

shal, still we cannot see how the plaintiffs in error can get relief in this suit, unless the court, as a matter of law, is authorized to allow a credit for disbursements not made. As far as this record goes, it is the United States that owes the deputies, and, if so, will owe them until they are paid. It may be that the fees earned by the deputies belong to the office of marshal, and that the amounts due them for services are due by the office, but the matter is complicated by the fact that when the marshal has collected his maximum compensation, as in this case, the United States are the beneficiaries of the office. It may be that by lapse of time and mistaken efforts and attempted remedies legislation is necessary to do full justice to all parties, but in this suit at law we do not think that the plaintiffs in error, on the showing made in this suit on the late marshal's official bond, can be allowed credits for amounts alleged to be due by the United States to either the marshal's office or to the deputies of the late marshal.

We are constrained to hold with the trial judge, and to rule that the record presents no reversible error. The case presented, however, while showing that the judgment of the court below is proper against the plaintiffs in error, yet suggests equities in favor of other parties, to whom the judgment of the court below, if left unqualified, may be construed injuriously; and therefore, while affirming the judgment, we deem it proper to modify the same so as to avoid the semblance of such prejudice.

It is therefore ordered and adjudged that the judgment of the circuit court in this case shall not be construed so as to prevent the plaintiff in error O. P. Fitzsimmons, late marshal of the United States for the northern district of Georgia, from claiming from the United States such sums as he may hereafter properly pay to his late deputies for services rendered to the United States within the purview of section 830, Rev. St. U. S., and which are not included in any of the claims allowed and audited in this suit; nor to prevent the late deputies of the said O. P. Fitzsimmons, late marshal of the northern district of Georgia, from applying to the United States, by suit or otherwise, for the direct payment to them for services rendered the United States during the term of office of O. P. Fitzsimmons, late marshal; and, as so modified and qualified, said judgment be, and the same is hereby, affirmed.

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WINEMAN v. GASTRELL.

(Circuit Court of Appeals, Fifth Circuit. January 11, 1893.)

No. 20.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

In Equity. Bill by Lucy E. Gastrell against Marx Wineman to remove cloud from title. A decree was given for complainant, which, on appeal by respondent, was affirmed. See 53 Fed. Rep. 697, where a full statement of the case will be found. Respondent now petitions for a rehearing. Denied.

Frank Johnston, for appellent.

A. M. Lea, for appellee.

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

**PER CURIAM.** In this petition for a rehearing there is no point raised which had not been carefully and fully examined and considered. The grant of 35,000 acres of land was a public law, standing upon the statute books of the state. The land was described as "35,000 acres of swamp land located in the Homochitto swamp," and at the time of the purchase by appellant there was not that amount of land of that description standing upon the books of the land department, and for appellant to plead want of notice he has to ignore the existence of the grant by which this land, identified sufficiently to demand notice, had been conveyed by his grantor to other parties. In *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336, although no patent had been issued, nor any notice of the withdrawal of the land received, yet it was held that the title had passed out of the United States by the grant. Every point urged in the petition has been carefully considered, and, being satisfied that the case has been so fully and thoroughly argued that nothing further could be urged that could change the conclusion of the majority of the court, the petition must be denied.

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**BRUSIE v. PECK BROTHERS & CO.**

(Circuit Court of Appeals, Second Circuit. February 7, 1893.)

**1. RES JUDICATA—QUESTIONS LITIGATED—PATENTS FOR INVENTIONS.**

In an action at law to recover royalties on a patented machine one of the defenses was that defendant's machine did not infringe the patent. There were admitted in evidence three machines, one being the patented machine and the others of the kind sold by defendant; and the jury, by request, made a special finding that each of the three exhibits "substantially embody the same device or idea, and accomplish practically the same results by means of the same mechanical principles." The letters patent were not in evidence. *Held*, that in another action for royalties subsequently accruing this finding was not conclusive upon the question of infringement, for in determining infringement the question is whether defendant's machines embody in their structure and operation the substance of the invention described in the letters patent, which is not the same as the question determined by the jury.

**2. CONTRACTS—DEPENDENT PROMISES.**

The owner of a patent granted to another the sole and exclusive right to manufacture, and also to sell, except that the owner could sell machines manufactured by the grantee, paying the latter 25 per cent. profit on the cost of manufacture. The grantee agreed to manufacture the machines of good material, and use his best endeavors to introduce the same, to pay a royalty of \$2 upon each machine sold, and not to sell below \$15 unless the price was changed by joint agreement. The owner of the patent subsequently and without cause manufactured and sold the machines at reduced prices. *Held*, that the promises were dependent, and the breach by the owner warranted the grantee in abandoning the contract.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Russell Brusie against Peck Brothers & Co. to recover royalties on a patented machine. Verdict and judgment for defendant. Plaintiff brings error. Affirmed.

Robert L. Wensley and Horace Graves, for plaintiff.  
Wolff & Hodge and Robert Sewell, for defendant.

Before LACOMBE and SHIPMAN, Circuit Judges