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and the plaintiffs, as his agents, are competent to recover the whole sum insured thereon, on proof of such legal and equitable interest in the said Fitch : 5. That the letter of the 27th of April 1824, whatever might be its effect, if taken alone, yet, taken in connection with the indorsement thereon, with the previous policy to which it refers, the actual state of the world, &c., and the nature of such transactions, is not such a representation as vitiates the policy. All which is ordered and adjudged by this court, to be certified to the said circuit court.

*HENRY WRIGHT, WILLIAM CAROTHERS, ROBERT DENNISON, WILLIAM PATTON, THOMAS BURMAN and JAMES ROBERTSON, [*165
Plaintiffs in error, v. The Lessee of LEVI HOLLINGSWORTH and JOHN KAIGHN, Defendants in error.

Practice in ejectment.

In an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, the declaration stated two demises, one, by H. & K., citizens of Pennsylvania, and the other, the demise of B. & G., citizens of Massachusetts; the cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the court, on motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of S., a citizen of Missouri; the parties went to trial, without any other pleading; and the jury found for the plaintiff, upon the third or new count, and a judgment was rendered in his favor.

The allowance and refusal of amendments in the pleadings, the granting and refusing of new trials, and most of the other incidental orders, made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction as to be fit for their decision only, under their own rules and modes of practice: this court has always declined interfering in such cases, p. 168.

After the filing of a new count to a declaration, the defendant, who, to the former counts, has pleaded the general issue, or any particular plea, may withdraw the same, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may if he pleases, abide by his plea already pleaded, and waive his right to pleading *de novo*, the failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new, as well as on the old counts. p. 169.

ERROR to the Circuit Court of West Tennessee. This was an action of ejectment, commenced in the circuit court for the district of West Tennessee, in 1813, by the lessee of Levi Hollingsworth and John Kaighn, citizens of the state of Pennsylvania, against Henry Wright and others, the plaintiffs in error, and citizens of Tennessee.

The declaration set forth a demise from Hollingsworth and Kaighn to John Denn, the defendant in error. A notice was served on the tenants in possession, who, at June term 1813, appeared, and put in the plea of "not guilty." At June term 1817, after a jury had been sworn in the cause, the plaintiff suffered a nonsuit; which was afterwards set aside; and the plaintiff had leave to add a new count to his declaration, upon condition, that all the costs of the term should be paid by him, absolutely; and that he should pay all preceding costs, the same to be refunded, if he should ultimately succeed in the action. A new *count was then filed, in which was stated [*166 a lease from Benjamin Spencer, a citizen of Missouri. To this count no plea was filed; and at June term 1825, a trial was had, and a verdict and

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judgment were rendered for the plaintiff, upon the last count in the declaration. This writ of error was brought to reverse the judgment.

White, for the plaintiff in error.—1. No plea was filed to the additional count in the declaration, upon which the trial was had, nor was there any other issue joined at the trial. 2. The amendment, authorizing a new lessor, ought not to have been allowed.

To the new count in the declaration, which introduced a new lessor, Benjamin Spencer, and stated a demise from him, the defendants were not called upon to plead. The case remained from 1817, when the additional count was filed, until June term 1825, when the trial took place; and the verdict of the jury was upon the new count, and nothing was said upon the former counts in the declaration. The verdict was therefore given, when no issue was joined; and the plea which had been put in originally, could not be applied, without consent or notice to the defendants, to the new count. A new party had been introduced, and the defendants should have been allowed an option, whether they would expose themselves to the expenses of a trial, upon the allegations in the additional count. The jury had not the count stating the demise from Benjamin Spencer, before them, and yet their verdict was upon it, exclusively. *Adams on Eject.* 200, 205; *1 Caines* 153, 251. The terms on which the nonsuit was taken off, were, the payment of the costs of the term, absolutely; and of all antecedent costs, which were to be returned, if a verdict should be obtained by the plaintiff in the ejectment. These costs were to depend upon the issue between the then parties; but the verdict in favor of the plaintiff, upon the new count, condemned the defendants to pay the whole costs, upon an issue, not formed at the time the court took off the nonsuit; and upon the claim of a party, not at that time known to the court.

It does not appear from the record, that any ground was laid for the amendment, and the court ought to have been satisfied, before it was allowed; it would have been irregular to allow the amendment, without terms. On the institution of the suit, a *capias ad respondendum*, authorized by the act of assembly of Tennessee, was issued, against the tenant in possession, and bail given to secure the damages which might be recovered; and the case stood upon the claims of the then actual parties in the cause.

*167] *A new plaintiff could not be introduced, who could claim the benefit of the bail. 1 *Scott's Revisal of the Laws of Tennessee*.

Isaacks, for the defendants in error.—No objections were made to this count, or to the issue at the trial; no allegation of surprise, but the defendants produced and examined their testimony; and the verdict was given, without any exception to the pleadings.

