must be affirmed. But it must at the same time be understood that this court express no opinion as to the facts or the law as decided by the Circuit Court, and that the whole case is open to re-examination and revision here, if the questions of fact or law should hereafter be brought legally before us, and in a shape that would enable this court to exercise its appellate jurisdiction.

LESSEE OF WILLIAM C. FRENCH AND WIFE, PLAINTIFF IN ERROR, *v.* WILLIAM H. SPENCER, JUN., JOSEPH SPENCER, AND ANNA A. SPENCER.

By an act of Congress passed in 1816, (3 Stat. at L., 256,) a bounty in land was given to those American citizens who were living in Canada at the time when war was declared against Great Britain, in 1812, and who returned to the service of their country.

This act was not like other bounty-land acts, by which the Government undertook to locate the bounty land. Under the act first mentioned, the warrants were delivered to the owners to be located by them, and were therefore assignable after an entry was made in the Land Office.

The deed of conveyance in question was sufficient to pass the interest of the grantor.

A patent issued to the original beneficiary, who had previously sold his right, enured to the benefit of the purchaser, and related back to the date of the entry; and the heir of the grantor in such a deed is estopped from setting up a legal title under the patent.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

It was an ejectment brought by French and wife, to recover an undivided half of three hundred and twenty acres of land in the county of Vigo, in Indiana.

Upon the trial, the evidence offered by the plaintiff was as follows:

1. Evidence that one Silas Fosgit, who had been a Canadian volunteer in the army of the United States in the last war with Great Britain, had died between the 28th of June, 1816, and the 29th day of June, 1823, and that his only heirs at law were Minerva French, (wife of said William C. French,) residing in the State of Michigan, and one Aruna Fosgit.

2. A copy of a patent, dated on the 26th of October, 1816, to Silas Fosgit, for two quarter sections of land in the district of Vincennes.

The evidence offered by the defendants was as follows:

1. The original patent above mentioned, which had been deposited by one Abraham Markle with George Horner in 1817, who delivered the same to the defendants in 1854.

2. Evidence that they were the only children and heirs at law of one William H. Spencer, sen., who died in 1852, and also that the warrant was located upon the lands in dispute, by Abraham Markle, on the 3d of June, 1816.

3. The deed or assignment from Fosgit to Spencer, duly proved. As the court considered this assignment sufficient to convey the land, it may be as well to insert it, viz:

"Whereas I, the undersigned, Silas Fosgit, late a private in the corps of Canadian volunteers, commanded by Lieutenant Colonel Joseph Wilcox, deceased, lately in the service of the United States of America, according to the provisions of an act of Congress of the United States of America, passed March 5th, 1816, entitled 'An act granting bounties in lands and extra pay to certain Canadian volunteers,' having applied for, have obtained a warrant, issued by the Secretary of the Department of War, for the location of three hundred and twenty acres of land within the Indiana Territory, agreeably to the directions of said act:

"Now, know all men by these presents, that I, the said Silas Fosgit, for and in consideration of the sum of five hundred dollars to me in hand paid by William H. Spencer, Esquire, of Genesee, in the county of Ontario, and State of New York, the receipt whereof I do hereby confess and acknowledge, have assigned and set over, and by these presents do grant, bargain, sell, transfer, assign, and set over, to said William H. Spencer, his heirs and assigns, forever, the said three hundred and twenty acres of land; to have and to hold the same, in as full and ample manner as I, the said Silas Fosgit, my heirs or assigns, might or could enjoy the same by virtue of the said warrant or otherwise. And I do, for myself, my heirs and assigns,

hereby authorize and empower the said William H. Spencer, his heirs and assigns, to make location of the said lands under and by virtue of the said warrant, and agreeably to the directions of the said act; and upon location thereof being made as aforesaid, to demand and receive a patent or deed of and for the said lands, in his own name, and for his sole use, benefit, and behoof; to the which end and intent I, the said Silas Fosgit, have and do make, ordain, constitute, and appoint the said William H. Spencer, his heirs and assigns, my true and lawful attorney and attorneys, irrevocable, to ask, require, demand, and receive the said deed or patent of and for the said land, and also to make location thereof, and one or more attorney or attorneys under him to constitute; and whatsoever the said William H. Spencer or his attorney or attorneys shall lawfully do in the premises, I, the said Silas, do hereby allow and confirm.

