

tice to complainants, who were non-residents, or any appearance by them, obtained an execution against them; and that by virtue of said execution the sheriff of said city thereupon levied upon and sold certain shares of stock in the St. Louis & San Francisco Railroad Company, as complainants' property. In one of the cases it is stated that all of the stock levied on and sold had been sold by complainants, and the certificates of stock transferred to the purchasers before said motion for execution was made. In the other case it is stated that part of stock levied on had been previously sold, etc., by complainants, and that the balance still belongs to them. In both cases it is alleged that the purchasers of the stock sold at said sheriff's sale purchased that part of the stock which had been previously sold by complainants, with notice of the fact that it had been so sold; that it is provided by a by-law of said St. Louis & San Francisco Railroad Company that no transfer of stock shall be allowed except by the stockholders in person or by a properly constituted attorney; and that, at the time of the transfer, the old certificates shall be surrendered and canceled before new are issued; that the stock sold by complainants as aforesaid has never been transferred on the books of the St. Louis & San Francisco Railroad Company, but still remains in the name of complainants; but that the purchasers at said sheriff's sale are now seeking to have the stock they purchased transferred to them on the company's books. Wherefore, the complainants pray that the St. Louis & San Francisco Railroad Company may be enjoined from transferring said stock on its books to the purchasers at said sale, and that the execution under which the sale was made be declared void.

*Broadhead & Haeussler*, for complainants.

*Botsford & Williams*, for defendant.

TREAT, J., (*orally*.) This is a demurrer to the bill. Some very important questions are involved in these cases, but they cannot be heard on demurrer at present. Both bills charge that judgment was improperly obtained, which, if it should so turn out to be the fact, plaintiffs will have the right to be heard in equity here. In the one case these parties plaintiff say they are the owners of a portion of the stock thus interfered with; in the other, that they are still on the stock books as the owners, though they have parted with the equitable title, and that they seek, by this bill, to protect the unknown holders of these certificates. This court has not been inclined to pass upon that question. The bill sets out an equity, which, if maintained by proper proof, will give the parties plaintiff a right to be heard to prevent any further action under these irregular executions. The entry, therefore, will be that the demurrer be overruled.

## LANDRETH and others v. LANDRETH.

(Circuit Court, E. D. Wisconsin. October 27, 1884.)

## TRADE-MARK — USE OF SURNAME — PARTIES OF SAME NAME — DECEPTION AND FRAUD — INJUNCTION.

While a party cannot be enjoined from honestly using his own name in advertising his goods and putting them on the market, where another person, bearing the same surname, has previously used the name in connection with his goods in such manner and for such length of time as to make it a guaranty that the goods bearing the name emanate from him, he will be protected against the use of that name, even by a person bearing the same name, in such form as to constitute a false representation of the origin of the goods, and thereby inducing purchasers to believe that they are purchasing the goods of such other person.

## In Equity.

*George Harding and Francis T. Chambers, for complainants.*

*Nash & Nash, for defendant.*

DYER, J. This is a suit for an injunction to restrain the defendant from using a certain label which the complainants allege they have adopted as their trade-mark in the sale of a certain variety of seeds known as "Landreths' Extra Early Peas." A motion has been made for a preliminary injunction, and, at the present stage of the case, I do not deem it necessary to do more than to announce briefly and quite informally my conclusions upon certain points concerning which my mind is free from doubt. There are some questions in the case upon which more light may be thrown by further and more elaborate argument, and the disposition of which, I think, should be postponed until the hearing on the merits. At present, I can hardly think the defendant has not the right to raise and sell the seed known as "Landreths' Extra Early Peas;" nor am I now of the opinion that he should be restrained from putting the peas on the market in bags of various sizes, fastened in the manner shown, and identified by such a metallic seal as it appears he now uses.

