

**A short treatise on the law of trade marks : interesting to manufacturers and merchants generally.**

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**Publication/Creation**

Providence : Perry Davis & Son, 1861.

**Persistent URL**

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LAW OF TRADE MARKS

BY

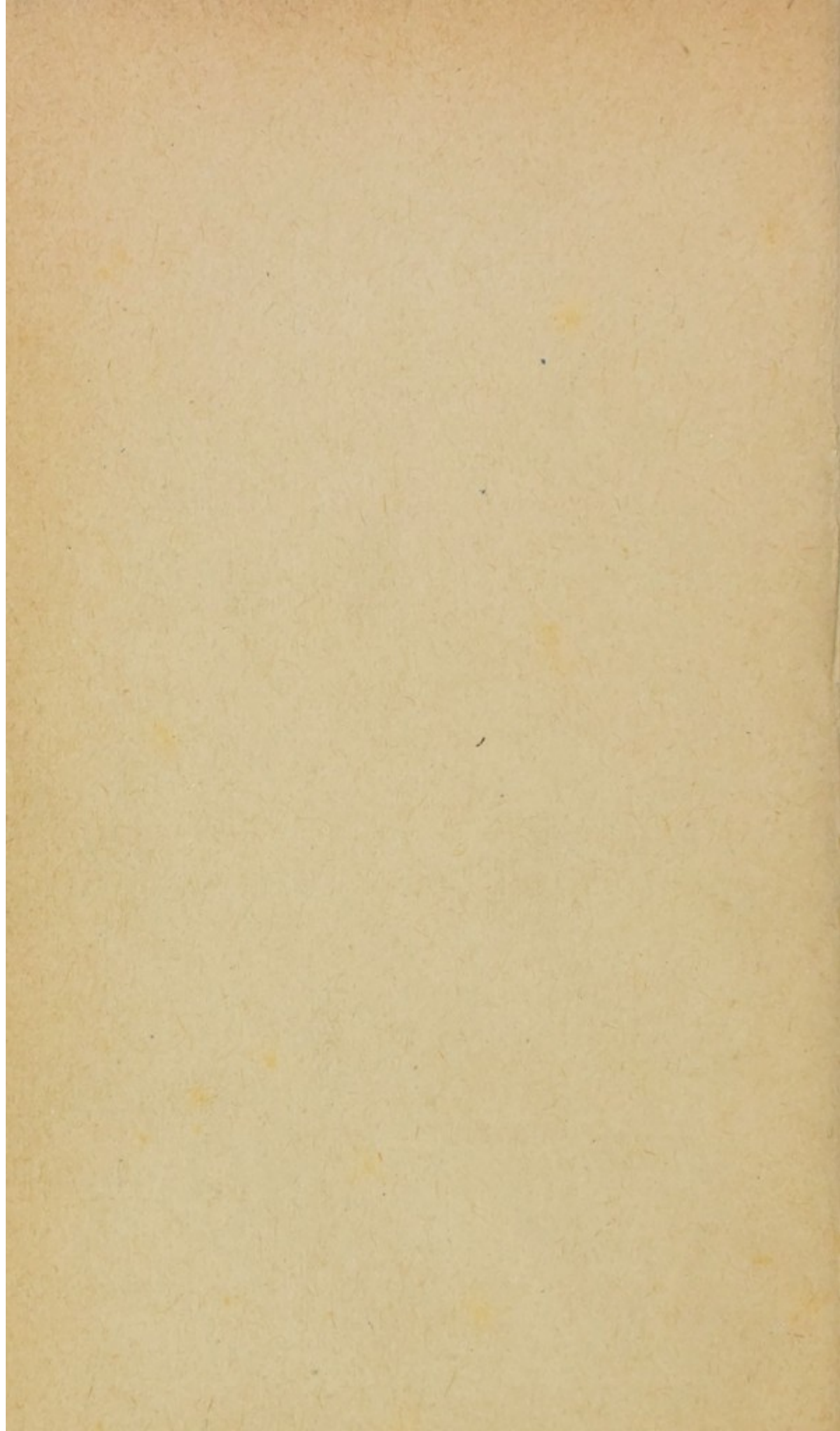
PERRY DAVIS.

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A

SHORT TREATISE

ON THE

LAW OF TRADE MARKS.

INTERESTING TO

MANUFACTURERS AND MERCHANTS

GENERALLY.



PROVIDENCE:

PERRY DAVIS & SON,

1861.

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TO THE PUBLIC,

AND PARTICULARLY TO

THOSE WHO HAVE APPLIED OR WHO MAY APPLY

THE NAME

PAIN-KILLER

TO THEIR COMPOUNDS OF DIFFERENT KINDS,

AND TO

MERCHANTS WHO SELL SUCH PREPARATIONS.





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## P R E F A C E .

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THE right to our trade mark having been often infringed upon, we have had frequent occasion to examine the reports of trade-mark cases, both in the courts of this country and England.