"In testimony whereof, I have hereunto set my hand and seal, this 28th day of June, 1816.

"SILAS FOSGIT. [SEAL.]

"In presence of—

GEORGE HORNER."

The counsel for the plaintiff objected to the reading of this deed in evidence, for the following reasons, viz:

1. Because said writing is upon its face void, as being in violation of the acts of Congress touching the subject of bounties in lands for military services, and against the public policy of the United States on that subject.

2. Because said writing, on a fair legal construction of its terms, conveys no legal title (and, indeed, no title at all, of any kind) to the lands in question.

3. Because said writing is irrelevant, and incompetent as evidence in this cause.

But the court allowed it to be read, and instructed the jury that it furnished a conclusive defence to the action. Whereupon the plaintiff objected, and brought the case up to this court.

It was argued by *Mr. Thompson* for the plaintiff in error, and by *Mr. Bennett* for the defendants in error.

The counsel for the plaintiff in error contended that the warrant was not assignable by the acts of Congress, under which it was issued; that the deed was not, in point of fact, an assignment of the warrant; that the warrant had been located on the 3d of June, twenty-five days before the paper was executed; that the paper did not amount to a conveyance of land; that it did not purport so to be; and that, if it were intended to be a deed of conveyance, it was void for uncertainty in the designation and description of the land. Upon the point whether the assignment related back to the date of the entry, the counsel for the plaintiff remarked:

But if it had been designed as a deed of conveyance, it did not convey the legal estate to Spencer, for Fosgit. at that time, had no such estate to convey. He could convey no higher estate than he had, and, if he had none in the particular land, he could convey none.

Coke, sec. 446.

Hillard's Ab., 309, sec. 25.

The patent was not issued until October 26, 1816—four months *after* this paper was executed—and, until then, the legal title was in the United States.

Foley *v.* Harrison, 15 How., 447.

Dubois *v.* Newman, 4 Wash. C. C. R., 77.

Wilcox *v.* Jackson, 13 Pet., 516.

Green *v.* Liter, 8 Cranch, 229.

Irvine *v.* Marshall & Barton, 20 How., 558.

If the legal title was in the United States till October 26, 1816, this paper could not have conveyed such a title to Spencer, on the 28th of June before that, as would have availed him then, or his heirs now, in an action of ejectment.

Baynel *v.* Broderick, 13 Pet., 436.

It is of no avail to say that, the moment the entry was made, the title so vested in Fosgit as that he could convey. What title? Not the *legal* title, certainly, for that, upon the authority of the foregoing cases, was in the United States. The most that could be claimed for him would be a mere equity; and it might well be questioned, if it were necessary in this action, whether he had even an equitable title to any particular land.

The language of the act granting these bounty lands is, that the party "shall be entitled to three hundred and twenty acres," &c. This *grants* nothing; no title passes by it. He shall be entitled to it when he shall get a warrant, select the land, have the selection confirmed, and get a patent. *All* this has to be done before he can have any title at all, and, until it is done, the title remains in the Government. If, therefore, he could sell or assign anything before all this was done, it could not be any title *in the land*, whatever else it might be.

If, then, this instrument is a deed of conveyance at all, it conveys at most but an equity, which does not avail the defendants in this action. If that were conceded to be its import, it would amount to nothing more than an executory contract to convey the legal estate, at some future time.

But, again, if it is conceded to be a deed of conveyance, it is a quit-claim merely, by which Fosgit parted only with the equitable estate he possessed at its date. Therefore, the Circuit Court erred in deciding that the subsequent legal estate which Fosgit acquired by the patent had relation back to the date of this instrument, and ripened the equity which Spencer acquired thereby into a legal title. A subsequently-acquired estate does not pass where there are no covenants of title.

Van Renssellear *v.* Kearney, 11 How., 297.

Pelletren *v.* Jackson, 11 Wend., 116.

