Having refused to do this, they were liable to him for the fair value of the bonds at the time of the demand.

Mrs. Kitchen was not a necessary party to the suit. The bonds were never hers in law. By the laws of Arkansas, a husband cannot legally make a gift to his wife during the marriage. He could not do so at the common law, and the statute of Arkansas which enables a married woman to take and hold property in her own right, expressly provides that no conveyance from a man to his wife, directly or indirectly, shall entitle her to any benefits or privileges of the act.*

Perhaps he might have made an equitable gift for her benefit. But in this case, the husband had not parted with the legal title to the bonds, and had a right to call any person to account who unlawfully converted them.

JUDGMENT REVERSED, with directions to award a *venire de novo*.

Mr. Justice STRONG stated that he was unable to construe the contract upon which the plaintiff relied, as it was construed by a majority of the court, and for that reason, among others, he dissented from the judgment.

DAVENPORT *v.* LAMB ET AL.

1. The act of Congress of 1836 authorizing the issue of patents for land in the name of deceased parties, who in their lifetime became entitled to such patents, applies to patents under the act of Congress of September 27th, 1850, called the Donation Act of Oregon; and such patents enure to the parties designated in the Donation Act, and not solely to the parties designated in the act of 1836.
2. The Donation Act declared that in case husband or wife should die before a patent issues, the survivor and children, or heirs, should be entitled to the share or interest of the deceased in equal proportions, except where the deceased should otherwise dispose of the property by will; *held* that each of the children, and the surviving husband or wife, took

* Digest of Statutes of Arkansas, p. 765, tit. Married Women.

equal shares, and that the property of the deceased was not to be divided so as to give one-half to the surviving husband or wife, and the other half to the children or heirs of the deceased.

3. A covenant to "warrant and defend" property for which a quit-claim deed is executed "against all claims, the United States excepted," only applies to claims from other sources than the United States. It does not cover any interest of the United States, nor preclude its acquisition by the covenantors or their heirs for themselves.

4. A covenant that if the grantors "obtain the fee simple" to property conveyed "from the government of the United States they will convey the same" to the grantee, his heirs, or assigns, "by deed of general warranty" only takes effect in case the grantors acquire the title directly from the United States, and does not cover the acquisition of the title of the United States from any intermediate party.

APPEAL from the Circuit Court for the District of Oregon.

Emma Lamb and Ida Squires, asserting themselves as granddaughters of one Daniel Lownsdale, to own each an undivided one-tenth of "the south half of Block G" in Portland, Oregon, filed a bill against their co-heirs and persons claiming under them for a partition; one Davenport, who set up a title adverse to them all, being made a party defendant, and the real matter in issue being the validity of the title set up by him.

The case was thus:

On the 25th of June, 1850, Daniel Lownsdale, Stephen Coffin, and W. W. Chapman, were the owners of a land claim, embracing a portion of the tract upon which the city of Portand is situated. The legal title to the property was then in the United States, but the parties, asserting their claim to the possession under the law of the provisional government of the Territory, expected that legislation would be taken at an early day by Congress for the transfer of the title to them, or some one of them. This expectation of legislation on their behalf was common with all occupants of land in Oregon, whose rights were merely possessory, the fee of the entire land in the Territory being in the United States. With this expectation these claimants, on the day named, executed a deed to Chapman, one of their own number, of numerous lots and blocks in Portland, into

which a portion of their claim had been divided, including among them the already mentioned south half of block G, the subject of the bill. The deed purported for the consideration of $60,000, to "release, confirm, and quit-claim" to Chapman, his heirs and assigns, the described property; and contained two covenants on the part of the grantors—one, to warrant and defend the property to their grantee, his heirs and assigns "*against all claims except the United States;*" and the other, "*that if they obtain the fee-simple to said property, from the government of the United States, they will convey the same*" to the grantee, his heirs or assigns, "*by deed of general warranty.*" The interest thus acquired by Chapman in the south half of block G, was afterwards assigned by various mesne conveyances to the defendant, Davenport.