To save the trouble of lengthy correspondence, and perhaps the necessity of a suit at law, we have thought proper to publish in this form a short treatise on the law of trade marks.

From the great number of cases reported, we select those bearing the closest analogy to ours, and yet the general principles laid down in the cases we cite will be found to lay at the foundation, and govern decisions in all cases reported. It will be found that while the law gives ample protection to the honest manufacturer, it frowns with terrible severity on frauds in any and every shape. We have endeavored to present the subject as clearly and candidly as possible, yet we find

it to exceed the limits we had originally proposed. We trust the labor may not be lost, — that while we hope in some measure to accomplish the object of showing our right to our trade mark, the subject may be more fully understood by others; for certainly it is a matter of great consequence to the manufacturer, the merchant, and to the community generally.

THE AUTHOR.

## THE LAW OF TRADE MARKS.

---

MORE than twenty years since, Perry Davis invented and prepared a medicine, which he called VEGETABLE PAIN-KILLER, — the word VEGETABLE being used simply to indicate that it was prepared wholly from vegetable substances. The name PAIN-KILLER he adopted as the name of the medicine, and to denote his manufacture. It is a compound name, formed from two distinct words; was entirely original with Mr. Davis, and never before used by any other party. He adopted this as his *trade mark*, and his medicine has *ever since been known in commerce as PAIN-KILLER*. The most common error, and one into which many have fallen in regard to the name PAIN-KILLER, is the supposition that it is a name common in the English language, to which every one has a right, and that no party can, in law or equity, appropriate it to his *exclusive* use, as designating his medicine.

The fact is not so, but wholly otherwise. The name was not known in the English language until formed by Mr. Davis, and by him applied to a medicine.

Neither WEBSTER nor WORCESTER mention it, nor any other authority that we have consulted.

The learned Justice PIERREPONT, in granting an injunction in the case of *Burnett v. Phalon*, says:—

“ Every man has a right to the reward of his  
 “ skill, his energy and honest enterprise, and  
 “ when he has appropriated, as his trade mark,  
 “ letters combined into a word before unknown,  
 “ and has used that word, and long published  
 “ it to the world as his *adopted trade mark*, he  
 “ has acquired *rights in it which the courts will*  
 “ *protect.*”

(The case is quoted more at length in another place.)

The same doctrine was held by the learned Justice INGRAHAM, in the Supreme Court of New York, in the case of *Wolf v. Goulard*, 18 Howard Practice Reports, 64. The Judge uses this language:—

“ When a person forms a new word to design-  
 “ nate an article made by him, which has never  
 “ been used before, he may obtain such a right  
 “ to that name as to entitle him to the *sole use*  
 “ of it, as against others who attempt to use  
 “ it for a *similar article.*”

The true definition of the name PAIN-KILLER, as it exists and as understood by the public at large is, *a particular medicine, manufactured by Perry Davis.*

It is the *medicinal qualities* of the *article itself* that have alone made its great reputation. The *name* has nothing to do with the *quality*, although perhaps not wholly inappropriate to describe it, but is indicative of its origin, — a name given to it, as everybody knows, by Perry Davis, — and that name he had a right to appropriate.

The *quality exists in the medicine itself*, and would be the same under whatever name it might be called; precisely the same that the name of a person points out no qualification, nor gives any indication as to that person's character. Hence it is, that when a person buys PAIN-KILLER, he does not do so for the sake of the *name*, for he would as soon purchase by any other.

It is *the medicine manufactured by Perry Davis*, which he knows possesses certain qualities; and instead of inquiring for "the medicine manufactured by Perry Davis," he asks for PAIN-KILLER, which he understands, and which does in fact, mean the same thing. This name was adopted and has been in extensive use on labels, wrappers,

packages and advertisements, for more than twenty years, and has become so inseparably associated with the name of Perry Davis, and as meaning his medicine, that no other person can use the same name on his labels, wrappers, or advertisements for a medicine, without infringing the rights of Perry Davis, and deceiving the unwary.

It is on this principle, that courts of equity protect the rights of a plaintiff in particular names, "marks," "devices," or "symbols," to designate certain trades or articles of merchandise.

This principle is fully illustrated in the case of *Knott v. Morgan*, 2 Kean's Reports, 213.

The plaintiff ran a line of omnibuses from Paddington to the Bank of England, having on the back of them the words "*Conveyance Company*," and on the sides, "*London Conveyance Company*." There was on the back of the defendant's omnibuses the words "*Conveyance Company*," and on the sides the words, "*Original Conveyance for Company*."

The Master of the Rolls (Lord Langdale) said : —

"The question was, whether the defendant  
" fraudulently imitated the title and insignia  
" used by the complainants, for the purpose of  
" injuring them in their trade. I have not the

“ least doubt that the defendant did intend to  
 “ induce the public to believe that the omni-  
 “ bus which he painted and appointed so  
 “ as to resemble the carriages of the complain-  
 “ ants, was, in fact, an omnibus belonging to  
 “ the complainants and the other proprietors of  
 “ the London Conveyance Company.”

