

TURNER vs. EUSTIS & Co.

An affidavit for continuance, concluding with "the application is not made for delay, but that the law may be administered," instead of *that justice may be done*, held insufficient—being a departure from the Statute. The granting and refusing continuances is within the sound legal discretion of the court; and this court will not interfere where there has been no abuse of that discretion.

Writ of Error to Pulaski Circuit Court.

DEBT by Eustis & Co., against Turner, in the Pulaski Circuit Court. Writ served 26th Feb. 1846.

The declaration contains three counts on three several promissory notes. At the return term, April, 1846, the defendant pleaded five pleas: 1st, *nil debet*: 2d, payment: 3d, that plaintiffs had assigned and delivered the note mentioned in the first count to the Granite Bank, in Boston, before suit brought, &c.: 4th, that they had transferred said note to some one unknown: and 5th, that while the Granite Bank held said note by assignment, as alleged in third plea, it was paid in full to said Bank, &c.

To the fourth plea a demurrer was sustained, and plaintiff took issue to the others. The issues were made up on the 28th May, 1846, and on the next day the defendant filed the following affidavit for continuance:

"E. Cummins, attorney for defendant, states on oath, that he has reason to believe and does believe, that said plaintiffs endorsed the

said promissory note, in said first count of the declaration mentioned in blank, and delivered the same to the Granite Bank in Boston, which latter Bank, by her cashier, endorsed the same to J. J. Fishe, Cash'r, (meaning, as is believed, to endorse the same to the said Fishe, as Cashier of the American Exchange Bank, N. Y., and transfer the same to the said last named Bank.) That these facts, as he believes, can be proven by A. Foster, Cashier of said Granite Bank, or other officers or agents of said Bank. That said Foster is believed to reside in the State of Massachusetts and out of the jurisdiction of this court, and since oyer was granted in this case no means could be used to procure his evidence at this court. That the same facts, so far as affiant is informed, cannot be proven by other witnesses than said Foster, or other officers of said Bank, none of whom, so far as affiant is advised, are within this State. That affiant has reason to believe that these facts can be proven by depositions by the next term of this court.

That this application is not made for delay, *but that the law may be administered.*"

The court overruled the motion for continuance, and defendant excepted.

Defendant then refused to appear further in the case, the cause was submitted to a jury, and verdict and judgment for plaintiffs. Defendant brought error.

CUMMINS, for plaintiff.

BERTRAND, contra.

OLDHAM, J. It is assigned for error in this case that the Circuit Court improperly refused a continuance upon the affidavit filed for that purpose.

The *Rev. Stat. ch. 116, sec. 86*, prescribes the requisites of an affidavit for the continuance of a cause—that a material witness, naming him, is absent, what is expected to be proven by him, what exertions have been made to procure his attendance, that the same facts cannot be established by any other witness, that there is reason to

believe that his attendance can be procured by the next term of the court, or that his testimony can be procured by that time, and that the application is not made for delay but that justice may be done. Without stating any other objection to the affidavit in the present case, instead of stating that the "application is not made for delay, but that justice may be done," it sets forth "that this application is not made for delay *but that the law may be administered.*" Although courts regard the administration of the law, as the performance of justice, they are not always regarded as equivalent expressions by suitors. Parties may sometimes conclude that the law is on one side and justice on the other. We see no hardship in observing the language of the Statute. Once allow a departure from it, and what may be regarded as equivalent expressions to be adopted, and it will become difficult for the courts to determine what is, and what is not, a compliance with the Statute.

The granting and refusing continuances, is within the sound legal discretion of the court, to whom the application may be made, and we see no such abuse of that discretion in the present case, as will authorize this court to disturb the judgment of the Circuit Court.

Judgment affirmed.