At the time this deed was executed Lownsdale was a widower having three children, named James, Mary, and Sarah.* At the same time there lived in the same town a widow named Nancy Gillihan, having two children, called William and Isabella. In July, 1850, the widower and the widow intermarried, and they had, as the issue of this marriage, two children, named Millard and Ruth.

On the 27th of September, 1850, Congress passed the act, which is generally known in Oregon as the Donation Act, and under which the title to a large portion of the real property of the State is held. It is entitled "An act to create the office of surveyor-general of the public lands of Oregon, and to provide for the survey and to make donations to the settlers of the said public lands."†

By the fourth section of this act a grant of land was made to every white settler, or occupant of the public lands in Oregon, above the age of eighteen years, who was a citizen of the United States, or had made a declaration according to law of his intention to become a citizen, or should make such declaration on or before the first day of December, 1851, and who was at the time a resident of the Territory, or might become a resident on or before the 1st of December,

* Mother of the two persons complainants in the bill.

† 9 Stat. at Large, 496.

1850, and who should reside upon and cultivate the land for four consecutive years, and otherwise conform to the provisions of the act. The grant was of 320 acres of land, if the settler or occupant was a single man, but if a married man, or if he should become married within a year from the first of December, 1850, *then the grant was of* 640 *acres, one-half to himself and the other half to his wife, to be held by her in her own right.*

By the same section the surveyor-general was *required to designate of the land thus granted the part enuring to the husband, and the part enuring to the wife, and to enter the same on the records of his office;* and it was provided that in all cases where such married persons complied with the provisions of the act so as to entitle them to the grant, whether under the previous provisional government or afterwards, *and either should die before the issue of a patent,* "*the survivor and children, or heirs, of the deceased, shall be entitled to the share or interest of the deceased in equal proportions,*" except when the deceased should otherwise dispose of the same by will.

Under this act Lownsdale was a donation claimant, and dated the commencement of his settlement on the 22d of September, 1848. This settlement became complete on the 22d of September, 1852, at the expiration of the four years prescribed. The proof of the commencement of the settlement and of the continued residence and cultivation required by the act was regularly made; and of the land the east half was assigned to Lownsdale and the west half to his wife Nancy. Within the portion thus assigned to the wife the premises in controversy were included. The tract thus claimed and settled upon embraced a fraction over 178 acres, and for it, in October, 1860, a patent certificate was given to Lownsdale and wife, and in June, 1865, a patent of the United States was issued to them, giving and granting in terms to Daniel Lownsdale the east half of the property, and to his wife, Nancy Lownsdale, the west half.

Nancy died in April, 1854, before the issue of the patent, leaving the four children already mentioned—two, William and Isabella Gillihan, by her first husband, and two, Millard

and Ruth Lownsdale, by her second. These four children and her surviving husband Daniel became entitled to her interest in the tract set apart to her; though in what shares the husband took as respected the children, whether one-half or only one-fifth, was one of the questions in the case.

In January, 1860, Daniel purchased the interest of Isabella Gillihan. He himself died in May, 1862, intestate, leaving as his heirs the four children already named, that is to say, James and Mary, by his first wife, and Millard and Ruth by his second wife; and also two children (the complainants in this case) of his deceased daughter Sarah, by his first wife. The four children living, each inherited one undivided fifth of their father's estate, and the two children of the deceased daughter, each one undivided tenth.

In 1864, William Gillihan, one of the children of Nancy, brought suit in one of the courts of the State of Oregon for partition of the tract set apart to Nancy as above-mentioned—called the Nancy Lownsdale tract—making defendants the heirs of both Daniel and Nancy, and numerous other persons purchasers and claimants under Daniel. By the decree in that case it was among other things adjudged that Daniel was the owner of an undivided two-fifths of the entire Nancy Lownsdale tract, and that the said William Gillihan and Ruth and Millard Lownsdale, as heirs of Nancy Lownsdale, deceased, were each entitled to an undivided one-fifth of the whole of said tract, and certain portions of said tract were decreed and set apart to the said William, Ruth, and Millard, to be held by them in severalty, and the residue of said tract was set apart and allotted to the heirs, vendees, or claimants, under Daniel, according to their respective interests, without however determining the extent of the respective rights and interests of the heirs, and vendees or claimants between themselves, and by reason of the said partition not being equal, owelty was allowed to William, Millard, and Ruth. The portion set apart to the heirs, and vendees or claimants, under Daniel, included the south half of block G, the premises in controversy.

