MAGRUDER *vs.* SNAPP.

The overruling of a motion for continuance, cannot be made a ground for granting a new trial.

Writ of Error to Pulaski Circuit Court.

Trespass *vi et armis*, brought by Catharine M. Magruder against Lewis Snapp, determined in the Pulaski circuit court, at the October Term, 1847, before the Hon. WM. H. FEILD, judge.

The declaration alleged that on the first of March, 1844, defendant took, carried away and converted to his own use, certain house-hold furniture, the property of plaintiff.

At the return term (April, 1845) defendant pleaded not guilty, to which plaintiff took issue, and the cause was continued on motion and affidavit of defendant that Jacob Grubb, a material witness for the defence, was absent, &c.

At the October Term, 1845, the cause was submitted to a jury, verdict for defendant, and a new trial granted. At the same term plaintiff took a rule for depositions.

At the April Term, 1846, the cause was continued on motion of the plaintiff, on account of the absence of Charles H. Adamson, a witness summoned on her behalf.

At the October Term, 1846, the cause was continued on motion of plaintiff.

At the April Term, 1847, plaintiff filed an affidavit and motion

for continuance, on the ground that she had taken the deposition of Charles H. Adamson, a material witness, and that the decision of the supreme court in the case of *Reardon vs. Farrington,* made after the taking of said deposition, would exclude it, and it was necessary for her to retake it, and on this showing the cause was continued.

At the October Term, 1847, plaintiff again filed an affidavit and motion for continuance, on the ground that she had been unable to procure the deposition of said Adamson, owing to the fact that he was at Comargo, in Mexico, which was under military government of the United States (war existing between the two countries) and she knew of no legitimate mode of taking such deposition. The court overruled the motion, and plaintiff excepted. The cause was then submitted to the court, sitting as a jury by consent, and finding and judgment for defendant. Plaintiff moved for a new trial, on the grounds that the court overruled her motion for a continuance, and that the court excluded the deposition of Adamson, the court refused a new trial, and plaintiff excepted, and took a bill of exceptions, setting out her motion and affidavit for continuance, and the deposition of Adamson which was excluded, &c. Plaintiff brought error.

WATKINS & CURRAN, for plaintiff. We concede that the court below rightly rejected the deposition offered in this case, because the notice was defective under the rule established by this court in *Reardon vs. Farrington,* 2 *Eng.* 364. As a decision, that rule operated retrospectively, and had the effect to throw out all the depositions previously taken in accordance with the practice of the bar, when its office under the power given by statute to this court to frame rules of practice, would have been more appropriately fulfilled by rule of court to operate in future. Upon the showing made of the materiality of the witness, and that after the deposition in question in all other respects regular had been taken, the witness had gone to a foreign country, in a state of war, under military government, and without any civil officers *de jure* or *de facto,* and that the movements of the wit-

ness were so uncertain that there was no opportunity for retaking his deposition, we submit, that the court below, in the exercise of its sound legal discretion, as distinguished in *Obaugh vs. Finn,* 4 *Ark.* 122, from an arbitrary discretion, was bound to have granted the plaintiff a new trial to prevent a failure of justice.

BERTRAND, contra. The deposition of Adamson was properly excluded. The notice was the same as in *Reardon vs. Farrington,* 2 *Eng. R.* 364.

The court properly overruled the motion for continuance. The cause had been several times continued for the same deposition. No suit shall be twice continued for the same cause. *Rev. Stat.* 631.

OLDHAM, J. The refusal of the circuit court to continue a cause cannot be made a ground for granting a new trial. We are not prepared to go beyond the rule laid down in the case of *Ashley vs. Hyde & Goodrich,* 1 *Eng. R.* 92. In that case the court said, "but should the party in his exceptions to the opinion of the court in overruling his motion for a new trial, set out the points of law and evidence that the court passed upon, and should the points clearly appear to have been taken at and during the trial, the bill of exceptions unquestionably makes them a part of the record. It matters not when the motion for a new trial was decided so that the exceptions to the opinion of the court overruling it, clearly show that the questions of law and fact were ruled erroneously against him at the trial." The decision of the court overruling the motion for a continuance, was made before and not at and during the trial. A party cannot be permitted to bring every possible decision that may be made during the progress of the cause, into his bill of exceptions overruling a motion for a new trial, and by that means bring them into review before this court. That the court struck out a plea is as much a ground for a new trial as that it refused to continue the cause.

The granting or refusing a continuance is a matter in the discretion of the court below, and will not be reviewed on error, unless that discretion should be abused to the prejudice of the party. So far from such being the case at present, the discretion of the court was governed strictly by the statute upon the subject of continuances. It is not controverted that the evidence given sustains the verdict. Affirmed.