

BRINKLEY vs. MOONEY.

Unlawful detainer for a lot of ground, tan-yard, situated thereon, together with tanning implements, hides, &c.: demurrer to declaration for misjoinder of causes of action, grounds of demurrer conceded, and leave granted to plaintiff to amend, on condition that he would restore to defendant the chattels taken by virtue of the writ; plaintiff prepared, and offered to file an amended declaration, but refused to comply with the terms imposed, whereupon the court refused to permit him to file the amended declaration, and gave judgment against him on the demurrer. HELD, that the court had no power to make the restoration of the personal property, a condition of the leave to amend.

The power of the court to impose terms on leave to amend discussed.

A sheriff may at any time (before suit against him for false return) be permitted to amend his return according to the facts.

Writ of Error to Clark Circuit Court.

Action of unlawful detainer brought by John S. Brinkley, against Lazarus Mooney, in the Clark circuit court, determined

at the September term, 1847, before the Hon. C. C. SCOTT, then judge of the 8th circuit.

Plaintiff alleged in his declaration, that defendant unlawfully detained from him a certain lot of ground, a tan-yard, situated thereon, tanning implements attached and belonging thereto, and a specified number of hides, skins, &c. The writ commanded the sheriff to put plaintiff in possession of the property, real and personal, named in the declaration, &c.

The sheriff returned upon the writ, that he had delivered the premises therein named to plaintiff, &c.

At the return term, on motion of defendant, the court permitted the sheriff to amend his return by specifying the personal property delivered to plaintiff, by virtue of the writ, to which defendant excepted.

Defendant demurred to the declaration, because of a misjoinder of causes of action; plaintiff conceded the grounds of demurrer, and asked leave to amend, which was granted by the court, on condition that he would restore to the defendant, the personal property taken and delivered to him under the writ. Plaintiff's counsel prepared, and asked leave to file an amended declaration, but stated to the court, that the plaintiff declined and refused to comply with the condition upon which leave had been granted him to amend. Whereupon the court refused to permit the amended declaration to be filed, and gave judgment for defendant on the demurrer, to which plaintiff excepted. Defendant moved for judgment of restitution, which the court refused, and he excepted. Both parties brought error

WATKINS & CURRAN, for the plaintiff. The sheriff has a right to amend his return, so as to show the truth in regard to acts done by him in his official character, by virtue of the mandate of the writ under which he acted; but not to introduce other acts, done in his individual character: by the writ, he was commanded to put the plaintiff in possession of "the premises"—a term confined to real estate, and not embracing the personal property mentioned in the recital of the writ.

The court erred in refusing to permit the plaintiff to file his amended declaration, without a compliance with the terms imposed. The allowance of such amendments in this State, is not within the discretion of the court, but a matter of right: and if refused, the party is entitled to a revision in the appellate court of the order refusing it. The only terms that can be imposed, must be in relation to that suit, such as, the payment of costs, granting an imparlance or continuance, (1 *Tidd's Pr.* 561 *et seq.*) and not the settlement of other matters in dispute between the parties.

JORDAN and CUMMINS, contra. Amendments at common law are within the discretion of the court for the furtherance of justice, (1 *Bou. L. D.* 105. 2 *Burr.* 756. *Stev. Pl.* 106. 3 *Salk.* 31;) and will not be allowed to the prejudice of the other party. (1 *Bou. L. D.* 105.) The allowance of amendments, and the terms upon which they will be allowed are governed by no general rule, but left to the sound discretion of the court. (2 *Mass.* 83. 16 *Mass.* 373. 7 *J. R.* 468. 16 *J. R.* 145. 5 *Cranch* 15. 1 *Caines Rep.* 9. 2 *Yates* 536. 6 *J. R.* 8,) and terms may be imposed even after the demurrer. (5 *Mass.* 99. 3 *Mass.* 208.) The court may impose any terms that are just and equitable, and a refusal to permit an amendment, without a compliance with the terms, cannot be assigned for error in this court. (2 *Cond. Rep.* 347. 3 *Gilman Rep.* 449. 18 *Maine Rep.* 249.) But if the discretion of the circuit court can be revised, it was surely just to refuse the amendment, unless the plaintiff would restore the property illegally taken under his own writ.

That the court had the power to permit the sheriff to amend his return according to the facts, *vide* 5 *Ark.* 78. 1 *Eng.* 474. 2 *Eng.* 341. 1 *Cow.* 430.

SCOTT, J. Did not sit.

WALKER, J. An action of forcible entry and detainer was instituted by Brinkley against Mooney, in the Clark circuit court,

for the possession of a lot of land. It appears, from the record, that the sheriff, in executing the writ, also took into his possession certain goods and chattels of the defendant, and, when he delivered to the plaintiff possession of the land, delivered to him the goods so taken. At the return term of the writ, the defendant demurred to the declaration; the plaintiff conceded the demurrer, and asked leave to amend: the court granted him such leave upon condition that he would restore to the defendant the goods so placed in his possession: the plaintiff prepared and tendered an amended declaration in apt time, but declined to comply with the terms imposed by the court: whereupon, the court refused to permit him to file his amended declaration, and gave judgment against him upon the demurrer to the original declaration, and dismissed his suit with costs.

The third assignment of errors presents the only material question to be determined, which is, "that said circuit court erred in refusing to permit said plaintiff to file an amended declaration."

Our statute of amendments is designed to afford to litigants an opportunity to correct any errors or imperfections which may arise in the pleadings from the commencement of the suit to final judgment, for the furtherance of justice, on such terms as may be just. (*Digest, sec. 113, p. 814.*) This right to amend is to be exercised under the sound discretion of the court: 1st, as to the nature of the amendment to be made, as that it shall conform to the nature of the action brought: 2d, that it shall be made in apt time, so as not to surprise the adverse party, or delay the suit, or multiply costs; in such cases the court should grant the amendment upon terms of time to respond or payment of costs: 3d, amendments are sometimes refused where, after repeated amendments allowed, the party still presents an insufficient pleading; here, terms of costs may be imposed; or, where it is persisted in until it amounts to an abuse of the privilege, may be absolutely refused: 4th, amendments are also sometimes refused where, after issue joined and a continuance had, the party seeks to interpose a defence not favored in law, such as limitation, usury, &c., which do not tend to the furtherance of justice.

But, where an amendment is offered in due time, it should be allowed as of course, and without terms. The imposing of terms presupposes the party to rest under neglect, or inattention to his rights.

In the case before us, the plaintiff had a right to his amendment without terms. The circuit court had nothing whatever to do with the personal property. The sheriff had no power to take it under his writ, and was responsible over to the party injured. It was not a case, as counsel seem to suppose, where, by mistake, property, not the defendant's, had been taken. But even if the doctrine could be made to extend that far, which is by no means admitted, the condition here imposed was, that the plaintiff should deliver over property which he held as was alleged, and not the sheriff. We are clearly of opinion that the terms were such as the plaintiff was not bound to submit to, and that he should have been allowed to file his amended declaration.

As regards the leave given the sheriff to amend his return, there was no error. The sheriff will always be allowed to amend his return (before suit brought for a false return) so as to make it conform to the truth of the case, for the correctness of which he is responsible.

The judgment of the circuit court must, for the error aforesaid, be reversed, and the cause remanded, with directions that the plaintiff have leave to file his amended declaration, that the case may progress to final hearing.
