EVORY ET AL. V. CANDEE.

Case No. 4,582.

{5 Ban. & A. 67.}[1]

Circuit Court, D. Connecticut. Jan., 1880.

PLEADING IN EQUITY—AMENDMENT OF ANSWER AFTER REFERENCE TO MASTER.

Where, after the case had been referred to a master, a motion was made to amend the answer, by setting up a new defence, denying the manufacture of the infringing articles, and the omission was not attributed to inadvertence or mistake, and it appeared that the defendant might avail himself of such defence before the master, the motion was denied.

{This was a bill by Alexander P. Evory and others against L. Candee & Co for an accounting, and the recovery of license fees alleged to be due by virtue of a written agreement entered into between the parties under patent No. 59,375, granted to plaintiffs November 6, 1866, for an improvement in shoes. A decree was entered in favor of the plaintiffs (Case No. 4,583), and a motion is now made on the part of the defendants for leave to amend their answer.}

Betts, Atterbury & Betts, for complainants.

C. P. Blake, for defendants.

SHIPMAN, District Judge. The proposed amendment sets up a new defence. It was not introduced, nor was it intended by the pleader to be introduced, in the accurately and carefully drawn answer of the defendant. There was no inadvertence, or slip, or mistake.

The affidavit of the defendants' manager that he supposed the answer contained a denial of the manufacture of the boots or shoes described or claimed in the plaintiffs' patent, I do not regard as material. The fact is that the defence is not one which was relied upon as a defence to the bill at the time the answer was filed. But the defendant has the benefit of this defence before the master, before whom it can be shown that the licensed article has not been manufactured by the defendant.

The inconvenience of trying this question before the master, (who has commenced his hearing) is not equal to the inconvenience and expense which would result from delay and a trial before the court. The pecuniary result which is probably involved. In this suit does not justify the delay, inasmuch as the decision of the question will be reached before the master, and by exceptions to his finding. The motion is denied.

{NOTE. For the disposition of a hill by Evory and others against these same parties to restrain the infringement of this patent, see 2 Fed. 542.}

[1] {Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.}