

Sur Objection by Defendant to the Form of Proposed Decree.

The decree is for infringement of letters patent No. 333,373, to Carl G. Wittenstrom, for improvements in the process of manufacturing castings from wrought iron and steel, by adding aluminum. The averment of infringement in the bill is as follows: "Yet the defendant, well knowing the premises, and after full notice of your orator's exclusive rights under said letters patent, has, within said district, and elsewhere within the United States and territories, and since the said 25th day of May, 1886, without the license of your orator, and to its great damage and injury, unlawfully used the improvements patented in said letters patent, and has thereby infringed upon your orator's exclusive rights in the premises." The answer denies infringement, but does not deny the notice, or in any way meet that portion of the averment of the bill. Objections to decree by defendant: "That plaintiff is not entitled to recover damages or profits, for the reason that said plaintiff has not set forth in its bill of complaint, nor does it allege, that it gave notice to said defendant, before bringing suit, of the issue and date of said patent, and of the fact that they were infringing the same, and that the defendant continued such infringement after such notice, in pursuance of the provisions of section 4900 of the Revised Statutes of the United States."

Jos. C. Fraley, for complainant.

Bakewell & Bakewell, for defendant.

ACHESON, Circuit Judge. Section 4900 of the Revised Statutes is not applicable here. The patent in suit is exclusively for a process, and therefore the case is not within either the letter or the spirit of section 4900. Even in a case where the patent is within the purview of section 4900, its provisions apply, as against the plaintiff, only "if he makes or sells the article patented." *Dunlap v. Schofield*, 152 U. S. 244, 247, 14 Sup. Ct. 576; *Campbell v. Mayor, etc.*, 81 Fed. 182, 184. Moreover, the bill here alleges that the defendant acted "after notice of your orator's exclusive rights under said letters patent," and this is not denied in the answer. Finally, upon any view, this defendant would be answerable for damages and profits for infringements persisted in after suit brought. The objection to form of decree is overruled.

THE THREE FRIENDS.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1898.)

No. 616.

ADMIRALTY PLEADING—LIBEL OF FORFEITURE.

An answer to a libel of forfeiture for violation of the neutrality laws construed, and held not to contain an admission that the vessel was fitted out and armed within the jurisdiction of the United States, as averred in the libel.

Appeal from the District Court of the United States for the Southern District of Florida.

This was a libel of forfeiture filed by the United States against the steamer *Three Friends* for alleged violation of the neutrality laws. The cause was heard in the district court on a motion by the claimants for permission to give a release bond, and on exceptions to the libel. 78 Fed. 173, 175. Thereafter a hearing was had upon the testimony, and the court (LOCKE, District Judge) rendered the following decision:

The parties herein being present by counsel, the court renders its decree upon the issue herein as follows, viz.: I fail to find in the testimony in this case any evidence whatever which shows or tends to show that this vessel was fitted out, equipped, or armed in any degree within the limits of the United States. The testimony first shows her fifteen or twenty miles at sea, on the high seas; and after that she took on board nothing but a number of men, with their personal baggage. Whatever of arms or ammunition or equipments of any kind are shown to have been upon her had been put on board before any witness had any knowledge of her; whether within the limits of this country, or some other, the testimony fails to show. It is shown that she subsequently went into the port of Navassa, but there received nothing on board, nor was in any way armed or equipped or fitted out. This is a case of forfeiture, and every reasonable presumption of matters not proven by the libelant is to be in favor of the innocence of the person or thing accused. This precludes the necessity of inquiring whether the vessel was fitted out with any felonious intent, and it necessarily follows that the libel be dismissed; but, the vessel being held to answer other libels, no warrant of restitution will be issued, but the marshal will continue his custody until further order; and it is so ordered.

From this decision the United States have appealed.

