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Douglas C. Kaplan

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AN ANALYSIS AND SURVEY OF THE LAW OF CONTINUANCES

DOUGLAS C. KAPLAN*

FOREWORD

In selecting this subject it was the desire of the writer to choose a topic of an original nature, the consideration of which might contribute to the recognition of problems not heretofore adequately examined. The limitations, technicalities, and complete lack of glamour of this subject are patent. It seems rather strange, however, that a device employed so frequently to impede the judicial process and obtain trial advantage has been horribly neglected. It is doubtful whether there is more than half a dozen articles on continuances in the entire Annals of Anglo-American jurisprudence.

It is the intention of this writer to lay open, in survey fashion, the situations involving the indiscriminate granting and refusal of continuances and the solutions offered through the legislative enactments of every American jurisdiction.

It should be noted that this paper will be divided into three (3) principal parts:

- (1) The restatement and analysis of traditional common law grounds for continuances.
- (2) A complete survey of the approach of every state in the U. S. towards the statutory solution of the delay caused by misuse of the continuance.
- (3) A model legislative enactment for the alleviation of this ancient problem.

INTRODUCTION TO THE PROBLEM

"Justice Shall Neither Be Delayed Nor Denied"

—Magna Charta

The abuse of continuances where it exists, is a curse which falls most heavily on the witness. In a recent burglary case in a certain city, there was no real doubt about the accused's guilt; but there were 19 continuances before he was tried and convicted. Meanwhile, the witnesses were forced to come ten miles to court on 19 occasions, each time being sent home to reflect on the course of justice.

Of course, this method of tiring out the witnesses is often due to local political intrigue, slack judicial methods, to connivance of attorneys, etc., and it has its larger aspects. But here we emphasize that any improvement in the system of evidence must

* Member of Florida Bar.

rest upon the assumption that promptness of trial is essential to the presentation of testimony and to securing good will and dependable mentality of witnesses.

We recommend to every State and City Bar Association to make a study of the abuse of continuances in their communities and demand of the courts that their abuses shall cease.¹

A "continuance" is the adjournment of a cause from one day to another of the same or subsequent term or the postponement of the trial of a cause.² The word finds its origin in antiquity when pleading was conducted orally. There were certain purposes for which the law allowed proceedings to be adjourned or continued. When this happened an entry of such adjournment to a given day and of its cause was made on a parchment roll; and by that entry the parties were also appointed to reappear at a given day in court. Such adjournment was called a continuance. Thus the award of a mode of trial on an issue in fact, and also the adjournment of the parties to a certain day to hear the decision of court on an issue in law, were each continuances and were entered as such on the roll. If there were any interruption without such an adjournment duly obtained and entered, it was called a discontinuance and the cause was considered as out of court by the interruption, and not permitted to proceed.

1. Report of the Committee on Improvements in the Law of Evidence—American Bar Association—Reports, on the section of Judicial Administration—Cleveland, July, 1938. Some additional comments made during Committee discussions are found below:

Comment by Judge Otis:

A year or two before I came to the federal bench (and I have been on the bench now 13 years) there was recommended to all the district judges of the United States by the Federal Judicial Council (the Chief Justice and the Senior Circuit Judges) the adoption of a certain rule. That rule was adopted in this district. The rule is that no case can be continued except from written application and for good cause, never upon mere agreement of Counsel. That rule has been an effective weapon in the hands of judges to prevent the delay of trials. It is a just rule. It recognizes that the judge is really the governor of his court and the litigation in it. How anyone can object to the rule, it is difficult to perceive. Of course, such a rule could not be adopted in some states without the consent of the legislatures. In Missouri for example there is a statute which provides that in State Courts the judge must continue a case upon agreement of counsel. It is an outrageous device whereby the great evil of the law's delays is greatly promoted.

Comment by Mr. Somerville (Miss.):

The law's delay was commented upon by Shakespeare in the 16th century, was campaigned against by Dickens in the 19th century and is an abuse reflecting upon administration of justice and the bar as a whole at the present time. A discontinuance of leniency in granting continuances could be a great step forward.

Comment by Mr. Leflar:

Two years ago as part of a program for criminal reform in Arkansas, I drafted a long statute which included a section setting up the rule of which Judge Otis speaks. The statute was rejected by the legislature, but we initiated it, and at the last general election it was adopted by the people by a 4 to 1 vote. The statute has now been in effect only about a year, and has not really had a trial yet, but a great majority of the lawyers appear to be pretty satisfied with it.

2. *Carrol, Schendorf & Boenicke v. Hastings*, 259 Ill. App. 564 (1931).

The official minutes of the pleadings and other proceedings thus made were called the record.³

For the purpose of precision the following distinction should be made. Although frequently used interchangeably, a continuance refers to an action or a suit while an adjournment relates to a court or other body.

In General

There are four principal ways in which a continuance might arise. They are, in reverse order of importance:

- (1) by operation of law
- (2) by the court on its own motion
- (3) by consent of the parties
- (4) for good cause upon application of an interested party

The continuance by operation of law includes all cases which remain undisposed at the end of a term, as well as cases involving enemy aliens upon declaration of war. These continuances occur as a matter of course and are relatively unimportant for the purposes of this paper.

Continuances granted by a court *sua sponte* have arisen only in a few isolated circumstances with the question turning generally on the interpretation of some local statute. They are relatively insignificant and will not herein be treated.

Some states have seen fit, by use of statute to permit the use of a continuance where the consent of all interested parties has been secured. The advisability of such a provision will later be considered at length.

We are principally interested, however, in continuances granted upon the application of a party where such party has shown cause. It is this source from which emanates the vast number of continuances which we shall be prone to examine.

The power to grant or refuse continuances is inherent in all courts.⁴ It is sometimes expressly conferred by statute and generally, a statute relating to continuances is considered, not the source of power, but only as prescribing certain requisites of the application thereof.⁵ The granting of a continuance is fundamentally a judicial act and some statutes providing that suits should be continued have been held unconstitutional. In some instances a continuance is a matter of common right irrespective of any statutes or rules of the court. As a general rule, however, the granting or refusal of a continuance is a matter committed to the sound discretion of the court, subject to common law and statutory limitations.

3. STEPHENS ON PLEADINGS p. 60; *Thomasson v. Summons*, 57 W. Va. 576, 50 S. E. 740 (1905).

4. *State ex rel. Buck v. McCabe*, 140 Ohio St. 535, 45 N.E.2d 763 (1942).

5. *East Texas Land Co. v. Texas Lumber Co.*, 217 Tex. Civ App. 411, 52 S.W. 645 (1899).

At Law and Equity

Except in those particulars in which procedure in equity has no analogy to proceedings at law, continuances in equity are granted or refused upon the same considerations that control the application for continuances in a court of law, especially where the same code of trial has been adopted in equitable as well as common law actions. In those jurisdictions where separate courts for law and equity have been abolished the question, of course, does not arise.

In Civil and Criminal Cases

In so far as the granting or refusal of continuances rests in the discretion of the court the rules are substantially the same in civil as well as criminal cases except as modified by differences in procedure in the two causes.⁶

It has frequently been stated that the propriety of granting motions for continuances is considerably dependent upon the particular time at which the motion is requested. We shall now examine a breakdown of a number of cases in which continuances were requested at different stages in the trial procedures.

Immediately Subsequent to the Impaneling of the Jury

Apparently the courts take a dim view of a motion for a continuance where the moving party waited until the jury had been impaneled before requesting a postponement. In *Lagow v. James*⁷ it was held that the trial court did not abuse its discretion in overruling an application for a continuance where the defendant had been fully aware of all matters set up therein and announced he was ready for trial. At this time the jury had been selected and impaneled and the plaintiff's petition had already been read. In *Bour v. Sherman*,⁸ a similar case, the motion was not presented to the court until after the jury panel was in the box being examined as to qualifications. On appeal it was held that the trial court was correct in refusing a continuance at that time. Other cases⁹ seem to be consistent with the views expressed above.

After Part of the Plaintiff's Evidence is in

In *Welpton v. Marshall*,¹⁰ the defendant was absent from trial and his counsel made an oral application for a continuance, which was insufficient and the plaintiff then introduced his evidence. On the following day

6. Where the trial of a criminal case is unreasonably postponed on account of neglect or laches of the prosecution in preparing the trial, especially where a term of court has passed at which a trial might have been had, such delay is a denial of the constitutional right to a speedy trial, and the defendant, if imprisoned is entitled to his discharge from custody upon Habeas Corpus. *United States v. Fox*, 3 Mont. 512 (1880).

7. 263 S. W. 632 (Tex. Civ. App. 1924).

8. 113 Fla. 730, 152 So. 3 (1910).

9. *Hill v. Hill*, 51 S.C. 134, 28 S.E. 309 (1897).

10. 186 N. W. 854 (Iowa 1922).

when the defendant appeared, a new application for a continuance was made which the court ruled would have been sufficient if made before the trial commenced but which was overruled as being untimely. On appeal it was held that no abuse of discretion was shown.

It also appears that although the situation may in fact warrant a postponement of a trial the courts have considered the expense incurred to the party's adversary. Thus in *Crabtree Coal Min. Co. v. Hamby's Adm'r*,¹¹ a motion for a continuance by one of the defendant's attorneys, after all but two or three of the plaintiff's witnesses had testified, was granted. It was held to be a valid use of discretion since to act otherwise would be to impose an unconscionable economic burden on the plaintiff.