“ The plaintiffs have a right to call upon this  
 “ court to restrain the defendant from fraudu-  
 “ lently using precisely (not *precisely*, but  
 “ words in colorable imitation, the facts were)  
 “ the same words and devices which they have  
 “ taken for the purpose of *distinguishing their*  
 “ *property.*”

His Lordship orders an injunction to issue,  
 restraining the defendant from using

“ the words or names ‘London Conveyance,’ or  
 “ ‘Original Conveyance for Company,’ or any  
 “ other names, words, or devices painted,  
 “ stamped, printed, or written, etc., *in such*  
 “ *manner as to form, or be a colorable imitation*  
 “ of the names, words, and devices painted on  
 “ the omnibuses of the complainants.”

We cite the above case in this connection, to  
 show the fact, so explicitly stated in the opinion  
 of Lord Langdale, that, “*London Conveyance Com-  
 pany*” meant, and in the connection which it was  
 used, “*distinguished their* (plaintiffs’) *property.*”

Precisely so does the name PAIN-KILLER distin-  
 guish the property of Perry Davis.



Mr. Davis, by his industry, money, and means, has established a valuable business in the sale of this preparation.

It is well known and extensively used in almost every part of the United States and the Canadas. It has been introduced into Europe, the East Indies, China, the West Indies, South America, and in fact into almost every land where American ships trade, and in all these places a good demand has been created.

Soon after the PAIN-KILLER became generally known, and the public fully satisfied that it was a medicine of real merit and great value, other parties used the name PAIN-KILLER on their medicines, apparently expecting to profit by the great popularity of the name. Some, whose sense of moral right was strong, or who had fears of the law, when shown their true position, left off the name PAIN-KILLER and adopted some other. Others preferred to know what the law would decide, and they were soon furnished with the information.

THE FIRST CASE WAS THAT OF  
 PERRY DAVIS *v.* PERRY & BURKE,

*Decided at the September Term of the Court of Common Pleas, for the county of Providence, December, 1848, (12 years since.)*

*(The defendants' medicine was called Perry & Burke's Pain-Killer.)*

An action was brought by Perry Davis, the original inventor and proprietor of a medicine known by the name of PAIN-KILLER, against Perry & Burke, at the May Term of the Court of Common Pleas for the county of Providence, 1848, and continued to and decided at the December Term following, for the use of the name, PAIN-KILLER, as applied by them to a medicine of their own preparation.

The principal Druggists and Apothecaries in the city of Providence were called upon the stand as witnesses. They all concurred in their testimony, viz: that the PAIN-KILLER was a medicine of real merit and value; that it had a *high reputation*, and a very extensive sale. That the name by which it was known was original with the proprietor, Perry Davis.

Many cases were cited which established the

right of property in the names and marks or symbols by which an article has become known in the market, as completely as the right of property in houses and lands, and the infringement of this right by using the same name or mark or symbol by others, in fraudulent imitation of them, is punished by damages, and restrained by injunction. One of the earliest cases was for the use of the word *Pessendede*, meaning in Turkish, warranted; which with various other marks and initials had been engraved on the watches sent by the manufacturer to the Turkish market. Another manufacturer adopted similar marks. The Court enjoined him from using *that word or any marks in imitation of the plaintiff's*. Other cases applied the doctrine to the marks on Powder Flasks, — upon Crowell Steel, where the mark was understood to be a general name for the article, — upon Day and Martin's Blacking, where persons of the *same name* used similar marks as the original.

The same doctrine was held by the Court in this case, and they left it to the jury to say whether the name PAIN-KILLER had been used by the defendants in *imitation* of, and for the purpose of benefiting by the reputation of the article manufactured

by Perry Davis, and whether the name PAIN-KILLER was his *property*, and first used by him.

The jury, after listening to every defence that could be made, found a verdict for the plaintiff, and thus established his right to the name, to the exclusion of any other person using the same without his consent.

THE NEXT CASE WAS THAT OF

PERRY DAVIS *v.* GEORGE KENDALL.

*Decision of the Supreme Court of Rhode Island at its September Term, 1850. [Decision announced Dec. 16, 1850.]*

This was an action on the case against the defendant for pirating the trade marks of the plaintiff. The plaintiff has for a number of years manufactured and sold a certain medical compound, which has become widely known under the name of PAIN-KILLER. This name was labelled upon the bottles containing the compound. The defendant labelled his bottles, of a compound similar in color, and purporting to possess the same medical virtues, with the same designation, *though the other inscriptions and designs upon the two labels were dissimilar.* The case was argued at the March Term, by Car-

penter and Bradley, for the plaintiff, and Ames and Payne, for the defendant. The Court held —

That a man may have property in trade marks, which is entitled to the protection of the law.