Jackson *v.* Waldron, 13 Wend., 212.

The United States never parted with the legal title to this land till the patent was issued, October 26, 1816. By that act, the title passed to Fosgit, and consequently must remain in his heirs, unless conveyed away by him or them. It is not pretended that this has been done by the heirs, and Fosgit himself could not have done it, *before he had it*, except by deed with warranty of title. He made no such deed.

It is, however, insisted that it is to be *presumed*, from lapse of time, that the legal estate has been conveyed to Spencer. This abandons the ground that the instrument of June 28, 1816, is a conveyance, and treats it as an executory contract to convey, and yields the point upon which the case was decided in the Circuit Court.

This *presumption*, that a deed was executed by Fosgit to Spencer, does not arise in the case as it now stands. The case turned, in the court below, upon the single question of the validity and effect of the paper of June 28, 1816; and both the instruction of the court and the bill of exceptions show this. It will be an easy matter to show that no such presumption can be indulged in this case, if that question shall ever arise. There is nothing to base it upon. It is not shown that *twenty* years have elapsed since Fosgit was in a condition to execute the agreement to convey.

3 Phill. on Ev., Cow. and Hill's Notes, 505, and cases cited.

Nor that he ever knew that the legal estate had passed to him by the issuance of the patent, or that, after his death, his heirs ever knew it. The disability and ignorance of the party always repel presumptions.

3 Phill. on Ev., C. and H.'s Notes, 497.

3 John. C. R., 129.

Hurst's Lessee *v.* McNeil, 1 Wash. C. C. R., 70.

Henderson *v.* Hamilton, 1 Hall's Rep., 314.

And, besides all this, there is no pretence of twenty years possession, claiming under *adverse* title.

3 Phill. on Ev., C. and H., 496, and authorities cited.

3 Green R., 120.

But, until this question shall properly arise, it will be premature to discuss it.

The counsel for the defendants in error made the following points upon the leading questions decided by this court:

I. By the issuing and location of his warrant for three hundred and twenty acres, Fosgit had title to the land, under the act "granting bounties to the Canadian volunteers;" and his deed to Spencer, who paid him five hundred dollars for it, was valid and effectual, as between the parties, to convey his right and title, even if no patent had ever issued. And the law was so held at the time. (No patent was required under this act; the grant, the warrant, and location, made the title perfect.)

Statutes, vol. 3, p. 256.

Laws of Indiana, 1807, 539, ch. 38.

13 Peters, 498; 2 Wheaton, 196.

3 Ohio R., 107; 16 J. R., 172, 178.

8 J. R., 315, 60, 81; 10 J. R., 456.

3 Stat. at Large, 641.

II. The patent was merely a formal (and unnecessary) evidence of this title, and, when issued, related back to the date of the act, (or the entry upon the land,) and would inure to the benefit of a *bona fide* purchaser.

3 Caines R., 62; 2 J. R., 80.

12 J. R., 140; 3 McLean's R., 109.

10 How., 372, 373; 5 Port., 237, 245.

III. Fosgit and his heirs are *estopped* from disputing Spencer's title.

1. By the deed.

11 How., 322, 323, 325; 6 Ind. R., 128.

7 How., 430; 9 Wend., 229.

1 Barb., 610; 4 Denio, 480.

3 Comstock, 276; 18 How., 82, 85.

The recitals in the deed to Spencer are equivalent to an assertion that Fosgit had title to the three hundred and twenty acres of land which he conveyed to Spencer. By this, Fosgit and his heirs are bound as much as if the deed contained a covenant of warranty.

11 How., 322, 323, 325; 18 How., 82, 85.

A deed, with covenants, would have passed an after-acquired title. This deed is just as effectual, for it estops the plaintiff from asserting an after-acquired title against defendants.

2. By receiving and retaining the five hundred dollars paid by Spencer for the land.

7 Harris, 430; 8 Wend., 480.

2 Hill, 64; 1 Denio, 169.

2 Denio, 139; 3 J. Ch. R., 23.

3. By the irrevocable power of attorney given to Spencer, that he might require and receive any further deed or patent necessary to secure his title for his "sole use and benefit." This patent, when obtained, was to be for Spencer's benefit. Attempting to use it for Fosgit's was a fraud, and the doctrine of *estoppel* applies. The instructions of the court were therefore right.