After the Plaintiff has Closed

Where the defendant requests a continuance after the plaintiff's evidence is in, based upon facts of which he was aware prior to that time, it has been held to be no good.¹² Obviously the defendant would be at a tremendous advantage if he could evaluate the plaintiff's case and then have ample opportunity to mend his own. Thus the courts had traditionally required a showing of extreme hardship by the defendant in order to get a postponement at that time.¹³

After Part of the Defendant's Evidence is in

"It is well settled that after a case has been called for trial, both parties have announced themselves ready, and evidence has been introduced both for and against issues as joined in the pleadings, an application for a continuance will not be regarded with much favor by the court." This quotation in *Butt v. Carson*,¹⁴ indicates generally the disposition of the courts when part of the defendant's evidence is in. However, it has been held improper to overrule the plaintiff's application for a continuance in order to meet a new claim which arose when the defendant was permitted to amend his answer.¹⁵

After the Defendants have Closed

Cases have arisen with regard to the allowance of an amendment to the plaintiff's pleadings after the defendant has presented his evidence.

11. *Crabtree Coal Mine Co. v. Hamby's Adm'r* 28 Ky. Law Rep. 687, 90 S.W. 226 (1906).

12. *Stokes v. Stokes*, 127 Ga. 160, 56 S.E. 303 (1906). The defendant did not indicate that he was unprepared until the plaintiff had closed and the defendant's answer and demurrer had been submitted.

13. In one old case the plaintiff amended his declaration at the close of the evidence in such a way as not to be prejudicial to the defendant. The defendant requested a continuance based on surprise. The trial court's disallowance was sustained on appeal.

14. 5 Okla. 160, 48 Pac. 182 (1897). Here it was held proper to refuse the plaintiff a continuance requested after the defendant had introduced evidence. The purpose of the continuance was to secure the attendance of a witness from another county who would refute the evidence given by the defendant.

15. *Vale v. Trader*, 5 Kan. App. 307, 48 Pac. 458 (1897).

The holdings on this somewhat consistently demonstrate that where the amendment or alteration is a material¹⁶ one the courts have granted a continuance in favor of their adversary. However, should the court in fact decide that the amendment is of little importance the doors for postponement remain closed.¹⁷

After Motion for a Directed Verdict

At this point many of the courts have seen fit to apply the "due diligence" test. An absence of due diligence on the part of the moving party has been held sufficient grounds for the refusal of the granting of a continuance.¹⁸ In *Pittsburg C. C. & St. L. R. Co. v. From*,^{18a} a passenger brought an action against the railroad company for being struck in the eye while riding on a coach. The plaintiff's evidence was in and the defendant's request for a peremptory ruling was refused. A continuance was requested on the ground that the defendant was surprised by the plaintiff's contention. The plaintiff introduced evidence to the effect that he was injured by the chain from a passing freight train. Defendant's counsel had been told a day before the trial that such proof would be given. The court held that a continuance to enable the defendant to procure evidence to rebut the plaintiff's contention was properly refused.

At the Close of the Trial

The magical words "due diligence" seem to be the key which opens the door to a continuance in this situation as in those just mentioned. In *O'Bannon v. McArron*,^{18b} the court felt that any diligence would have discovered the infirmity in a deed in time to obtain another deed and thus refused a request at the close of trial to defer decision until such was done. Although due diligence would not in fact have discovered a situation, such as where an amendment is made to a party's pleadings, a continuance will be denied unless it is prejudicial to the interests of the adversary.¹⁹

TRADITIONAL COMMON LAW GROUNDS FOR GRANTING CONTINUANCES

Failure to Adequately Prepare For Trial

The spirit of justice demands a fair opportunity for a party to prepare his case. Where this is denied, particularly in criminal cases, such denial

16. *Bradkin Realty Co. v. Lesser*, 156 N.Y. Supp. 707 (1st Dep't 1916). The plaintiff amended his complaint so that it stated a promise to pay by the assignee. The court held that his amendment was a change of a cause of action and hence the defendant was entitled to an adjournment.

17. *Enterprise Sheet Metal Works v. Schendel*, 63 Mont. 529, 208 Pac. 933 (1922). In this case the plaintiff amended his complaint and the defendant in his request for a continuance could not show valid cause for the court to determine that there was prejudice.

18. *Garretson v. Western L. Indem. Co.*, 175 Iowa 172, 157 N.W. 160 (1916).

18a. 142 Ky. 51, 133 S.W. 977 (1911).

18b. 236 S.W. 48 (1921).

19. *DeVine v. Miller*, 272 Mich. 177, 261 N.W. 290 (1935).

upon appeal has been held to represent an abuse of discretion.²⁰ It should be herein noted that the length of time allotted to a party to prepare his case is not always determinative of whether a fair opportunity for preparation has been given. Thus, refusal of a continuance where the attorney for a party litigant had an exceptionally short time for preparation or, on the other hand, refusal to deny a continuance to an adversary who has enjoyed a considerable time for preparation has not been held a breach of discretion. However, where a lawyer as a result of inadvertence, procrastination, or merely because he was too busy with other matters seeks a continuance on the grounds of lack of preparedness, it will seldom, if ever, be granted and the trial court's discretion will prevail.²¹

Discretion of the Court

By far, the overriding consideration in the entire field of continuances is the element of discretion. It has often been stated that the granting or refusing of a continuance is largely within the discretion of the trial court.²² The decision, prior to the advent of statutory controls, of the courts was seldom questioned on appeal in the absence of a clear abuse of discretion although the opinion has occasionally been expressed that a continuance by a trial court is not reviewable.²³ The vast majority of jurisdictions do permit review where such discretion is arbitrary or capricious.²⁴ This question of discretion will be reviewed at length in the second section of this paper.

Missing Papers

The courts have, in a number of situations, granted continuances where the absence of certain papers would result in manifest injustice. The yardstick principally employed is that of fair play. The attorney's negligence or that of his client in losing, destroying, or misplacing a document necessary for the effective prosecution of a litigant's claim or defense would probably not be considered sufficient grounds for a continuance. The loss of records or documents by the court or its clerk has been conceded as adequate

20. In *State v. Collins*, 104 La. 629, 29 So. 180 (1900), the defendant was being tried for murder. The indictment was returned, the accused assigned counsel, arraigned, and the case set for trial, on the first day of the term. The trial was set for 3 days later and counsel for the defendant moved for a continuance, which was denied. Justice Blanchard for the Supreme Court of Louisiana said:

The law travels with a leaden heel but strikes with an iron hand, is a maxim pregnant with obvious meaning. In this instance it doffed the 'leaden heel' and struck with the 'iron hand'. While the zeal displayed by our learned Brother of the district court in the prompt indication of the law merits commendation, we are yet constrained to hold that in this instance he carried it a little too far. We differ from him in his ruling denying the continuance sought.

21. *Tomlinson v. United States*, 68 App. D.C. 106, 93 F.2d 652 cert. denied, 302 U.S. 642 (1937).

22. *Goldsby v. United States*, 249 U.S. 204 (1918); *Tierney v. Coolidge*, 308 Mass. 255, 32 N.E. 2d 198 (1941); *Hays v. Chilcoat*, 146 Okla. 62, 294 Pac. 119

23. See note, 74 Am. Dec. 141, 142.

24. *Adcock v. Adcock*, 339 Ill. App. 543, 91 N.E.2d 99 (1950).

grounds for the issuance of a continuance.²⁵ Generally, there is little confusion here and almost complete reliance on the trial courts determination of the best ends of justice.

Absence of Counsel

The courts have looked unfavorably upon situations where the issuance of continuances is sought because of the absence of counsel. *Cotton States Life Insurance Co. v. Edwards*,²⁶ summed up the traditional feeling of the courts by saying "the continuance of cases on account of the absence of counsel is not favored, and such absence is no cause of postponement, unless in cases of necessity or misconception." Absence without leave to attend trials of cases pending in other courts, is no grounds for continuance.²⁷ The courts will almost invariably refuse a continuance when any one of the following are demonstrated:

- (1) No reasonable excuse for absence of counsel is shown.
- (2) There has been no diligence in procuring the attendance of the attorney.
- (3) The cause was of such a nature that it could have been tried by another attorney without special preparation.²⁸

The absence of counsel is one of the grounds more frequently discussed by the statutes in those states which have attempted to regulate the court's discretion in granting continuances. Statutory treatment of this subject will be treated in another part of this paper.

Illness or Death of Counsel or his Relatives

The trial bench seems disposed to grant continuances in cases where sole counsel is incapacitated through his own illness or that of a member of his immediate family.²⁹ This is especially true when it is impossible for his client to proceed without him. Where counsel dies during the course of a trial the courts will almost invariably grant a continuance until the new counsel can prepare himself.

Withdrawal of Counsel from Case

The courts have been loath to grant continuances in this case because of the imminent possibility of opening the door wide to the flagrant abuse of this privilege. If a case were continued every time the attorney withdrew the matter would never be closed. In criminal cases, however, special consideration is shown because of the sentiment that such a defendant should be given every opportunity for the best possible defense. In *Van*

25. *Shalin v. Skamania Boom Co.*, 56 Wash. 305, 105 Pac. 632 (1909).

