DIXON *vs.* FEILD, JUDGE, &C.

Where a cause is continued over the objection of a party, without legal authority—as without a proper showing of the want of testimony, or that the party for other cause is unable to go safely to trial on the merits,—a mandamus will lie from this court to compel the inferior court to proceed with the trial.

Writ of Mandamus to the Hon. W. H. Feild, Judge of the Circuit Court of Pulaski County.

This was a petition filed by Wiley Dixon, setting forth that he had instituted an action of replevin for a slave, in the Circuit Court of Pulaski county, which was then pending therein against Sarah E. Thatcher *et al.* heirs of Samuel Thatcher; that when said cause was finally called for trial at the June term, 1849, he appeared by his attorney and demanded that the cause progress to trial, but that the Circuit Court refused to try or progress with said cause, and, on the motion of the defendants, without affidavit or other legal showing, ordered the cause to be continued, to

abide the determination of a cause in chancery between a certain Snapp & Howell, as complainants, against said Sarah E. Thatcher *et al.*, as defendants, concerning the same slave: and praying for a writ of mandamus commanding the Circuit Court to set aside the order continuing the cause and ordering it to abide the determination of the chancery cause, and to progress with the action of replevin.

The court awarded an alternative writ of mandamus, to which the judge of the Circuit Court of Pulaski county made return, contending that the Circuit Court being a court of general justisdiction, except as restrained by the constitution and laws, is authorized to exercise a legal discretion in conducting the causes therein, and having exercised a legal discretion in continuing the cause, if it erred the error could be corrected only by a writ of error, not by mandamus: that as the court did not refuse to act, but had acted its action, if erroneous, could not be corrected by mandamus. And for cause for refusal to obey the command of the writ, showed that the motion of the defendants for a continuance set forth that the plaintiff (Dixon) had instituted an action of detinue against Snapp & Howell for the same slave: that Snapp & Howell had filed their bill of interplea, which is still pending, making the plaintiff and defendants in the replevin suit parties, and praying that they be compelled to interplead and have settled, by the judgment of the court, the title to said negro slave; that upon said bill an injunction had issued prohibiting Dixon from prosecuting his suit at law against Snapp & Howell, and ordering said Dixon and all others claiming said negro to interplead and set forth their respective rights, so that the right of property might be determined. And by reference to the bill of interplea it appeared that a certain Sarah Snow claimed title to said negro, that she is made a party to the bill, but is not a party to the replevin suit, and that a trial in this cause will not affect her rights, and the whole case would have to be tried again in chancery: and for this reason the court, in the exercise of its discretion, continued the cause until the next term.

The plaintiff filed his demurrer to the return, in which the defendant joined.

FOWLER, for the plaintiff. The writ of mandamus lies to compel inferior courts or tribunals, and the judges thereof, to perform the duties required of them by law or by the constitution of their respective offices—such as, to entertain jurisdiction, pronounce a decree or judgment, grant an appeal or injunction, hold a court, sign a bill of exceptions, &c. 3 *Sumn. Cir. C. R.* 497. 1 *Ark. R.* 123. 1 *Eng. R.* 423. *Ib.* 11. 5 *Ark. R.* 50. 4 *ib.* 325. 5 *ib.* 373, 689. 8 *Pet. R.* 302, 303. 1 *Woodb. & Minat.* 7. 5 *Pet.* 190. 1 *Paine's C. C. R.* 455. 12 *Petersd. C. L.* 443, 463, 471, 480. 1 *Salk.* 299. 1 *Wils. R.* 138. 1 *Term R.* 376. 1 *Mo. R.* 81, 116. 13 *Pet. R.* 290. 3 *Bl. Com.* 110, 111.

It does not lie to control the proper discretion of an inferior court, nor to require it to pronounce a particular judgment; but will be granted to compel the court to proceed and render some judgment, (9 *Pet. R.* 604. 8 *ib.* 302, 304. 13 *ib.* 290. 1 *Paine's C. C. R.* 455. 4 *Eng.* 242,) or compel the court to proceed and determine a case pending before it. *Koon Ex parte,* 1 *Denio R.* 646.

