

§ 948, any circuit or district court may, at any time in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues.

I am of opinion that an amendment of these writs will not prejudice defendants, who had due notice to appear on Sunday, and who did appear, though under protest, on Monday. *Hampton v. Rouse*, 15 Wall. 684; *Semmes v. U. S.* 91 U. S. 21; *McIniffe v. Wheelock*, 1 Gray, 600. The question, it must be remembered, is not whether the common law would have called these writs void or voidable, (though if that were the question it might be well maintained that they were voidable only,) but whether the statute of the United States is broad enough to include them in the class of processes which may be amended. Of this there is no doubt. As the writs were voidable, I think they should be amended on the terms of the plaintiff, taxing no costs up to the time of the amendment. Amendment on terms within 30 days.

NOTE. The circuit court may allow an amendment of a writ of error made returnable on a wrong day. *Semmes v. U. S.* 91 U. S. 21; *Woolbridge v. McKenna*, 8 FED. REP. 663. A summons which did not issue cannot be amended by adding a seal and the signature of the clerk. *Dwight v. Merritt*, 4 FED. REP. 614; S. C. 18 Blatchf. 306; *Peaslee v. Haberstro*, 15 Blatchf. 472.—[ED.]

### Duy, Receiver, etc., v. KNOWLTON.\*

(Circuit Court, D. Indiana. October 28, 1882.)

#### MARSHAL'S FEES.

Where the marshal is required to serve process in suits other than where the United States requires the service, he has a right to demand his fees in advance of the service to be performed.

*Claypool & Ketcham*, for plaintiff.

*Charles L. Holstein*, U. S. Atty., for the marshal.

GRESHAM, D. J. The usual process was issued in this case, directed to the marshal, commanding him to summon the defendant. The marshal refuses to serve the process until the proper fees are paid in advance or a deposit of money made for their security. A rule is

\*Reported by Chas. H. McCaper, Asst. U. S. Atty.

asked against the marshal to show cause why he should not be punished for contempt for his refusal to serve the process.

In settling his accounts with the proper accounting officers of the treasury department, the marshal is charged with all fees earned by him, and from the amount thus earned he is allowed to retain for his personal compensation, over and above the necessary expenses of his office, including clerk hire and the amount allowed his deputies, any sum remaining, not exceeding \$6,000. If any excess remains over and above the credits allowed by law, he is required to pay it into the treasury, whether the fees earned have been collected or not.

The marshal is therefore a public officer, charged with the duty of collecting funds for the United States, and when he is required to serve process (not in suits where the United States requires the service) he has a right to demand the payment of the proper fees in advance of the service performed. He need not wait and take the chances of collecting them on an execution. See Rev. St. 841 to 846, inclusive.

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### TURNBULL and others v. WEIR PLOW Co. and others.

(Circuit Court, N. D. Illinois. March, 1880.)

#### 1. PATENTS FOR INVENTIONS—CONVEYANCE OF RIGHT.

A conveyance of "all my right, title, and interest in and to" a patent, though properly recorded, does not include the right for two counties covered by a prior conveyance, although the prior conveyance was not recorded in the patent-office.

#### 2. CONVEYANCE OF PATENT—WHAT INCLUDES.

A conveyance of the right to make and sell a patent includes the right to the use of the thing patented.

In Equity.

*James L. High*, for complainants.

*West & Bond*, for defendants.

DRUMMOND, C. J. I think the plaintiffs in this case were entitled to a decree. Some of the questions involved are of importance, and have been reargued in this case.

The bill charges an infringement by the defendants of two claims in the patent, issued originally October 18, 1859, and reissued in 1871, for some improvements in a plow or cultivator. One of the principal, and the most important questions in the case arises under

the law of congress upon the subject of patents. The patent was issued originally to Thomas McQuiston, and the plaintiffs claim, through him, the right in two counties, Warren and Henderson, in this state, to use the improvement patented. The conveyance by McQuiston, through which the plaintiffs claim, was not recorded in the patent-office at the time the conveyance, through which the defendants claim, was made by McQuiston and recorded. In other words, the conveyance through which the defendants claim from the patentee was first recorded in the patent-office before that through which the plaintiffs claim was recorded.

I stated, at the time I decided this question before, (*Turnbull v. Weir Flow Co.* 6 Biss. 225,) that it was one of great difficulty, and about which I had some doubt, because the decision seemed to be contrary to the practice adopted in the patent-office as to the construction which was there placed upon assignments of patents. After the patentee had made an assignment of the right to these two counties in Illinois, he made an assignment through which the defendants claim, which assignment, it is insisted, according to the general scope of the language, would include the two counties which had been previously assigned by the patentee, and under which the plaintiffs claim. The language of the assignment to the defendants is as follows: "Do hereby grant and convey to the said William S. Weir all my right, title, and interest in and to said letters patent in the following-described territory." The construction which the court formerly placed upon that assignment was that it did not necessarily include the right which had been previously conveyed by the patentee in the counties of Warren and Henderson, but only included all the right which the assignor then had. The language of the statute authorizing assignments in writing to be made of rights secured by letters patent, is somewhat different from that contained in this assignment, and also in the form which was given by Mr. Fisher at the time he was commissioner of patents. The language in the statute in substance is this: all the right which was secured to the patentee by letters patent. Rev. St. § 4898. The language used in the form prescribed by Mr. Fisher is substantially like that used in the assignment through which the defendants claim: "all the right, title, and interest in and to said letters patent." It is quite clear to my mind that Mr. Fisher, at the time he prescribed this form, was not thinking of the case where a patentee had disposed of a portion of his interest in the letters patent,—as, for example, in such a case as this, where he had assigned the right in a particular terri-

tory, reserving his right to other portions of the territory covered by the patent,—and therefore I cannot hold that the form prescribed by Mr. Fisher has the same efficacy as that prescribed by the statute itself. Where a man assigns all the right which was conveyed to him by letters patent, the meaning is that the assignment takes with it everything that the letters patent conveyed. It is certainly different from an assignment which declares merely that he assigns all the interest which he, at the time he makes the assignment, has in the letters patent, provided, as in this case, he had previously assigned a part of the interest which he had to another person. So that, admitting that the question is one of difficulty and doubt, I must still adhere to the view which I originally took of this case, and hold that it was not the intention of the assignment which was made to Weir, and through which the defendants claim, to convey to him the interest, which had been previously conveyed by the patentee, in the counties of Warren and Henderson, in this state.

Another objection made to the right of the plaintiffs to recover is that the conveyance to them did not include the right to use as well as to make and sell the improvement patented within those counties. I think that the assignment to make and sell includes necessarily the right to use the thing patented, because without the right to use, the right to make and sell would be a barren right. It must be construed as having been the intention of the parties that the right to manufacture and sell, included the right in the vendee to use the thing sold.

There is nothing in the case to estop the plaintiffs from setting up a claim under this patent in consequence of any supposed laches that they may have committed; and I think it must be considered that the defendants, under all the circumstances in the case, have infringed upon the right of the plaintiffs. I have not the models of the machines here, without which a statement of the particular points constituting the claim of infringement by the defendants would be unintelligible. It is sufficient to say that I have heretofore fully considered those questions, and have reconsidered them on the argument which has been made, and have reached the conclusion which I then formed, although, perhaps, I did not particularly state it at the time.

It may be said the case is not one of very great importance in some respects; that is, it includes only two counties in this state; but, as I have said, some of the questions involved are quite important, and particularly as to the construction, under the patent law, of the assignments in this case.