The right of property is in the trade marks, not in the compound to which they are affixed.

Any person may manufacture and sell the compound which is manufactured and sold by the plaintiff; but not as the manufacture of the plaintiff; or in such a way that the public may be misled to believe it the manufacture of the plaintiff.

The case depends upon the question of fact, whether the marks adopted by the defendant to designate his compound were such as would, under ordinary circumstances, mislead the public with the belief that the compound was made by the plaintiff. The majority of the Court thinking that the public would be misled, judgment was entered for plaintiff.

In a few instances since the trial of the cases before cited, we have found it necessary to proceed by injunction against some persons who used our trade marks, but none have cared to contest the matter in the courts. In all such cases, they have abandoned the name.

A learned jurist says:—

“It is now the well-established doctrine, that  
“the exclusive property of the manufacturer  
“or merchant, in his trade marks, is of that  
“nature and character that its adequate secu-  
“rity and protection, by the exercise of the  
“highest power of the courts, is an imperative  
“duty, as well for the safety of the interests  
“of the public, as for the promotion of individ-  
“ual justice, — and a duty which cannot be  
“evaded or denied, without a violation of those  
“principles upon which a large portion of  
“equity jurisdiction is founded, and its most  
“important functions are exercised.

“When we come to consider the character and  
“extent of the wrong that is committed by an  
“invasion of the right of property in a trade  
“mark, the just and rational ground upon which  
“this doctrine has now become firmly estab-  
“lished, will be made perfectly apparent.  
“During the current century, which beyond all  
“others has been characterized by a wonder-  
“fully increased activity in the multiplication  
“of all conceivable productions to supply the  
“material needs or wants of man, natural or  
“artificial, the right of property in trade  
“marks has grown to be of immense and incal-  
“culable value to the manufacturer, the mer-  
“chant, and the public.

“It is the means, and in many instances the  
“only means, by which the former are enabled  
“to inspire and retain public confidence in the  
“quality and integrity of things made and sold.

“— and thereby secure for them a permanent and reliable demand,— which is the life of manufacturing and mercantile operations.

“ And it is also, in like instances, the only means by which the public is protected against the frauds and impositions of the crafty and designing, who are ever on the alert to appropriate to themselves the fruits of the well-earned reputation of others, regardless of individual rights or the public interests.” //

Another learned jurist, in 1846, referring to the subject of one party pirating the trade marks of another, says:—

“ The consequences and probable result of such forgery—for forgery in a *very mean shape* it is— can hardly have occurred to those who are guilty. He who counterfeits my name to a note, may make one innocent man suffer; but he who truly, in this sense, robs me of my good name, injures all to whom he sells; he may ruin me, while he certainly lays himself open to be looked at as a forger without imprisonment, and a liar among his debtors. And yet although the laws may not give him the jail,\* it will stop him peremptorily; it will leave ‘*its marks*’ upon his character, and give me damages, and all the profit which he

\* Since the above was written, the laws of some States do give him the “jail.”

“by the use of my honest name and fame, and  
“his bad goods, has obtained from confiding  
“buyers. He shall not, as the courts have said,  
“trade under another man’s flag. The law  
“confines its protection of trade marks to no  
“narrow limits, but frowns on fraudulent imi-  
“tations of all kinds.”

By the statute laws of the States of New York, Connecticut, and we believe some other States, it is made a misdemeanor, and punishable with fine and imprisonment, for one party to use the stamps or labels of another. The merchant who sells the counterfeit is liable to the same penalty.

One of the earliest trade-mark cases was in the time of Elizabeth, *Southern v. How*, Popham’s Reports, 144, and is thus reported:—

“An action upon the case was brought in the Common Pleas, by a clothier; that, whereas he had gained great reputation for the making of his cloth, by reason whereof he had great utterance, to his great benefit and profit, and that he used to set his mark to his cloth, whereby it should be known to be his cloth; and another clothier foreseeing it, used the same mark to his ill-made cloth, on purpose to deceive him: and it was resolved that the action did lie.”

The law of trade marks in regard to medicine



was thus stated as early as 1783, by the great jurist, LORD MANSFIELD, in the case of *Singleton v. Bolton*, 3 Douglas, 293.

“That if the defendant sold a medicine of his own, under the plaintiff’s name and mark, that would be a fraud for which an action would lie.”

In this case, as the plaintiff was not the original compounder of the medicine (Dr. Johnson’s Yellow Ointment), and had acquired no exclusive right to manufacture, by purchase or otherwise, and as there was no evidence that the defendant sold his medicine as and for that of the plaintiff, the action was not sustained, but the LAW on the subject was propounded thus simply and clearly by LORD MANSFIELD.

