

against the defendants, and a sale made of the property, and Dendel became a purchaser. There was nothing said in the bill or in the decree about the right of homestead of Craig in the property. The time for the redemption from the sale having expired, a deed was made to Dendel, the purchaser under the sale, and then he applied to the district court for a writ of assistance to dispossess Craig from the property, which the court refused to allow, and from the order refusing the writ Dendel has appealed to this court.

I think the decision of the district court was right. Under the conceded facts of the case, the bankrupt had a homestead in the property. The mortgage not being acknowledged in conformity with the statute, the foreclosure proceedings and sale did not divest him of this right. That was an independent proceeding not connected with the proceedings in bankruptcy. The bankrupt law did not destroy the homestead right. The fact that neither the bankrupt nor the assignee interposed to the proceedings of foreclosure the homestead right, did not deprive the bankrupt of the right. If the bankrupt as to that interest was independent, as he clearly was, of the assignee in bankruptcy, then he should have been made a party in order to affect his interest; and it can hardly be assumed that it was the duty of the assignee to bring before the court the right of the bankrupt in property with which he, the assignee, had no connection. It seems clear that the act of congress reserving the interest of the bankrupt in the property means, when it refers to 1871, the amount or value of that interest. So that I think the decree of the district court was correct, and it will be affirmed.

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HALL and others *v.* STERN and others.

(Circuit Court, S. D. New York. July 10, 1884.)

PATENT MIRRORS—MEASURE OF DAMAGES.

The defendants, retail dealers in fancy articles, had supplied themselves, up to a certain time, with a style of mirror of which the complainants had a monopoly in the United States, by purchasing the mirrors of complainants; they then began to import a like sort from Europe and sell them at a figure below complainants' price. They sold them at a loss. *Held* that, in estimating complainants' damages, the measure should be the profits they would have made on the trade which defendants diverted. The sales made by defendants are not the criterion of complainants' loss, because it cannot be legitimately inferred, under the particular circumstances, that the complainants would have sold as many mirrors as the defendants sold.

In Equity.

*Edmund Wetmore*, for complainants.

*Delos McCurdy*, for defendants.

WALLACE, J. The proofs in this accounting do not show that the complainants lost the sale of their patented mirrors to the extent that

similar mirrors were sold by the defendants. Both parties were merchants in the city of New York. The complainants sold the mirrors mainly to retailers in that city. The defendants were retailers of general fancy goods. Up to the time when the defendants began to import mirrors and compete in the retail trade with complainants' customers, they had bought exclusively of the complainants, and their purchases were from \$1,000 to \$1,200 annually. They imported similar mirrors at a cost much below the price the complainants had charged for them, and sold them at greatly reduced prices to their customers, and sold three times as many as they had formerly sold during the same period of time. They made no profits on these sales, but sold at a loss. The proofs show that complainants would have had a monopoly of the sale of the mirrors in the United States during the period covered by the accounting if they had not been interfered with by the defendants; and that the defendants, by their conduct in importing similar mirrors and selling them at retail at a reduced price in the same market, prevented sales which complainants would otherwise have made to other retailers. The damages to which complainants are entitled is the loss which they sustained by the diversion of trade which they would have enjoyed if the defendants had not supplanted them in the market, and their consequent loss of profit on such trade. The master has awarded them damages on the theory that they lost the sale of all the mirrors imported and sold by the defendants during the period in question. The proofs do not justify this conclusion.

The question is not what speculatively the complainants may have lost, but what they actually did lose. If the defendants had not sold the patented mirrors to their customers, it does not follow that the complainants would have sold them to the same customers or to retail merchants. *Seymour v. McCormick*, 16 How. 480. If it had been shown that the ordinary sales of the complainants for the same market fell off during the period of the defendants' sales in an amount equal to, or even approximating reasonably to, the amount of the defendant's sales, the master's findings could be approved. *Hostetter v. Vowinkle*, 1 Dill. 329. But the proofs do not furnish satisfactory data from which to estimate the extent of the diversion of the complainants' trade in the mirrors, although enough appears to indicate that their sales fell off to the extent of the usual purchases of the defendants. The competition of the defendants had ceased so recently at the time of the accounting that the effect upon complainants' sales afterwards could not be satisfactorily established. For aught that appears, the defendants created a market by their own enterprise, and by selling the mirrors at a reduced price, that otherwise would not have existed.

