

Case No. 13,012.

SMITH v. BARKER.

{Brunner, Col. Cas. 52;¹ 3 Day, 280.}

Circuit Court, D. Connecticut.

Sept., 1808.

AFFIDAVIT FOR CONTINUANCE—EXTRINSIC
EVIDENCE NOT ADMISSIBLE TO EXPLAIN.

An affidavit in support of a motion to put off a cause for the absence of a witness cannot be explained by matters extrinsic.

{This was an action of assumpsit by Nathan Smith against Jacob Barker for breach of a contract. The cause is now heard on a motion for a continuance.}

Mr. Goddard, in support of a motion for a continuance of this cause, read an affidavit of the absence of a witness.

Mr. Daggett, contra, contended that there had been negligence in procuring the attendance of the witness.

Mr. Goddard was about to make some remarks in explanation, when he was interrupted by—

LIVINGSTON, Circuit Justice. When an affidavit is relied upon the court will not go out of it. I shall, therefore, decline hearing any ore tenus explanation. The name of the witness must always be disclosed in the affidavit unless there are circumstances to show that the party, without any fault of his, was unable to learn his name. Hereafter when a cause is ready for trial no application for a continuance will be successful unless upon an affidavit conformable to the English practice.

His honor remarked upon the inconveniences of putting off a cause ready for trial in this court, and said the English courts, and the courts in those states which follow the English practice, were growing more strict upon this subject.

{For the hearing in this see Case No. 13,013.}

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