26. 74 Ga. 220, 77 S.E. 209 (1884).

27. *Tobias v. Adams*, 206 Cal. 88, 273 Pac. 576 (1928); *Benjamin v. Van Voorhis*, 106 N.J. Eq. 196, 150 Atl. 393 (1930).

28. *Blake v. West Virginia Ins. Co.*, 111 W. Va. 245, 161 S.E. 32 (1931).

29. *Courtney v. Central Trust Co.*, 112 Fla. 295, 150 So. 276 (1933). The Florida Supreme Court reversed the decision of the Circuit Court of Manatee County which refused to grant a continuance to the attorney for the defendant whose wife was faced with a medical emergency on the day of trial.

Cott v. Wall,³⁰ the trial court was sustained in refusing to grant a continuance where the defendant in order to get a time advantage requested, on the eve of the trial, that his attorney withdraw and then requested a continuance. The court perceived the obvious ruse and was sustained in denying the request for postponement.

Absence of a Party

Where a party's absence from trial results in the request of a continuance by his attorney the court will require a strict showing of good cause if absence is not due to death or illness. The court has the power to search and inquire whether the absence of the party results merely from his inconvenience or whether his absence is in fact a matter of good faith. Should the court find the former, a continuance would be summarily denied.

An interesting situation occurs where the presence of a party is required in two separate proceedings which take place simultaneously at different locales. The general rule as acknowledged in *Nevins v. Nevins*,³¹ is that the party is bound by the first notice of trial, and the requirement of his presence at that trial affords a ground for a continuance of other proceedings. Obviously a continuance will only be granted when the party is in fact needed as a material witness for his own cause, and then only under the forementioned circumstances. There is considerable doubt as to whether a continuance would issue in favor of a party who expected to present his absent adversary as a witness. The means were available whereby he could have obtained the testimony of the absent party.

Illness or Death of a Party

The death of a party to a suit generally creates a permissible delay in favor of the cause of the decedent. Such a right to a continuance does not issue in favor of the adversary of the decedent. Where the presence of an absent party, who has succumbed to a grave illness, is necessary for the effective disposition of a case the courts have been rather liberal in the granting of a postponement. This is particularly true in criminal cases where the defendant is given every opportunity for the best available defense.³² Practically speaking, however, where the illness appears to be one of a particularly long duration the courts are less prone to grant a continuance. Illness in the family of a party litigant is a less cogent argument to the courts for the postponing of litigation.

30. 53 Utah 252, 178 Pac. 42 (1918).

31. 38 Nev. 541, 148 Pac. 354 (1915). The Court said that a party who is a material witness in his own behalf must have his testimony ready for use at the trial unless prevented from so doing by some obstacle which by the exercise of reasonable diligence he cannot overcome. The Court also provided that the obstacle should not be one which he has created by his own voluntary act.

32. *Fails v. State*, 60 Fla. 8, 53 So. 612 (1910).

Public Excitement

Worthy of only casual mention is the arousing of public resentment as a grounds for a postponement. Formerly in criminal cases it had been a recognized procedure in a particularly flagrant situation to continue a case until public ire and bias had subsided. The court recognized the difficulty in getting an unprejudiced determination of the case and perhaps the possibility of uncontrollable lynch mobs as per class "B" motion pictures. Continuances in this instance have been substituted by motions for change of venue which are considerably more effective under the circumstances.

Pendency of Other Proceedings

Where justice demands that a cause await the trial or appeal of another suit and the parties are identical and the issues are substantially the same, the subsequent cause may be continued pending outcome of prior litigation.³³ In *Reed v. Territory*,³⁴ the court said that it is almost universally recognized that a grand jury can find a valid indictment against a defendant notwithstanding the fact that another indictment or information is pending against the accused for the same offense. The pendency of the other indictment or information, when there has been no jeopardy on it, cannot then be pleaded in abatement of the second indictment. Thus, it would seem that in criminal cases where there had been no jeopardy on a former indictment, it cannot be set up as a ground for a continuance of a case based upon a completely new one. In specialized proceedings such as bankruptcy, all proceedings are stayed in the regular court pending determination of whether the defendant is in fact bankrupt.

Surprise

With the advent of the new rules concerning discovery in many states, the use of a continuance because of surprise by the adversaries has diminished considerably. It nonetheless still exists and is used in cases where a party would be unjustly prejudiced unless a continuance were granted.³⁵ Where a continuance is issued because of surprise by the adversary's evidence it must be that type of evidence which ordinary prudence³⁶ and industry would not have uncovered. Similar requirements exist with reference to unexpected suppression and exclusion of evidence. Where there is a mistake of fact causing surprise at a trial, providing there is no bad faith, a continuance can and in fact does often issue (e.g., misunderstanding as to time and place of holding court or as to the docket on which the case

33. *Kalmus v. Kalmus*, 103 Cal. App.2d 405, 230 P.2d 57 (1951). *Cert. denied*. 342 U.S. 903 (1951).

34. 1 Okla. Crim. 481, 98 Pac. 583 (1908).

35. In *Cottrel v. Gerson*, 296 Ill. App. 412, 16 N.E.2d 529 (1938), an attorney, not of record, entered the case on behalf of one party. It was held not prejudicial to his adversary and hence the continuance was rightfully refused.

36. *Hanes v. Baker*, 181 Okla. 146, 73 P.2d 143 (1937); *Chamberlain v. Chamberlain*, 114 Cal. App. 591, 300 Pac. 100 (1931).

is entered). It is not true, however, that a continuance will issue where one party has been laboring under a mistake of law.³⁷

Absence of Witnesses or Evidence

It should be noticed that this ground for a continuance is somewhat dissimilar from other grounds heretofore mentioned. This is perhaps the first instance in which we have discovered a common law *right* to a continuance providing certain criteria are met. It should be noticed, however, that this ground is not in itself devoid of the use of discretion, but it does perhaps manifest itself in a different way. Since the trial judge does himself decide the existence, or non-existence, of the abstract criteria giving rise to the continuance, it may be contended that the discretion of the trial judge does still exist, but merely has been canalized to other waters. This represents the first real attempt of the courts to set up criteria from which a continuance should issue. It is doubly important because this is unquestionably the most common ground for the granting of a postponement.

In essence it represents a noticeable limitation on the discretion of the trial court. An example of such criteria set down by the court may be found in *Hyde v. State*.³⁸ They are: 1) to satisfy the court that the persons are material witnesses, 2) to show that the party applying has been guilty of no laches or neglect, 3) to satisfy the court that there is reasonable expectation of his being able to secure the attendance at the future time to which he wishes the trial put off. Further criteria have been set up by other courts in an attempt to systematize the discretion problem. For example, it has been stated that the following five requirements are necessary before a continuance is to be granted due to an absent witness:³⁹ 1) the expected testimony must be material and competent, 2) it will not merely be cumulative or impeaching, 3) it will be credible and will affect the result, 4) it could probably be obtained at a future time, 5) the moving party has exercised due diligence to secure the attendance of the witnesses.

Amendment of Pleadings

Amendment or substitution of pleadings will generally not be considered grounds for a continuance unless it is of such material consequence and represents such a surprise that it would be manifestly unconscionable not to give to the adversary an opportunity to prepare a defense thereto. Thus, in *Downs v. Cassidy*,⁴⁰ where the plaintiff amended his complaint alleging slanderous words to be made in the second person instead of the third, the trial court was affirmed in the denial of the continuance because the amendment was relatively insignificant to the defendant's case. In those jurisdictions which permit an amendment of the pleadings which in fact

37. *Brandt v. McDowell*, 52 Iowa 230, 2 N.W. 1100 (1879).

38. 16 Tex. 445, 67 Am. Dec. 630 (1856).

39. *Blackburn v. State*, 122 Am. St. Rep. 746 (1905).

40. 47 Mont. 471, 133 Pac. 106 (1913).

sufficiently alters, or changes completely the entire theory of the action, fair play requires a postponement and an opportunity to answer. The determination of when an amendment represents a surprise does in fact belong to the trial judge and only in the most flagrant cases will his decision be set aside. Some courts have held this ground for a continuance so exclusively in the province of the trial court that they have deemed his discretion unserviceable. In *Tassey v. Church*,⁴¹ the court in a surprising opinion said,

... the question whether or not a party was surprised in allowing the amendment is not of a nature to be examinable on a writ of error, but the judgment of the court as in numerable other instances, [shall] be final and conclusive

This view has since been shared by a very few other courts.

EXAMINATION BY STATES

It is the desire of the writer in the following section to present and examine all pertinent discoverable statutory provisions governing the issuance of continuances as they exist in all forty-eight states. This examination shall be done with an eye to studying the legislative program of the individual state concerned as well as the investigation of the efficacy of particular statutory provisions.

As is ordinarily the case in this type of statutory examination, there is a considerable amount of repetition of frequently used provisions. An attempt has been made to keep this to an absolute minimum. Reference will be made from time to time to the "standard absent witness section." This does not mean that all state statutes contain the same verbatim provision involving this subject. It does mean however that they are so substantially similar as to require no additional discussion.

