

HUNTER VS. GAINES ET AL.

Exceptions to the ruling of the court upon applications for continuances are not to be encouraged—the discretion of the circuit court will rarely be controlled.

(For the principles decided, see *Rector et al. vs. Gaines et al., ante.*)

Appeal from the Circuit Court of Hot Spring county.

The Hon. JOHN C. MURRAY, special Judge, presiding.

FLANAGIN, and WILLIAMS & WILLIAMS, for appellant.

WATKINS & GALLAGHER, for appellees.

Mr. Justice SCOTT delivered the opinion of the Court.

This was an action of ejectment upon the same certificate

proceeded upon by the appellees in the case of *Rector et al. vs. Gaines et al.* The evidence introduced by the plaintiffs below was the same that was introduced by them in that case.

The defendant below applied for a continuance for want of evidence to enable him to set up the same New Madrid claim that Rector offered to set up in the case against him, and by means of the same evidence that he offered; also—alleging that she held under Hale—for want of a certified copy of the proof taken in support of the Perciful claim before the Register and Receiver of the land office at Washington, Arkansas, in January, 1851, which had been mislaid or lost; of which claim Hale was alleged to be the owner; also, because Hale had applied to the proper authorities at Washington, to set aside the certificate of purchase, on which the plaintiffs below proceeded. The Court below overruled the motion, and we think correctly.

To say nothing of the showing as to diligence, the evidence neither as to the New Madrid claim of Langlois, nor as to the pre-emption claim of Perciful, was admissible according to the doctrines of the law applied in the case of *Rector et al. vs. Gaines et al.* The appellant, nevertheless, had the full benefit of the evidence offered in that case in support of the claim of Langlois, as the same was preserved in the bill of exceptions taken, as fully as if it had been presented anew in her case.

There was certainly nothing in the third ground for continuance worthy of notice.

Exceptions to the ruling of the Court upon applications for continuances are not to be encouraged. A large discretion is allowed, which will rarely be controlled.

But although the Court ruled correctly as to this motion, and, also, as to all other questions in the progress of the trial, except as to those relating to the recovery of the rents and profits, the ruling as to them was erroneous; and for this error the judgment must be reversed, and the cause remanded, unless the appellees shall elect to enter a remittitur, as ruled in the case of *Rector et al. vs. Gaines et al.*

Mr. Chief Justice ENGLISH not sitting in this case.