#### Parker *vs.* Shephard *et al.*

Where a summons was issued and served in the morning, by which the defendants were cited to appear and answer the complaint in the court of First Instance, at 10 o’clock, and judgment was rendered against them at 9 o’clock in the morning of the same day ; Held, that the judgment was irregular, and should be reversed, notwithstanding the court offered them permission to come in at a subsequent day and make their defence.

Appeal from the court of First Instance of the district of San [\*132](#p132)Francisco. The facts upon which the judgment of the court was based, are stated in the opinion of the chief justice.

*Mr.* Shaw, for plaintiff.

*Horace Hawes,* for defendants.

*By the* Court,

Hastings, Ch. J.

It'appears from the record that the defendants were cited to appear and answer the complaint at the hour of 10 o’clock of the day specified for trial. That the judgment was rendered at the hour of 9 o’clock of said day, on *ex parte* proof of plaintiff’s title, the defendants not being present.

From this decision of the court the appeal is taken.

The proceedings of the court of First Instance, one hour before the time of trial, are evidently irregular, and could not be corrected but by consent of parties. The defendants, it seems, had several days allowed by the court within which to appear and make their defence; and inasmuch as it does not appear that they could *not* have had a fair trial on the merits, -we think it but just that the costs of this court should abide the event of a new trial.

The judgment, therefore, of the court of First Instance is reversed, and a new trial upon the merits awarded.