6 Indiana R., 128, 289; 7 do., 301.

IV. The deed was not in violation of any act of Congress. The act "granting land to the Canadian volunteers" did not forbid a transfer of the warrant or a sale of the land.

Statutes, vol. 3, p. 256.

The acts afterwards passed do not include the Canadian volunteers, but are confined to *enlisted* soldiers. This is conceded as to all acts framed before April 16, 1816. That act could not defeat the vested rights acquired under the act of March 5, 1816.

7 John., 477; 7 Barb., 445.

The act of 16th April, 1816, does not embrace the Canadian volunteers. A special act providing for a particular case is not changed by general words in another act; effect should be given to both. It applies only to soldiers *enlisted* during the late war.

3 Stat. at L., 287, sec. 5.

A prohibition against assigning the *warrant*, or selling the *land*, after the grant was made, would have been void.

It would have improperly interfered with private property and vested rights.

Congress settled this question by the act of 3d March, 1821.

3 Stat. at L., 641; 1 Indiana R., 342.

This act, in effect, declared the opinion of the Attorney General wrong. It confirmed all assignments or sales of the Canadian volunteers. It was a declaratory act of what the law was, and was as valid and effectual as to sales made before or after its passage.

If this act cannot have a retrospective effect, how can the act forbidding the sales or assignments, passed after the grant was made? If both relate back, or if neither relate back, defendants' rights are protected. But the act forbidding a transfer applies only to *enlisted* sailors.

Besides, Fosgit, by his agent, Markle, had located the land. He did not sell the warrant to Spencer, but the "three hundred and twenty *acres of land;*" and there is no act of Congress preventing any man from selling his land which he has selected and located, and a right to take and hold, and which he has

taken possession of. Congress has no power to pass such an act, nor is there any decision to be found that a patent, when afterwards issued, in such a case, would not inure to the benefit of a *bona fide* purchaser.

36 Maine, 448.

Mr. Justice CATRON delivered the opinion of the court.

Silas Fosgit obtained a warrant for three hundred and twenty acres of land as a Canadian volunteer in the war of 1812 with Great Britain. This warrant he caused to be located in the Indiana Territory, June 3, 1816, on the land in dispute. On the twenty-eighth day of that month he conveyed the land to William H. Spencer, who died in possession of the same; it descended to his children and heirs, who continued in possession, and are sued in this action by one of the two heirs of Fosgit, who died about 1823. A patent was issued by the United States to Fosgit, dated in October, 1816. The deed from Fosgit to Spencer was offered in evidence in the Circuit Court, on behalf of the defendants, and was objected to:

1st. Because it is void on its face, being in violation of the acts of Congress touching the subject of bounty land for military services, and against the policy of the United States on that subject.

2d. Because said writing, on a fair legal construction of its terms, conveys no legal title (and indeed no title at all, of any kind) to the lands in question; and

3d. Because said writing is irrelevant, and incompetent as evidence in this cause.

The court overruled the objections, and permitted the defendants to give the writing in evidence, and instructed the jury that it was a complete defence to the action; to all of which the plaintiff excepted.

1. Was the writing void because it was in violation of acts of Congress touching the sale of bounty lands before the patent had issued? This depends on a due construction of the act of 1816. It gave to each colonel nine hundred and sixty acres; to each major eight hundred acres; to each captain six hundred and forty acres; to each subaltern officer four hundred acres;

to each non-commissioned officer, musician, and private, three hundred and twenty acres; and to the medical and other staff in proportion to their pay, compared with that of commissioned officers. Warrants were ordered to be issued by the Secretary at War, subject to be located by the owner, in quarter sections, on lands within the Indiana Territory, surveyed by the United States at the time of the location. And three months additional pay was awarded to this description of troops.

