whereabouts of the defendant day and night better than any other living person, and is more qualified as to his whereabouts than any other person. That the defendant can prove his continuous whereabouts better by said Mrs. Carrie Weir than any other person. That she occupies the same room and bed with the defendant at night and that he can prove these facts by no other witness. That without said witness he cannot safely go to trial at this term of court.

The appellate court ruled as follows:

In our opinion the application for a continuance was properly overruled, because the application itself does not show that Mrs. Weir would testify that appellant was not guilty, and it specifies no time or place at which she would place the defendant at the time of the offense. It does not appear from the application that she would testify contradictory to the state's witnesses.¹²

DILIGENCE

It is definitely established, both at common law and under all statutes and court rules that a motion for a continuance must be supported by a full and complete disclosure of the diligence exerted by the movant to secure the absent testimony or evidence. The diligence must be shown to have been exercised not only prior to having made the motion except in the case of surprise or other excuse, but also in reasonably sufficient time before the trial to have obtained the attendance of the absent witness or to have procured the missing evidence. It has even been held in federal court that proof of due diligence to procure the attendance of testimony of an absent witness and of facts presenting reasonable grounds to believe that this evidence will be secured at the next term of court is essential to a right to continuance or to an admission of the statement of the witness' testimony as evidence.¹³ In Ohio it has been held that a refusal to grant continuance on a showing that material witness was in the armed forces and unable to be present at the trial for the reason that the moving party had adequate time after the case was assigned to arrange for the taking of the deposition of the witness was not an abuse of discretion by the trial court.¹⁴ The failure of the evidence offered to show that the missing witness had received a subpoena was given in an Ohio appellate court case as good reason for refusing a continuance.¹⁵ While the same objection would be voiced by a federal court under the same circumstances, it is indicative of the impossibility of formulating hard and fast rules, such as a showing of having reached the witness with service, that there are cases in which the showing of

¹² *Ware v. State*, 133 Miss. 837, 98 So. 229 (1903).

¹³ *Armour v. Kollmeyer*, 161 F. 78 (1908).

¹⁴ *Reitnour v. McClain*, 40 Ohio L. Abs. 185, 57 N.E. 2d 78 (1943).

¹⁵ *Watson v. Stack*, 10 Ohio L. Abs. 343 (1931).

service was held not to be necessary to support a continuance. In an early federal case it was stated by the defendant that he had employed a process server and had asked the defendant's brother to take certain steps to secure service. The witness was alleged to be material and the defendant did not feel he could go to trial without the missing testimony. No service was had and the plaintiff's attorney argued that proof of service was necessary to a grant of continuance. The court held that the process server had not been heard from and may have met with an accident, and that under those circumstances a continuance would be granted.¹⁶ Again, in the case of *White v. Lynch*,¹⁷ it was held that the fact that an attorney, who was a material witness and who had promised to be present, did not attend was ground for a continuance, even though he was not subpoenaed.¹⁸ See *Okey v. Webber*, for an example of "reasonable" diligence sufficient to secure a reversal of a common pleas court's refusal to continue the action where the defendant could not locate a material witness and therefore could not secure service.

The diligence of an applicant to secure an absent witness where the witness is an employee of the applicant has received special treatment by the courts, sometimes working without benefit of statutory assistance and in other cases viewing a statutory requirement of diligence to mean that employer applicants have added responsibility where their employees are to testify. The requirement as to employer applicants for continuances seems to be advisable in order to eliminate the possibility of connivance between the employer and employee to postpone the trial.¹⁹

CUMULATIVE NATURE OF THE ABSENT TESTIMONY OR EVIDENCE

Since it would be improper to delay a trial unnecessarily, the party applying for a continuance on the ground of the absence of a material witness must ordinarily show that there are no other witnesses by whom he can establish the same facts. If no such showing is made, or if it appears that substantially the same testimony as that which is absent is offered at the trial, a continuance will ordinarily be refused. What is or is not cumulative evidence as regards the granting of a continuance should be distinguished from the ordinary concept of cumulative evidence defined in cases relating to new trials for newly discovered evidence where the rule against granting new trials for the production of merely cumulative evidence is usually strictly enforced. In considering requests for new trial the courts seem to hold that cumulative evidence is evidence of the

¹⁶ *Pennington v. Scott*, 2 U. S. (2 Dall.) 94, (1786).