It should presently be noted that continuances arising by operation of law, and those employed in special types of cases (*e.g.*, contested wills, workmen's compensation, etc.) have been specifically excluded.

ALABAMA

There are two statutory provisions which are invariably employed, in some form or another, in every jurisdiction where there has been substantial legislative expression on the subject matter. They deal with continuances requested because of the absence of witnesses and the effect of the admission of the adverse party of what would have been said, had the witness testified. The Alabama rule generally provides that party applying for a continuance of any civil action must state in a written affidavit the names and places of residence of the absent witness or witnesses. He must additionally recount the diligence employed in attempting to obtain his or their testimony and what he expects to prove thereby. The code also

41. 4 W. & S. 141, 39 Am. Dec. 65, 67 (Pa. 1842).

provides, in the same section, that if it be stipulated by the opposite party that the witness if called would testify as set forth in the affidavit, the cause shall not be continued by reason of the absence of such testimony.⁴²

An interesting controversy exists in question of whether continuances should be permitted upon the consent of all parties to an action. Those who say that it should, point to the mutual consent aspect and conclude that no one is hurt thereby. The necessity of postponing, particularly in trials which have reached advanced stages, does not leave the court itself unscathed. The need of making new arrangements consumes a considerable amount of court time. Then too, the consent of the attorney for the adverse party is not always given for his client's best interests. Many attorneys feel that as a matter of professional courtesy it is necessary to honor the request of brother lawyers for additional time for the preparation of their case. For those lawyers who are disposed to indolence, such a situation does not incite a desire for timely preparation. Alabama has obviously realized the importance of this problem and although it has not eliminated consensual continuances it has limited them to one in number.⁴³

The Criminal Code of Alabama requires that all witnesses be subpoenaed again following a continuance,⁴⁴ for the day in which their presence in court is required. Other states have remedied this situation by providing that a continuance automatically requires the attendance of all witnesses at the newly appointed time or provides for the immediate right of the adverse party to take depositions of all witnesses then present at the trial.

ARIZONA

One of the classical examples of the neutralizing effect of a poorly written statute may be found in the Arizona Code. It provides that whenever an action has been set for trial on a specified date by order of the court, no postponement of the trial shall be granted, except for sufficient cause, supported by affidavit, or by consent of the parties, or by operation of law.⁴⁵ Standing alone, this provision first shuts the door to all continuances and then with unexcelled gusto proceeds to open it wide and remove all the hinges. The situation is not, however, as bad as it might seem since subsequent provisions tend to define and qualify this section.

The "absent witness" provision referred to in the discussion of the Alabama Code is found in Arizona in its most typical form. It has been

42. ALA. CODE 7 Rule 16, Appendix Cir. & Infer. Ct. Rules (1940).

43. ALA. CODE 7 Rule 17, Appendix Civ. & Infer. Ct. Rules (1940).

44. ALA. CODE § 295 (1940).

45. ARIZ. CODE ANN. § 21-801 (1939).

set down in the note below⁴⁶ for the purpose of comparison and analysis.

In Arizona, the party obtaining the continuance must, if required by his adversary, consent that the testimony of any witness or adverse party in attendance be taken by deposition without notice. The testimony so taken may be read on the trial by either party as if the witness were present. This provision, in some respects, avoids the undesirable result of requiring that the witnesses again receive subpoenas for the newly appointed time.⁴⁷

Another frequently employed device contained in this code to prevent trial advantage in favor of a party who has been granted leave to amend his pleadings to conform to his evidence, is to permit his adversary the right to an immediate continuance if it is necessary to provide an adequate defense.⁴⁸

The Arizona Code presents an interesting codification of the criminal provisions for a continuance. It defines a continuance⁴⁹ and guarantees the right to a speedy trial.⁵⁰ The Criminal Code also prohibits application for a postponement after the cause is called for trial unless the defendant or the state, as the case may be, can show that the ground arose after the cause was called for trial.⁵¹ This is a very wise idea since, as heretofore indicated, the later the stage of a trial, the more discomfort to all concerned. Additional provisions describe the form of the application,⁵² state what must be included therein,⁵³ provide for a hearing on the application,⁵⁴ indicate the effect of the admission to the proposed statement of an absent witness,⁵⁵ and provide that the continuance should last no longer than the ends of justice require.⁵⁶ The last two sections of this act

46. ARIZ. CODE ANN. § 21-802 (1939).

Affidavit for postponement—For want of testimony—Admitting that witness would testify—On an application for postponement of the trial, if the ground for the application be the want of testimony, the party applying therefore shall make affidavit that such testimony is material showing the materiality thereof, and that he has used due diligence in procuring such testimony, stating such diligence and the cause of failure, if known, and that such testimony cannot be obtained from any other source; and if it be for the absence of the witness, he shall state the name and residence of the witness and what he expects to prove by him, and he shall also state that the postponement is not sought for delay only but that justice may be done if the adverse party would admit that such evidence would be given and that it will be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed and such evidence may be controverted as if the witness were personally present.

47. See note 44 *supra*.

48. ARIZ. CODE ANN. § 21-449 (1939).

49. ARIZ. CODE ANN. § 44-1601 (1939).

50. ARIZ. CODE ANN. § 44-1602 (1939).

51. ARIZ. CODE ANN. § 44-1604 (1939).

52. ARIZ. CODE ANN. § 44-1605 (1939).

53. ARIZ. CODE ANN. § 44-1606 (1939).

54. ARIZ. CODE ANN. § 44-1607 (1939).

55. ARIZ. CODE ANN. § 44-1608 (1939).

56. ARIZ. CODE ANN. § 44-1609 (1939).

require that the reasons for the postponement shall be set down on the record⁵⁷ and that in the case of multiple defendants, a continuance to one is not a continuance at all.⁵⁸

ARKANSAS

One ground for continuance already discussed among those granted at common law, but not heretofore noted in statutory provisions, is that in which the party or his attorney is in attendance at the state legislature. Arkansas provides that any proceedings pending in their court in which *any* attorney for either party to a suit is a member of the Senate or the House of Representatives or is a clerk or Sergeant-at-Arms shall be stayed for not less than fifteen (15) days preceding the convening of the General Assembly and for thirty (30) days after its adjournment, unless otherwise requested by an interested member of said General Assembly.⁵⁹ Most statutes are not nearly so liberal as to permit a continuance where *any* attorney of either litigating side is in attendance at the State Legislature. The standard requirement is that it be the attorney of record.

The Arkansas Code contains substantially the same provision for the granting of a continuance to a party whose case has suffered as a result of the permitted amendment of his adversaries' pleadings as does that of Arizona.⁶⁰ It also contains the almost standard "absent witness" provision.⁶¹

In criminal matters Arkansas has an efficacious provision which states that the rules applying to matters of civil nature shall also be applicable in criminal cases.⁶² The only noticeable exception to this is the provision that the State Attorney is not required to present an affidavit in requesting a continuance and that his official statement in writing could suffice.⁶³

CALIFORNIA

The California Code provides for a continuance where the attorney of record, party, or *principal witness* is absent as a result of attendance at the legislature.⁶⁴ This is one of the few times that such a statute includes within it a provision for a continuance based upon the absence of the principal witness. Such a clause does seem, however, to serve the best ends of justice.

An abbreviated form of continuance for absent witness is also herein found.⁶⁵

57. ARIZ. CODE ANN. § 44-1610 (1939).

58. ARIZ. CODE ANN. § 44-1611 (1939).

59. ARK. STAT. ANN. § 27-1401 (1947).

60. See note 48 *supra*.

61. See note 46 *supra*.

62. ARK. STAT. ANN. § 43-1706 (1947).

63. ARK. STAT. ANN. § 43-1707 (1947).

64. CALIF. PENAL CODE, Rt.2, tit. 6, Ch. 8, § 1050 (1927).

65. CAL. CODE CIV. PROC. ANN. § 595 (1) (1946).

The code provides for a continuance based upon the agreement of all parties concerned in a specific litigation, however it restricts the duration of such continuances to thirty days.⁶⁶

COLORADO

No significant statutory provisions.

CONNECTICUT

The Connecticut statutes provide that in every civil action in which the defendant is an inhabitant of the state and is absent from the proceedings in question until the return day without entering an appearance the case shall be continued for 30 days by order of court. If the defendant does not appear thereafter and if no special reason is given a default judgment should issue. In the case of a non-resident defendant where the same situation prevails a continuance of three months duration is generally ordered by the court which can, at its option, require further notice by publication if such is deemed advisable. If no appearance is made after three months a default judgment will issue.⁶⁸

The statutes further provide that any continuance arising from the above provision shall terminate whenever the court finds that the absent or non-resident defendant, or his duly authorized agent or attorney, received actual notice of the pendency of the case at least 12 days prior to such finding. Then unless special reason is given for further delay, the cause may be brought to trial.⁶⁹

The Connecticut statutes contain a handy device for discouraging frivolous continuances which is employed in a considerable number of states. That is, the option rests with the court to require the party making request for continuances to pay to the adverse party such sum by way of indemnity as it shall deem reasonable.⁷⁰ This is an excellent tool in the hands of the court and, if wisely used, can prove itself quite valuable.