By the acts of 1811, ch. 10, 1812, ch. 14, sec. 12, and that of May 6, 1812, ch. 77, sec. 2, it was provided that each private and non-commissioned officer, who enlisted in the regular service for five years, and was honorably discharged, and obtained a certificate from his commanding officer of his faithful service, should be entitled to a bounty of one hundred and sixty acres of land; and that the heirs of those who died in service should be entitled to the same, to each of whom by name a warrant was to issue. The act of May 6, 1812, provided for surveying, designating, and granting these bounty lands; the fourth section of which declares that no claim for military land bounties shall be assignable or transferable until after the patent has been granted; and that all sales, mortgages, or contracts, made prior to the issuing of the patent, shall be void; nor shall the lands be subject to execution sale till after the patent issues.

It is insisted that this provision accompanies and is part of the act of 1816, and several opinions of Mr. Attorney General Wirt are relied on to sustain the position that the acts granting bounty lands are *in pari materia*, and must be construed alike. He gave an opinion in 1819, (2 L. L., and Opinion 6,) that a land warrant issued to a Canadian volunteer was not assignable on its face, or in its nature, and consequently that the patent must issue in the name of the soldier. But he did not decide, nor was he called on to do so, that, after the warrant had been located and merged in the entry, that the equitable title and right of possession to the land could not be transferred by contract.

The act of 1816 involves considerations, different from the previous provisions, for the protection of the enlisted common soldier. A class of active, efficient, American citizens, who

had emigrated to Canada, were compelled to leave there on the war of 1812 breaking out; they returned to their own country, and went into its service; and when the war was ended, both officers and soldiers were compensated in lands and money for this extraordinary service. The act of Congress orders the warrants to be delivered to the respective owners, to be located by them; whereas the common soldier, provided for in the acts of 1811 and 1812, did not receive his warrant, but the Government bound itself to locate the land at its own expense. Congress may have thought it not at all necessary to guard the Canadian volunteers against being overreached by speculators, and deprived of their bounty lands. This, however, is mere conjecture. The act of March 5, 1816, has no reference to, or necessary connection with, any other bounty-land act; it is plain on its face, and single in its purpose. And, then, what is the rule? One that cannot be departed from without assuming on part of the judicial tribunals legislative power. It is, that where the Legislature makes a plain provision, without making any exception, the courts can make none. McIver *v.* Reagain, 2 Wheaton, 25; Patton *v.* McClure, Martin and Yerger's Ten. R., 345, and cases cited; Cocke & Jack *v.* McGinnis, ib., 365; Smith *v.* Troup, 20 Johns., 33. We are therefore of the opinion that Fosgit could sell and convey the land to Spencer after the entry was made.

2. The next ground of objection to the deed is, that it conveys no title when fairly construed. It has a double aspect, obviously, for the reason that the parties to it did not know, at the time it was executed, whether or not the land had been located by Fosgit's agent. The issuing of the warrant is recited in the deed, and the quantity of land it calls for; and then the grantor says: "For the consideration of five hundred dollars, I have assigned and set over, and by these presents do grant, bargain, sell, transfer, assign, and set over, to said William H. Spencer, his heirs and assigns, forever, the said three hundred and twenty acres of land; to have and to hold the same in as full and ample a manner as I, the said Silas Fosgit, my heirs or assigns, might or could enjoy the same, by virtue of the said land warrant or otherwise."

Then follows an irrevocable power from Fosgit to Spencer, his heirs or assigns, to locate the warrant, obtain a patent, &c.

The warrant having been located on land already surveyed, it could easily be identified. The description is to the same effect as if the deed had said, I convey the land covered by my warrant of three hundred and twenty acres.

We are therefore of the opinion that the deed was a valid conveyance of Fosgit's interest in the land sued for at the time the deed was executed.

The third exception to the deed is covered by the foregoing answers.

3. The charge of the court to the jury held, as a matter of law, that the deed was a complete defence to the action, and that the patent issued to Fosgit *related* back to the location of the warrant, and constituted part of Spencer's title.

This consideration involves a question of great practical importance to States and Territories where entries exist on which patents have not issued, as sales of such titles are usual and numerous. The incipient state of such titles has not presented any material inconvenience, as it is usually provided by State laws that suits in ejectment may be prosecuted or defended by virtue of the title.

