very fair, but it nowhere removes or cures the errors we have pointed out, and for these the judgment of the court is

Reversed and the case remanded, with instructions to set aside the verdict and grant a new trial.

Mr. Samuel Shellabarger, *Mr. J. M. Wilson* and *Mr. A. J. Poppleton* for plaintiff in error. *Mr. J. L. Webster* and *Mr. W. J. Connell* for defendants in error.

WHITNEY *v.* COOK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 285. October Term, 1880. — Decided May 2, 1881.

Damages are awarded in a case where the appeal was taken for delay, and was frivolous.

The case is stated in the opinion.

Mr. Chief Justice Waite announced the judgment of the court.

There has been no appearance for the plaintiffs in error in this case. The writ of error has operated to delay proceedings on the judgment against Klein, the garnishee. There is nothing whatever in the record to justify him in staying execution. The security by Whitney, the judgment debtor, was for costs only. The cause has been permitted to remain on the docket for two years, notwithstanding what was said by us at the October Term, 1878, 99 U. S. 607, when we felt compelled to deny a motion to affirm because it could not be brought under the operation of rule 6, there being no color of right to a dismissal.

We, therefore, affirm the judgments, with interest and costs, and award two hundred and fifty dollars damages against Klein on account of the delay. *So ordered.*

Mr. P. Phillips and *Mr. G. Gordon Adam* for defendants in error.

FLETCHER *v.* BLAKE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 685. October Term, 1880. — Decided December 6, 1880.

The internal revenue stamps used by the defendant in error are no infringement of the letters patent issued to the plaintiff in error, June 8, 1869, for an improvement in stamps used for revenue and other purposes.

Cases Omitted in the Reports.

The case is stated in the opinion.

Mr. Justice Harlan delivered the opinion of the court.

This is an appeal from a decree in the Circuit Court of the United States for the Southern District of New York, dismissing a bill in equity, based upon an alleged infringement of letters patent issued to the plaintiff in error on the 8th of June, 1869, for an improvement in stamps used for revenue and other purposes.

At the time of such alleged infringement the defendant was a collector of internal revenue. The revenue stamps, the sale and use of which by him constitutes the basis of the claim herein for damages, were sold and used in pursuance of directions by the Commissioner of Internal Revenue, and in discharge of defendant's duties as such collector, and for no other purpose. The action is further defended upon the ground that the stamps so sold and used by the defendant, known as tax-paid special stamps, rectified spirit stamps, and wholesale liquor dealer's stamps, were not constructed in accordance with the specifications, claims and drawings of the letters patent; that there has been no infringement upon any right or privilege secured to plaintiff by his letters patent; and, lastly, that the alleged improvement was neither useful nor valuable.

The solicitor general, in both his oral and printed arguments, claims, that, although the grant to the patentee, his heirs and assigns, was of an exclusive right for a prescribed term to make, use and vend his invention or discovery, the United States are at liberty to use the thing protected without making compensation to the patentee. This, upon the ground that the government is not named in the patent law as being excluded from using the invention or discovery which may be patented. To support that position reference is made to several adjudged cases in the English courts. *Feather* v. *The Queen*, 6 B. & S. 257; *Walker* v. *Congreve*, 1 Carpmael Pat. Cas. 356; and *Dixon* v. *Small-Arms Co.*, L. R. 10 Q. B. 130. In view of those decisions, we are invited, notwithstanding what was said in *United States* v. *Burns*, 12 Wall. 246, repeated in *Cammeyer* v. *Newton*, 94 U. S. 225, to re-examine the question as to the right of the United States, without the consent of the patentee, and without making compensation, to use in the public business any invention or discovery for which letters patent may have been issued.

It has also been suggested that since the collector, in using the stamps in question, acted in accordance with orders of his superior

officers, he can, in no event, be held individually liable to the plaintiff, and that the claim of the latter, if any he has, should be asserted directly against the United States.

We deem it unnecessary to pass upon either of the foregoing propositions, because we are all of opinion, passing by all other questions in the case, that the stamps used by the collector are not included in the patent of the plaintiff.

That which plaintiff claimed and desired to be secured was described in the schedule, referred to in the letters patent, as "a postage or revenue stamp having a portion of its *surface* composed of thin or fragile paper, or other suitable material, *loosely attached* and *on which* a portion of the design or other matter is printed, substantially as and for the purposes set forth." Referring to the descriptive portion of the schedule, the invention is declared to consist "in providing the stamp with a flap or flaps covering a portion of its face, and arranging the requisite design or printed matter on such stamp *to extend over the flap or flaps* and remaining or uncovered portion of said face or body of the stamp. By this application of my invention as applied to an adhesive stamp, whether for internal or other purposes, said stamp may be cancelled by tearing off the flap or flaps which, if necessary, may be preserved as evidence of the cancellation; or where not required to be preserved, the flap or flaps may be torn off and thrown away or be so mutilated by the act of cancelling as heretofore practised on postage stamps (which and other adhesive stamps, my invention is equally applicable to) as that it will be impossible to use the same stamp over again without detection of the fraud."

Upon comparing the stamp, as thus described, with the stamp used by the defendant, we are satisfied that the latter is not covered by the plaintiff's patent. It is a different article altogether from that described in the specifications and claim of the plaintiff. The stamp used by the government is composed of one continuous piece of paper, of uniform thickness, upon the face of which is certain printed or engraved matter, with blanks in which are inserted, at the appropriate time, certain figures and names required by law to appear on revenue stamps. No separate paper is attached, loosely or otherwise, to the face of that stamp. Upon the back of the body of the government stamp, attached to its outside edges, is a slip of red, blank paper, of less width than the stamp. When the stamp is pasted upon the barrel, that portion of it immediately over

the red slip does not adhere to the barrel. It is protected from the paste on the barrel by the intervening red slip, so that when the portion, thus protected, is cut or torn out for preservation or for any other purpose, the slip, underneath, with the remaining portion of the stamp, adheres to the barrel. An essential characteristic of plaintiff's stamp is a flap, originally a distinct piece of paper, but, when used, to be loosely attached to the *face* of the body of the stamp. A further characteristic is that upon the piece, thus loosely attached, must appear a portion of the vignette, design, or printed matter required to be engraved or printed on the face of revenue stamps. The government stamp has no such characteristics. It is, as we have said, one continuous paper, containing upon it the required printed matter, with no flap loosely attached to its face, which may be subsequently torn off. Neither the red slip of unprinted paper across the back of the government stamp, and which adheres to the barrel, nor that portion of the stamp which does not adhere to the barrel, answers the same purposes as the flap of plaintiff's stamp. The present claim by the plaintiff is manifestly broader than his claim and specifications, as set out in the schedule to his letters patent. We concur with the court below in the opinion that the whiskey stamp is a modification of the inventor's idea that had not occurred to him when he drew his specifications, which were so limited in their terms as not to include the stamps used by the government. It is, clearly, not a mere colorable contrivance or imitation for evading that which had been done before.

Decree affirmed.

Mr. Treadwell Cleveland and *Mr. Joseph H. Choate* for appellant. *Mr. Solicitor General* for appellee.

HILL *v.* HARDING.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 735. October Term, 1880. — Decided December 6, 1880.

A bankrupt may prosecute in his own name a writ of error to a judgment rendered after the adjudication of bankruptcy; but the assignee will be heard on questions which he thinks involve the estate of the bankrupt.

THESE were motions by the defendants in error to dismiss, and by the assignee in bankruptcy to be substituted as plaintiff. The case is stated in the opinion.