

or abandoned, and not to be too early or too late in filing their statements. It is also apparent that there may arise perplexing questions as to when a work is completed, or abandoned, and, in determining such questions, the court should not take a technical and narrow view, but should save to parties entitled to liens any rights they may justly have, under a fair and equitable construction of the facts and the law applicable thereto. The demurrer must be overruled.

ARNOLD *et al.* v. CHESEBROUGH.¹

(Circuit Court, E. D. New York. December 18, 1887.)

PLEADING—AMENDMENT—CONDITIONS.

When it does not appear that plaintiff's situation has changed for the worse in consequence of defendant's delay in interposing a particular defense,—unless in proceeding to make proof of his case, which he might not have done had the defense been interposed originally,—a motion to amend the answer will be granted, but on payment of taxable costs to the time of the amendment.

In Equity. On motion to amend answer.

Henry A. Rawcliffe, (*John H. V. Arnold*, of counsel,) for complainants.
Bliss & Schley, (*Walter S. Logan*, of counsel,) for defendant.

LACOMBE, J. The practice formerly prevailing in this state of examining into the meritoriousness or morality of defenses sought to be interposed by way of amendment to the answer is no longer valid. *Gilchrist v. Gilchrist*, 44 How. Pr. 317; *Sheldon v. Adams*, 41 Barb. 54; *Pike v. Bingham*. 11 Reporter 750. When law or equity recognizes a defense as proper to be interposed to the plaintiffs' claim, it should be treated upon a motion of this kind as entitled to the same consideration as any other defense. There is nothing upon the papers to show that plaintiffs' situation has changed for the worse in consequence of defendant's delay in interposing this defense, nor that, by reason of the lapse of time, she has lost the opportunity of presenting evidence to defeat the proposed defense which she might have secured had it been interposed when issue was joined. Nor does it appear that the final disposition of the case will be in any way delayed by the interposition of the defense at this stage of the trial. The plaintiff, however, has proceeded at great length to make proof of her case, which possibly she might not have done had this defense been interposed originally. The defendant's motion is therefore granted, upon payment of taxable cost to date, including the fees of examiners and stenographers, if any.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

UNITED STATES *v.* BADEAU.*(District Court, S. D. New York, December 20, 1886.)*

1. PLEADING—AMENDMENT—CHANGE OF ACTION—ACCOUNT—ACCOUNT STATED.

Where suit is brought upon a long account claiming a final balance, an amendment will not be allowed at the close of the trial changing the complaint into a claim upon an account stated at a time near the end of the account, for the purpose of excluding corrections of quarterly adjustments, which justice may require to be made.

2. AMBASSADORS AND CONSULS—FEES—WHEN "OFFICIAL"—PAYMENT UNDER MISTAKE.

The defendant, a consul, was sued for balance of alleged consular fees claimed to belong to the government, and he proved that he had always retained in his hands a sum in excess of the amount claimed, although this amount had in early accounts been credited to the treasury department, and it appeared that the moneys were not in fact official fees, but legally belonged to the consul. *Held*, that the facts did not show a voluntary payment to the government of the fees in question, so as to preclude the defendant from resisting a recovery of the amount erroneously returned in his former accounts; and further, that the ruling of the state department, and the tabular list of fees promulgated by the president, apparently including the fees in question, until a revision and different ruling by the state department, made the case one of an accounting under a mistake of mixed law and fact, and were not conclusive upon the defendant.

3. SAME—FEES—PERSONAL PERQUISITES.

The sections of the Revised Statutes in relation to consular acts abroad, consular fees, and the regulations authorized to be issued by the president, are limited to those subjects which belong to the business, the interests, and the jurisdiction of the United States. Fees received by the consul, acting under state authority, and wholly independent of the authority of the United States government, are not official fees as respects the federal government, but the private property of the consul, which he may retain for his own use, and for which he is not required to account to the government.

Action by the United States upon the official bond of Adam Badeau, consul.

This is an action upon an official bond, to recover of the defendant \$10,572.64, balance alleged to be due the government on the accounts of the defendant as consul general at London, from July, 1870, to September, 1881. The only matter in controversy related to certain fees which had been collected by the defendant for taking the acknowledgment of deeds, mortgages, assignments, powers of attorney, affidavits, etc., while consul at London, which the defendant claimed were unofficial fees, belonging to him personally. In his quarterly accounts rendered to the treasury department from July, 1870, to September, 1875, the defendant had credited all such fees to the government. In consequence of a ruling made in the department of state about that time, to the effect that fees in the nature of notarial acts, not connected with the business of the government, were "unofficial," and might be retained as such by consular officers, the defendant omitted from his quarterly accounts thereafter all such fees for services performed under authority of state laws, making return, however, for affidavits, etc., taken in the business of the