

1FED.CAS.—63

Case No. 434.

ANONYMOUS.

{1 Brunner, Col. Cas. 74;<sup>1</sup> 3 Day, 308.}

Circuit Court, D. Connecticut.

April, 1809.

AFFIDAVIT FOR CONTINUANCE—ADMISSIBILITY OF COUNTER-AFFIDAVITS.

After an affidavit in support of a motion for the continuance of a cause, on the ground of the absence of a material witness has been made, the opposite party may make a counter-affidavit stating any circumstances that render it impossible or improbable that the evidence of the witness can be obtained within a reasonable time; but such counter-affidavit must not deny the materiality of the evidence.

On motion for the continuance of this cause, the party made an affidavit stating the absence of Joseph Howland, Jr., a material witness, and that he hoped to procure the testimony of the witness at the next court. A counter-affidavit was filed, stating that Joseph Howland, Jr., was gone to foreign parts; that he expected to have no fixed residence, and that he did not expect to return within two or three years.

THE COURT would not continue the cause, and took the opportunity to observe that there was manifest utility in counter-affidavits, as was evident from the present instance. They said, however, that counter-affidavits should not deny the materiality of the evidence expected from the witness, but might state any circumstances that rendered it impossible or improbable that his testimony could be procured within a reasonable time.

EDWARDS, District Judge, said that the English practice was lame in this respect; that it threw great power into the hands of a party, and that this court was perfectly free to establish a better practice. He added that the whole English practice of admitting affidavits was modern.

NOTE, [from original report.] See [Hyde v. State, 16 Tex. 454](#), citing case in text.

<sup>1</sup> [Reported by Albert Brunner, Esq., and here reprinted by permission.]