

PAYNE vs. BRUTON.

Where demurrer to plaintiff's replication to defendant's plea, is sustained, the plaintiff has a right to plead over, by amending or filing a new replication. The plaintiff's right, in such case, to file one new replication is undoubted, and if it be necessary for the attainment of justice, he should be permitted to file several. *Rev. St. ch. 116, sec. 76, cited.*

Appeal from the circuit court of St. Francis county.

THIS was an action of replevin, by Payne against Bruton, determined in the circuit court of St. Francis county, at the March term, 1845, before the Hon. J. T. JONES, judge.

The suit was commenced 17th November, 1843, for the recovery of two slaves, Violet and Nathan, alleged to be the property of plaintiff. The sheriff returned upon the writ, that he had taken the slaves from defendant, and delivered them to the agent of plaintiff, on his executing bond as required by the statute.

The declaration contained three counts: the two first in the *cepit*, one charging the *caption* of the slaves, by the defendant, on the 10th day of August, 1840, "at the county of Stewart in the State of Tennessee, to wit, in the county of St. Francis aforesaid," and the other alleging that he took them on the 1st of November, 1843, in St. Francis county. The third count was in the *detinet*.

At the return term (March, 1844,) the defendant filed five pleas: the 1st, was *non cepit* to the first two counts: 2d, *non detinet* to the third, and to these two pleas issue was joined. The 3d plea was property in defendant and not in plaintiff: 4th, that the cause of action did not accrue to plaintiff within two years next before the commencement of the suit: the 5th plea averred that, before the institution of the suit, plaintiff sold the slaves to one Green B. Myrick.

Time was given plaintiff, by consent, until the next term of the court to reply to the last three pleas. Accordingly, at the September term, 1844, he replied to the 3d plea, denying property in defendant, and averring property in himself: to the fifth, he replied,

denying the sale to Myrick: to the fourth plea, he filed two replications. By the first, he alleged that when the cause of action accrued, both he and defendant were citizens and residents of Stewart county, Tennessee, where he had ever since resided; and that defendant, on the — day of April, 1841, within two years of the time when the cause of action accrued, removed from Tennessee to Arkansas, and in the county of St. Francis ever after remained. By the second, he alleged the residence of defendant in Tennessee, and his removal therefrom, and settling in Arkansas, as in the first replication; and also that plaintiff instituted his action within two years after he discovered the defendant's place of residence, and the plaintiff had come into the State of Arkansas.

To these last replications the defendant demurred, and took issue on the replications to the 3d and 5th pleas. The demurrer was taken under advisement until the March term, 1845, when the plaintiff moved for leave to file four additional replications to the defendant's plea of the statute of limitation. The motion was overruled, and the demurrer sustained. The plaintiff then moved for leave to plead over, the motion was overruled, judgment *de retorno habendo* rendered, a writ of inquiry awarded, damages assessed, and final judgment for defendant.

When the plaintiff moved for leave to plead over, he offered to file the same four replications offered before, and his motion being overruled, he excepted, and set them out in his bill of exceptions. The first replication, so offered, stated the residence of the parties in Tennessee, and the removal of defendant to Arkansas, and alleged that he removed before the plaintiff's claim was barred by the laws of Tennessee, for the purpose of cheating and defrauding plaintiff out of the subject matter of the suit. The second, averred that the cause of action did accrue within two years, &c. The third, averred the residence of defendant in Tennessee, and his removal before the claim was barred by the laws of that State, and that plaintiff brought the suit within two years after ascertaining his residence. The fourth replication averred the continued residence of plaintiff in Tennessee, the residence of defendant there when the cause of action accrued, and his removal, before it was barred

by the laws of that State, to parts unknown to plaintiff, intending thereby to cheat and defraud him out of the subject matter of the suit, and that plaintiff brought the action within two years after discovering his residence.

The plaintiff appealed.

PIKE & BALDWIN, for the appellant.

OLDHAM J., delivered the opinion of the court.

Upon the demurrer being sustained to the replications to the defendant's plea of the statute of limitations, the plaintiff most unquestionably had the right to plead over, by amending or filing a new replication. The refusal of the court to permit the plaintiff to file a replication, as well as the rendering judgment of *retorno habendo* were most certainly erroneous. The plaintiff's right to file one replication was undoubted, and if it was necessary for the attainment of justice, he should have been permitted to file several. See *Rev. St. ch. 116, sec. 76.* Judgment reversed.
