

away from such ownership (see language of Wheeler, J., in *Schumacher v. Schwencke*, supra, and of Bond, J., in *Graveley v. Graveley*, supra). In a suit not pitched upon the statute (i. e. in a suit between citizens of different states, alleging infringement generally, covering state and interstate commerce), the fact that the trade-mark in question is registered, vel non, is a matter of utter irrelevance. The counsel are laboring under the error of confounding the trade-mark, or the right to the same, with the registry thereof, or, rather, with the mere certificate of such registry. Sections 10 and 11 of the act make it as clear as possible that the act does not in any manner 'prevent, lessen, impeach or avoid,' any remedy or right, or 'unfavorably affect any claim to a trade-mark' either before registry, after registry, or even after the term of registry has expired. Nor does this act make registry anything but prima facie evidence of ownership, so that one may be the registered owner, and another the actual owner. It thus appears that trade-marks do not lie in the sphere of patents and patent rights. The latter are governmental grants of exclusive privileges, and the federal government is given sole and exclusive legislative authority over them. The other are mere common-law rights of property in devices used in trade to designate origin, quality, grade, or source of manufacture of certain articles. These rights of property depend on the general fundamental rights of individuals, and the statutes of the different states. If they can be affected by federal legislation at all, it is only within the sphere of commerce between the states, with foreign nations, and with the Indian tribes."

None of the assignments of error are well taken, and the judgment of the circuit court is affirmed.

BREWSTER v. EVANS.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1899.)

No. 731.

APPEAL—TIME FOR TAKING.

Where a writ of error was not sued out until more than six months after the expiration of an extended time allowed after judgment for preparation of a bill of exceptions, nor within that time after the bill of exceptions was actually signed and filed, it is too late to give the circuit court of appeals jurisdiction, and cannot be aided by a showing that the bill was not returned promptly to counsel after being signed by the judge.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

T. M. Miller, for plaintiff in error.

J. M. Stone, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The judgment sought to be reviewed in this cause was entered on the 14th day of June, 1897, and the court adjourned for the term on the same day. A bill of exceptions was signed by the judge on the 1st day of September, 1897, and was filed in the clerk's office on the 1st day of October, 1897. The record does not show any order of the court nor agreement of counsel extending the time within which a bill of exceptions might be taken, nor does it show any other excuse for failure to seasonably present a bill of exceptions. As the case is presented by the record, the trial judge had no authority to sign and allow a bill of exceptions after the term at which

the judgment was rendered. *Muller v. Ehlers*, 91 U. S. 249; *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230. Counsel for the defendant in error, however, admits that the court gave an order allowing the plaintiff in error 60 days within which to present his bill of exceptions. The bill was not filed within 60 days. Counsel for plaintiff in error tenders his affidavit "that the bill of exceptions in said cause was presented to the judge of said district within the time prescribed by law and the order of the court; that the same was not returned for quite a long while to counsel for appellant for examination, and this, and this only, delayed the suing out of the writ of error,—the same being sued out promptly upon the receipt of the bill of exceptions by counsel." The writ of error was sued out on April 28, 1898,—more than 6 months after the bill of exceptions was signed by the trial judge, and more than 10 months after the entry of the final judgment. Whether an order by the trial court giving time within which to prepare and have allowed a bill of exceptions has the effect of a motion for a new trial, held under advisement by the court, in determining when the time within which a writ of error may be sued out under the act of 1891, need not be decided, because the 6 months allowed by said act had elapsed in this case, whether we count from the actual date of entry of the judgment, or from the expiration of the 60 days allowed by the court, or even from the day when the bill of exceptions was signed by the trial judge. We are clear that the writ was sued out too late to give this court jurisdiction. See *City of Waxahachie v. Coler* (recently decided) 92 Fed. 284. Writ of error dismissed.

IRVINE v. ANGUS et al. ¹

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

No. 438.

1. MONEY PAID—VOLUNTEER—PAYMENT MADE BY CLAIMANT TO PROTECT PROPERTY DURING LITIGATION.

A decree adjudged that the defendant in the suit held certain mining stock as trustee for the complainant, and directed its transfer on payment by complainant of a sum found due the defendant for disbursements, and which was made a lien on the stock. The defendant appealed from the decree to the supreme court, claiming the stock as absolute owner. Pending the appeal, assessments were made on the stock, the payment of which was necessary to prevent the stock from being sold, and which the defendant paid. The decree below was affirmed, after which, for the first time, the complainant tendered payment of the sum thereby found due the defendant. *Held*, that the appeal taken by the defendant was only an exercise of a legal right, and could not be regarded as wrongful, although a repudiation of the trust; and as, in any event, he was entitled to protect his lien on the stock, his payment of the assessments was not officious nor the act of a volunteer, and that on the complainant's taking advantage of the decree after its affirmance, and obtaining from the court a transfer of the stock, he at once became liable as upon an implied promise to repay to the defendant the amount of such assessments, as having been made to his use and benefit.

2. LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION.

A cause of action to recover the money paid on such assessments did not arise until the complainant in the suit availed himself of the decree

¹ Rehearing denied May 23, 1899.