A recent case in the English courts, decided in 1841, reported in 2 Man. and Gran. 385, *Morrison v. Salmon*, applied the same doctrine to “Morrison’s Universal Medicines,” which name or trade mark had been adopted by the defendant. All the judges, TINSDALE, Chief Justice, BASANQUET, ERSKINE, and MAUL, were entirely satisfied as to the legal right in such a case for the plaintiff to recover damages of the defendant.

The English courts of Equity also grant injunc-

tions against the adoption of a plaintiff's trade mark by a defendant, as in the famous case of *Gout v. Aleplogu*, 6 Bevan, 69.

The report says:—

“The plaintiff had been accustomed to engrave upon the inside of his watches, and in Turkish characters, his name, and also the word *Pessendede*, which signifies warranted or approved. There was also R. G., and a crescent put in relief, and a sprig in crescent.”

The Vice-Chancellor (SHADWELL) granted an injunction in the terms of the notice of motion, restraining Aleplogu from sending or permitting to go to Constantinople and Turkey, or to any other place, and from selling and disposing of any watches with the name of plaintiff thereon in Turkish characters, or the word “*Pessendede*” thereon in Turkish characters, or any watches in imitation of the plaintiff's watches, and also restraining Aleplogu and Messrs. Parkinson from manufacturing or vending such watches.

Subsequently, upon further hearing, the injunction was continued. 1 Chitty, Gen. Practice, 721.

It will be seen that the courts enjoin the use of a novel name or word as a trade mark, as well as the name of the proprietor; in this case the word *Pessendede*, like our word PAIN-KILLER.

There are other cases in the English books illustrating, like the above, the law of trade marks, and applying it to the names, words, and devices, on lines of omnibuses, 2 Keen, 214, *Knott v. Morgan*. Others, forbidding even the use of a man's own name in such a manner as to be taken for the name or trade mark of another, as in the case of *Sykes v. Sykes*, 3 B. & C. 541, where "Sykes's patent" had been stamped on powder-flasks of the plaintiff, and subsequently on those of the defendant. So in the cases of Rodgers's Cutlery, *Rodgers v. Novill*, 5 Man & Gr. & Scott, 109, of *Day & Martin's* Blacking, 1 Cooper, Ch. 489; *Day v. Binning*, and *Croft v. Day*, 7 Bevan, 84; and in some recent cases the English courts have applied this doctrine to the protection of AMERICAN MANUFACTURERS of edge tools, whose names and marks upon their tools have been imitated in England.

*The Collins Co.* (of Hartford, Conn.) *v. Brown*, 3 Kay & John's, 428, and the *Same v. Cowen*, 3 Kay & John's, 423.

It may be remarked that the English Chancery enjoins such imitations though innocently and unintentionally made. In the case, *Millington v. Fox*, 3 Myl. and Cr. 353, the Chancellor, LORD COTTENHAM, in giving his decision, said:—

“ At the same time this case is very different  
“ from the cases of this kind which usually oc-  
“ cur where there has been a fraudulent use by  
“ one person of the trade marks or names used  
“ by another trader. I see no reason to believe  
“ that there has, in this case, been a fraudulent  
“ use of the plaintiff’s marks. It is positively  
“ denied by the answer, and there is no evi-  
“ dence to show that the defendants were ever  
“ aware of the existence of the plaintiffs as a  
“ Company manufacturing steel; for although  
“ there is no evidence to show that the terms  
“ ‘Crawley,’ ‘Crawley Millington,’ were merely  
“ technical, yet there is sufficient to show that  
“ they were very generally used in conversa-  
“ tion, at least, as descriptive of particular  
“ qualities of steel. In short, it does not ap-  
“ pear to me, that there was any fraudulent  
“ intention in the use of the marks. That cir-  
“ cumstance, however, does not deprive the  
“ plaintiffs of their rights to the exclusive use  
“ of their names, and therefore I stated, that  
“ the case is so made out as to entitle the plain-  
“ tiffs to have the injunction made perpetual.”

And further, the Chancellor holds that

“ A man, though not intending an injury to  
“ another, shall not be allowed to adopt the  
“ marks by which the goods of another are des-  
“ ignated, if the effect of adopting them would  
“ be to prejudice the trade of such other per-  
“ son.”

The English courts of law act upon the same

doctrine as in the case of *Crawshay v. Thompson*, 4 Man. & Gr. 357, when the judges decided that it is not necessary to aver or prove wrongful intent on the part of the infringer.

Our American courts give a protection no less ample and complete to property in trade marks.

Judge Story, in a case which came before him, in 1844, *Taylor v. Carpenter*, 3 Story, 458, after stating in the strongest terms his decision sustaining the right to trade marks, speaks thus—

“ I do not quote cases to establish the principles above stated. They are very familiar to the profession, and not susceptible of any judicial doubt.

