BRINKLEY ET AL. *vs.* DUNCAN AS AD.

Where plaintiff is allowed until a specified time to file an amended declaration, it is irregular to file it after that time; but defendant waives such irregularity by appearing, after the amended declaration is filed, consenting to a continuance, and entering into an agreement of record recognizing the amended declaration.

As to clerical errors.

Appeal from the Clark Circuit Court.

DEBT, by Duncan, as administrator of Dickinson, against Brinkley, Maddox, and Stroud, determined in the Clark Circuit Court, in March, 1849, before the Hon. JOHN QUILLIN, Judge. The material facts of the case are stated in the opinion of this Court.

WATKINS & CURRAN, for the plaintiffs.

FLANAGIN, contra, contended that amendments are within the discretion of the court for the furtherance of justice, (6 *Term R*, 8. 3 *Pet. R.* 12. 11 *Wheat.* 280,) and that if the filing of the amended declaration was irregular, the defendants in the court below had waived the irregularity by their appearance and agreement.

Mr. Justice SCOTT delivered the opinion of the Court.

At the March term, 1848, of the Circuit Court for Clark county, leave was granted to the plaintiff below "to file an amended declaration thirty days previous to the first day of the next term, and that the cause be continued." The declaration was not filed within the time, but afterwards; and in this the filing was irregular. Three days after the amended declaration was thus filed, in the September term, 1848, both parties appeared in Court, and, by their consent, the cause was continued, and at the same

time they placed upon the record an agreement having a direct reference to this declaration. (*a*).

This appearance, continuance by consent and agreement, whereby the declaration was recognized, were, in our opinion, a clear waiver on the part of the defendants of the irregularity of filing the declaration out of time. And we hold, therefore, that there was no error in the refusal of the court below at the succeeding term to strike it from the files.

This disposes of the first, second, and third assignments; and, as to the fourth, this does not seem to be sustained by the record. From that it appears that the Court found that the action "was founded upon a writing obligatory for the sum of twelve hundred and forty-six dollars and one half cent," and that the recovery adjudged was for "the aforesaid sum of twelve hundred and forty-six and one half cent ($1200.00½)for his debt," which sufficiently shows that the judgment was in fact for dollars and cents, and not for the number of cents alone, as seems to have been supposed. But the second transcript of the judgment filed here clearly settles this question, as well as all questions as to the amount of the judgment rendered: showing, as it does, that the supposed errors, which grounded this assignment, were but clerical mistakes in copying the record.

Finding no error in the record, the judgment is affirmed.

NOTE (*a*)—The agreement referred to by the court was this: "Came the parties by attorney, and, by consent, this case is continued; and if defendants, Brinkley et al., demur to said declaration at the next term hereof, defendants waive the right of continuance on that account." At the next term defendants did not demur, but moved to strike out the amended declaration because it was filed too late, but the court overruled the motion, and they excepted. REPORTER.