

*WOODS & BEMIS *v.* YOUNG.*Error.*

The refusal of the court below to continue a cause, after it is at issue, cannot be assigned for error.

Woods v. Young, 1 Cr. C. C. 346, affirmed.

ERROR to the Circuit Court of the district of Columbia, sitting at Alexandria.

The plaintiffs below, Woods & Bemis, took a bill of exceptions to the refusal of the court to continue the cause until next term, upon their motion, grounded on an affidavit, stating the absence of a witness, the facts which they expected to prove by him, on a belief that he would prove those facts (which appeared to be material to the issue), that he resided in the state of Maryland, about twenty-five miles from the place of trial, had been summoned, and promised to attend; that the cause had been called at a former day for trial, in the regular course of the docket, and was then postponed, at the request of the plaintiffs, on account of the absence of that witness; that the cause being now again called for trial, the witness was still absent, but it was expected that his attendance might be had at the next term.

The bill of exceptions stated a general rule of practice, which had been made at a former term, and entered on the minutes of the court, and which was still in force, "that when a motion shall be made for the continuance of a cause, for want of a witness, the affidavit must state the fact or facts which the party making the affidavit expects to prove by such witness, and that the said party verily believes that the said witness will prove such fact or facts, and that he the deponent has used all proper means to obtain the attendance of such witness, and that he believes he shall be able to procure the testimony of such witness at the next term, or in a reasonable time to be therein stated." No motion had been made for an attachment against the witness, or any other process to compel his attendance.

*The case was submitted to the court, without argument, by Swann, for the plaintiffs, and Youngs, for the defendant. [*238

BY THE COURT.—The question is, whether a refusal to continue a cause can be assigned for error. The impression of the court is, that it cannot. Has the party, by law, a right to a continuance in any case? If he has, it will have weight. Is it not merely a matter of favor and discretion? This is a case in which this court cannot look into the merits of the question, whether the court below ought to have granted a continuance of the cause.

Judgment affirmed, with costs. (a)

(a) This case was brought up in expectation that this court would have decided the question whether an attachment can be served upon a person who resides out of the district, but within 100 miles of the place of trial, and who has been summoned and fails to attend as a witness in a civil cause. But the court having intimated an opinion that the refusal to continue the cause, could not be assigned for error, the counsel did not argue the other point.