The learned Vice-Chancellor SANDFORD says:—

“ The great importance of the subject of trade marks and symbols, and the growing interest which it has excited, have induced the author to collect, in a note, at the end of this case, the recent authorities relative to this branch of the law, both here and in England. Since the decision of *Coates v. Holbrook*, the case of *Taylor v. Carpenter*, cited in the opinion of the Court, has been decided on an appeal from the Chancellor’s decree, in our court of last resort, so that several of the propositions held in the case of *Coates* are now definitely settled in this State.

“ The great interest felt in these questions,

“ by the manufacturing and commercial world,  
 “ is illustrated by the fact that the judgment  
 “ of the Assistant Vice-Chancellor, in *Coates v.*  
 “ *Holbrook*, was noticed at some length in the  
 “ London Times, soon after it was pronounced,  
 “ and was stated at large in the Liverpool  
 “ newspapers.”

Another learned judge of the SUPREME COURT OF THE UNITED STATES, still on the Bench, has had occasion judicially to apply this doctrine for the protection of trade marks in medicine. In the case of *Coffeen v. Brunton*, 4 McLean, 516, Judge McLEAN granted an injunction in a case stated by himself, as follows:—

“ In the case under consideration, in his label,  
 “ the plaintiff calls his medicine ‘*Chinese Lini-*  
 “ *ment,*’ the defendant calls his ‘*Ohio Liniment,*’  
 “ but from the body of the label, and from the  
 “ *directions for the use of the medicine*, it is clear  
 “ that the *language of the defendant is so assim-*  
 “ *ilated to that of the plaintiff, as to appear to be*  
 “ *the same medicine, the alterations being only*  
 “ *colorable.*”

And upon a further hearing, reported in 5 McLean, 256, the Court stated the law upon the subject as follows:—

“ To entitle a plaintiff to protection against a  
 “ false representation, it is not essential that the  
 “ article should be inferior in quality, or that the

“individual should fraudulently represent it so  
“as to impose upon the public, but if by rep-  
“resentations it be so assimilated as to be  
“taken in market for an established manufac-  
“ture, or compound of another, the injured  
“person is entitled to an injunction. The  
“injury is not the less, though the false repre-  
“sentation be made without the knowledge of  
“such interference.

While the judge dissolved the injunction, he expressly states that it was simply upon the ground that it was established by the evidence, that Coffeen the plaintiff, and Loree were partners originally, and equally entitled to the use of the trade mark and the sale of the medicine.

Judge McLean also granted an injunction in the case of *J. N. Harris & Co.* (our agents at Cincinnati, Ohio) v. *George W. Denig & Co.*, of Chillicothe, for pirating our trade mark. The defendants immediately abandoned the use of it, and the case was never brought to trial.

Not only the courts of the United States, but the State courts, particularly of the commercial States of New York and Massachusetts, have had occasion to apply the same doctrine. The first cases in New York were in 1844, upon the same subject as the decision of Judge Story, — the trade marks

and labels upon spools of thread. The decisions in the Courts of Chancery and the Court of Errors in New York were equally emphatic and pointed as that of Judge Story.

They may be found in 2 Sandford, Chancery Reports, 586.

Another important case in New York, *Amoskeag Manufacturing Co. v. Spear*, 2 Sandford, Superior Court, 599.

The plaintiffs were manufacturers of cotton goods at Amoskeag Falls, in the State of New Hampshire. They used a label with the words following, and thus arranged : —

AMOSKEAG MANUFACTURING COMPANY,  
Power Loom,  
Yds.  
A. C. A.

*Amoskeag Falls, N. H.*

The words were printed in red colors, the label had a fancy border, — square externally and elliptical within, — and the words contained in the upper and lower lines of the label were printed in a line corresponding with the interior curve of the border.

The defendants were dealers in domestic goods



in New York, and among others sold Tickings, manufactured at Lowell, Massachusetts. "To this they caused to be affixed a label, and the same had been used for five years before the action was brought, corresponding with that of the plaintiff's in size, color, fancy border, position, general arrangement, &c."

The words of the defendants' label were as follows, and thus arranged:—

LOWELL PREMIUM TICKINGS.

Power Loom,

Yds.

A. C. A.

*Warranted Indigo Blue.*

It was claimed by the plaintiffs, that notwithstanding the difference of the words in some part of the defendants' label, yet the resemblance to the plaintiffs' was such, that purchasers would be, and were in fact, deceived,—and upon this point the Court says:—

"Upon comparing the original trade mark of  
 "the plaintiffs, with those used by the defend-  
 "ants, I find it impossible to doubt that the lat-  
 "ter is a designed, elaborate imitation of the for-  
 "mer. They are the same in form, size, and color.  
 "It is only on a very close inspection that the  
 "ornamental border can be at all distinguished.

“The variations in the words, scarcely impair-  
 “ing, are quite insufficient to destroy a general  
 “resemblance that was calculated to deceive  
 “the public, and by which the evidence is  
 “abundant and conclusive, to show that many  
 “dealers have been in fact deceived.