¹⁷ 2 U. S. (2 Dall.) 183, (1787).

¹⁸ *Okey v. Webber*, 13 Ohio L. Abs. 588 (1932).

¹⁹ See *Alaska Anthracite R. Co. v. Moller*, 257 F. 511 (1919); *Stedman v. Hamilton*, 4 McLean, Ind. (1849); *Service Fire Ins. Co. v. Rountree*, 292 Ky. 59, 165 S. W. 2d 973 (1942). In the latter case an insurance company had been notified of a policy holder's contentions five months before the pertinent adjuster employee had gone into military service yet failed to do anything about it. A continuance on the ground of the adjuster's absence was denied.

same kind as that already given on the same point. Evidence of any disputed fact having been offered by showing particular circumstances, any evidence which only shows the same circumstances is purely cumulative. Evidence which would tend to establish the disputed fact by other circumstances is not cumulative but corroborative. The extent of the rule excluding cumulative evidence as a ground for continuance seems to be carefully limited to those cases wherein the facts about which the absent witness would testify are established on the trial by other witnesses or from other sources, without substantial conflict or dispute or where the court may say with confidence that the applicant has not been harmed by a denial of the application for delay upon a review of the complete record. The line between the two types of cases is a fine one and seems to result in the simple conclusion that a request for a new trial will be granted only for compelling reasons while an application for a continuance does not put the court to a post-trial but a pre-trial consideration of what may be prejudicial to the applicant. The problem does not occasion too much difficulty in the usual case in Ohio since the court rules, *supra*, permit the introduction of the missing evidence as on a deposition. But, it is probably true that even on the acceptance of the affidavit concerning absent testimony, even if cumulative in effect, there may be prejudice to the applicant for a continuance since the probable weight of the personal testimony with the jury may or may not be a proper subject of inquiry for the court. If the absent witness is a person of high reputation in the community the weight of his oral testimony at the trial might possibly override any objection to its cumulative nature or even the fact that the adverse party would admit that the absent witness would so testify.

The Ohio cases that have dealt with this sub-topic are *Cohen v. Rudnicka*,²⁰ in which a continuance was denied for the purpose of obtaining an impeaching witness, and *Coppock v. Horine*,²¹ in which a continuance to permit the presence of an expert witness was held properly denied where it did not appear that the expert would testify to anything not covered by medical testimony already proffered and accepted on behalf of the movant. Another, and probably the leading, Ohio case ruling on the subject is *Kroger Adm'r. v. Ryan*.²² The Supreme Court reversed the circuit court and affirmed the judgment of the common pleas court on its finding that the defendant's motion for a continuance would be denied where, in the trial court's opinion, proper diligence had not been shown. The question of cumulative evidence was also raised and the syllabus note reads as follows:

1. Cumulative evidence is additional evidence of the same kind to the same point. Therefore, where evidence offered on

²⁰ *Supra*, note 10.

²¹ 32 Ohio L. Abs. 109 (1940).

²² 83 Ohio St. 299, 98 N. E. 428 (1911).

a motion for a new trial is merely cumulative upon the same point upon which evidence was given by the party at the trial, such evidence will be rejected as cumulative. But, where the evidence thus offered is respecting a new and distinct fact, although it tends to establish the same general result sought to be established by evidence given at the trial, such new evidence is not cumulative and, if otherwise competent, will be received.

While there are no reported federal cases the following state cases will serve to illustrate the general view. In *Wheeler Stave Co. v. Wright*,²³ a motion for continuance based upon the absence of five witnesses, where diligence was conceded, was denied where it was alleged they were present at the time of the alleged incident and could have seen it had it occurred and that they would have testified that it did not occur. The ground for denial was simply that others present had already so testified and further testimony on the point was unnecessary. In *Thompson v. Harrelson*²⁴ a plaintiff was denied a continuance on the ground that two witnesses were absent when he told the judge that he could swear to the same facts that he wished to prove by the missing witnesses. The missing witnesses were his sister-in-law and his son-in-law.²⁵

PROBABILITY OF PRODUCING THE ABSENT WITNESS OR EVIDENCE

It is stated that as a general rule a continuance will not be granted unless it is shown that the testimony of the witness whose presence is desired can in all probability be secured at a future time. The only reported Ohio case raising this question follows this general rule.²⁶ That case held that where a notary taking a witness' deposition in another county sustained the witness' refusal to testify and the relator's counsel had selected the notary and there was no assurance that another attempt would not end in the same manner, thus indefinitely postponing the action, a continuance motion was properly denied. Numerous decisions of other jurisdictions support the general rule. In a Montana case,²⁷ citing Oklahoma, California and Illinois decisions, the court stated that it is incumbent upon one seeking a continuance by reason of the absence of a witness that he must show that the witness can be pro-

²³ 194 Ark. 115, 106 S. W. 2d 191 (1937).

