was entitled to insist on the delivery of the specific goods sold.

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De Villiers, C.J., said:—The proper course is for the applicant to bring his action for specific performance or for damages for non-delivery of the goods. It does not appear that the goods mentioned had ever been in his possession. The Court will not now express any opinion on the merits of the case, nor go into the validity of the applicant's claim. There is no allegation that the estate will not be able to pay damages. The proper course will be to dissolve the interdict and allow the sale to go on, leaving the applicant to his remedy at law. Costs will stand over pending the result of such action. Unless an action is brought the respondent will be entitled to his costs as a matter of course.

Rule discharged accordingly.

[Applicant's Attorney, Truter.
Respondent's Attorney, Christie.]

King *vs.* Porter, Hodgson, & Co.

Plea in abatement.—Leave to amend.—Rule of Court No. 27. Costs.

Forty-eight hours notice must be given of an application under the 27th Rule of Court for leave to amend pleadings.

Where the plaintiff, in an action against a firm, had omitted to join all the partners, and a plea in abatement was filed, and the plaintiff applied for leave to amend, which application the defendants opposed, the Court allowed the amendment, and gave the costs of opposing the motion against the defendants.

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„ 12.

King *vs* Porter, Hodgson & Co.

The plaintiff sued Francis Porter and Charles Hunter Hodgson, heretofore trading in Cape Town under the style or firm of Porter, Hodgson, & Co., in an action for the recovery of certain property or its value. The defendants by their attorney entered appearance, and before pleading to the claim, said that at the time when plaintiff's action was

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alleged to have accrued, the firm of Porter, Hodgson, & Co. consisted of the said defendants together with one Andrew Stein, and that the said Stein had not been joined as a co-defendant; wherefore they prayed that plaintiff's declaration be quashed with costs. The defendants then pleaded over.

The defendants' attorney was requested to consent to the declaration being amended so as to make Mr. Stein a party to the suit, but consent was refused. Plaintiff's attorney thereupon gave notice of an application to the Court for leave to amend to be made on the 5th June.

Leonard, for the defendants, objected to the application being heard, as the forty-eight hours' notice required by the practice of the Court, had not been given.

The application was thereupon refused with costs.

Postea (June 12),—

Stockenström (with him *Buchanan*), for the plaintiff, after due notice, renewed the application, supported by an affidavit showing that after service of summons, notice that appearance had been entered by the defendants was given without any intimation that all the parties had not been included in the summons; that the late firm of Porter, Hodgson, & Co., had been dissolved, and that the defendant Porter was the only partner really interested in the subject matter of the suit, and that Mr. Hodgson, who held Mr. Stein's power of attorney, stated he was quite willing to allow the amendment and accept service for Mr. Stein. Counsel stated that in England it would have been necessary to have an order of Court to amend (*Chitty's Practice*, 12th ed., vol. 2, p. 911), but under the 27th Rule of Court amendment of pleadings, unless the parties consented, could be made only by leave of the Judge.

Leonard, for the defendants, urged that the passage from *Chitty* was founded upon statute. In this case the plaintiff might have protected himself by applying for the names of the members of the firm. The plaintiff had not served proper process or declared against the proper persons. The plea of abatement, if successful, went to the whole case, and qualified the declaration. The effect of this application, if allowed, would be to set aside on motion that which, if proved, would quash the whole action.

The Court granted leave to amend the summons and declaration after due notice served on the proper persons. The plaintiff to pay the costs of the plea of abatement, but the defendants to pay the costs of opposition to the application.

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Amendment of pleadings allowed accordingly, with costs.

[Plaintiff's Attorneys, FAIRBRIDGE, ARDERNE, & SCANLEN.
Defendants' Attorney, TRUTER.]

HAISMAN *vs.* MAASCH.

Amendment of Pleadings.—Magistrate's discretion.—Act 20, 1856, *sec.* 50.

The exercise of a Magistrate's discretion, under the 50*th section of Act No.* 20, 1856, *to allow or refuse an amendment in a summons, is subject to review; and where permission to amend had been improperly refused, and an appeal had, the Court ordered the amendment to be allowed, and the case remitted to the Magistrate for hearing on the merits.*

1879.
June 13.

Haisman *vs.* Maasch.

This was an action brought in the Court of the Resident Magistrate of Cape Town, in which the plaintiff's summons called upon "Carel Maasch, of Woodstock Hotel," to appear and show cause why he should not pay £20 for compensation in damages "for that the said defendant did during the month of April last keep at large or permit and harbour on his premises a certain ferocious dog, which dog did, on or about the 17th April, and in the public streets, fly at, attack, bite, and injure," the plaintiff's wife. At the hearing the defendant's agent excepted to the summons on the ground "that no place is mentioned to show whether the point at issue is in the jurisdiction of this Court." The Magistrate sustained the exception with costs. Plaintiff thereupon requested leave, under the 50th section of Act 20, of 1856, to alter the summons by inserting after the word "street," the words "of Papendorp, in this District," but the Magistrate refused to allow the amendment. The plaintiff now appealed.