DELAWARE

The only discoverable provision of general application is the standard "absent witness" provision.⁷¹

FLORIDA

The Florida Statutes provide that the court in which an action is pending may order such continuances as are necessary to afford the defendant a reasonable opportunity to defend his action.⁷² Why the statute

66. CAL. CODE CIV. PROC. ANN. § 595 (2) (1946).

67. CAL. CODE CIV. PROC. ANN. § 595 (3) (1946).

68. CONN. GEN. STAT. § 7808 (1949).

69. CONN. GEN. STAT. § 7808 (1949).

70. CONN. GEN. STAT. § 7929 (1949).

71. See note 46 *supra*.

72. FLA. STAT. § 47.31 (1951).

speaks only in terms of a defendant in a civil action is a source of unanswered bewilderment to this writer. In addition the statutes provide a continuance in favor of the litigant whose attorney is a member of the state legislature while said legislature is in session.⁷³ The statute remains silent whether this privilege extends to the parties themselves or principal witnesses in the case.

Florida does have, however, a well codified set of rules governing the issuance of continuances in criminal matters.⁷⁴ It is so substantially similar to that provided under the Arizona code that repetition would be superfluous.

GEORGIA

This state has the most plenary statutory coverage on the subject matter of any state examined. There has been an obvious attempt to codify all, or at least most, of the common law rules and the result is humorous, if not enlightening.

The first section is a recital of the fact that no cause whatever pending in any of the courts shall be continued more than one term at common law, at the instance of the same party, for any cause whatsoever.⁷⁵

Absence of a party or his leading attorney in the following situations will give rise to a continuance: attendance on the General Assembly,⁷⁶ at a meeting of the board of control of an eleemosynary institution,⁷⁷ attendance at a meeting of the Board of Regents of the University System,⁷⁸ attendance at the State Board of Health,⁷⁹ attendance on National Guard Duty.⁸⁰ Further provision is made in the case of attendance on General Assembly by witnesses.⁸¹

The Georgia Code contains a specific prohibition against the granting of a postponement to the party requesting leave to amend his pleading, with the possible exception of the time needed for such amendment.⁸² However, provision is made for continuances in the event the adverse party is surprised by the amended pleadings.⁸³

The Code contains the standard provision for "absent witnesses" with one very salient exception.⁸⁴ In all other similar statutes the opposite party can frustrate the applicant's request for a continuance by admitting that the absent witness would have said what was contained in the applicant's

73. FLA. STAT. § 54.08 (1951).

74. FLA. STAT. §§ 916.01 to 916.09 (1951).

75. GA. CODE ANN. § 81-1401 (1933).

76. GA. CODE ANN. § 81-1402 (1933).

77. GA. CODE ANN. § 81-1403 (1933).

78. GA. CODE ANN. § 81-1404 (1933).

79. GA. CODE ANN. § 81-1405 (1933).

80. GA. CODE ANN. § 81-1406 (1933).

81. GA. CODE ANN. § 81-1407 (1933).

82. GA. CODE ANN. § 81-1408 (1933).

83. GA. CODE ANN. § 81-1409 (1933).

84. GA. CODE ANN. § 81-1411 (1933).

affidavit. Here, however, the opposite party must admit the *truth* of what was contained in the applicant's affidavit before the requested continuance will be prohibited. The wisdom of such a provision is more than questionable since, to prevent the continuance from issuing the opposite party would be in a worse position than if the witness were in fact secured.

Another statutory provision which finds itself exclusively in the Georgia Code and appears to be an extension of a common law doctrine, provides for a continuance in the event one of the parties is, "providentially prevented" from attending trial. The attorney for such party must state that he cannot go safely to trial without the presence of such absent party.⁸⁵

Meritorious of a special notice in the Georgia statutes is the provision for the absence or illness of counsel as cause for continuance.⁸⁶ Where the parties' leading counsel is providentially prevented from attending the trial and the party making the application will swear that he cannot go safely to trial without the services of the absent counsel and he expects his services at the next term a postponement will be granted.

In both of the above two situations the word "providentially" is subject to considerable interpretation.

By way of definition there is included in the code a statement to the effect that the party making application for a continuance must show that he has used "due diligence".⁸⁷

Provision is also made with reference to continuances upon appeal.⁸⁸ The code states that no appeal shall be continued more than twice by the same party, except for providential cause, for which it may be continued as often as justice may require.

All applications for a continuance not expressly provided for are to be granted and refused, as the ends of justice require. But in all cases the presiding judge can if he so desires, admit a countershowing to a motion⁸⁹ for a continuance and after a hearing, may decide whether the motion will prevail. This section would seem to lay in the trial judge's absolute discretion with respect to matters not spoken of by the legislature and at least some discretion in deciding the criteria where the legislature has spoken.

Public announcement of the issuance of a continuance, in open court, as well as recordation on the trial docket⁹⁰ are the final requirements of the Georgia Statutes.

85. GA. CODE ANN. § 81-1412 (1933).

86. GA. CODE ANN. § 81-1413 (1933).

87. GA. CODE ANN. § 81-1416 (1933).

88. GA. CODE ANN. § 81-1418 (1933).

89. GA. CODE ANN. § 81-1419 (1933).

90. GA. CODE ANN. § 81-1421 (1933).

IDAHO

Perhaps, the most interesting provisions in the Idaho Code deal with the continuance of actions in the Justice and Probate Courts. The court may, on its own motion, postpone trial for not more than one day where it is engaged in the trial of another action, or for two days if postponement is rendered necessary by alteration or amendment of the adversary's pleadings. Additional permission is granted, at the option of the court, for a stay of proceedings with the agreement of both parties. No time limit is provided for here. The standard "absent witness" provision is also contained in this section.⁹¹

Fundamental to the limitation of frivolous continuances, is the provision for the affective cost thereof. It should not be considered as a penalty against the moving party but rather as the price which must be paid for delay. Idaho, as do many states, provides for the allocation of costs of the adjournment to be imposed, in the discretion of the court, upon the requesting party.⁹²

Idaho does not lack, in ordinary civil cases, the almost standard statutes concerning absent witnesses.⁹³ Precaution is also taken to include a section requiring the moving party to consent to the recordation of the testimony of the adversaries' witnesses who are present at the trial and permission to read these as depositions at the date to which the trial is postponed.⁹⁴

ILLINOIS

This state has placed all applicable provisions concerning adjournment and continuances under one statutory heading. Sections one and two contain the standard "absent witness" provisions.⁹⁵ Section number three indicates that it shall be sufficient cause for adjournment if, because of war or insurrection, a defendant, whose presence is necessary for the full defense of his action, is in the military service of the U.S. or the State of Illinois. The privilege is also extended where the moving party or his attorney of record is in attendance at the General Assembly. The last statement is qualified by the fact that the lawyer-client relationship must have existed prior to the commencement of the legislative session.

Section number four prevents a continuance based upon the amendment of pleadings in the absence of showing of surprise by the adversary.

The statute further provides for the right of the court to grant a continuance on its own motion and constrains it from granting a motion for a continuance after the cause has been reached for trial, unless sufficient excuse be shown for delay.

91. IDAHO CODE ANN. §§ 16-705 to 16-707 (1947).

92. IDAHO CODE ANN. § 12-109 (1947).

93. IDAHO CODE ANN. § 10-109 (1947); See note 46, *supra*.

94. IDAHO CODE ANN. § 10-110 (1947).

95. See note 46 *supra*.

The final provision gives the court the right to tax costs in its discretion and provides for contempt proceedings to enforce payment thereof.⁹⁶

INDIANA

Most sections, heretofore mentioned, dealing with costs provide, generally, that they can be allocated against the moving party at the option of the court. Many of the same codes make provision for adjournment where one party is given leave to amend and his adversary claims surprise. Would it not be inequitable to require the party requesting the delay because of his adversary's action to pay the cost of the continuance? Indiana has solved the problem by providing that, "if by reason of an amendment to the pleadings a party who would otherwise be ready for trial be compelled to obtain a continuance, it shall be at the costs of the party making the amendment."⁹⁷

The Indiana Code also contains the standard provision for adjournment requested for absent witnesses⁹⁸ as well as a section granting a continuance where the parties' only counsel is in attendance at the state legislature.⁹⁹

A special section prevents the courts from granting an adjournment for the exchange of interrogatories unless it is shown to the court by affidavit that the party who files such interrogatories expects to obtain facts which will be material to him on trial, that he believes such facts to be true, and that he cannot prove the same by any other witness.¹⁰⁰

A similar rule requires that a continuance which has arisen because one party has filed a deposition less than one day before it is to be presented in court must be at the expense of that party.¹⁰¹

IOWA

In Iowa a continuance may be allowed for any cause not growing out of the fault or the negligence of the applicant, which satisfies the court that substantial justice will more nearly be obtained. All such motions must be supported by affidavit of the party, his agent or attorney.¹⁰² Motions must, however, be filed without delay after the grounds become known to the party or his attorney. Such a motion may be amended only to correct a clerical error.¹⁰³

Standard provision is made for "absent witness" continuances.¹⁰⁴ However, the adverse party may file specific written objections which

96. ILL. REV. STAT. c. 110 § 259.14 (1953).

97. IND. ANN. STAT. § 2-1304 (Burns 1933).

98. IND. ANN. STAT. § 2-1301 (Burns 1933); See note 46 *supra*.

99. IND. ANN. STAT. § 2-1302 (Burns 1933).

100. IND. ANN. STAT. § 2-1023 (Burns 1933).

101. IND. ANN. STAT. § 2-1519 (Burns 1933).

102. IOWA CODE ANN. R.C.P. 183 (1950).

103. IOWA CODE ANN. R.C.P. 182 (a) (1950).

104. IOWA CODE ANN. R.C.P. 183 (b) (2) (1950); See note 46 *supra*.

ultimately become part of the record. If this defense is adequate in the eyes of the judge presiding, no continuance will issue. Moreover, where the defenses are distinct the cause may be continued as to one or more defendants.¹⁰⁵ The wisdom of such a provision appears to be obvious. Granted that a certain amount of time will be consumed in arguing the merits of the grounds for the postponement, assuming there is a hearing, it would be manifestly unfair to permit the moving parties' allegations to be unchallenged in the face of error.