The Circuit Court has no power to continue a cause until an affidavit is offered, as required by statute. (*Dig.* 809, *sec.* 83 *to* 87.) His duty is to dispose of the cause by trial, &c., and his discretion, to continue or not, only begins when the affidavit is filed.

RINGO & TRAPNALL, contra. Applications for continuances must always be addressed to the discretion of the court, and any fixed rule on the subject is impracticable. This court ought not to interfere with the discretion of the Circuit Court. (*Harper* 112. *Ib.* 85. 4 *Hen & Munf.* 157. 3 *Munf.* 170. *Gil.* 12. 32 *Ala.* 320. 1 *How.* 100. 6 *Smedes & M.* 451. 2 *Cond. R.* 349. *Ib.* 97.) It will not revise an exercise of discretion in the court below unless it be shown that palpable injustice is done, (4 *Ark.* 275. 1 *J. J. Marsh.* 315. 2 *id.* 267. 2 *Eng.* 112;) nor reverse a decision

granting or refusing a continuance unless it clearly appears that the court below had been guilty of a palpable violation of public duty. 2 *Ark.* 41. 3 *Burr.* 1514. 5 *Cow.* 15. 6 *Cow.* 577.

A mandamus is a proper remedy to compel inferior courts to adjudicate upon a subject within their jurisdiction when they neglect or refuse to do so, but when they have adjudicated a mandamus will not lie. 2 *Bibb.* 574. 1 *Eng.* 2. 3 *Ark. R.* 430. 1 *Cow.* 423. 19 *John.* 260. 18 *John.* 242. 15 *East* 117. 3 *Dallas* 512.

Mr. Chief Justice JOHNSON delivered the opinion of the court.

This is an application for a mandamus to the Circuit Court of Pulaski county to compel that court to set aside an order continuing a certain cause described in the petition, and to proceed with the trial thereof. The Circuit Court, in the return to the alternative writ, denies that a mandamus will lie inasmuch as there was no refusal to act; but that, on the contrary, action was actually had by a continuance of the cause. This is not the kind of action that the writ of mandamus was designed to enforce. The petition alleges that the Circuit Court refused to go on with the trial of the cause, but continued it without any legal authority. It is the peculiar province of the writ of mandamus to compel inferior courts to go forward in the discharge of their constitutional duties in cases where they either neglect or refuse to do so without authority of law. It is clear that the statement made by the defendant's attorney, and upon which the cause was continued, was wholly insufficient to warrant the Circuit Court in refusing to try the cause and continuing it over to the next term. The statement was not verified by affidavit, and, even if it had been, could not have changed the character of the case. Upon the supposition that the statement was true, and that it was is admitted by the demurrer, yet it furnished no sufficient ground for a continuance of the cause or refusal of the court to progress with the trial. The defendants did not allege the want of testimony or any other cause why they were not ready to go into the trial of the cause. It is only in cases where either party is not prepared to go to trial, and he shall make a

showing to that effect, verified by affidavit, that the Circuit Court, sitting on the common law side, can grant a continuance. The application for a continuance in this case was not based upon a supposed want of testimony or any thing else necessary to enable the defendant to go safely to trial upon the merits; consequently there was no such showing as could have called for, or even authorized, the Circuit Court to exercise its discretion in respect to the propriety of a continuance.

The demurrer, therefore, must be sustained, and the rule made absolute.

RULE OF THE COURT, ADOPTED JULY TERM, 1849.

Ordered: That the court in term, or a Judge in vacation, may entertain a petition, *Ex parte,* for supersedeas of an execution when the error complained of affects the legality of the execution only, and not the validity of the judgment: but in no case (where an appeal has not been taken or a writ of error does not lie) will the court or Judge grant a supersedeas affecting the validity of the judgment, unless a writ of certiorari, with notice to the adverse party, be awarded to remove the case into this court for revision; and in such case the writ of supersedeas shall be ordered to abide the adjudication upon the writ of certiorari, and upon condition that the applicant or some responsible person for him with sufficient security, shall enter into recognizance to the adverse party in a sum sufficient to secure the debt, interest and costs.