

this because I have discovered any want of attention; quite the contrary; but I am conscious of your desire to return to your homes and to your families, and to your daily avocations. Justice demands a patient and careful investigation in order to arrive at a just conclusion. The case is of great interest both to the government and to the defendant, and the responsibility now rests with you to ascertain the truth, and when you shall have done so, it will be your bounden duty to declare it without reference to consequences. And your verdict will simply be, "We, the jury, find the defendant, Stillwell H. Russell, guilty as charged in the indictment;" or that "We, the jury, find the defendant, Stillwell H. Russell, not guilty." The question as to whether the defendant intended to defraud is not in the case, as that is not made an element in the offense charged.

Verdict of guilty, April 4, 1883. Defendant sentenced to two years' confinement in penitentiary at Chester, Illinois.

MORGAN and others *v.* ROGERS.

(Circuit Court, D. Rhode Island. February 12, 1884.)

TRADE-MARK—TRANSFER BY GENERAL CONVEYANCE.

A trade-mark will pass under a general conveyance of all the assets and effects of a firm, though not specifically designated.

In Equity.

Nathan F. Dixon, J. Van Santvoord, and A. Chester, for complainants.

Benj. F. Thurston and J. C. B. Woods, for defendant.

COLT, J. It appears by the bill and evidence that the complainants had, from time to time, advanced large sums of money to the firm of J. Miller & Sons, who were carrying on the business in Providence, Rhode Island, of the manufacture and sale of certain proprietary medicines, notably the compound known as Dr. Haynes' Arabian Balsam. To secure the complainants, Miller & Sons executed a chattel mortgage to them, dated June 1, 1875. On or about March 22, 1876, the complainants took possession under the mortgage and proceeded, through an agent, to carry on the business of the manufacture and sale of these medicines. Subsequently, on February 13, 1877, Miller & Sons conveyed to the defendant, Rogers, the exclusive right to use their trade-marks, and to make and sell their medicinal compounds. The present suit is brought to restrain the defendant from using these trade-marks. The main question in the case turns upon the meaning of the following clause in the mortgage:

"The following articles of personal property, now in our possession, and now in and upon the premises known and designated as numbers (8) eight and (12) twelve High street, in said city of Providence, viz.: The entire property, stock, furniture, and fixtures, and other articles, now in and upon said premises, together with all debts and book accounts, assets, and effects of every kind and nature, belonging to said firm of J. Miller & Sons."

The complainants contend that the above recital includes all trade-marks then owned and used by Miller & Sons in their business on High street, and that such was the intention of the contracting parties. The defendant claims that this description does not cover any trade-mark, but only the property, stock, accounts, etc., belonging to the firm; that such was the intention of the parties; and that the proof shows that at most, and independent of the mortgage, the complainants have a parol license to use the trade-marks until reimbursed for their advances to Miller & Sons. The clause of conveyance in the mortgage is very broad in its terms. Clearly the language bears the construction, and will bear no other than that the whole property of Miller & Sons, upon the premises occupied by them, together with their assets of every kind, passed by way of mortgage to the complainants. The description plainly identifies the property and states what is conveyed. It is not a case where there is an ambiguity by reason of two inconsistent descriptions in the same instrument, nor is it a case where the instrument fails to point out the subject-matter so that a stranger, after examination, might be deceived, but in plain and unequivocal language, and for the large consideration of \$48,500, the entire property of the firm of Miller & Sons, at their place of business, and all the firm assets, are conveyed by way of mortgage to the complainants. There is no reason why a trade-mark cannot be conveyed with the property with which it is associated. As an abstract right, apart from the article manufactured, a trade-mark cannot be sold, the reason being that such transfer would be productive of fraud upon the public. In this respect it differs from a patent or a copyright. But in connection with the article produced, it may be bought and sold like other property. It constitutes a part of partnership assets, and is properly sold with the firm property. *Browne*, Trade M. §§ 360, 361; *Hall v. Barrows*, 10 Jur. (N. S.) 55; *Ainsworth v. Walmsley*, 35 Law J. Ch. 352; *Kidd v. Johnson*, 100 U. S. 617; *Walton v. Crowley*, 3 Blatchf. 440; *Congress & Empire Spring Co. v. High Rock Congress Spring Co.* 57 Barb. 526, and 4 Amer. L. T. Rep. 168; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321. For a trade-mark to pass under a bill of sale it is not necessary that it should be specifically mentioned. In *Shipwright v. Clements*, 19 Weekly Rep. 599, there was a sale by one partner to the other of all his interest in the partnership, stock in trade, goods, chattels and effects, book debts, moneys in the bank, and all other property not being on the premises, the defendant covenanting that he would not carry on the trade within one mile of the premises, or in any way affect the business to

be thereafter carried on by the purchaser. The court held that this was a sale of the business, and that a trade-mark passed under such a sale, whether specially mentioned or not. If a trade-mark is an asset, as it is, there is no reason why it should not pass under the term assets, in an instrument which conveys the entire partnership property. To hold that the trade-mark is not included in this mortgage, is to say that the most valuable part of the partnership property is not covered by the words assets and effects of every kind and nature.

