

Case No. 17,075.

WALKER v. JOHNSON.

{2 McLean, 255.}<sup>1</sup>

Circuit Court, D. Indiana.

Nov., 1840.

AMENDMENT OF DECLARATION—RULE TO PLEAD.

[An amended declaration was filed in vacation, 20 days before the first day of the term, but when defendant's counsel called at the clerk's office he found that it had been removed by plaintiffs counsel. It was returned to the office before the first day of the term. *Held* that, as the case involved legislative enactments which had never been construed, and the amendment presented a new state of the case, defendant would not be required to plead during the term.]

Amended declaration, filed in vacation, more than twenty days before the first day of the term, and notice given to defendant's counsel, but no rule taken on the rule docket, and when defendant's counsel, a few days before commencement of the term, called at the clerk's office to examine the declaration, it was not in the office, having been taken out by the plaintiff's counsel; it was returned to the office before the first day of the term, of which, however, the defendant's counsel had no notice. Plaintiff's counsel moved a rule to plead, to operate *instanter*, or during the term. Defendant's counsel resisted the motion, on the ground that the amended declaration was long and complicated, and presented a new cause of action, and that he had had no opportunity of examining it before the term.

Fletcher & Butler, for plaintiff.

Mr. Morrison, for defendant.

PER COURT. Inasmuch as the declaration had been taken from the office by the plaintiff's

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counsel when the defendant's counsel applied for it, it must be considered as filed the first day of the term, so far as relates to the defendant's counsel having an opportunity to examine its contents; and as the case is of a peculiar nature, arising out of legislative enactments, which have never had a judicial construction, and the amendment presents, at least, a new state of the case, the defendant is not bound to plead during the present term. Rule denied, and the cause continued.

{For opinion on demurrer to replication, see Case No. 17,074.}

<sup>1</sup> {Reported by Hon. John McLean, Circuit Judge.}