In Indiana, it is provided by statute that "every certificate of purchase at a land office of the United States shall be evidence of legal title to the land therein described." That is to say, for the purposes of alienation and transfer, and for the purposes of litigating rights of property and possession, a certificate of purchase shall be treated as a legal title; and to this effect it is competent evidence in an action of ejectment. Smith *v.* Mosier, 5 Black. R., 51.

After the patent issued, this title was exclusively subject to State regulations, in so far as remedies were provided for its enforcement or protection; and therefore no objection can be made to any State law that does not impugn the title acquired from the United States.

Whether the patent related back in support of Spencer's deed is not a new question in this court. It arose in the case of Landes *v.* Brant, (10 How., 372,) where it was held that a

patent issued in 1845 "to Claymorgan and his heirs," by which the heirs took the legal title, related back and inured to the protection of a title founded on a sheriff's sale of Claymorgan's equitable interest, made in 1808. There, as here, the contest was between the grantee's heirs and the purchaser of the incipient title. The court holding, that when the patent issued, it related to the inception of title, and must be taken, as between the parties to the suit, to bear date with the commencement of title.

It is also the settled doctrine of this court, that an entry in a United States land office on which a patent issues, (no matter how long after the entry is made,) shall relate to the entry, and take date with it. (Ross *v.* Barland, 1 Peters, 655.) The *fiction* of relation is, that an intermediate *bona fide* alienee of the incipient interest may claim that the patent inures to his benefit by an *ex post facto* operation, and receive the same protection at law that a court of equity could afford him.

4. We hold that, on another ground, the instruction was clearly proper.

Here, the after-acquired naked fee is set up to defeat Fosgit's deed, made forty years ago in good faith, for a full consideration, and to oust the possession of Spencer's heirs, holding under that deed. The rule has always been, that where there was a warranty or covenants for title, that would cause circuity of action if the vendee was evicted by the vendor, then the deed worked an estoppel. But the rule has been carried further, and is now established, that where the grantor sets forth on the face of his conveyance, by averment or recital, that he is seized of a particular estate in the premises, and which estate the deed purports to convey, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was seized and possessed at the time he made the conveyance. The estoppel works upon the *estate*, and binds an after-acquired title, as between parties and privies. Van Rensselaer *v.* Kearney, 11 How., 325; Landes *v.* Brant, 10 How., 374.

It follows that the heir of Fosgit is estopped by her father's deed from disturbing the title or possession of Spencer's heirs.

It is ordered that the judgment of the Circuit Court be affirmed.

GEORGE SMITH, APPELLANT, *v.* JOHN J. ORTON.

After various proceedings in the mode of deeds, bonds, &c., the legal title to a piece of property became vested in one person, and the equitable title in another.

The holder of the equitable title has a right to file a bill against the holder of the legal title, to compel him to convey such legal title upon clearing off the encumbrances.

This right is not destroyed by the circumstance that the holder of the legal title had succeeded in a suit against another holder of the legal title, to which suit the holder of the equitable title was not a party.

The fact that neither party is in actual possession of the premises is of no consequence, because the controversy is with respect to the legal title.

THIS was an appeal from the District Court of the United States for the district of Wisconsin.

It was before this court at a prior term, and is reported in 18 Howard, 263. It is proper to remark that the bill, in this case, set forth that the controversy in the State court, which was referred to in 18 Howard, had become terminated.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Doolittle* for the appellant, upon which side there was also a brief by *Mr. Brown*, and by *Mr. Gillet* for the appellee, upon which side there was also a brief by *Mr. Mariner.*

Mr. Justice CATRON delivered the opinion of the court.

The bill was demurred to, and the demurrer sustained below, and the facts appear only on the face of the bill. Davis held the legal title to the two lots (Nos. 7 and 8) in dispute, lying in or near the city of Milwaukee, in the State of Wisconsin. Davis held the legal title as trustee for Otis Hubbard. In June, 1851, Hubbard, for a good and valuable consideration, conveyed the premises to Joachim Gruenhagin, by a deed in fee, by which the grantee became seized of the entire interest of Hubbard.