

so, Gordon's wedge arms could be taken from the well after the apparatus is set without affecting the functions of the double packer; but in Palm's device the wedge arms do more. They serve the purpose of placing the packers in position, but they also aid in sustaining the casing afterwards; a matter of no small moment when the weight of a long string of heavy iron pipe is considered. In fact, the greater the pressure, the more firmly Palm's wedge arms become imbedded. That Palm's idea was a most valuable one is also shown by the fact that Gordon's packers are now constructed on this principle of using the wedge arms for a support, substantially as Palm did. Conceding that Palm's improvement was a valuable one, it must still be admitted he makes use, by mechanical equivalents, of Gordon's device, and that he has borrowed the basis idea of the wedge arms and the cone from that source. This view is strengthened by the fact, testified to by himself, that he was employed in making Gordon packers. The mechanism of Gordon is simply reversed in Palm's device. In the former the upper sharpened edges of the cleats on the wedge arms and the lifting of the casing cause the wedge arms to catch the well wall, and thus secure the starting point in a self-supporting casing, viz., a stationary base; in the latter, the spring and gravity, or jarring, cause the same result, though from an opposite starting point. In both, increased pressure on the wedge cone aids and finishes the work. That the additional function of the wedge arms helping sustain the casing appears in the Palm device does not make it any less an infringement. It is still Gordon's device inverted, plus the added function of the sustaining aid of the wedge arms. As such, it is our duty to decree it an infringement. Let a decree be drawn accordingly.

ACHESON, Circuit Judge, concurs.

AMERICAN TUBE & IRON CO. v. KENTUCKY SOUTHERN OIL & GAS
Co. et al.

(Circuit Court, D. Kentucky. April 19, 1892.)

No. 6,168.

1. MORTGAGES—FORECLOSURE—TRUSTEE AND BONDHOLDERS.

When a mortgage is made to a trustee to secure coupon bonds, the right to bring suit of foreclosure is in the trustee, which right, however, is not exclusive of the bondholders unless made so by the terms of the deed.

2. SAME.

Where a trustee in a mortgage securing coupon bonds accepts the position of trustee in a subsequent deed of general assignment made by the mortgagor for the benefit of all his creditors, which embraces the property covered by the mortgage, the respective interests to be represented by the trustee under the deed are conflicting and antagonistic, and such acceptance causes a forfeiture of any preference the trustee might otherwise have had, as against the bondholders, to bring suit to foreclose the mortgage.

2. SAME—POWERS OF BONDHOLDERS.

A mortgage made to a trustee to secure coupon bonds provided that, in case of nonpayment of any one of the bonds or coupons for 30 days after maturity and payment demanded, it would be lawful for one fifth or more of the holders of the bonds to cause the principal to be at once matured, and to call on the trustee to foreclose the mortgage. *Held*, that the bondholders alone were to exercise the option, and the trustee need not join with them therein.

In Equity. Bill by the American Tube & Iron Company against the Kentucky Southern Oil & Gas Company and others to foreclose a mortgage. Demurrer to the bill overruled.

Chas. C. Dickey, James S. Pirtle, and Walter Evans, for complainant.
Stone & Sudduth, for defendants.

BARR, District Judge. The counsel for defendants insist that their demurrer to the bill should be sustained because, under the mortgage, complainant has no right to such a foreclosure of the mortgage, but the trustee must bring such suit. The demurrer is filed by all of the defendants, and, while some of these have no interest in the question presented by counsel in support of the demurrer, others of them have, and it should therefore be considered. That question is whether or not the complainant, as bondholder, can sue for itself and other bondholders who may come in. This question may be determined by a reference to the mortgage deed. Where a mortgage is made to a trustee to secure coupon bonds to be issued, the right to foreclose the mortgage is in the trustee; but this right to have a foreclosure is not exclusive of the bondholder, unless made so by the terms of the mortgage or deed of trust. The trustee, however, has the preference unless there is some reason why the bondholders should sue rather than the trustee. This mortgage provides that—

“In case the said oil company shall fail to pay any one of said bonds for thirty days after the same shall have matured and its payment been demanded at the place of payment, or in case the said oil company shall fail to pay any one of the coupons upon any of the said bonds for thirty days after the same shall have matured and been demanded at the place of payment, then it shall be lawful for the holder or holders of one fifth or more of said bonds to cause the principal thereof to be at once matured, and to call upon the said trustee to foreclose this deed of trust and have the property sold by due and proper legal proceedings, for the benefit of the holders of the said bonds and coupons, first, however, indemnifying the trustee for its costs and expenses to be hereby incurred.”

Another provision of the deed of trust is that—

“The said trustee shall not be compelled to do anything under this deed of trust until satisfactorily indemnified from all costs and expenses or liability therefor, and shall not be liable for any acts of agents or servants employed by it in the necessary conduct of its trust, but shall only be liable for its own acts.”

