

ments were well known, and that the third, so far as its contents are identical with those on the stub, is not new. *The question turns on that feature of the third element, whereby a removable part of the stamp proper, the contents of which identify the stamp with the stub after the stamp has been attached, can be so removed as to retain its own integrity, but mutilates and thereby cancels the stamp by its removal.*

"This is what we ascertain to be the precise idea embodied in the invention described and claimed in the patent, and which, although we find to be new in the sense that it had not been anticipated by any previous invention, of which it could therefore be declared to be an infringement, yet is not such an improvement as is entitled to be regarded in the sense of the patent laws as an invention." (The italics are ours).

If the supreme court meant to say by the last words above quoted and put by us in italics that as the subject of this patent was, in the last analysis, merely a scheme to prevent fraud\* and not "*an art, machine, manufacture, or composition of matter, or any new and useful improvement thereof*" within the meaning of Section 4886 R. S. U. S., then we could understand the decision as not necessarily inconsistent with the statute or with the spirit of our patent laws; but the decision does not say this, and it is certainly used as an authority for the position that a thing may be "*an art, machine, manufacture, or composition of matter, or any improvement thereof*" within the statute, and may be new and useful, and yet not be "*in the sense of the patent laws an invention.*" To give such an effect to that decision is to stamp it as a piece of judicial legislation. We have shown in the last quotation from Mr. Justice Matthews' opinion that the supreme court found in the subject of the patent novelty. In the very next clause of that opinion, we see that the court finds that the subject of the patent had the other requirement of the statute—utility—the court stating:

"In reaching this conclusion" (that it was new yet could not "be regarded in the sense of the patent laws as an invention,") "we have allowed its due weight to the presumption in favor of the validity of the patent arising from the action

\*In *Kneass v. Schuylkill Bank*, 4 Wash., 9; Fed. Cas. No. 7,875, Mr. Justice Washington (in 1820) held that the patent there under consideration, which was for copper-plate, or copper-plate and type-printing on banknotes, for the purpose of producing a particular effect, viz., security against counterfeits, was clearly within the act of congress and patentable. Speaking on this question, Mr. Justice Washington says:

"Is this the discovery of an art, machine, etc., or of an improvement in any art, machine, etc. If it be either, then it is the subject of patent by the express words of the act of congress"

This case is referred to in *Curtis on Patents*, 4th ed., § 10, as one of the leading cases on this question.

of the patent office in granting it; and we have not been unmindful of the fact, abundantly proven, and indeed not denied, that the adoption of the present tax-paid stamp, in lieu of that previously in use by the internal revenue bureau, has proven its superior utility in the prevention of frauds upon the revenue."

After stating more fully facts which show the great utility of the subject of the patent, the court proceeds:

"Such an increased utility, beyond what had been attained by devices previously in use, in cases of doubt is usually regarded as determining the question of invention. But in the present case we are not able to give it such effect.

"No change, it will be observed, was made in the character of the stamp, so far as the relation between the stamp proper and the stub is concerned, nor in the identifying marks which constituted the written and printed matter upon both; and the expedient of using a paper backing which prevented the adhesion to the package of the part intended to be detached and removed, it is manifest, would be adopted by any skilled person having that end in view." (The italics are ours).

How is this manifest? Is it any more manifest than that, while a strand of wire will effect an enclosure and resist pressure to the extent of its strength, a barb put on such strand of wire, by pricking the animal likely to cause the pressure, will repel it and thus remove that pressure and its cause, which otherwise might be exerted and be too great for the wire to resist!\* Yet in the latter case the supreme court recognized patentable invention in the barbed wire.

But if the novelty and utility be admitted, and it be further admitted that the thing is "*an art, machine, manufacture, or composition of matter, or any improvement thereof,*" by what warrant does the court say that that which admittedly was not done before and is useful was manifest? Does there not exist in these two facts—novelty and utility—the very strongest evidence of which the case in its nature is susceptible, that it was not manifest, since it was not done before, and its utility and general use proves it to have supplied a long-felt want?

Could it not be said with truth of the subject of such a patent, in the words of Milton, *supra*:

"The invention all admired, and each, how he To be the inventor miss'd; so easy it seem'd Once found."

Is not the thing done by the patentee in *Hollister vs. Benedict*, *supra*, judged by its results, exactly the thing, of all things, that does prove the patentee to have been an inventor within the meaning of the statute? Unfortunately in these cases the courts do not consider

\*The Barbed Wire Patent, 143 U. S., 275

the condition of things existing *a priori* but only *a posteriori* and then, because, *a posteriori*, the solution in the shape of a new and useful article is simple, *ergo*, it was manifest and, therefore, not patentable. But looked at from the *a priori* point of view it would be presented in this light: A difficulty; a want; a problem, whatever we choose to call it. *Presto*, the removal of that difficulty; that want supplied; that problem solved. If the solution takes the form of some complicated machine or some intricate process, then it is an invention, according to the test in *Hollister vs. Benedict*. If it be so simple as to create surprise that it was not thought of before, then "*it is manifest that it would be adopted by any skilled person having that end in view.*" But is this the law as expressed by the statute? Is this the true spirit of our patent laws? If so, we misunderstand them and misunderstand Chief Justice Marshall\* in the interpretation of those laws. In all such cases the patentee who has complied with the statute and disclosed by his patent a simple thing, which is admittedly new and useful, is to find in the statute a trick to obtain his disclosure, and will be told when he attempts to assert his rights: "Rights! you have no rights. True, it is new; true, it is useful; true, it was not done before; true, it has gone into general use since the patent; but now that we see it we tell you, *a posteriori*, what we could not have told you *a priori*—it is obvious; any one who had a mind to could have done it; it is not a patentable invention!" In vain will such person reply: "Not a patentable invention? Where do you find such a test for a patentable invention in the statute? The statute says that if what I have done is new and useful and comes within any of the comprehensive classes named in the statute, such as machines, manufactures, or compositions of matter, it is patentable; nay if it be but '*any*' improvement in any machine, manufacture, or composition of matter, if I comply with the conditions precedent, I shall have a patent. On the faith of the statute and on the liberal interpretation of the patent law as expounded by one of the greatest jurists this country has ever produced, I have disclosed that invention which all admire and which the pirates have proved their admiration for by copying and which you now say is obvious. All I ask is that faith be kept with me; I have placed my faith in my government,

\*Grant vs. Raymond, 6 Peters, 218.

†Judge Coxe, holding United States circuit court for the Southern district of New York, in the case of *Mack v. Spencer Optical Mfg. Co.*, 52 Fed. Rep., 819, in sustaining the patent for a new and useful, but very simple device, states:

"The suggestion that anyone could have done what the patentee did, recalls the reply made by Charles Lamb to the young pedant, who declared that he could write like Shakespeare, if he had a mind to: 'Yes,' said Lamb, 'if—you—had—the—mind—to.'"