

vised Statutes of the United States permits the amendment by the court of any process returnable to or before it when the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues. If there be no summons, or if the summons misleads, or tends to mislead, the defendant, or to put him off his guard, or if the amendment works a surprise upon him, or if there be nothing in the record to amend by, the amendment should not be allowed. Such are the cases quoted by counsel for defendant: *Dwight v. Merritt*, 4 Fed. Rep. 616,—where the summons had not the seal of the court, nor the signature of the clerk, and so was not in fact a summons; *Brown v. Pond*, 5 Fed. Rep. 34; *U. S. v. Rose*, 14 Fed. Rep. 681—where the summons issued for the recovery of a penalty did not have upon it indorsed the statute imposing the penalty, as is required in the New York practice, and there was no complaint served with the summons explaining it. In the case now before us, the summons admitted in the motion to be a summons has the seal of the court and is properly tested. It calls attention to the terms of the complaint filed with and attached to it. It requires an answer thereto, specifying the time and place for the service of such answer. So the defendant is in no wise misled or surprised. He knows exactly the nature of the wrong with which he is charged. He cannot have been misled or injured by the erroneous assertion that, on his failure to answer, judgment would be taken against him. Nor can the amendment injure him whereby this is changed into the assertion that, in such event, application will be made to the court for the relief sought. Had he been served with a summons only, the case would have been different. But the complaint, a part of the record, served simultaneously with the summons, not only gave him clear notice, but also furnishes something by which the summons can be amended. *Randolph v. Barrett*, 16 Pet. 141. This amendment, being allowed pending a cause, requires no notice. Leave is granted to plaintiff to amend the summons as indicated. See *Semmes v. U. S.*, 91 U. S. 24; *Tilton v. Cofield*, 93 U. S. 164.

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EMMONS v. UNITED STATES.

(Circuit Court, D. Oregon. November 2, 1891.)

ASSIGNEE.

Under the act of 1887, (24 St. 505,) the assignee of a claim against the United States may sue thereon in his own name.

(Syllabus by the Court.)

At Law.

Mr. Zera Snow, for plaintiff.

Mr. Franklin P. Mays and Mr. Charles E. Lockwood, for the United States.

DEADY, J. This action was commenced on September 30, 1889. It is brought to recover \$1,230, paid the United States land-office at Ore-

gon City as purchase price and fees on three several entries of timber land under the act of June 3, 1878.

In the amended petition it is alleged that the parties making these entries believed at the time that the lands were unfit for cultivation, and chiefly valuable for timber; that afterwards the commissioner of the general land-office set aside and canceled said entries on the ground that said lands, or the major part of them, were fit for cultivation when the timber was removed, and restored them to the public domain; and that subsequent to said cancellation the final certificates issued to the purchasers in said entries, and the claims thereon arising against the United States were duly assigned to the plaintiff, who now holds the same.

There is a prayer for judgment, coupled with an offer to surrender the certificates as the court may direct.

The cause was heard before the district judge for Washington on a demurrer to the petition, who, on April 18, 1890, sustained the demurrer on the ground that, while the United States is liable in an action by the entry-man, an assignee cannot maintain the same; and, further, that the petition should show a surrender of the certificates, or account for them.

The plaintiff had leave to amend his petition in regard to the surrender of the certificates, which he did on May 8, 1890; and on the same day filed a petition for rehearing on the question of the right of the assignee to sue.

The petition was granted, and the cause heard on a demurrer to the amended petition.

Section 1 of the act of 1853 (10 St. 170) provides "that all transfers and assignments" thereafter made of any claim against the United States shall be null and void, unless made after the allowance of the same and the issue of a warrant for the payment thereof.

The court of claims was established in 1855. 10 St. 612. The act was silent on the right of an assignee of a claim to sue thereon. In 1877 the supreme court, in *U. S. v. Gillis*, 95 U. S. 407, held that the act of 1853 applied to suits in the court of claims, and this ruling has been adhered to.

On March 3, 1887, an act was passed (24 St. 505) enlarging the jurisdiction of the court of claims, and giving the circuit and district courts concurrent jurisdiction therewith, within certain amounts.

Section 1 of this act defines the jurisdiction to be of all claims arising in a certain manner, "in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

The right of an assignee to sue has not been passed upon by the supreme court since the passage of this act.

The right to sue the United States, in respect to any claim on which it is liable, under the act of 1887, either in a court of law, equity, or admiralty, as if it were "suable" generally,—as a private person,—certainly includes the assignee of such claim.

The assignee of a claim against the United States is the "party" to whom the claim belongs. He owns it; and, being such owner, he is entitled, in my judgment, to redress against the United States, as if it "were suable," not by the assignor or original holder alone, but generally, as if the United States were a private person.

The court is as competent to deal with the claim in the hands of the assignee as in those of the assignor. Proof of the assignment is the only additional circumstance in the case, and that is a very simple matter.

*U. S. v. Jones*, 131 U. S. 1, 9 Sup. Ct. Rep. 669, was a suit under the act of 1887 by an assignee. The objection was not made in that case, and it appears to have been taken for granted, that the assignee could maintain the suit if the assignor could.

Sooner or later this question must be decided by the supreme court, and it may as well be in this case as any other.

My impression is that under the act of 1887 the assignee may sue the United States, in respect to the claims mentioned therein, as if it were a private person, and I will give judgment accordingly.

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FINANCE CO. OF PENNSYLVANIA *et al.* v. CHARLESTON, C. & C. R. Co. *et al.*

*In re* HART.

(Circuit Court, D. South Carolina. November 2, 1891.)

**ATTORNEY'S LIEN—MISUSE OF PAPERS—RIGHT OF INSPECTION.**

An attorney in possession of papers of a railroad company upon which he has a lien for legal services cannot be compelled to permit an inspection thereof by the company's attorney, or to deliver them up to the court, upon a suggestion that he is now retained by persons bringing suits against the company upon causes of action arising out of transactions with which he was professionally connected while counsel for the company, and that his possession of the papers relating thereto would give him an undue advantage, when no particular suits are specified, and the attorney denies that he is prosecuting any action to which the papers in his possession relate either directly or indirectly.

At Law. In the matter of the suggestion of counsel for D. H. Chamberlain, receiver, against James F. Hart, Esq.

*A. T. Smythe*, for receiver.

*C. E. Spencer*, for respondent.

**SIMONTON, J.** James F. Hart, Esq., was for many months general attorney for the Charleston, Cincinnati & Chicago Railroad Company. His connection with the company in this capacity ceased 30th June, 1891. At the time he so ceased to be its attorney he had in his hands papers belonging to it, obtained by him in his official capacity. These he claims a lien upon until his arrears of salary, amounting to several thousand dollars, have been paid. The present proceeding is based upon the statements that the said James F. Hart is the attorney for persons