Two granddaughters of Lownsdale, through his daughter

Sarah, now deceased, assumed accordingly that through their mother, this Sarah, they owned, together, her undivided one-fifth of the south half of the block G; each of them of course an undivided one-tenth.

Davenport denied such their ownership, asserting that he himself owned the whole of the south half of the block; or, if not the whole, then five-eighths; and, if not five-eighths, then one-half; either one of which latter interests in himself being inconsistent, like the first, with that of one-fifth in the said two granddaughters.

I. Davenport founded his ownership apparently of the *whole* of the south half in part on the first of the covenants (quoted *supra*, p. 420) in the deed of June 25th, 1850, to Chapman, through whom he claimed; and as much or more on a matter alleged by him, to wit, that in 1860 Lownsdale offered to sell him a portion of another block in Portland (block 75), and that he, Davenport, knowing that a difficulty was likely to occur about that and other property, submitted to Lownsdale a list of all the property he believed he then rightly held, and among the rest the south half of block G, and pointed out such as he thought the title of might be defective through him, and that Lownsdale agreed verbally for $2000 to give a confirmatory title to all the property thus submitted to him, "that HE thought might require it." Davenport accordingly paid the $2000, and Lownsdale gave to him a deed for half of block 75, and also a confirmatory deed for certain other lots, but not for the south half of block G; that lot not being included among those described in the confirmatory deed; and a lot therefore to which Lownsdale, as Davenport considered, was to be held to have declared that he had no title in himself.

II. But if this was not all so, and if what was thus alleged in the nature of an estoppel *in pais* did not exist or operate, Davenport conceived that still he had five-eighths of the property; for that (explaining), he had got—

First. Four-eighths, the *true* share (as he asserted) of Daniel as survivor of his wife, inasmuch as under the statute which gave the wife's property to her surviving husband

and her children "in *equal* proportions," Daniel had got one-half or four-eighths, an equal share with the children, and not one-fifth, the same share as if he were but one of five children, regarded as a class; and that this one-half passed under the second of the two covenants of the deed of June 25th, 1850.

Second. One-eighth,—the eighth, to wit, that came from Isabella Gillihan; for, that this had been truly and literally "obtained" by Daniel "from the government of the United States," though indirectly, and came under the covenant; the fact, as he assumed, that it came through Isabella, and not directly, not affecting Lownsdale's obligation or that of his heirs to convey.

III. The final and least favorable to himself of Davenport's positions was, that if this second fraction of title—the one-eighth—Isabella's share—did not pass, still that he, Davenport, had one-half; the share of Daniel as got by survivorship, and under the statute, as already stated, from his deceased wife Nancy.

In this state of claim respectively it was that the bill in this case was filed; the complainants setting up a claim for their one-fifth, and Davenport setting up his title; the matter already mentioned as alleged by way of estoppel *in pais*, though set out and well colored in his answer to the bill, not being proved by writing or in some essential features otherwise than by his own testimony.

The court below held that Daniel Lownsdale became the owner in fee of two-fifths (undivided) of the west half of the Lownsdale donation claim (being the part allotted to Nancy), including the south half of block G; one-fifth by donation from the United States upon the death of his wife Nancy, before the issue of the patent, and the other one-fifth by purchase from Isabella Gillihan; and that the title to the one-fifth of the south half of block G acquired from the United States enured to Davenport, by virtue of the covenant in the deed of June 25th, 1850, to Chapman, Davenport deriving his interest under Chapman; and that the remaining four-fifths in the south half of that block were owned by the four

children of Lownsdale living, and the two children of his deceased daughter Sarah; and the court decreed a partition accordingly.

From this decree Davenport alone appealed to this court.

Mr. W. W. Chapman, for the appellant:

1. The decree is erroneous, in not giving to Davenport the whole of the property in controversy, instead of one-fifth of it.