Whereas a majority of the statutes concerning cost indicate that they may be imposed in the discretion of the court as a condition of granting the postponement, Iowa takes a more affirmative position. This state provides that: "Every continuance shall be at the cost of the movant unless otherwise ordered by the court."¹⁰⁶

One unique section of the Iowa Code would grant the movant a continuance at the expense of the adverse party if said adverse party had responded to a subpoena by the party now requesting the postponement. This provision is an exclusive creature of this state and appears to the writer to be of very limited utility.¹⁰⁷

KANSAS

Like many states Kansas has permitted a cause to be continued where the leading attorney is in attendance at the General Assembly.¹⁰⁸ It has also included a section substantially similar to the standard "absent witness" provisions.¹⁰⁹

Some states have required a strong showing of necessity before permitting a continuance to be issued after the cause has reached trial. In Kansas the subject is treated by the casual statement that:

The Court may for good cause shown continue an action at any stage in the proceedings upon such terms as may be just.¹¹⁰

Another frequently used provision, that which grants to a party a continuance when he is genuinely surprised by an amendment to the adversary pleading,¹¹¹ is also herein contained.

KENTUCKY

With the exception of a provision requiring the moving party to pay costs in all cases of continuances except those arising out of an amendment of the adverse party,¹¹² there are no significant statutory enactments on the subject.

105. IOWA CODE ANN. R.C.P. 184 (1950).

106. *Ibid.*

107. IOWA CODE ANN. § 622.79 (1950).

108. KAN. GEN. STAT. § 46-126 (Supp. 1951).

109. KAN. GEN. STAT. § 60-2934 (Supp. 1951); See note 46 *supra*.

110. KAN. GEN. STAT. § 60-2933 (Supp. 1951).

111. KAN. GEN. STAT. § 60-762 (Supp. 1951).

112. KY. REV. STAT. § 453-070 (1953).

LOUISIANA

The continuance provisions under the Louisiana code pertain exclusively to the field of criminal law. Such complete criminal codes in this field have been found in Arizona and Florida.

First, to everyone there is guaranteed the right to a speedy public trial. There is an additional guarantee against abuse of discretion by the trial court. This is accomplished by warranting the right of appeal to the proper tribunal as well as the right to invoke the supervisory jurisdiction of the Supreme Court through use of its writ of mandamus.¹¹³ Furthermore, a continuance of a trial as to one of a number of jointly indicted persons will not act to deny or deprive the others of the right of speedy trial.¹¹⁴

Along with the standard "absent witness" statement¹¹⁵ there is contained in this criminal code the frequently used privilege of continuing a cause in which the leading counsel is in attendance at the state legislature.¹¹⁶ Every motion for a continuance is tried summarily and contradictorily with the opposite party and unless the evidence shows to the satisfaction of the court that the movant is entitled to a continuance, it is denied.¹¹⁷ No continuance can be indefinite and the judge is under obligation to fix a new date for trial if practicable.¹¹⁸ The last provision is a *must* if the courts do not wish to tie themselves to an inextricable morass of endless litigation.

MAINE

No significant statutory provisions.

MARYLAND

The legislatures, in their infinite wisdom, have seldom provided for the adjournment where one party to a litigation dies. Maryland, however, does permit such an adjournment for as long as the ends of justice might require, but provides that it should not exceed four terms after the death of the party.¹¹⁹ Such a situation is not infrequent and the above provision does seem to serve the best interests of justice. The court may also continue a case in the following instances in order to obtain a trial of the same on its merits: where a commission is granted for the taking of testimony; where a judgment is set aside for fraud or irregularity; and where a new trial is granted.¹²⁰ Both of the above provisions seem to be addressed to the court rather than an interested party litigant.

113. LA. REV. STAT. ANN. § 320 (1953).

114. LA. REV. STAT. ANN. § 318.1 (1953).

115. LA. REV. STAT. ANN. §§ 322, 325 (1953).

116. LA. REV. STAT. ANN. § 326 (1953).

117. LA. REV. STAT. ANN. § 323 (1953).

118. LA. REV. STAT. ANN. § 324 (1953).

119. MD. ANN. CODE GEN. LAWS, art. 75, § 67 (1951).

120. MD. ANN. CODE GEN. LAWS, art. 75, § 66 (1951).

Like most states heretofore examined the standard "absent witness" provisions,¹²¹ as well as the privilege of continuance when the absent attorney is in attendance at the legislature are present.¹²² Then too, the moving party is charged with the cost of the adjournment unless the court shall otherwise direct.¹²³

MASSACHUSETTS

Unique to Massachusetts is the provision which permits the court to order a continuance to enable an absent party to defend an action brought against him and to enable either party to set off his judgment or execution against that which is recovered against him.¹²⁴ Noticeable by its absence is the requirement of an appropriate affidavit by the moving party alleging sufficient grounds for an adjournment. The courts are cautioned, however, that such a privilege should not be extended where there is unreasonable delay, neglect or default.

Specific injunctions or prohibitions against the granting of continuances for certain grounds have been clearly enumerated. Thus, where the defendant's reply to a complaint has not been timely filed, or where interrogatories have been filed and the time for answering them has not expired, or where all parties agree to a delay for filing amendments or papers the trial shall not be postponed.¹²⁵ If, however, the original process is insufficient or defective a continuance may be granted for the issuance of new process.¹²⁶

Special note should be taken of the lack of provision for absent witnesses¹²⁷ which has been contained in almost every state heretofore examined.

MICHIGAN

The only discoverable statutory provision of general application involving continuances cautions the court against granting adjournment where affidavits are made in bad faith and for the sole purpose of delay.¹²⁸

MINNESOTA

Minnesota's sole statutory section involving civil continuances contains the standard "absent witness" provisions.¹²⁹ In criminal cases the privilege of the leading counsel who is in attendance at the state legislature is extended.¹³⁰

121. MD. ANN. CODE GEN. LAWS, art. 75 §§ 64, 65 (1951); See note 46 *supra*.

122. MD. ANN. CODE GEN. LAWS, art. 75, § 74 (1951).

123. MD. ANN. CODE GEN. LAWS, art. 75, § 73 (1951).

124. MASS. ANN. LAWS c. 224 § 4 (Supp. 1953).

125. MASS. ANN. LAWS c. 231 § 79 (Supp. 1953).

126. MASS. ANN. LAWS c. 223 § 84 (Supp. 1953).

127. See note 46 *supra*.

128. MICH. COMP. LAWS § 618.10 (Supp. 1952).

129. MINN. STAT. § 546.08 (1949); See note 46 *supra*.

130. MINN. STAT. § 316 (1949).

MISSOURI

Here application for adjournment is permitted to be made orally with the consent of the adverse party. However, should such consent not be secured, a motion in writing accompanied by an affidavit setting forth the grounds is necessary.¹³¹ The two primary grounds for civil continuances are contained in the standard absent witness provision,¹³² and the privilege of the absent counsel who is in attendance in the state legislature.¹³³

In criminal cases continuances are granted to either party for good cause shown and taxable to the person at whose instance it is granted, unless the court otherwise directs.¹³⁴ If an adjournment is granted, the time for the new trial should immediately be stated. It is furthermore provided that failure of a witness to be present at the new time is punishable by loss of the witness fee and possible compulsion to appear.¹³⁵

MISSISSIPPI

Of special note in this state is the last sentence contained in the "absent witness" provision:

A denial of the continuance shall not be ground for reversal unless the Supreme Court shall be satisfied that injustice resulted therefrom.¹³⁶

Such a provision would appear to indicate that in the absence of a strong showing of manifest injustice the discretion of the trial court in this state is absolute. This is probably the most clear, discoverable, example of allowance by the legislature of almost complete discretionary power.