²⁴ 192 Ga. 419, 15 S. E. 2d 497 (1941).

²⁵ See also: *City of N. Y. Ins. Co. v. Greene*, 183 Va. 35, 31 S. E. 2d 268 (1944); *Silfast v. Matheny*, 171 Or. 1, 136 P. 2d 260 (1943); *Ohern v. Hatter*, 189 Okl. 663, 119 P. 2d 48 (1941). But see, *VonRaitz v. Ankers*, 173 N. Y. S. 411 (1919), where defendant was denied a postponement when he set up the absence of his mother, whom he deposed was present when the agreement constituting the defense was made, held, that a denial of continuance could not be sustained on the ground that the mother's testimony would only have been cumulative of that of the defendants.

²⁶ *State ex rel. Dolle v. Miller*, 18 O. Dec. 218, 5 OLR 260 (1907).

²⁷ *O'Neill v. Wall*, 103 Mont. 388, 62 P. 2d 672, 674 (1937).

duced at a later date. The case is rather strong authority since the missing witness was the defendant. Indiana, it appears, makes it a statutory requirement that the affidavit of the movant for a continuance show the probability that the absent witness will attend within a reasonable time.²⁸

Although there are other considerations weighed by the courts in determining whether a continuance will be granted in the case of absent witnesses or evidence it is submitted that the above tests constitute the prime determinants employed by the courts in exercising their discretion in the matter. These or other analagous considerations are also used by the courts to weigh the right to a continuance based on grounds other than absence of witnesses or missing evidence.

Probably the second most frequently used ground for requesting a continuance is the argument of surprise. This ground ordinarily arises from two sources. First, the amendment of a pleading by the adverse party immediately before or during the trial, and, secondly, where a witness for the examining party testifies contrary to expectation.

AMENDMENT OF PLEADINGS

This ground for continuance is recognized by Ohio Rev. Code §2309.61. In accord with the general rule under common law it is to be noted that although the statute furnishes a ground for continuance the grant of the continuance is still discretionary with the court. The tenor of the law on this point seems to be that where a continuance is asked on this ground the applicant must show how he is prejudiced by the amendment, the rule being that an amendment made before or during trial which does not affect the merits nor in reality surprise the adverse party is not ground for a continuance.²⁹

In the federal courts the practice of allowing continuances after amendment of pleadings by the adverse party is recognized as being within the courts power under Federal Rule of Civil Procedure 15 (a). The consideration of the real effect of the amendment is looked at as it is in state courts.³⁰

²⁸ *Indiana Quarries v. Lavender*, 64 Ind. App. 415, 114 N. E. 417 (1916).

²⁹ For Ohio rulings holding the amendments material and therefore good grounds see, *Dye v. Luck*, 30 Ohio L. Abs. 439 (1938); *Laws v. Morely*, 27 Ohio C.C. Dec. 209, Ohio C.C.R. (n.s.) 103 (1915). For Ohio cases holding the amendments not material and therefore not good grounds see *Industrial Comm. of Ohio v. Cleek*, 13 Ohio App. 417, 32 Ohio Ct. App. 23 (1920); *Cinn. Traction Co. v. George*, 22 Ohio C.C. Dec. 403, 3 Ohio C.C.R. 209 (1910), *aff'd*. 86 Ohio St. 339 (1912). Thus, if an amendment at the trial changes the form of the action or sets up a new and different cause of action the opposite party is usually entitled to a continuance. But, if the facts on which such a defense is based are necessarily involved in the defenses originally pleaded the amendment will not be deemed to work a surprise.