“I cannot escape from the conviction that  
 “the real motive of the defendants was, an  
 “expectation of the benefit to result to them-  
 “selves, from the error of purchasers, and from  
 “the imposition upon purchasers, that subor-  
 “dinate dealers would be tempted and enabled  
 “to practise.”

It was claimed by the defendants that the substitution in their label of the words

LOWELL PREMIUM TICKINGS,  
*Warranted Indigo Blue,*

for that of

AMOSKEAG MANUFACTURING COMPANY,  
*Amoskeag Falls, N. H.*

in that of plaintiffs, “provided an effectual security against the imposition of dealers, and the mistakes of purchasers.”

But the Court says:—

“I cannot think so,—I cannot think that this  
 “security is provided, — for not only may the  
 “substituted words, as is proved to have been  
 “the case, from their position, wholly escape  
 “the attention of the purchaser, but when

“read, they may not have the effect of altering  
“the belief that the general resemblance of  
“the labels is calculated to produce. The  
“words are exceedingly ambiguous. They are  
“not a declaration that the tickings are not  
“manufactured by plaintiffs, but are entirely  
“consistent with the supposition that they  
“are.”

The injunction was made perpetual, the defendants being enjoined against using the label, except as to the letters “A. C. A.” which were considered to be, under the evidence, mere descriptions of the *kind and quality of goods*.\*

And yet, according to the ruling of the learned Vice-Chancellor, SIR LANCELOT SHADWELL, in the case of *Ransom v. Bentall*, Law Journal Reports, New Series, Vol. 3, p. 161, it would seem proper that the letters “A. C. A.” in the above case should have been also included in the injunction.

In this case, *Ransom v. Bentall*, the plaintiffs, were manufacturers of case-hardened ploughshares, on which they stamped their name, also marked upon them the letters “H. H.,” *to denote the shares being case-hardened* (this certainly was descriptive of quality, in the plainest sense possible), and also certain numbers, as No. 6, *to denote their size* (this equally

\* We quote other points in the Amoskeag case in another place.

true represented kind). Aside from the matter of the name or style, the defendants claimed the right to use the letters and the figure, H. H. 6.

In his decision, the Vice-Chancellor said :—

“ The defendant is in fact asking me to sanction the commission of a fraud. If he had been in the habit of marking his ploughs only with H. H. 6, and *could see the marks so placed that no person could be deceived in purchasing the ploughs*, then I might refuse the injunction as to that part of the ploughs. But here the defendant wants me to decide, *ab ante, that no possible use of H. H. 6 may not have the effect of misleading persons.*”

The Court allowed an injunction, restraining not only the use of the *particular style of letters and figures*, but also “ any words,” “ letters,” and “ figures,” which purported to represent that they were used by the complainants.”

In the case of *Stokes v. Landgraff*, 17 Barbour, 608, the Supreme Court of the State of New York, affirms the same general principles, in the following language :—

“ The principle is well settled that a manufacturer may, by priority of appropriation of *names, letters, marks, or symbols* of any kind, to distinguish his manufactures, *acquire a property therein as a trade mark*, for the invasion

“ of which an action for damages will lie, and  
“ in the exclusive use of which he may have  
“ protection, when necessary, by injunction.”

In the case of *Clark v. Clark*, the Court says:—

“ Ownership in his trade mark is allowed the  
“ manufacturer, that he may have the exclusive  
“ benefit of the reputation which his skill has  
“ given, to articles made by him, — and that no  
“ other person may be able to sell to the public,  
“ as his, that which is not his.

“ An imitation of his mark, with partial differ-  
“ ences, such as the public would not observe,  
“ does him the same harm as an entire counter-  
“ feit. If the wholesale purchaser most con-  
“ versant with the marks, is not misled, but the  
“ small retailer or consumer is, the injury is  
“ the same in law, and differing only in degree.  
“ A right of action must exist, for the last, as  
“ well as the first.”

In the case of *Williams v. Johnson*, 2 Bosworth, 1, it appeared that the plaintiffs, Williams & Bro. were the manufacturers at Manchester, Connecticut, of a particular kind of Soap, to which they gave the name of “Genuine Yankee Soap.” It was manufactured and put up with great care, attained a high reputation, and probably was one of the best articles of the kind for toilet use made in the country. It was known to the trade as “Yankee Soap,” and every person understood that to mean,

a certain kind of Soap manufactured by the plaintiffs. Each cake of their Soap was covered with tin-foil, and on one side a pink-colored label, arranged as follows. We copy from the label before us:—

GENUINE  
**YANKEE SOAP,**

*Manufactured at*

**MANCHESTER, CONN.,**

BY

**WILLIAMS & BROTHER,**

CHEMISTS AND APOTHECARIES.

To prevent counterfeits their signature will be upon each cake.

