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.

1879.
June 5.
,, 12.

King *vs.* Porter, Hodgson & Co.

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.

1879.
June 13.

Haisman *vs.* Maasch.

Buchanan, for the appellant, urged that there was sufficient on the face of the summons to show that the cause of action was within the Magistrate's jurisdiction, especially as the return showed it had been served by the messenger of the Magistrate's own Court. But if the exception was good, the amendment could not have prejudiced the defendant, and ought therefore to have been allowed.

Upington, A.G., for the respondent, contended that the exception had been properly taken and allowed. Permission to amend was, by the 50th section of Act No. 20, 1856, in the discretion of the Magistrate, if it was in a particular not material to the merits of the case.

Buchanan, in reply, said the Magistrate was bound to exercise his discretion in a proper manner.

De Villiers, C.J. :—The amendment ought to have been allowed. The messenger who served the summons was the messenger of the Magistrate's Court, and in the absence of any allegation that the matter was not within the jurisdiction of the Magistrate, he might have assumed that he had jurisdiction. The record must be sent back with a direction to the Magistrate to allow the amendment.

Fitzpatrick, J., concurred.

Dwyer, J. :—The discretion that is given by the Act to Magistrates is a judicial discretion, and it is as much their duty to exercise such discretion properly as it is to decide on any other question which comes before them. (As to amendment of pleadings *vide Tildesley* v. *Harper*, L. R. 3 Ch. Div. 277.)

Appeal allowed accordingly, with costs.

[Appellant's Attorney, Buchanan.
Respondent's Attorney, Aschen.]