The evidence, in our opinion, strongly confirms the construction we have put upon the instrument, and shows that such was the intent of the parties. The complainants proceeded to take possession under the mortgage of the entire property and assets of the firm, to use the trade-marks, and to manufacture and sell the medicinal compounds. At the time possession was taken, one of the Millers sent for Mr. Morgan, and surrendered the keys. Two of the Millers for months after this continued to sell the medicines under the direction of the agent who was carrying on the business for the complainants. The annual royalty due Dr. Haynes the complainants assumed and paid. The defendant, Rogers, as shown by his letters, understood that the complainants had succeeded to all the rights of Miller & Sons, and were running the business. He says, however, that in the fall of 1876, after a consultation with the Millers, and after what they said, he took legal advice, and found that the complainants had title under the mortgage only to the goods and effects of Miller & Sons. But that his mind was not clear on the question of the trade-marks is shown by the fact that subsequently, in his conveyance from Miller & Sons, of February 13, 1877, under which he now claims the right to use these trade-marks, there is a provision that if, at the expiration of two years, he should not be in the exclusive enjoyment of the trade-marks in consequence of any act done by the Millers in *conveying* or *incumbering* them, then, at his option, the annuities to be paid to the Millers under the agreement were to cease. The fact that the complainants agreed to turn over the property to the Millers after they had been paid cannot operate to divest them of the exclusive right to the trade-marks if they had acquired such under the mortgage. With such exclusive right they, as well as Miller & Sons, might hope the debt would soon be extinguished, but without such exclusive right such a result would be most improbable.

Upon a proper construction of the clause of conveyance in the mortgage, and upon the evidence showing the intent of the parties, we are satisfied that the relief prayed for should be granted, and that the defendant should be enjoined from the use of the trade-marks.

TUTTLE, Trustee, etc., v. CLAFLIN and others.

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

1. PATENTS—CRIMPING-MACHINE—PATENT No. 37,033.

The first claim of patent No. 37,033, for an improvement in frilling and crimping machines, being limited by its terms to a combination in which the blade acts to space the crimps as well as to form them, is not infringed by a crimper which does not space the crimps.

2. SAME—CRIMPER AND SMOOTHER—SECOND CLAIM.

The specifications for the second claim of the same patent, describing a combined crimper and smoother, point out the method in which the parts can operate without spacing the crimps, and the claim is infringed by a machine which crimps and smooths the cloth by a similar device.

C. B. Stoughton, for complainant.

Vanderpoel, Green & Cuming, for defendants.

WALLACE, J. The complainant's patent, (No. 37,033, Crosby & Kellogg, patentees, granted December 2, 1882,) for an improvement in frilling and crimping machines, describes and claims devices which constitute distinct inventions residing in the same machine. The devices for forming and spacing the frill or crimp, and those for securing them in place after it is formed, accomplish distinct results, both of which are useful, and either of which would support a patent. The devices also co-operate to make the stitched plait. The sewing mechanism is essential only for making the complete or stitched plait. The claims of the patent cover all the devices in combination, and also the sub-combinations, which are operative only in forming and spacing the frills or plaits. The first claim covers the crimping devices with and without the stitching mechanism. It is limited, however, by its terms to a combination in which the blade or crimper acts to space the crimps as well as to form them. The defendants' crimper does not act to space the crimps, and they do not therefore infringe this claim. The second claim is as follows: "In combination, a crimper and a smoother, substantially such as described, and acting substantially as specified, to fold the crimps to an edge." The crimper described in the specification is a blade actuated by a cam and spring, and its mode of operation is to engage the cloth, advance and make a crimp of the cloth lying between it and the holder, and shove the cloth along under the holder; it then retreats for another advance. While it moves forward to crimp it acts as a crimper. After the crimp is formed it acts as a spacer to space the crimps apart, and as a pusher to force the goods through the machine. The space between the crimps depends upon the length of advance of the crimper after the crimp is formed, which is determined and made adjustable by other mechanism. The crimper which is included in this claim is one which is to operate in combination with the other necessary co-operative parts substantially in the manner thus pointed out. It may operate effectively to fold the crimp to an edge without