

ciding the case, if within its jurisdiction, but if not within its jurisdiction, the court will administer such relief as may be in its power between the parties before it; *third*, indispensable parties, without whom the court will not proceed with the case at all. *Shields v. Barrow*, 17 How. 13C; *Barney v. Baltimore City*, 6 Wall. 284.

The prayer of the bill in this case, as has been stated, is for a reconveyance by defendants to complainant of the land in controversy, and for an account of phosphates, if any, taken from, or damages to, the land. Now, can the right of complainant to have this decree be determined without Cross as party? According to the bill, the deed made by complainant to Cross, and by Cross to defendant, was merely formal, and for convenience in getting the title into defendants. While it seems he would be a proper party, the court is not prepared to say that his presence is indispensable to granting the relief prayed for. It appears that Cross acted only as an intermediary between complainant and defendant, and that the real substantial issue is between the present parties to the bill. Conforming to the statute and equity rule above quoted, and to the decisions of the supreme court on the subject, this is a case in which the court should proceed with the parties before it, and the demurrer on this last ground cannot be sustained. Fos. Fed. Pr. § 50. See, also, *Conolly v. Wells*, 33 Fed. Rep. 205, in which the decisions of the supreme court on the subject are collated. The demurrer in this case will be overruled.

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### CHAMBERLAIN v. BITTERSÖHN.

(Circuit Court, D. South Carolina. November 4, 1891.)

#### WRITS—SERVICE OF PROCESS—EFFECT OF AMENDMENT.

When, on defendant's special appearance and motion to set aside the complaint for variance from the summons, the court allows the summons to be amended so as to state that on default of answer plaintiff "will apply to the court," whereas before it read, "will take judgment against you," the order allowing the amendment is sufficient notice to defendant, and the original service will not be set aside because the copy served did not conform to the summons as amended.

At Law. On motion to set aside service of the summons.

*Mitchell & Smith*, for plaintiff.

*Northrop & Memminger*, for defendant.

SIMONTON, J. In this case the defendant, having been served with copy summons and complaint, employed an attorney. Becoming dissatisfied for some reason, he changed his attorney, and employed the gentleman who made this motion. When the present attorneys undertook the case, they entered a special appearance for the purpose of a motion to set aside the complaint "for irregularity, in that it does not conform to the summons." This motion was heard on 21st of October, and

an order was made permitting an amendment of the summons in the particulars stated hereafter. On 27th October last the plaintiff's attorney, in writing, informed the attorney for the defendant that the summons had been amended in the words ordered by the court. The amendment consisted in this: The notice following, and contained in the summons, had stated that, in default of an answer to the complaint annexed thereto, plaintiff "would take judgment against you." In lieu of these words, which were stricken out, were inserted the words, "will apply to the court." The motion now is to set aside the service of the summons on the defendant herein as defective for the reason that the copy does not conform to the original as amended. In other words, the plaintiff amended the summons in the record. This amendment caused a variance between it and the copy which had been originally served upon defendant. Because of this variance the defendant contends that the summons should be set aside. The copy summons served upon the defendant must be an exact reproduction of the original summons. Its office is to let him know that a complaint has been or is to be filed against him, so that he may defend or not, as he may be advised. In the present case the copy summons had fulfilled its office. Upon service of it the defendant came in, and, standing upon his summons, moved that the complaint be dismissed, because it did not correspond with the summons; that is to say, the summons called for an answer to the complaint. The defendant alleged that no answer could be required because of the defect, and that the complaint should be dismissed. His motion was heard and considered. The defect was recognized. The complaint was not dismissed. The court allowed an amendment of the record, and the defect was cured. This being the case, the complaint stands, and the defendant must answer it or go by default. No further summons is necessary, nor is it necessary to serve any amended summons in the same action. The defendant did not require any notice of the change in the phraseology of the summons. The order of this court, made in a proceeding in which he was the active party, gave him full notice, and all that that order effected was the correction of the record. The defendant shall have until the rule-day in December next to make such defense as he may be advised.

## CHAMBERLAIN v. BITTERSOHN.

(Circuit Court, D. South Carolina, October 24, 1891.)

## 1. SUMMONS AND COMPLAINT—VARIANCE—NOTICE.

Under United States circuit court rule 5 for the district of South Carolina, requiring a notice to be served in all cases with the summons and complaint, stating, except where the demand is for a liquidated sum, that, on failure to answer, plaintiff will apply to the court for the relief demanded in the complaint, a notice served with a complaint and summons for trespass on lands is fatally defective when it states that on failure to answer plaintiff will "take judgment against you for the relief demanded in the complaint." *Chamberlain v. Mensing*, 47 Fed. Rep. 202, followed.

## 2. SAME—AMENDMENT OF PROCESS.

But as the notice refers to the complaint, which is served with it, thus giving notice of the nature of the relief demanded, defendant could not have been prejudiced by the defect; and the notice may be amended, under Rev. St. U. S. § 948, permitting amendment of process when the person against whom it is issued will not be prejudiced thereby.

At Law. Action for trespass on land.

*Mitchell & Smith*, for plaintiff.

*Northrop & Memminger*, for defendant.

SIMONTON, J. This is a motion to set aside a complaint, in that it does not conform to the summons. The summons, served with complaint, is in the usual form, with this exception. It concludes with these words: "If you fail to answer this complaint within the time aforesaid, the plaintiff will take judgment against you for the relief demanded in the complaint." Under our rule of court, when the complaint is upon a liquidated demand under contract, the plaintiff can, on failure of answer, take judgment. In all other cases he must apply to the court for the relief demanded in the complaint. And the summons contains the notification to him of the category in which his suit falls. The complaint is for a trespass on land. If it be not answered, plaintiff cannot take judgment. But he must apply to the court for his relief. The summons and complaint do not conform, and the defect is fatal. *Chamberlain v. Mensing*, 47 Fed. Rep. 202. The defendant, upon the intimation of this conclusion, asks leave to amend his summons. In the case just quoted no such motion was made, and the point was not decided. A strong intimation of an opinion against it was given. I now have full opportunity of considering the authorities, and will discuss and decide it. Every court possesses the discretion of allowing any amendments in the pleadings in a pending case. This power is exercised in furtherance of justice. "Perhaps," says MARSHALL, C. J., "the legal discretion which thus exists acknowledges no other limit than is necessary for the purposes of justice and for the restraint of gross and inexcusable negligence," (*Calloway v. Dobson*, 1 Brock. 119;) or, as it is put by PARK, J., in *Taylor v. Lyon*, 5 Bing. 333: "Amendments are now generally allowed at every stage of the pleadings for the advancement of justice. The question usually is, will any injustice be done by what is proposed? If not, the amendment is allowed." Section 948 of the Re-