

amendment at that time, and hear testimony upon a new issue, was, in effect, to compel defendants to defend a new suit, without notice or time for preparation, as appears from defendants' bill of exception No. 1."

Bill of exception No. 1 (there is no other bill of exception in the record) shows:

"That on September 14, 1892, the court announced its judgment in favor of the plaintiff, Thorn, and against the defendants, Maddox Bros. & Anderson, for the land in controversy; whereupon the said defendants filed a motion in arrest of judgment, and, no service being had upon plaintiff, who was present by his counsel in open court, his counsel consenting to the hearing of said motion, the court gave plaintiff's counsel until September 15, 1892, to be heard upon said motion. The judgment of the court was announced as stated, but was not entered of record until after both of said motions were heard, on September 15, 1892; and on September 15, 1892, plaintiff, Thorn, came with a motion to amend his pleading, as filed January 2, 1891, so as to show diversified citizenship of plaintiff and defendants, and said motion in arrest and motion to amend, both, at the same time, came on to be heard; and, the court being fully advised thereof, did order that said motion in arrest of judgment be overruled, and that plaintiff be allowed and permitted to amend his plea to show such diversified citizenship, and the defendants consented, subject to their motion in arrest of judgment, and the action of the court thereon that said plea be amended without rewriting said entire plea; but said amendment was granted by the court upon the terms that plaintiff, Thorn, pay one-half of said costs, and Maddox Bros. & Anderson pay the other half of said costs, as now taxed; and for more particularity reference is made to each of said motions, and likewise the orders of the court in reference thereto,—to which action of the court, as hereinbefore recited, in open court, the defendants excepted."

It is not necessary to recite the motions referred to and the orders thereon. The parties were all in court. This case was up. The parties had just been heard on Nash's report. It was known that the judge was ready to announce his decision. The parties were giving expectant attention. The judge announced his decision in favor of the plaintiff below, (the defendant in error,) doubtless, as the manner is on such occasions, stating orally his views of the case. On the instant the plaintiffs in error made their motion in arrest of judgment on the ground that the record did not show diversity of citizenship of the parties. Thereupon (we presume on oral motion or request) the court gave plaintiff's counsel until the next day to be heard on said motion. The counsel for the plaintiff immediately prepared an amendment of his pleadings, fully showing such diversity of citizenship, made oath to it before the clerk, got the counsel for the motion in arrest of judgment to accept service of the amended pleading, subject to motion in arrest of judgment, and filed the amendment thus verified, and service thereof accepted, with the clerk, on the day the decision was announced and the motion in arrest of judgment made. Doubtless, the matter progressed continuously as rapidly as was practicable. The trial judge had suspended the entry of judgment until the next day, when the parties were to be heard on the motion in arrest of judgment. On the next day the matter was again taken up. The plaintiff presented his motion for leave to amend his pleadings. All the parties were present and before the court, as on the day before. The defendants could then have suggested that they would want to contest the allegations of the amendment, and would

need time to obtain proof to support such contest. No such suggestion was then made by them. No suggestion is yet made that the citizenship of the parties is not, in fact, as is alleged in the amendment. Appellants stand on the proposition that after the judge had announced what his decision was, and what the judgment of the court would be, (for it was not yet entered,) the court could not, under any circumstances, permit the defect in the record to be cured without awarding a new trial. Without reviewing the authorities (which are very numerous) on the subject of the trial judge's discretion to allow amendments of substance, pending a trial, without vacating the submission, we are of opinion that the provision of the statute which says any court of the United States "may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion, or by its rules, prescribe," is broad enough to warrant the action of the trial judge in allowing the amendment on terms, and proceeding to judgment. This discretion is a legal discretion, and subject to review. The amendment offered was one of vital substance. The matter of it is generally susceptible of ready and abundant proof, and hence, in practice, it is most generally not contested,—is virtually admitted when properly pleaded. It is, however, necessary to be proved, unless so virtually admitted, when it is put in issue by proper pleading. It is not now material to inquire what character or amount of proof on that subject is prima facie sufficient. The pleading having been sworn to by the plaintiff's counsel, who was still present in court to be cross-examined if the defendants so desired, and nothing then shown by the defendants, or yet shown by them, to indicate that the discretion was improvidently exercised, we are of opinion that this assignment of error is not well taken. There being, therefore, no error in the judgment which the plaintiffs in error are in a position to urge, the judgment should be affirmed. The writ of error sued out by the plaintiff below, having been consolidated with this case in this court, and the two writs, and the returns thereon, having been treated as one case and one record, is disposed of by our judgment herein. Affirmed.

NEWMAN v. CROWLS et al.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 148.

1. JUDGMENTS—SERVICE OF PROCESS.

Though the judgment of a court of general jurisdiction recites that the defendants were duly cited by publication, as required by law, the presumption in favor of the judgment, thence arising, cannot prevail against the return of the sheriff and the actual publication, where they appear in the record and are insufficient.

2. ESCHEAT—PUBLICATION OF CITATION.

Sayles' St. Tex. art. 1770, provides that all lands of which the owner may die seised, without any devise thereof, and having no heirs, shall escheat to the state. Article 1771 authorizes proceedings to enforce such escheat on behalf of the state; and article 1773, as amended in 1885, pro-