J. Ward Gurley, for appellant.

A. W. Cockrell, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. The district judge found no evidence in the case showing or tending to show that the vessel *Three Friends* was fitted out, equipped, or armed in any degree within the limits of the United States. This finding is undoubtedly correct. The learned counsel for the United States argues in his brief that the fitting out of the vessel within the jurisdiction of the United States, as averred in the libel, was admitted by claimant's answer, so that no proof thereof was required. The claimant's answer admits the truth of the first and second articles propounded in the libel. These articles propound that C. R. Bisbee was the collector of customs, had seized the vessel *Three Friends* within the limits of the Southern district of Florida, and was still holding the same for forfeiture. As to the other material articles in the libel, the answer was as follows:

"Second. The matters and things contained in the third, fourth, and fifth articles in said libel are falsely alleged, and that the truth is that the said vessel, *Three Friends*, was not on the 23d day of May, 1896, furnished, fitted out, or armed with intent that she should be employed in the service of any people engaged in armed resistance to the government of the king of Spain, in the Island of Cuba, and that the said vessel, *Three Friends*, did not, as alleged in said articles, or in any of them, proceed upon a voyage to the Island of Cuba with such intent.

"Third. That said vessel never has been used in any way which would entitle the United States to a forfeiture of said vessel."

We are unable to see how the special denial that the *Three Friends* was "furnished, fitted out, or armed with intent," etc., coupled with the general denial of the material facts in the libel, can be taken as an admission that said vessel "was furnished, fitted out, and armed with intent," etc., within the jurisdiction of the United States. The right to a forfeiture depends entirely upon the jurisdiction within which the vessel was furnished, fitted out, and armed, if furnished, fitted out, and armed at all with intent, etc. The decree of the district court is affirmed.

MECKE v. VALLEY TOWN MINERAL CO. et al.

(Circuit Court, W. D. North Carolina. September 12, 1898.)

1. REMOVAL OF CAUSES—PROCEDURE.

Where a cause is properly removable, a removal is effected at once on the filing of a sufficient petition and bond, regardless of any action of the state courts, though the applicant follows and unsuccessfully defends an order of removal in such court on appeal.

2. SAME—TIME FOR FILING PETITION.

Where, before the time for a defendant to answer expired, plaintiff obtained leave to file an amended complaint, and the time for answer was by the same order extended, and the amended complaint changed the whole aspect of the case as to a defendant, a petition for removal filed by such defendant before the expiration of the time for answer so extended was in time.

3. SAME—SEPARABLE CONTROVERSY.

Where a complaint seeks to establish an indebtedness against a corporation defendant alleged to be insolvent, and also asks judgment therefor against a second defendant on the alleged ground that it has assumed all the indebtedness of the first corporation, there is a separable controversy between plaintiff and such second defendant.

On Motion to Remand.

J. H. Dillard, for plaintiff.

T. P. Axley and Merrimon & Merrimon, for defendants.

SIMONTON, Circuit Judge. This case comes up on a motion to remand it to the state court. The plaintiff, Herman Mecke, filed a complaint in the superior court of Cherokee county, N. C., in behalf of himself and all others, creditors of the Valley Town Mineral Company, who will come in, etc., against that company, the Roessler & Hasslacker Chemical Company, and R. L. Cooper, Ben Posey, and J. P. Abernathy, trustees. It alleges: A purchase by A. H. Mugford and R. P. Getty, in the year 1895, from J. W. Cooper, G. K. Welch, and others, of certain lands in Cherokee county, N. C., for the sum of \$10,000. For this they paid \$5,000 in cash, and gave notes for the remainder, secured by deed of trust, in which the defendants Cooper, Posey, and Abernathy were trustees. That these lands were supposed to contain minerals, especially talc, and that, in order to mine the same successfully, Mugford and Getty on 15th October, 1895, organized a corporation, under the laws of the state of New Jersey, known as the Valley Town Mineral Company, a defendant, of which Mugford was made manager; Getty, superintendent; and plaintiff, the president. That on 2d October, 1895, Mugford and Getty executed to plaintiff a paper writing giving him a lien on these lands to secure him his advance of \$5,000 towards the purchase money; plaintiff agreeing at the same time to furnish other moneys to pay off the notes for the unpaid purchase money, for \$2,500 each, due one and two years after date, one of which has been paid, but by whom is not stated. That subsequently plaintiff assigned all his interest in said paper writing to the Valley Town Mineral Company, it assuming to pay the said several notes for the purchase money. That on 26th September, 1896, Mugford and Getty conveyed all their interest in said lands to the Roessler & Hasslacker Chemical Company, a corporation of the