There is no provision in this deed which excludes in terms the bondholders from foreclosing this mortgage, but it is said that the provision in regard to maturing the bonds upon the default of the mortgagor in the payment of the coupons is so connected that the bondholders cannot

mature the bonds and foreclose the mortgage without the aid of the trustee. But it will be observed that the holders of one fifth of the bonds are given the right to mature the bonds in certain events, and the trustee has nothing to do with this. It is the exercise of their option, and not his, which matures the bonds. It is true they may call upon the trustee to foreclose the deed of trust, and this privilege is connected with the other by the conjunction "and," but I apprehend the bonds would still be matured if there was no trustee to call upon, or if the trustee should refuse to bring suit to foreclose. These provisions of the deed do not, we think, give the trustee the exclusive right to foreclose the mortgage, but do show that the parties contemplated the foreclosure to be by the trustee. These provisions, and others, should give the trustee the preference as between it and the bondholders in foreclosing the mortgage, unless there is some reason why the trustee should not have such preference.

This brings us to consider whether the allegations of the complainant's bill should, if true, deprive the Germania Trust & Vault Company of the preference in bringing a foreclosure suit in this case. The bill alleges that the mortgagor is insolvent, and has made to said company a general assignment for the benefit of all of its creditors, of all its property, including the property covered by the mortgage to secure the coupon bonds, belonging to complainant and others. The deed of trust to secure these coupon bonds does not pass the legal title under the Kentucky law, but the deed of assignment does pass the legal title. This latter deed does not give the right to sell real estate without the concurrence of the grantor, or by a decree of a court. This is not because the title does not pass, but that it is prohibited by a statute of the state, which has existed since 1820. The trustee in a deed of assignment has the legal title, and may sell and pass title to personal estate without the concurrence of the grantor or an order of court. This difference as to the title which the Germania Trust & Vault Company has under the first and the second deed would not make any material difference, if there is no antagonism in the interest of the beneficiaries under the two trusts. The trustee, under the first deed, represents preferred creditors, and it is the duty of such trustee to see that all of the bonds legally issued under this deed have a preference over the general creditors of the mortgagee, — the oil company. It is the duty of the trustee, under the second trust deed, (the deed of general assignment,) to prevent, if it can be legally done, the coupon bonds under the first deed of trust getting a preference. Thus there is an antagonistic and conflicting interest to be represented under these deeds. This conflicting interest is sufficient to deprive the trustee, under the first deed, of the preference it would otherwise have, as against some of the bondholders, in bringing a suit to foreclose the mortgage.

The preference in favor of a trustee, in the absence of a contract giving a preference, is because the trustee is presumed to represent all of the bondholders, and its convenience in practice; but, if the trustee has accepted a position antagonistic to his duty as such trustee, then he for-

feits this preference as against a bondholder. It may be the complainant has some right to come into this court by reason of its citizenship, but I have not considered that question. The demurrer should be overruled, and it is so ordered.

HUTCHINSON *et al.* v. BLUMBERG.

(Circuit Court, N. D. Illinois. June 8, 1892.)

1. TRADE-MARKS—WHAT WILL BE PROTECTED—STAR.

The word "Star," and the symbol of a star, adopted and used during many years by manufacturers of shirts, waists, underwear, and furnishing goods, to mark and designate their goods, in combination with the words "Star Shirts," and other words describing the articles, so that the goods become well known by such mark, and by the designation of "Star Goods," constitute a valid trade-mark.

2. SAME—INFRINGEMENT.

Such trade-mark is infringed by marking similar goods with a star and crescent, making the star so prominent that such goods may also be designated as "Star Goods," and purchasers may be readily deceived into the belief that the goods were made by the proprietors of the trade-mark, even though the star so used is not of the color usually employed for the trade-mark, and is a five-pointed star, while that in the trade-mark is uniformly six-pointed.

3. SAME—INJUNCTION.

The facts that the infringer of a trade-mark, on being notified of his infringement, told his customers to erase the trade-marks from their goods, and had since gone out of business, are not ground for denying an injunction to the true owner of the trade-mark, where every step of the suit for an injunction and accounting has been contested by the infringer, and he has put the complainants to the expense of proving every fact necessary to establish their right and his infringement.

In Equity. Bill by Gardiner S. Hutchinson, Henry B. Pierce, Ira Cole, and Thomas S. Morison against Jacob J. Blumberg for infringement of trade-mark, praying an injunction and an accounting. Decree for complainants.

B. F. Watson and Cornelius V. Smith, for complainants.

Elbert C. Ferguson, for defendant.

BLODGETT, District Judge. The complainants in this case, who were copartners doing business under the style and firm name of "Hutchinson, Pierce & Co.," having their principal place of business in the city of New York, charge that the firm of T. A. Morison & Hoyt, in or about the year 1859, was engaged in the manufacture of shirts, waists, underwear, and furnishing goods, and, to designate the goods of their manufacture, adopted and employed as their device and trade-mark the word "Star," and with the form and symbol of a star to represent the word "Star," and also the words, "Star Shirts," and the device or figure of a star in combination with the words "Star Shirts," and other words describing the goods as "* shirt" and "* waist;" that complainants, through a series of mesne assignments, have become and now are the successors of said firm of T. A. Morison & Hoyt, and have also become the owners of said trade-mark, and of the exclusive right to use the same; that the goods manufactured by complainants and their predecessors have been extensively sold, and have become well known by said trade-mark and