

MOWAT AND OTHERS V. BROWN AND OTHERS.

Circuit Court, D. Minnesota.

July, 1883.

PRACTICE—CONTINUANCE—ABSENCE OF
MATERIAL WITNESS.

Where a defendant, having good reason to believe that his co-defendant, who is a resident of Canada and has not been served, will be present at the trial as he has promised, in reliance on such promise has failed to take his testimony by deposition, and the testimony of the co-defendant is material, a continuance of the case may be granted to allow such testimony to be taken.

At Law.

Atwater & Atwater, for plaintiffs.

A. R. Lewis, for defendants.

NELSON, J., (*orally.*) A motion is made in this case for a continuance on account of the absence of a material witness. The material witness is the co-defendant, who was not served with process. The suit was brought against Brown & Brown, consisting of Calvin Brown and his brother. The plaintiff resides in Minneapolis, and the co-defendant not served resides in Canada. The suit is brought upon a bill of exchange, in which both parties are interested. Issue was joined in the state court of the county of Hennepin some time in February, and the case was removed to this court some time in the month of July. The co-defendant, who was not served, it appears, according to the affidavit of the party served, was in Minneapolis in the latter part of February, this year. He stated to the co-defendant that he would be on hand ready to be a witness, and to be examined as a witness for him in the case. Calvin Brown, who was served, supposed and he had reason to believe that his co-defendant, who was equally interested in the result of the controversy, would be present in attendance as a witness, as he had so stated, and in view of that 719 fact his deposition

was not taken, neither was he served with a summons to appear at this term, when he was in this state in February. I think, from all the facts stated in the case, that there is no doubt about the materiality of the testimony of the co-defendant, Brown, who is now in Canada. His brother was led to believe, even as late as this month,—about the sixth or seventh of this month,—that he would be in attendance, by a correspondence that he had with him. In view of these facts, stated in the affidavit, notwithstanding objection being made by plaintiff to the continuance of this case, it will have to go over the term.

The motion for continuance is granted.

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