It cannot be legitimately inferred that the defendants would have sold the same number of mirrors if they had maintained the higher price; on the contrary, it is fair to presume that the usual law of trade operated, and that the reduction in price attracted purchasers and in-

creased the number of sales. Especially is this so in view of the fact that the defendants sold two or three times as many mirrors annually after they reduced the price as they had sold before.

The remarks of JOHNSON, J., in *Burek v. Imhaueser*, 14 Blatchf. 21, are applicable:

"It was not made to appear that the plaintiff could have sold his watches to the persons who purchased from the defendants. \* \* \* It cannot be known that those who bought the infringing article would have bought the plaintiff's watches under any circumstances. The difference in structure as well as the difference in price enters into that question, and no means are afforded for determining it."

It may be reasonably assumed, in view of the steady demand in the market for these mirrors at the original price, and in view of the exigencies of the defendants' trade as dealers in general articles of this description, that the defendants would have continued to deal in them as they had been accustomed to, and the amount of their annual purchases of the complainants in the past might stand as a fair criterion of their probable purchases in the future if they had not supplied themselves from other sources. Upon this basis, as the complainants' sales fell off to the extent substantially of the former purchases of the defendants, they are entitled to damages for the loss of profits which would have accrued to them upon sales which they would have made to the defendants. The sum allowed by the master is far in excess of such profits.

As a sufficient time has now elapsed to ascertain to what extent the ceasing of the defendants' competition increased the subsequent sales of the complainants, an element in the computation which was wanting at the time of the accounting may now be supplied. The case will be sent back to the master, with leave to the parties to reopen the proofs.

The exceptions are sustained.

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### SHAW v. SOULE and others.

(Circuit Court, D. Vermont. July 10, 1884.)

#### 1. PATENT LAW—ASSIGNMENT—ALLEGED FRAUD.

An inventor wishing to assign and receive royalties upon a patent for improvements in window-curtain fixtures, for which he had applied, mentioned as an inducement a weighted stick to be a feature in the patent, without saying that a third party had a patent covering the same. The assignment being made, and the patent obtained, without covering the stick, however, except in combination, after the assignee has manufactured under the patent and paid royalties, and after the other man's patent of the stick has been adjudged invalid through the efforts of the assignor, the assignee cannot escape liability for arrears on the plea of fraud.

#### 2. SAME—GUARANTY.

No guaranty of title is binding against the setting up of invalid claims.

## Referee's Report.

*Jas. D. Denison*, for plaintiff.

*Guy C. Noble*, for defendant.

WHEELER, J. According to the referee's report, the plaintiff represented to the defendants that his invention of improvements in curtain fixtures, for which he had applied for a patent, covered a weighted stick, to induce them to take an assignment of the patent, manufacture under it, and pay him a royalty; and did not inform them that one Knapp had a patent purporting to cover the stick, which he knew, and which, if disclosed, would prevent the arrangement. The plaintiff's patent, when obtained, did not cover the weighted stick itself, but only the combination of it with other parts, and Knapp's patent appears to be, and has been adjudged to be, invalid as to that part. *Knapp v. Shaw*, 15 FED. REP. 115. The defendants took an assignment of the patent, covenanted to manufacture under it and pay a royalty to the plaintiff, did manufacture, and have been defended by the plaintiff against Knapp's patent, and have paid the royalties stipulated for, except an arrear for which this suit is brought.

