

## P. &amp; Z. PHILLIPS vs. REARDON &amp; SON.

This court cannot review the decision of the court below refusing a continuance of a cause, unless the affidavit for continuance is brought upon the record by bill of exceptions.

Plea of payment and issue thereon: judgment *nil dicit* without disposing of issue—Held erroneous.

*Writ of Error to the Circuit Court of Hot Spring County.*

DEBT, by Reardon & Son against P. & Z. Phillips, upon a writing obligatory, determined in the Hot Spring circuit court in February 1844, before Clendenin, judge.

At the August term 1843, to which the suit was brought, defendant pleaded payment and plaintiffs took issue to the plea, all in short upon the record by consent. The cause was then continued on the affidavit of defendant, that Thomas Thorn, a material witness for his defence was not in attendance. At the February term 1844, defendant again filed an affidavit and motion for continuance on the ground of the absence of the same witness, alleging due dili-

gence, &c. The court overruled the motion, "whereupon," the record states, "the plaintiffs moved the court for judgment, and the writing obligatory sued on being exhibited to the court, and the defendants saying nothing further in defence, it is therefore considered by the court that the plaintiffs do have and recover," &c.—then follows the judgment. Defendants brought error, and assign for errors, that the court below refused them a continuance, and rendered judgment against them without disposing of the issue formed upon their plea.

WATKINS & CURRAN, for the plaintiffs. 1st, The court erred in refusing to continue. It is true the application was for the same testimony, but it cannot be said to be for the same cause within the meaning of the statute. The affidavit shows that they did every thing in their power and made the proper use of the means prescribed by law for obtaining Thorn's testimony.

2d, It was error to render judgment by *nil dicit* without making any disposition of the issue formed on the plea of payment. *Reed et al. vs. The State Bank*, 5 Ark. 193. *Hicks vs. Vann*, 4 Ark. R. 526.

PIKE & BALDWIN, contra. The court properly refused the continuance, because no case can be twice continued for the same cause. *R. S. p. 631, sec. 85.*

In cases of *Hicks vs. Vann* in 4 Ark., and *Reed vs. The State Bank*, 5 Ark. 193, relied upon by the plaintiffs for a reversal of the judgment, it is laid down that a judgment *nil dicit* cannot be given as long as there is an issue of law or fact undisposed of; but this was debt on bond. The defendants by pleading payment admitted the debt, and saying nothing further judgment was properly rendered against them.

JOHNSON, C. J. The first error assigned is the refusal of the circuit court to grant a continuance of the cause. The question sought to be raised by the assignment is not legitimately before us, as the plaintiffs have wholly failed to bring it upon the record by a

bill of exceptions. It is true that an affidavit is transcribed into the record and is now in this court, yet it was not placed there in such a way as to entitle it to our consideration as a part of the record. Under this view of the case the refusal of the court to grant a continuance will be entirely disregarded.

But it is also contended by the plaintiffs in error that the court below erred in rendering judgment without a finding upon the issue. The plaintiffs in error interposed their plea of payment upon which an issue was regularly formed and entered in short upon the record. It does not appear by the record that any action was had upon the issue thus made, but that judgment by *nil dicit* was rendered and that without any regard to the issue whatever. This being the state of case the plea and the issue thereupon still remain undisposed of, and consequently the judgment is erroneous.

Judgment reversed.

---

---