

Case No. 1,363.

BESTOR v. SARDO.

[2 Cranch, C. C. 260.]<sup>1</sup>

Circuit Court, District of Columbia.

Oct. Term, 1821.

EVIDENCE—ABSENT WITNESS—AGREEMENT TO ADMIT TESTIMONY.

If, upon a motion for the continuance of a cause upon affidavit that a material witness is absent, the opposite party, to prevent the continuance, admits that the absent witness would, if present, testify as stated in the affidavit, he is not thereby precluded from offering evidence at the trial to disprove or explain away the force of the testimony which he has admitted that the absent witness would give.

At law. Replevin. Avowry for rent arrear. Upon the plaintiff's affidavit for the continuance of the case to the next term, on account of the absence of a witness who, he stated, would testify that the plaintiff did not get full possession of the house until some time after the rent was to commence. The defendant, in order to prevent the continuance, admitted that the absent witness would, if present, testify as stated in the affidavit.

At the trial, Mr. Ashton, for the defendant, offered evidence to prove that the plaintiff was permitted to occupy the house for some time before the commencement of the term, and in consideration thereof permitted the defendant to occupy two rooms in the house, for some time after the rent began to accrue.

To the admission of this evidence, Mr. Law, for the plaintiff, objected, because, as he contended, the defendant's counsel had admitted the fact which the absent witness would testify.

THE COURT, however, (nem. con.,) said that the spirit of the act of Maryland, 1787, c. 9, [2 Maxcy's Laws Md. 29,] respecting continuances, was, that the party applying for the continuance should have the same benefit only which he would have had if the witness were present; and permitted the defendant's counsel to offer evidence to explain the fact of the possession being withheld of a portion of the premises.

<sup>1</sup> [Reported by Hon. William Cranch, Chief Judge.]