³⁰ See the following federal cases denying a continuance on amendment by the adverse party: *George v. Wiseman*, 98 F. 2d 923 (1938); *Federal Life Ins. Co. v. Rascoe*, 12 F. 2d 693 (1923), *cert. den.* (47 S. Ct. 112) (273 U. S. 722)

SURPRISE TESTIMONY

Suprise by reason of unexpected testimony of a party's witness during the trial may be good ground for continuance, when it appears that proper preparation of the case to avoid surprise was made and available means to overcome the effect of the surprise were used. The Ohio position is in accord with the authorities as it is in all matters affecting continuances. In *Kroger Adm'r v. Ryan*,³¹ the court was faced with a request for a continuance because the movant's witness allegedly surprised the movant by stating that certain evidence was not known to him of his own knowledge. The movant argued that he thought, under the circumstances of the case, that the witness, a doctor, knew of the evidence first hand, and that the movant had not been previously advised that the witness did not have first hand knowledge. The court held that a normal amount of diligence would have uncovered this fact and that a continuance could not be granted for such reason. Conclusive as this holding appears to be it should be noted that the motion was first made in connection with a motion for new trial and not at the time of the alleged surprise testimony. There is language by the court which indicates that the motion might have been sustained if requested at the proper time, notwithstanding the lack of diligence. The case is cited with approval in *Gichanov et al. v. United States*.³²

ABSENCE OF COUNSEL OR PARTY

Another frequently argued ground for continuance is the absence of counsel or party. Whether or not a continuance should be granted because of the absence, from illness, death, or other cause, of applicant's counsel must necessarily depend on the facts and circumstances of each case. The mere unexplained absence of counsel, or without sufficient reason being given therefore, is not ground for continuance. If a party is or can be adequately represented by other counsel the motion will be denied, and where it is claimed that substituted counsel is not sufficiently informed, proper and diligent efforts to have obtained the necessary information must be shown. Mere pressure of other business by which counsel is detained is generally held not sufficient ground for a continuance, particularly where it is not shown that other professional advice is unavailable. Counsel's absence because of his attendance on the legislature as a member thereof does not seem to be a sufficient ground for a continuance except where in some states it is so provided by statute. But even in such jurisdictions it must be shown that counsel was retained prior to commencement of the session. In determining whether a continuance should be granted because of a counsel's illness the courts seem receptive if the motion is made at the first term after issue is joined, rather than when

(1948). For a federal holding of an amendment by the adverse party to be good ground for a continuance see, *Strong v. Dist. of Col.*, 10 D. C. 499 (1877).

³¹ *Supra*, note 22.

³² 281 F. 125 (1922).

the action has been pending for sometime and the illness is of long standing. The illness of a member of counsel's family has been accepted as valid grounds for a continuance.

In the Ohio case of *Zander v. Fanshaw*,³³ it was held that a continuance was properly denied in order that defendant might employ counsel where it appeared that counsel was present although not a person satisfactory to the defendant. The absence of chief counsel was held not to be sufficient grounds for continuance in *Homan v. Lightner*.³⁴ But, the sickness of the principal counsel of defendant, the other not being prepared, was held good ground for continuance at cost of defendant in *Shultz v. Moore*.³⁵ In a federal case the refusal of a continuance for one month on the ground of illness of defendant's attorney was held improper where the defendant's attorney had pursued the case with diligence to its close.³⁶ In a case between two states a continuance was granted on account of the absence of senior counsel of one party by reason of unexpected and severe illness.³⁷ A refusal of further continuance because of absence of defendant's counsel was held not an abuse of discretion.³⁸ In *Copper River Mining Co. v. McClelland*,³⁹ the inability of the two principal counsels of corporate appellant to attend the trial was held not to be sufficient ground for a continuance. In the Ohio case of *Scheu v. Scheu*,⁴⁰ the lack of a proper showing of reason for absence of counsel appears to have lost the motion. The appellate court made the following remarks:

It is claimed that the court abused its discretion in refusing to grant a continuance of the cause when (Fricke) chief counsel of appellants could not be present at the trial at the time it was tried. It is also asserted that Logan W. Marshall of counsel was ill during the trial of the cause. There is not sufficient showing of any abuse of discretion on the part of the court in requiring counsel to proceed with the trial in the absence of Fricke, who no doubt had ample notice of the date fixed for the trial, and it does appear that he was physically unable to be present. Manifestly, courts may not cease to function because one of counsel, even though chief counsel, as suggested, chooses to remain away from the place of the trial at the time set for the hearing. The physical condition of Marshall was not brought to the attention of the trial judge and he therefore was not given an opportunity to act in the situation presented.