The question now is whether the misrepresentation and concealment as to the weighted stick constitute a defense to this suit for this arrear. It is quite clear that the defendants could not, after manufacture and sale under the patent, rescind the contract, and treat it, and have it treated, as void, on any ground of fraud in its making. They had proceeded upon it so far as to affirm it; and it is not argued but that they had. The question is therefore narrowed down to whether they are entitled to damages arising out of the making of the contract which should be applied by way of recoupment to meet the sum due. The case does not show but that the defendants have enjoyed as much, nor but that the patent was worth as much, as if it had covered the weighted stick by itself. They have suffered nothing, so far as appears, except through Knapp's patent purporting to cover it, and Knapp's claim that his patent was valid to cover it. Had the plaintiff's patent covered it, Knapp's claim might not have been prevented; and whether it would or not, under his representation and the assignment of the patent he would have been bound to defend it only against lawful claims.

No guaranty of title is binding against the setting up of unfounded claims. *Underwood v. Birchard*, 47 Vt. 307. There is nothing, therefore, to show that the defendants have any claim for damages growing out of the transaction which could be applied if ascertained; and, further, no amount of damages is found, nor basis for ascertaining them is stated. The plaintiff is therefore entitled to judgment.

Judgment on report for plaintiff; damages, \$732.90.

## DADD, as Trustee, etc., v. MILLS and others.

(Circuit Court, S. D. New York. July 6, 1884.)

## 1. PERPETUITIES—REALTY—PERSONALTY.

The laws of New York prohibit the suspension of the power of alienation of both real and personal property by any limitation or condition whatever for a longer period than during the continuation and until the termination of not more than two lives in being.

## 2. SAME—"POWER OF ALIENATION"—"UNQUALIFIED OWNERSHIP."

The statutes of New York use the term "power of alienation" in reference to real estate, and "unqualified ownership" in reference to personal property, in prohibiting perpetuities, but the meaning of the terms is synonymous.

## 3. SAME—PERSONAL PROPERTY.

The prohibition upon suspending the absolute ownership of personal property for a longer period than during two lives in being is directed to the accumulation of interest and income upon trusts in expectancy, and does not apply where all the *cestui que trust* are in being and may lawfully join with the trustee in an alienation of the property.

## 4. SAME—PATENT—TRUSTEE—RESUME OF FACTS.

If two parties, one having exclusive patent-rights in certain territory, the other similar rights in certain other territory, and the two jointly as to still other territory, join in an instrument giving a third party the sole powers (1) to convey rights, etc., in states and territories, with certain exceptions; (2) to do likewise as to the excepted states and territories; (3) to collect money and royalties; and (4) to bring certain suits at request of either party,—all under certain restrictions and in trust for the benefit of the owners, the trust to continue for the unexpired term of the letters patent,—the legal effect of such an instrument is to make the assignee an agent to carry out the joint instructions of the makers, so that it may be out of the power of either of the two to injure or be injured by the other or his representatives after his death; and the statutes prohibiting perpetuities have no application, as no person has any interest in the trust, present or in expectancy, except the persons who create it for their own benefit.

In Equity.

Rodman & Adams, for complainant.

Bartlett, Wilson & Hayden, for defendants.

WALLACE, J. At the hearing of this cause the question was reserved for further consideration whether the complainant acquired title to the letters patent granted to Clements & Fowler under the trust assignment to him executed by the owners of the patents.

It is insisted for the defendants that the trust estate created by the assignment is void because the absolute ownership of the patent is suspended for a longer period than two lives in being, and as the main intent and object of the assignment is thus to suspend illegally the power of alienation, the assignment is inoperative. If no efficacy can be given to the assignment without sanctioning a prohibited trust, the complainant's title is null.

As the trust was created and its objects are to be carried out in this state, the defendants' position that the validity of the transfer is to be tested by the rules of the local law is correct. The laws of this state prohibit the suspension of the power of alienation of both real and personal property by any limitation or condition whatever for a