1. It is not necessary that the record should show the grounds on which the court set aside the nonsuit, and afterwards allowed the amendment; they are stated to have been done, after motion, and a rule granted. The law of Tennessee authorizes the court to allow amendments, beyond the statutes of amendments and *jeofails* of England, "provided that the nature of the action shall not be changed; and all causes shall be tried, without being entangled in the nice formalities of pleading." (Act of Assembly of

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Tennessee of 1809, ch. 49.) And the courts of Tennessee have given a most liberal construction to this law.

2. A plea of "not guilty" had been put in, and issue joined upon it. This plea traversed all the facts in the plaintiff's declaration, and made the traverse as broad as possible. The plea put in to the declaration, in its original form, was the proper plea to the new count.

3. It is not claimed, that the bail put in, when the suit was commenced, inured to the benefit of Benjamin Spencer.

TRIMBLE, Justice, delivered the opinion of the court.—This action of ejectment, was commenced in the circuit court, held in East Tennessee, by suing out a writ of *capias ad respondendum*, accompanied with the declaration, and the tenants in possession held to bail, to answer to the action, in the manner provided for by a statute of the state. The original declaration contained two counts; the first, on the demise of Hollingsworth and Kaighn, citizens of Pennsylvania; the second, on the demise of Joseph Blake and Daniel Green, citizens of Massachusetts. The tenants appeared and pleaded not guilty, upon which issue was joined. A trial was had, and a nonsuit suffered by the plaintiff, which was set aside, on the payment of costs. After these proceedings, the court, on the motion of the plaintiff, permitted the declaration to be amended, by adding a count, on the demise of Benjamin Spencer, a citizen of Missouri. The parties went to trial, without any other pleadings, and a verdict having been found for the plaintiff, upon the third or new count, judgment was thereon rendered in his favor; to reverse which, the defendants have prosecuted this writ of error.

They allege the judgment is erroneous and should be reversed.—
*1. Because the count on which judgment was rendered against them does not show that Missouri is one of the United States. 2. Because [*168 the court permitted the declaration to be amended, by adding a new count, on the demise of Benjamin Spencer; and especially, as the amendment was permitted with payment of costs. 3. Because no plea was filed to the new count, nor any issue made up thereon.

The first objection was very properly not pressed, in argument. The count alleges Benjamin Spencer to be a citizen of the state of Missouri. This count was filed, after Missouri was admitted as a state into the Union; and there can be no question but that this, and every other court in the nation, are bound to take notice of the admission of a state, as one of the United States, without any express averment of the fact.

In support of the second objection, it is urged, that the admission of the new count, on the demise of a new lessor, made a material alteration in the suit; that the suit having been originally commenced, under the state practice, by writ of *capias ad respondendum*, to which the former lessors only were parties, the amendment was, in substance and effect, the institution of a new suit, or at least grafting a new one upon the old; and produced an incongruity upon the record; the first and second counts, and the proceedings on them, being proceedings under the statute, and the third or new count, a proceeding at common law; and that according to established principles of practice, it should have been allowed, if at all, only on payment of costs.

This argument would be entitled to great, and perhaps, decisive influence,

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if addressed to a court having any discretion or power over the subject of amendments. But the allowance and refusal of amendments in the pleadings, the granting or refusing new trials, and indeed, most other incidental orders made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discussion of the courts of original jurisdiction, as to be fit for their decision only, under their rules and modes of practice, This, it is true, may, occasionally, lead to particular hardships ; but on the other hand, the general inconvenience of this court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This court has always declined interfering in such cases ; accordingly, it was held by the court, in *Wood v. Young*, 4 Cranch 237, that the refusal of the court below to continue a cause, after it is at issue, is not a matter upon which error can be assigned ; that the refusal of *the court below to grant a new trial, is *169] not a matter for which a writ of error lies, 5 Cranch 11, 187, and 4 Wheat. 220 ; and that the refusal of the court below, to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal on a writ of error. We can perceive no distinction in principle between these cases, and the one before the court. We must take the declaration, including the amendment, as we find it on the record. Nor can we interfere, because the court below did not, as it ought, require the costs formerly accrued, to be paid, as a condition of the amendment.

The authorities cited by the learned counsel, do not, we think, support his last position, that the judgment is erroneous, because a plea was not filed to the new count. They prove, unquestionably, that upon the amendment being made to the declaration, by adding a count, the defendants had a right to plead *de novo* ; they prove nothing more. They do not show that the defendants, in such cases, must necessarily plead *de novo* ; or that judgment may be entered by default, for want of a plea to the new count, if, before the amendment, he has pleaded the general issue. We think the practice is well settled to the contrary. The defendant has a right, if he will, to withdraw his former plea, and plead anew, either the general issue, or any further or other pleas, which his case may require ; but he may, if he will, abide by his plea already pleaded, and waive his right of pleading *de novo*. His failure to plead, and going to trial, without objection, are held to be a waiver of his right to plead, and an election to abide by his plea, and if it, in terms, purports to go to the whole action, as is the case in this instance, it is deemed sufficient to cover the whole declaration ; and puts the plaintiff to the proof of his case, on the new as well as on the old counts. This is the general doctrine in other forms of action, such as trespass and *assumpsit* ; and we see no reason to distinguish the action of ejectment, or take it out of the general rule.

Judgment affirmed, with costs.