MONTANA

Montana would tax the payment of costs occasioned by the postponement to the moving party, unless, at the option of the court, this is deemed inadvisable.¹³⁷ It also grants to the adverse party the right to have the testimony of his witnesses, who are present at the trial when the continuance is granted, recorded and presented at the new date and subject to the same objections as if the witnesses were produced.¹³⁸ To these may be added the standard "absent witness" provisions.¹³⁹

Any cause which would be considered a good one for postponement in a civil case is sufficient in a criminal action.¹⁴⁰

131. MO. REV. STAT. § 510.090 (1949).

132. MO. REV. STAT. §§ 510.100, 510.110 (1949); See note 46 *supra*.

133. MO. REV. STAT. § 510.120 (1949).

134. MO. REV. STAT. § 545.710 (1949).

135. MO. REV. STAT. § 545.740 (1949).

136. MISS. CODE ANN. § 1520 (1942).

137. MONT. REV. CODE ANN. § 93-8608 (1947).

138. MONT. REV. CODE ANN. § 93-4911 (1947).

139. MONT. REV. CODE ANN. § 93-4910 (1947).

140. MONT. REV. CODE ANN. § 94-7010 (1947).

NEBRASKA

When an application for postponement is made in Nebraska the payment to the adverse party of a sum not exceeding \$10.00 besides the cost of the term, may, in the discretion of the judges, be imposed as a condition of granting the postponement.¹⁴¹ Such a provision, although not common, is used by some states as a deterrent in small cases.

The "absent witness" provision¹⁴² here contains a clause substantially similar to that noticed in Mississippi.¹⁴³ That is, no reversal may be had in the Supreme Court in the absence of finding a clear abuse of sound legal discretion. The remarks made with respect to the Mississippi provision are applicable here.

The familiar section granting an adverse party the right to a continuance where there has been an amendment of the other parties pleading is also found here.¹⁴⁴

NEVADA

Two provisions have been provided by the Nevada legislature for the purpose of controlling the indiscriminate granting or refusal of continuances. These are the standard "absent witness" section¹⁴⁵ and the right of the court to apply the costs of the adjournment to the moving party.¹⁴⁶

NEW HAMPSHIRE

No significant statutory provisions.

NEW JERSEY

No significant statutory provisions.

NEW MEXICO

In this state a motion for a continuance must be filed on the second day of the term or as soon thereafter as it becomes certain that it will need to be made. No continuance is to be granted during the course of the trial for a cause that could have been discovered by reasonable diligence beforehand.¹⁴⁷ Regardless of when requested, a continuance growing out of the fault or negligence of the party applying therefore must be disallowed.¹⁴⁸

An application for continuance in New Mexico can be amended only once, except to supply a clerical error by permission. The adverse party may, within a reasonable time, file written objections to a motion for adjournment and must state why he believes it is insufficient. If the motion

141. Neb. Rev. Stat. § 25-1714 (1953).

142. Neb. Rev. Stat. § 25-1148 (1953); See note 46 *supra*.

143. See note 136 *supra*.

144. Neb. Rev. Stat. § 25-855 (1953).

145. Nev. Comp. Laws § 8758 (supp. 1949); See note 46 *supra*.

146. Nev. Comp. Laws § 8930 (supp. 1949).

147. N.M. Stat. Ann. § 19-808 (1941).

148. N.M. Stat. Ann. § 19-809 (1941).

is granted, the moving party must pay the costs of the term.¹⁴⁹ The standard absent witness provision is also herein contained.¹⁵⁰

NEW YORK

No significant statutory provisions.

NORTH CAROLINA

In every request for postponement the party must allege in his affidavit two necessary allegations: that he has used due diligence in having his case ready for trial and that by reason of circumstances beyond his control, which he must set forth, he cannot have a fair trial at the regular trial term.¹⁵¹ Where the motion for adjournment is requested less than 30 days prior to the term in which the trial is to be held, an additional allegation is necessary. The applicant must state the facts upon which his application is grounded, occurred, or came to his knowledge, too late to allow him to apply previously and that his application is made as soon as reasonably possible. The applicant must in all cases pay the cost of the application.¹⁵²

A reduced version of the standard "absent witness" provisions is contained herein. The opposing side may always attempt to controvert the allegations of fact in the application for continuance, and to offer counter affidavits to that end.¹⁵³

No action in North Carolina abates by the death or disability of a party or the transfer of any interest therein if the cause of action survives or continues. A motion may, however, be made within one year after the occurrence and the court may grant a continuance in the name of of the original party.¹⁵⁴

NORTH DAKOTA

No significant statutory provisions.

OHIO

The Ohio Code provides for a continuance where one party alters or amends his pleadings and the adverse party, as a result thereof is genuinely surprised and could not reasonably be expected to go on with the trial.¹⁵⁵ No additional provisions of general application are made.

OKLAHOMA

The court may for good cause shown, continue an action at any stage of the proceedings on terms as may be just. If a party or his attorney

149. N.M. Stat. Ann. § 19-812 (1941).

150. N.M. Stat. Ann. §§ 19-810, 19-811 (1941).

151. La. Rev. Stat. Ann. §§ 322, 325 (1953).

152. N.C. Gen. Stat. § 1-176 (1943).

153. N.C. Gen. Stat. § 1-177 (1943).

154. N.C. Gen. Stat. § 1-74 (1943).

155. Ohio Code Ann. § 2309.61 (supp. 1953).

of record is serving as a member of the legislature or the senate which is in session, it shall be sufficient cause for a continuance. The refusal to grant such constitutes error and entitles the party to a new trial as a matter of right. If the party or his attorney of record gave notice to the supreme court or the court of criminal appeals of his desire to appeal from any judgments and was subsequently called to the legislature or assembly he is given such additional time as is reasonable for the perfection of his appeal.¹⁵⁶

Standard provision is made for the "absent witness" with the added statutory prescription that when an adjournment is so granted it shall be at the cost of the party making the application unless the court otherwise order.¹⁵⁷ As in Ohio and other states heretofore examined, provision is made for a continuance where one party is rendered unprepared for trial because of the amendment of his adversary's pleadings.¹⁵⁸

OREGON

The court may as a condition of granting a postponement impose a sum not exceeding \$10.00 as costs.¹⁵⁹ Additional provision is made for absent witness continuances.¹⁶⁰ There are no other discoverable sections of general application.

PENNSYLVANIA

No significant statutory provisions.

RHODE ISLAND

The sole discoverable provision of general application in Rhode Island permits courts to order a continuance as they think necessary or proper to enable an absent party to defend his action and to enable either party to set off his judgment or execution against that which is recovered against him. The actions can not, however, be unreasonably delayed by the neglect or fault of either party.

SOUTH CAROLINA

The absence of a witness to any bond or note is not considered a good cause, in any court, for postponing an action.¹⁶¹ In South Carolina a sum not exceeding \$10.00 besides the fees of witnesses may be imposed as a condition of granting the postponement.¹⁶²

SOUTH DAKOTA

With the exception of certain types of actions any party, or his attorney of record who is in attendance at the legislature or state assembly may

156. Okla. Stat. tit. 12, § 667 (1951).

157. Okla. Stat. tit. 12, § 668 (1951); See note 46 *supra*.

158. Okla. Stat. tit. 12, § 319 (1951).

159. Ore. Comp. Laws Ann. § 10-922 (Supp. 1943).

160. Ore. Comp. Laws Ann. § 5-107 (Supp. 1943); See note 46 *supra*.

161. S.C. Code § 26-9 (1952).

162. S.C. Code § 10-1610 (1952).

request postponement of an action provided he informs his adversary at least fifteen days prior to the term in which trial is to be held.¹⁶³

All applications for continuance, regardless of grounds, must be made on or before the first day of the trial term, unless the cause for the continuance shall have arisen, or come to the knowledge of the party subsequent to that date.¹⁶⁴

The standard "absent witness" provision is present. It also contains the pronouncement that counter affidavits will be disallowed except for those offered to show want of diligence or that the application was not made in good faith.¹⁶⁵

When an action or proceeding is called for trial or hearing the court may, upon good cause, postpone the cause until such time as may be just, in consideration of all the circumstances.¹⁶⁶ The costs of any continuance may be imposed in the discretion of the court as a condition of granting it.¹⁶⁷

TENNESSEE

The "continuance by consent" provision, which this writer has often questioned, is given a new look in Tennessee. Not only is the consent of all parties to the litigation necessary but the court must also agree to the adjournment.¹⁶⁸ Such a requirement would seem a necessary restriction upon consensual procrastination. As a matter of fact, the court may impose upon the applicant any conditions which it may, under the circumstances, deem necessary and proper.¹⁶⁹ This would, of course, include the right to allocate costs as a condition of the adjournment.¹⁷⁰ Additional sections, somewhat extraneous to the above discussion, indicate that the death of a party will not prevent a trial at the term in which the cause is renewed,¹⁷¹ nor will an amendment by one's adversary do so, unless the court is satisfied that substantial justice requires it.¹⁷²

TEXAS

No application for a continuance may be heard in Texas before the defendant files his defense; nor can any adjournment be granted except for sufficient cause supported by affidavit. Continuances are also available by consent of the parties.¹⁷³

163. S. D. Code §§ 33.1115 (Sup. 1952).

164. S. D. Code § 33.1116 (Supp. 1952).

165. S. D. Code §§ 33.1117, 33.1118 (Supp. 1952).

166. S. D. Code § 33.1114 (Supp. 1952).

167. S. D. Code § 33.1808 (Supp. 1952).

168. TENN. CODE ANN. § 8790.1 (Williams 1934).

169. TENN. CODE ANN. § 8791 (Williams 1934).

170. *Ibid.*

171. TENN. CODE ANN. § 8792 (Williams 1934).

172. TENN. CODE ANN. § 8793 (Williams 1934).

173. TEX. STAT. R.C.P. 251 (1948).

Consideration is given to the possibility of the absence of counsel. It is provided that the absence of counsel will not be good cause for a continuance or postponement of a cause when called for trial.¹⁷⁴ This rule is not absolute and the court in its discretion, upon good cause shown, may order otherwise.¹⁷⁵

