

## PALMER vs. SHEPHERD.

Where the plaintiff, in accordance with the statute, and practice, was granted leave to file an amended declaration by a certain time, and accordingly filed it within the time, the court erred in striking it out, dismissing the suit, &c.

*Appeal from Lawrence Circuit Court.*

On the 15th January, 1850, Joseph H. Palmer filed a declaration in debt, by attachment, against James M. Shepherd, in Lawrence Circuit Court, on a promissory note, and a writ issued returnable to May term, 1850.

At the return term, defendant pleaded the general issue, and the plaintiff took issue, in short on the record, and the case being called for trial, the plaintiff moved the court for leave to file an amended declaration, at or before a time to be named by the court; which leave the court granted, upon terms that the plaintiff be taxed with the costs of the amendment; and the court ordered the amended declaration to be filed on or before the next day. On the next day, the plaintiff, in pursuance of such leave filed his amended declaration, and the cause stood continued. At the next term, on motion of the defendant, the court struck out the amended declaration, dismissed the case, and discharged the defendant, to which plaintiff excepted, &c.

The cause was determined in the court below, before the Hon. W. C. SCOTT, Judge. Plaintiff appealed.

BYERS & PATTERSON, for the appellant. The court correctly permitted the plaintiff to file his amended declaration, and afterwards erroneously ordered it to be stricken from the files. 1st. Because it was filed in the time and in accordance with the leave

granted and terms of the court. 2d. The amendment conformed strictly to the "nature of the action" described in the original declaration, and was founded upon the same *identical note intended* to have been described in the original declaration: 3d. The amended declaration was not a mere nullity, and could not legally be stricken out. See *sec. 113, ch. 126, Dig. Anthony v. Beebe, 2 Eng. 448. Brinkley v. Mooney, 4 Eng. 448. 2 Ark. 115, ib. 133; 4 ib. 624. McLarren v. Thurman, 3 Eng. 313. Anthony v. Humphrey, 4 Eng. 171. King & Houston v. State Bank, 4 Eng. 185.*

FAIRCHILD, *contra*. It is admitted that formal and substantial amendments of declarations are permitted and favored; but this rule is subject to important qualifications:

I. That to refuse or allow an amendment, is a matter of discretion with the inferior court. *Chirac v. Reinecke, 6 Cond. Rep. 317. Pain v. Parker, ib. 329. Smith v. Smith, B. Mon. 296. 15 John. Rep. 318. 8 Mo. R. 334. 5 Ark. 208.*

II. No amendment will be allowed that unjustly prejudices or delays the opposite party. *Anthony v. Beebe, 2 Eng. 447. 7 U. States Dig. 36. Bogart v. McDonald, 2 John. Cases, 219 note.*

III. No amendment will be allowed that introduces a new, substantive and independent cause of action from that exhibited in the original declaration. *Sackett v. Thompson, 2 J. R. 206. Sevier v. Smith, 18 J. R. 310. Elliott v. Bohannon, 5 Mon. 442. 5 Litt. 308. 1 A. K. Marsh. 450. 17 J. R. 111. The Post Master General v. Ridgway, Gilpin's Rep. 135. Bogert v. McDonald, 2 John. Cas. 219—note, 3 sec.*

The court allows amendments only for the furtherance of justice; the amended declaration must not show a *similar* cause of action, but the same identical cause of action, otherwise the court should strike it out on motion.

Mr. Justice SCOTT delivered the opinion of the Court.

Our statute, as well as the whole current of our decisions, fully authorized the action of the court below in granting the motion made in this case to file an amended declaration. The record

shows that one was filed in pursuance of that leave and within the time allowed. And we think it entirely clear, in view of this statute, of the powers of the court otherwise, and of those decisions, that the court below erred in granting the motion at the succeeding term to strike this amended declaration from the files, and in rendering a judgment against the plaintiff.

The judgment must for this error be reversed, and the cause remanded, to be proceeded with.

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