2. If not thus erroneous, it is erroneous in not giving five-eighths.

3. And if not erroneous in either respect, it is erroneous in not giving to him one-half instead of one-fifth.

1. *Davenport is entitled to the whole property.* In making the decree below the first clause in the covenant is unnoticed, and the second (including the release obtained from Isabella) is held to operate only upon the same proportional interest in the block which Lownsdale obtained in the tract of 178 acres as survivor of his wife—determined by the court to be only one-fifth of it—notwithstanding the original decree in partition had allotted to the vendees and heirs of Lownsdale the entire block.

The first covenant protects the covenantee and assigns, in the possession against Lownsdale and all other persons, and against any title ingrafted upon it through his instrumentality. He filed his notification, including it, and dating his settlement and residence from the 22d September, 1848, to and including the date of the covenant. This appropriated the possession and the block to his own use, against which he had covenanted to warrant and defend. He was not obliged to do this. He could as easily have omitted it as have embraced it, and he knew when he did so that his wife would thereby become entitled to an interest in her *own right*, and deprive the covenantee of the possession and title, unless by the happening of a contingency provided for by the law (then unlikely to occur), by which the title and possession might revest in him. In the face of this covenant he took this risk. In consequence of the peculiar form of the

covenant, the covenantee might not have been able to maintain an action at law, and because the subject was, for the time, supposed to be out of reach of the arm of a court of equity. But the contingency did happen. The same possession, with a title ingrafted upon it, through his instrumentality, revested in him, and it is now within the reach of a court of equity, perfect and complete, as contemplated by the parties in the formation of the second covenant, and therefore his warranty should estop him and his heirs from asserting a right to the possession thus ripened into a title through his act.

In addition to this, the agreement between Davenport and Lownsdale operated as an estoppel *in pais*. The south one-half of block G was not put in the confirmatory deed only because Lownsdale declared he had no title to it. Having received the $2000 for confirming to Davenport all that he did claim, his descendants ought not now to be allowed to gainsay his declaration.

2. *If not entitled to all, Davenport is entitled to five-eighths.* The Donation Act gives the property to the husband, as one party, and to the children as the other, in equal proportions. Each thus takes one-half. This seems a more natural construction than to reduce the husband to the grade of a child. If this is so, Davenport has certainly one-half, equal to four-eighths.

But he has another fifth through Isabella under the second covenant.

Mr. G. H. Williams, *contra*, argued that the covenants to Chapman were joint and not several, and that being in a deed where he was himself grantor were void; that the heirs of Lownsdale were not named in it, and that it did not bind them; that the covenantors had not obtained the fee from the United States; but that it was granted to the heirs of Nancy Lownsdale, and that if the husband's share, as survivor of his wife, was within the covenant, the shares of the children assuredly were not; that these shares under the Oregon statute were four-fifths; the husband being only entitled to an equal proportion, or one-fifth, with them.

Opinion of the court.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

Neither of the patentees were living at the time the patent for the donation claim in this case was issued, Lownsdale having died in May, 1862, and Nancy having died in April, 1854. At common law the patent would have been inoperative and void from this circumstance.* By that law the grant to a deceased party is as ineffectual to pass the title of the grantor as if made to a fictitious person; and the rule would apply equally to grants of the government as to grants of individuals, but for the act of Congress of May 20th, 1836,† which obviates this result. That act declares: "that in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who has died, or who shall hereafter die, before the date of such patent, the title to the land designated therein, shall enure to, and become vested in, the heirs, devisees, and assigns of such deceased patentee, as if the patent had issued to the deceased person during life." This act makes the title enure in a manner different from that provided by the Donation Act upon the death of either owner before the issue of the patent, for we do not understand that the survivor of the deceased husband or wife was at the time his or her heir by any law of Oregon. If the act of 1836 can be considered as applying to patents issued under the Donation Act, where the party originally entitled to the patent has died before the patent issues—and on this point no question is made by either party—then its language must be construed in connection with, and be limited by, the provisions of the Donation Act, giving the property of a deceased husband or wife to the survivor and children, or heirs of the deceased, unless otherwise disposed of by will; and in that case the patent here must be held to enure in favor of these parties instead of the heirs solely.

