

1824.

Walden
v.
Craig.

[PRACTICE.]

WALDEN ex dem. DENN v. CRAIG.

In ejectment, an amendment, so as to enlarge the term laid in the declaration, will be permitted, in the discretion of the Court.
But a writ of error will not lie, in a case where the Court below has denied a motion for this purpose.

ERROR to the Circuit Court of Kentucky.

In 1797, John Den, lessee of Ambrose Walden, instituted an action of ejectment in the United States District Court of the District of Kentucky, against Richard Fen, as casual ejector. The declaration states a demise for the term of ten years from the 15th day of August, 1789. At March term, 1798, Lewis Craig and Jonathan Rose were admitted defendants, in the place of Richard Fen, the casual ejector; and entered into the usual rule, confessing the lease, entry, &c. At June term, 1800, judgment was rendered for the plaintiff for his term yet to come, &c. and a writ of *hab. fac. poss.* was awarded. On the 5th day of September, 1800, Thomas Bodley and others, claiming as landlords of Craig and Rose, obtained an injunction to the above judgment. At May term, 1809, the bill of injunction was dismissed, for want of jurisdiction. In September, 1811, Bodley and others obtained a second injunction to stay execution on the judgment at law in ejectment. At May term, 1812, the injunction was

dissolved on hearing, on bill, answers, depositions, and exhibits; and in April, 1813, the complainants dismissed their bill. Walden, on the 22d of May, 1819, took out a writ of *hab. fac. poss.*, which was quashed by the Court, on the ground, it is presumed, that the term stated in the declaration in ejectment had expired. At November term, 1821, Walden moved the Court to enlarge the term stated in the declaration. The Court being divided, the motion was entered as overruled; and the plaintiff (Walden) took out a writ of error to the judgment of the Court on this motion.

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This cause was argued by Mr. *Taylor*,^a for the plaintiff, no counsel appearing for the defendant.

Feb. 6th.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

Feb. 21st.

Upon this case two questions arise:

1. Ought the Circuit Court to have granted leave to the plaintiff to extend the term laid in his declaration?
2. Does a writ of error lie to the refusal to grant this amendment?

It has been truly said in argument, by the counsel for the plaintiff in error, that the power of amendment is extended at least as far in the 32d

^a He cited *Cro. Jac.* 440. 1 *Salk.* 47. 2 *Str.* 807. 2 *Burr.* 1159. 4 *Burr.* 2447. *Str.* 1272. *Cowp.* 841. 7 *Cranch.* 569. 1 *Cranch.* 110. 4 *Cranch.* 237. 4 *Cranch.* 324. 5 *Cranch.* 11. 5 *Cranch.* 15. 6 *Cranch.* 206. 7 *Cranch.* 569.

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section of the judiciary act, as in any of the British statutes; and that there is no species of action to which the discretion of the Court in this respect ought to be more liberally applied than to the action of ejectment. The proceedings are all fictitious, fabricated for the mere purposes of justice, and there is every reason for allowing amendments in matters of mere form. There is peculiar reason in this case, where the cause has been protracted, and the plaintiff kept out of possession beyond the term laid in the declaration, by the excessive delays practised by the opposite party. The cases cited by the plaintiff's counsel in argument are, we think, full authority for the amendment which was asked in the Circuit Court, and we think the motion ought to have prevailed. But the course of this Court has not been in favour of the idea that a writ of error will lie to the opinion of a Circuit Court, granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed. For this reason, the writ of error must be dismissed.