³³ 29 Ohio App. 259, 162 N. E. 745 (1928).

³⁴ 28 Ohio L. Abs. 78 (1935).

³⁵ 1 McLean 334, 7 O.F. Dec. 714 (1838).

³⁶ *Goodyear Service v. Pretzfelder*, 84 F. 2d 242 (1936).

³⁷ *State of Rhode Island v. State of Mass.*, 36 U. S. 226, (1837).

³⁸ *Spees Sand and Clay Works v. American Trust Co. of N. Y.*, 286 U. S. 548, (1931).

³⁹ 138 F. 333 (1905), cert. den. 200 U. S. 616 (1905).

⁴⁰ 33 Ohio Op. 343, 64 N. E. 2d 334 (1945).

The absence of a party on whose behalf a continuance is asked may be good ground, but a stricter showing of good cause seems to be required in such cases than in those cases where it is asked on the ground of absence of a mere witness. A complainant is not entitled to a continuance because of the absence of the defendant, since if he expects to make the latter a witness he should take the proper steps to procure his testimony. The illness of a party where his presence is deemed necessary seems to be sufficient ground for a continuance, providing there is hope for an early recovery. In a criminal prosecution any illness of the defendant which would tend to hamper the defense counsel is good reason for a continuance. A defendant is not entitled to a continuance as a matter of course because of the plaintiff's death. A court may or may not grant a continuance because one of the parties is absent in the military service. In the latter type of absence the courts usually try to protect the absent service man, but where the action affects public welfare, policy or other broad issues the absent service man is not allowed to delay the grinding out of the most good for the greatest number of people.

The Ohio case of *State ex rel. McCabe v. Buck*,⁴¹ holds that to constitute a sufficient ground for continuance because of the absence of a party it must appear that the absence is unavoidable, and not voluntary; that his presence at the trial is necessary; that the application is made in good faith; and that he will be able to attend court at some reasonable future time. The same court also took the view that to authorize a continuance on the ground of the enforced absence of a party, "it must be made to appear that he is a competent and material witness". As to illness of a party, *Welliver v. Welliver*,⁴² holds that, "generally the enforced absence of a defendant because of sickness is ground for continuance, if application is made in time". The court however found that the application had not been made in good faith. In *Allaman v. Slothower*,⁴³ the court held:

The seventh assignment of error is that the defendant was deprived of his day in court by a surprise move. The cause came on for trial. Counsel for defendant protested that he was not ready to proceed. Plaintiff offered testimony to the effect that defendant's counsel had been notified of the date of the hearing four days before said date. Although there was some discussion respecting this matter no evidence was forthcoming to dispute the proof. The trial judge required the defendant's counsel to proceed and this was done in the absence of defendant. The action of the trial judge was clearly within his discretion. The trial began about 2 P.M. and continued until a few minutes after 4 P.M., at which time plaintiff rested. Defendant's counsel then requested opportunity to call his client. This was

⁴¹ 140 Ohio St. 535, 45 N.E. 2d 763 (1943).

⁴² 32 Ohio L. Abs. 172 (1940).

⁴³ 60 Ohio L. Abs. 145 (1950).

denied and the trial judge immediately announced his finding. The appropriateness of this action is not so plain. Manifestly, had the defendant been present in court the trial would not have proceeded until the next morning. It would have been appropriate to say to counsel that if the defendant were in court the following day he would be permitted to make his defense. However, the prejudice to the defendant by the action of the court does not appear because there is no statement of affidavit in the record that he would have taken advantage of the opportunity to appear had it been accorded to him.

In *Short v. Beoddy*,⁴⁴ it was held that notwithstanding allegations by plaintiff's counsel that he had made repeated unsuccessful attempts to contact plaintiff a denial of a continuance was not an abuse of discretion. It was held in *Jones v. Little*,⁴⁵ that it is not a sufficient ground for continuance that defendant was not a witness. But in *Harragh v. Morganthau*,⁴⁶ it was held error to deny a continuance because of plaintiff's illness where plaintiff, who was his only witness, was so ill that appearance in court would probably have resulted in his death. Further, in *Smith v. Daniel*,⁴⁷ the alleged physical inability of the appellant to proceed to trial was not sufficient grounds to reverse the trial court's ruling that no continuance would be allowed by reason of such allegations. Another old federal case, *Respublica v. Matlack*,⁴⁸ holds that a cause will be continued where the defendant is absent in the plaintiff's service.