* Galt *v.* Galloway, 4 Peters, 345; McDonald *v.* Smalley, 6 Id. 261; Galloway *v.* Finley, 12 Id. 298; McCracken's Heirs *v.* Beall and Bowman, 3 A. K. Marshall, 210; Thomas *v.* Wyatt, 25 Missouri, 26.

† 5 Stat. at Large, 31.

The four children of Nancy Lownsdale, the two by her first husband, Gillihan, and the two by her last husband, survived her, and these, with her surviving husband, became entitled, on her death, to her property in equal proportions, she having died intestate. This is, indeed, the express language of the statute, and in consequence each of the five persons named took an undivided fifth interest in the property. The learned counsel of the appellant, however, contends that the statute should be construed as dividing the property equally between the survivor on the one part, and the children or heirs upon the other. But the construction we give is the more natural one, and is in accordance with the uniform ruling of the courts, State and Federal, in Oregon.

In January, 1860, Lownsdale purchased the interest in this property of Isabella Gillihan (then Isabella Potter, she having intermarried with William Potter), and thus became owner of two undivided fifths. On his death these two undivided fifths passed to his heirs, he having died intestate, unless they were controlled by his covenant in the deed to Chapman.

In 1864 a suit was brought in a Circuit Court of the State of Oregon, by one of the children of Nancy by her first husband, for partition of the property which was assigned to her of the donation claim—the Nancy Lownsdale tract as it is termed. In that suit the heirs of both Daniel and Nancy, and numerous other persons, purchasers and occupants under Daniel and the appellant, Davenport, were made parties. The suit resulted in a decree setting off, so far as practicable, the two undivided interests of Daniel to his heirs and vendees in lots and blocks as they were claimed, without any determination, however, of the extent of the respective rights and interests of these heirs and vendees between themselves; and in setting apart the remaining undivided three-fifths in severalty to the children of Nancy who had retained their interests, owelty being allowed and paid for the inequalities existing in the partition. The tract set apart for the two-fifths of Lownsdale included the prem-

ises in controversy. The heirs of Lownsdale were his two children living by his first wife, two children of a deceased daughter by his first wife, named Emma S. Lamb and Ida Squires, and his two children by his second wife. Against these heirs the only claimant of the premises in controversy was the appellant, Davenport, who derived his interest by various mesne conveyances from Chapman.

The present suit is brought by the children of the deceased daughter of Lownsdale by his first wife, they having inherited her interest.

For its determination it is necessary to consider the effect upon the interest claimed by Davenport of the covenants contained in the deed of Lownsdale, Coffin, and Chapman, executed to Chapman on the 25th of June, 1850.

So far as that instrument purports to be a conveyance from Chapman to himself, it is of course ineffectual for any purpose. Its execution by him left his interest precisely as it existed previously. But this superfluous insertion of his name in the deed as a grantor, does not impair the efficacy of the instrument as a conveyance to him from Lownsdale and Coffin, nor their covenants with him and his heirs and assigns. These covenants must be treated as the joint contracts of the two actual grantors.

Whether these covenants bind the heirs of the covenantors, they not being named, may perhaps admit of question.* The court below held that to the extent that the covenants affected the land, the heirs were bound by them, and as they have not appealed from this decision, it is unnecessary for the disposition of the case that the question should be determined by us.

What, then, is the effect and operation of the covenants? The first covenant, as already stated, is "*to warrant and defend*" the property released to Chapman, his heirs and assigns "*against all claims, the United States excepted.*" At the time this covenant was executed the title to the property was in the United States, and this fact was well known to

* Rawle on Covenants of Title, 579; Lloyd *v.* Thursby, 9 Modern, 463; Morse *v.* Aldrich, 24 Pickering, 450.

the parties. Land was then occupied by settlers throughout the Territory of Oregon, under laws of the provisional government, which were generally respected and enforced. These laws could of course only confer a possessory right, and no one pretended to acquire any greater interest under them. It was against the assertion of claims from this source and any other source, except the United States, the owner of the fee, that the covenant in question was directed. By it the grantors were precluded from asserting any interest in the premises against the grantee and his heirs and assigns, unless such interest were acquired from the United States. The warranty does not cover that interest, and did not preclude its acquisition by the covenantors or either of them, or by their heirs, or its enjoyment by them or either of them when acquired.