Further, it is not clear that the defendant has not the right to advertise his peas as "Landreths' Extra Early Peas," provided he does so in such manner as to clearly inform the public that the peas are of his own growth and production. It seems to me this case is not, accurately speaking, one of trade-mark or trade-name. It is rather a case in which the question appears to be whether the defendant, by the use of certain labels or inscriptions on the bags in which his peas are put upon the market, is not selling his own goods as the goods of Landreth & Sons, of Philadelphia. The complainants, in 1873, placed upon their bags and adopted this inscription, printed in blue ink, and in the following form:

Guaranteed to Contain  
Landreths'  
Extra Early Peas,  
Provided the Seal is Unbroken.

Below which is printed the quantity of peas contained in the bag, as, for instance, "1-4 Bus.," and the year. It is very satisfactorily shown that, by this form and character of label, the complainants' bags have become known and recognized by dealers and by the public as containing peas produced and sold by the complainants; and it would appear that this form of designation of their goods has become, by use and public recognition, valuable to them. It is, so to speak, the recognized flag under which they sail in the trade. The defendant, in 1883, having commenced the business of producing and selling a variety of peas which he advertises as "Landreths' Extra Early Peas," at Manitowoc, in this state, placed upon the bags in which his peas were sold, the following inscription, printed in blue ink:

This Bag Contains  
Landreths'  
Extra Early Peas,  
Provided  
The Seal is Unbroken.

Below this label is printed the quantity of peas contained in the bag, as, for example, "1-4 Bus.," and the year. That this was a substantial adoption of the complainants' label, in its collocation of words and general appearance, cannot be doubted. The deviation is so slight as not to be observable, except as the two labels are placed side by side. It is equally clear that an ordinary purchaser, accustomed to rely on the inscription upon the complainants' bags as designating the peas grown and sold by them, would be readily led to suppose, upon ordinary observation of the defendant's label, that the peas put up in his bags and sold by him were the goods of the complainants. In short, the defendant's label is a very plain imitation of that previously adopted by the complainants. There is nothing in the defendant's label to fairly distinguish his production of "Landreths' Extra Early Peas" from that of the Philadelphia producers. Even admitting that the defendant has the right to use the same words as those which constitute the complainants' label, he has no right to use them in such form or such style of arrangement, as to lead the public to suppose that the peas contained in his bags are peas grown and sold by the complainants. This is so, without regard to any question of tech-

nical trade-mark or trade-name. The authorities in abundance declare this to be the law.

In *McLean v. Fleming*, 96 U. S. 254, the supreme court say:

"Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant, and that he persists in so doing after being requested to desist."

Of course, a party cannot be debarred from the right to honestly use his own name in advertising his goods and putting them on the market, but where other persons bearing the same surname have previously used the name in connection with their goods, in such manner and for such length of time as to make it a guaranty that the goods bearing the name emanate from them, they will be protected against the use of that name, even by a person bearing the same name, in such form as to constitute a false representation of the origin of the goods. To illustrate: The complainants and the defendant bear the same surname. Each is a dealer in "Landreths' Extra Early Peas." While the defendant has the right to use his own name in advertising his peas and putting them on the market, he has not the right to use it in such manner as to lead dealers and purchasers to suppose that, when in fact purchasing his peas, they are purchasing the peas grown and sold by the complainants. Adjudged cases thus enunciate the law. As is stated in one of them, "no man has the right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own." See, also, *Holloway v. Holloway*, 13 Beav. 209. Many other cases of similar and uniform purport might be cited.

Now, as I have said, the defendant's label, is, as it seems to me, a palpable imitation of the complainants'. In the color of ink used, in the arrangement of the words, and in the general style of the label, he has, so to speak, dressed his goods in the garb previously adopted by the complainants. Whether intended or not, this necessarily operates as a fraud upon them, and upon the public. If the defendant has the right to use the same words as those which constitute the complainants' label, he ought to accompany them with some clear *indicia* of the source of the goods. He seems to have done so in his late issue of circulars and advertising cards. In the absence of anything in the inscription he places on his bags, distinctly denoting that he is the producer and seller of the peas in which he deals, called "Landreths' Extra Early Peas," he evidently leads or may lead purchasers to believe that in purchasing his peas they are purchasing the peas grown and sold by the complainants. This appears from affidavits presented on this motion. Such abandonment of their label