Standard provision is made for "absent witness" continuances¹⁷⁶ and in the interests of fair play an adversary is given an opportunity to formulate a defense where there has been an amendment of pleadings.¹⁷⁷

An interesting provision exclusively found in Texas requires the clerk of court to honor the request of a non-resident attorney for the date of an action in which he is to appear. Failure of the clerk to furnish such information, upon proper request is sufficient grounds for a continuance or a new trial when such failure prevents the attorney from preparing or presenting his claim or defense.¹⁷⁸

The Texas code of criminal procedure provides for a wide variety of continuances. Actions may be adjourned by operation of law if the accused has not been arrested or if there is insufficient time for trial during the present term.¹⁷⁹ Adjournment may also be accomplished by consent of the parties¹⁸⁰ or upon written applications where sufficient cause is shown.¹⁸¹ Generally speaking, no written motion is needed,¹⁸² but any material fact stated in the applicant's affidavit concerning the diligence which he employed may be denied *in writing* by the adverse party.¹⁸³ If such a denial is filed by the adversary, a hearing is held upon the question and a final decision thereon is handed down by the court.¹⁸⁴ Otherwise, no argument can be heard on an application for a continuance unless requested by the judge. When argument is heard the applicant is given the right to open and close.¹⁸⁵

UTAH

Utah, as a condition of granting an adjournment, may require the applicant to consent to the taking of the testimony of the witnesses of the adverse party and that such testimony so taken be read at the trial with the same affect and subject to the same objections as an ordinary

174. TEX. STAT. R.C.P. 253 (1948).

175. *Ibid.*

176. TEX. STAT. R.C.P. 252 (1948).

177. TEX. STAT. R.C.P. 66 (1948).

178. TEX. STAT. R.C.P. 246 (1948).

179. TEX. STAT. C.C.P. 542 (1948).

180. TEX. STAT. C.C.P. 539 (1948).

181. TEX. STAT. C.C.P. 540 (1948).

182. TEX. STAT. C.C.P. 546 (1948).

183. TEX. STAT. C.C.P. 547 (1948).

184. TEX. STAT. C.C.P. 548 (1948).

185. TEX. STAT. C.C.P. 549 (1949).

deposition.¹⁸⁶ As we have seen previously, this is not an uncommon section.

Standard provision is made for "absent witness" continuances¹⁸⁷ as well as those which arise as a result of the amendment of the adversary's pleadings.¹⁸⁸

VERMONT

No significant statutory provisions.

WASHINGTON

In excess of the witness fees, an amount not exceeding \$10.00 may be imposed, at the discretion of the court, as the "price" of a continuance in Washington.¹⁸⁹ This section has been noted previously in other jurisdictions but, generally, appears in its more familiar form which deals exclusively with costs. The only other discoverable section of general application is the "absent witness" provisions. Notice should be taken herein, however, that in this particular section reference is made to *evidence* instead of *witnesses*.

WEST VIRGINIA

In this state, the trial of an action at law cannot be continued because of the filing of an amended declaration unless the court is satisfied that the applicant cannot proceed safely without such an adjournment.¹⁹¹ If a continuance is given, it is at the cost of the applicant and no suggestion of trial court discretion in this manner is made.

The "absent witness" section of the West Virginia Code differs substantially from what has heretofore been called standard.¹⁹² Under the standard type section, if the adverse party would admit that the witness, if present, would have testified according to what was contained in the affidavit, no adjournment was granted. Here, however, there is no such admission provision. In its stead has been substituted the adversary's prerogative of cross examination in open court of matters set forth in the applicant's affidavit.¹⁹³

WISCONSIN

All applications for a continuance, with the exception of those on a day to day basis within the same term must be made on the first day of

186. UTAH CODE ANN. R.C.P. 40 (b) (1953).

187. UTAH CODE ANN. R.C.P. 40 (c) (1953).

188. UTAH CODE ANN. R.C.P. 15 (b) (1953).

189. WASH. REV. CODE § 22-19 (1951).

190. WASH. REV. CODE § 21-1 (1951).

191. W. VA. CODE ANN. § 5641 (1949).

192. See note 46 *supra*.

193. W. VA. CODE ANN. § 5641 (1949).

the term. This is, of course, unless the reason giving rise to the request was not discovered or did not come into existence until some later time. This would appear to be rather lenient in comparison with the requirement that the motion be as much as thirty (30) days prior to the term, as has been noticed in other states.¹⁹⁴

Unique to Wisconsin is a provision which is closely related to its "absent witness" section. It states:

Where an application for a continuance is made by a party whose affidavit states that he has a valid defense to some part only, of the other party's cause of action or demand, which he desires time to obtain testimony to establish the application shall be denied if the other party withdraws or abandons that part of his cause of action or demand.¹⁹⁵

The logic of this section is patent and hence there is no need to labor the point. Another novel provision which should be noted is that in non-consensual continuances payment of the fees of witnesses in actual attendance as well as *reasonable attorneys fees* and other costs must be made prior to adjournment.¹⁹⁶ The privilege of the party or his leading counsel who is absent attending a legislative session is also granted here.¹⁹⁷

WYOMING

In Wyoming any court, for good cause shown, may continue the action at any stage of the proceedings at the cost of the applicant.¹⁹⁸ No provision is made for any specific time when the motion or application has to be presented to the court.

Besides the standard "absent witness" section,¹⁹⁹ the only other pertinent statement indicates that the civil rules concerning continuances are applicable in criminal cases.²⁰⁰

It is customary, at this point to summarize the analysis of the provisions which have heretofore been considered and arrive at ultimate conclusions. The writer cannot help but feel the superfluity of such a procedure in this case. It is therefore deemed a wiser, and a more constructive approach to present, by way of conclusion, a model statutory enactment which contains those provisions necessary to the expedient and equitable administration of justice.

194. WISC. STAT. § 270.145 (1951).

195. *Ibid.*

196. *Ibid.*

197. WISC. STAT. § 256.16 (1951).

198. WYO. COMP. STAT. ANN. § 32002 (1945).

199. WYO. COMP. STAT. ANN. § 32001 (1945); See note 46 *supra*.

200. WYO. COMP. STAT. ANN. § 32003 (1945).

MODEL ACT GOVERNING THE ISSUANCE OF CONTINUANCES

Chapter I

Sec. 1—1 Definition of Continuance

A continuance within the meaning of this Chapter is a postponement of a cause for any period of time.

Sec. 1—2 Right to a speedy trial.

In all cases, both civil and criminal the party litigants shall have a right to a speedy trial.

Sec. 1—3 Limitation of Continuances.

No cause pending in any of the courts of this state shall be continued more than one term at the instance of the same party, for any cause whatsoever.

Sec. 1—4 Continuance for absence of evidence—Admission of adverse party.

A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, on the trial, or offered and overruled as improper, the trial must not be postponed.

Sec. 1—5—Legislative Privilege.

When a party, or the attorney of record for a party to any action or proceeding in any court or any commission, is a member of the legislature of this state, or is president of the senate, in session, such fact shall be sufficient cause for adjournment or continuance of such action or proceeding without the imposition of terms.

Sec. 1—6 Amendment of Pleadings.

When either party amends a pleading or proceeding, and the court is satisfied that because of the amendment the adverse party could not be ready for trial, a continuance may be granted to another day in the same term or to the next term of court.

Sec. 1—7 Costs.

Where a continuance has been granted it shall be at the cost of the applicant, to be paid as the court shall direct. Provided, that if by reason of an amendment to the pleadings a party who would otherwise be compelled to obtain a continuance so applies it shall be at the cost of the party making the amendment.

Sec. 1—8 Party Must Consent to Deposition.

The party obtaining a postponement shall, if required by the adverse party, consent that the testimony of any witness or adverse party in attendance be taken by deposition, without notice. The testimony so taken may be read on the trial by either party as if the witness were present.

Sec. 1—9 When request to be made.

All applications must be made on or before the first day of the term, unless the cause for the continuance shall have arisen or come to the knowledge of the party subsequent to that day, in which case the motion shall be made as soon as practicable. No continuance may be granted for an indefinite period of time.

Sec. 1—10 Contesting Grounds for Continuance.

Counteraffidavits shall be permitted by the adverse party to challenge the veracity of the allegations in the affidavit of the applicant. In such a situation the judge shall try the disputed facts and his determination shall be conclusive as to their existence, or non-existence.

Sec. 1—11 No Continuance May Be Grounded in Consent.

The granting of continuances arising exclusively out of the consent of the parties is expressly prohibited.

Sec. 1—12 All Other Cases.

In all other situations for which provision has not herein been made the court or judge may, upon a showing of good cause and due diligence, direct the trial or hearing to be postponed to another day of the same or next term.

Sec. 1—13 Continuances in Criminal Cases.

A continuance may be granted, either on application of the defendant or the prosecuting witness under the same rules as in civil cases.