The second covenant is that if the grantors "*obtain the fee simple*" to the property "*from the government of the United States, they will convey the same*" to the grantee, his heirs or assigns, "*by deed of general warranty.*" This covenant is special and limited. It takes effect only in case the grantors, or their heirs (if the covenant binds the heirs), acquire the title directly from the United States; it does not cover the acquisition of the title of the United States from any intermediate party, and this was evidently the intention of the parties. They expected to obtain by the legislation of Congress the title of the United States to lands in their possession, and in case their expectations in this respect were realized, they contracted to convey the same to their grantee, or to his heirs or assigns. They could not have intended, in case their expectations were disappointed, and the title passed from the United States to other parties, to render it impossible for them to acquire that title in all future time from those parties without being under obligation to instantly transfer it to the grantee or his successors in interest.* And such would be the effect of their covenant if it were given an operation beyond the precise limitation specified.

* Comstock *v.* Smith, 13 Pickering, 116.

As already stated, Lownsdale took under the Donation Act, as the survivor of his deceased wife, one undivided fifth interest in her property, and he subsequently purchased a similar interest from Isabella Gillihan, a daughter of his wife by her first husband. The interest which he thus purchased is not covered by the covenant. He did not acquire it directly from the United States. Whether the interest which he received as survivor of his deceased wife, Nancy Lownsdale, is within the covenant depends upon the question whether he took that interest by descent, as heir of Nancy, or directly as donee from the United States. The court below held that he took as donee, and not as heir, and that in consequence the interest was within the operation of the covenant, and Davenport, his assignee, was entitled to have such interest transferred to him, and that interest was accordingly set apart in severalty to him.

Whether this ruling is correct it is unnecessary for us to determine. The appellant does not of course controvert it, and the heirs of Lownsdale, who alone could in this case question its correctness, have not appealed from the decree of the court below.

The parol evidence offered of an alleged contract, in 1860, on the part of Lownsdale with Davenport, to confirm the title of the latter to the whole of block G, and of Lownsdale's declarations at that time as to the title, is entirely insufficient to create any estoppel *in pais* against the assertion of the interest claimed by his heirs to portions of that property. The alleged contract of Lownsdale was simply to confirm the title of Davenport to all lands to which he, Lownsdale, deemed the title doubtful; and the ground of complaint appears to be that he did not consider the title of Davenport to block G as doubtful, and so declared, and therefore did not include that block in the property covered by his confirmatory deed. The declarations are at best but the expression of his opinion in relation to a subject upon which Davenport was equally well informed, or possessed equally with him the means of information. If the evidence of such declarations could be received years after the death of the

party who is alleged to have made them, to control the legal title which has descended to his heirs, a new source of insecurity in the tenure of property would be created, and heirs would often hold their possessions upon the uncertain testimony of interested parties, which it would be difficult and sometimes impossible to meet or explain after an interval of years, instead of holding them upon the sure foundations of the records of the country.*

The decree of the court below must be

AFFIRMED.

WEST TENNESSEE BANK *v.* CITIZENS' BANK.

A case is not within the 25th section of the Judiciary Act when the judgment below is founded on a matter which is not within the section, even though it be founded also, for an independent base, on other matter which it is asserted is within it.

MOTION, by *Mr. Edward Janin*, to dismiss, for want of jurisdiction, a writ of error to the Supreme Court of Louisiana, in a case wherein the Bank of West Tennessee was the plaintiff, and the Citizens' Bank of Louisiana, defendant; the case having been brought into this court by a writ of error, issued under the 25th section of the Judiciary Act.

Mr. T. J. Durant opposed the motion.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

The plaintiff in error brought suit against the defendant in error, in the Fifth District Court of New Orleans, to recover the sum of $93,380.97, for moneys deposited by the plaintiff with the defendant, and moneys collected by the latter for the former. All the so-called moneys received by

* Biddle Boggs *v.* The Merced Mining Co., 14 California, 367.