MISCELLANEOUS GROUNDS FOR CONTINUANCE

The multitude of grounds which may exist for arguing for a continuance in a particular case leave much to the initiative of counsel. The cases are too few and the holdings too narrow to formulate any meaningful rules. Thus all that can be done is refer the reader to the cases for whatever value they may have.⁴⁹

⁴⁴63 Ohio L. Abs. 603 110 N. E. 2d 488 (1951).

⁴⁵2 U. S. (2 Dall.) 182, (1792).

⁴⁶89 F. 2d 863 (1937).

⁴⁷46 F. 2d 740 (1931), cert. den. 283 U. S. 852 (1931).

⁴⁸2 U. S. (2 Dall.) 108 (1790).

⁴⁹*Mengert v. News Printing Co.*, 6 Ohio N. P. n.s. 572 (1905), held that a party to a pending action assailed by a publication by a party outside the record, against which the party assailed is entirely helpless to protect himself in the pending action, has good ground for the continuance of the action. In *Washington v. Cincinnati*, 25 Ohio L. Rep. 65 (1926), it was held that where the defendant was placed on trial ten minutes after filing of the affidavit charging unlawful possession of liquor, and he asked for a continuance, refusal is an abuse of discretion. But see *State v. Sultan*, 142 N. C. 569, 54 S. E. 841 (1906), where a continuance was denied when requested on the ground that trial is sought in the same term that the indictment is brought. A continuance was asked and denied on the ground that a Jew had scruples against appearing in court as a witness on Saturday. *Phillips v. Graetz*, 23 Am. Dec. 1 (1909). It has been held that an accomplice in a criminal case who turned state's witness in return for a promise of immunity from further prosecution has an equitable right to a continuance pending application to the executive for a pardon. *Lowe v. State*, 111

CONCLUSION

Correlation of the foregoing comments leads to the conclusion that the manner and method of applying for and supporting an application for a continuance varies little as between state and federal courts. All statutes and rules developed appear to be declaratory of the common law on the subject. Obviously, where the result of a ruling of a trial court on an application is the granting of a continuance, any appellate court review of the ruling would tend to support the trial court's view of the matter. This follows simply because the reason for the grant is to see that justice is done to the party requesting the continuance, and few appellate courts would substitute their judgment in a matter more intimately understood by a trial judge at the time the request is made. Where the complaint of the party is to the effect that the trial judge denied justice by denial of a continuance, the appellate court feels more free to act, providing, of course, that the all important abuse of discretion can be shown. It follows that no absolute rules can be laid down as to what will constitute sufficient grounds for a continuance in all cases. But, both in federal and state courts, the various rules and formulas for determining the question are fairly well uniformly understood and applied.

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Md. 1, 73 Atl. 637 (1909). Statutes limiting continuances to be granted non-resident litigants without limiting residents have been held discriminatory and therefore unconstitutional. *Jones v. Paxton*, 27 F. 2d 364 (1928); *State v. Belden*, 193 Wis. 145, 211 N. W. 916 (1927). In an action on an insurance policy a request for continuance on the ground that insurers attorney had not seen the policy was held properly denied. *Inter-Ocean Casualty Co. v. Copeland*, 184 Ark. 648, 43 S. W. 2d 65 (1931). A denial of a continuance asked by defendant, a newspaper publisher, on the ground that prejudice existed against the newspaper by a large class of citizens because of its attitude during a recent political campaign was held not an abuse of discretion. *Courier-Journal Co. v. Sallee*, 104 Ky. 335, 47 S. W. 226 (1898). An early federal case held that a continuance will not be granted because of a report of the recent trial of another cause, depending on the same facts and principles, has been published in a newspaper. *Hurst v. Wickerly*, Fed. Cas. No. 6940, 1 Wash. C. C. 276 (1805). The foreman of the jury in a slander case was excused at his own request on account of having uttered similar words of the plaintiff to those in the suit. The court held that this did not constitute grounds for a continuance. *Palmer v. Bogan*, 1 Cheves 52 (S.C.) (1839).