

STEDMAN ET AL. V. HAMILTON ET AL.

{4 McLean, 538.}¹

Circuit Court, D. Indiana.

May Term, 1849.

CONTINUANCE—AFFIDAVIT—SUFFICIENCY—OF.

An affidavit that the defendant can show, by a certain witness, that the goods were damaged when bought, for which the note sued on was given, without alleging that the fact was unknown to the plaintiff, is not sufficient ground for the continuance of a cause.

{This was an action by Stedman, Maynard & Co. against Hamilton & Hamilton.}

OPINION OF THE COURT. A motion is made for a continuance on an affidavit, that the note on which the action was given was for merchandize—a part of which, at the time of sale, was damaged, which fact the affiant, one of the defendants, believes he can prove, if the case is continued. That process was served only a few days before the time expired for service of process; that the clerks of plaintiffs, and Composette, clerk of defendants, reside in Ohio; and their attendance can not be procured at the present term. This affidavit is insufficient. It does not show that the unsoundness of the goods was unknown to the defendants. It does not show the extent of the defects in the goods. The writ was served thirty-five days ¹¹⁹⁸ before the commencement of the present term, and the material witness is in the employ of defendants, and, it is said, not more than thirty-five miles from his residence. These considerations are sufficient to deny the motion for a continuance, without going into the consideration whether the defense could be set up, if proved.

¹ [Reported by Hon. John McLean, Circuit Justice.]

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