On the reverse side was a label, colored like the former, with a description of the qualities of the Soap. There was also another label in imitation of writing, as a *fac simile* of their signature, "Williams & Bro."

The cakes of Soap thus prepared were put up in boxes containing one dozen each. On the cover of the box was a label, reading as follows: "One Dozen Genuine Yankee Soap, warranted superior to any foreign compound for Shaving and the Toilet, manufactured at *Manchester, Connecticut, by Williams & Bro., Chemists and Apothecaries.* To

prevent counterfeits, their name will be on each cake.”

The defendants manufactured Soap, put up in cakes of same size and shape, and used labels in imitation of the plaintiffs’, *with the exception* that the name of the manufacturers purported to be, *L. Williams & Co.*, and the place of manufacture, *New York*.

The label was thus arranged :—

GENUINE  
**Y A N K E E   S O A P ,**

*Manufactured*

BY

**L. WILLIAMS & CO.,**

**NEW YORK,**

CHEMISTS AND APOTHECARIES.

To prevent counterfeits their signature will be upon each cake.

The defendants’ Soap was packed in boxes of one dozen each, and labelled on the cover, “One Dozen Genuine Yankee Soap, warranted superior to any foreign compound for Shaving and the Toilet. Manufactured by *L. Williams & Co.*, *New York*. To prevent counterfeits their signature will be on each cake.”

It will be observed, the fact is clearly stated on

the label of each cake of soap, and on the outside cover of the box, that neither the name of the manufacturer nor the place of manufacture was the same.

The plaintiffs' label was —

“Genuine Yankee Soap, manufactured at *Manchester, Conn., by Williams & Bro.*”

The defendants' label was —

“Genuine Yankee Soap, manufactured by *L. Williams & Co., New York.*”

Except the change in the name of the manufacturer, and the place of manufacture, the defendants used the trade mark and labels in imitation of the plaintiffs.

The learned judge who gave the opinion in this case, and granted the injunction (Mr. Justice Woodruff), characterizes the conduct of the defendants as

“A gross and palpable endeavor by an imitation of the plaintiffs' marks and labels, to deceive the public, and obtain the patronage of right belonging to the plaintiffs.”

“The plaintiffs had employed their skill in the compounding of well-known ingredients, for the manufacture of soap, and in all the benefits resulting from that skill were entitled to protection.”

“What marks or devices (say the Court) are



“ employed by the plaintiffs to denote that the  
 “ soap is made by them, and is combined by  
 “ the skill that was employed in the making  
 “ of soap, heretofore made and sold by them,  
 “ bearing the same mark, are entitled to pro-  
 “ tection.

“ As, for example,—If the plaintiffs have cho-  
 “ sen to stamp their soap with some impression  
 “ having no other meaning than to distinguish  
 “ their manufacture from that of others, and  
 “ have given it out as *their mark*, and, by this  
 “ description, soap of their manufacture had  
 “ acquired a reputation and sale, they would  
 “ be entitled to protection.

“ The marks and labels which they have  
 “ adopted for this purpose the defendant has  
 “ copied,—and even the single variation in the  
 “ change of name imports a falsehood, and  
 “ tends to create, rather than to destroy the  
 “ impression, that the soap was manufactured  
 “ by the plaintiffs.”

Quoting from Senator LOTT, in the case of *Taylor*  
 v. *Carpenter*, the Court say:—

“ *Honest competition relies only on the intrinsic*  
 “ *merit of the article brought into market, and*  
 “ *does not require a resort to false or fraudulent*  
 “ *device or token. That certainly cannot deserve*  
 “ *the appellation which studiously gives to the*  
 “ *product of pretended superior skill, the name*  
 “ *and external resemblance and imitation of the*  
 “ *article with which it professes to compete.*”

And again, quoting from Vice-Chancellor SANDFORD, in the case of *Coates v. Holbrook* :—

“ A man is not to sell the goods or manufactures of B, under the show or pretence that they are the goods or manufactures of A, who by superior skill or industry has established the reputation of his articles in the market.

“ The law will not permit a person to practise a deception of that kind, or to *use the means which contribute to effect it. He has no right, and he will not be allowed to use the names, letters, marks, or other symbols* by which he may palm off upon buyers, as the manufacture of another, the article he is selling, and thereby attract to himself the patronage that without such deceptive use of names, &c. would have enured to the benefit of that other person who first got up, or was alone accustomed to use, such names, marks, letters, or symbols.”

And again, quoting from Mr. Justice DUER, in the case of the *Amoskeag Manufacturing Co. v. Spear*.

“ In order to convey a false impression to the mind of the public, as to the true origin and ownership of goods, *it is not necessary that the imitation of an original trade mark should be exact and perfect. It may be limited and partial. It may embrace variations that a comparison with the original would instantly disclose. Yet a resemblance may exist, that was designed*

“to mislead the public, and the effect intended  
“may have been produced, nor can it be doubted  
“that when this design is apparent, and this effect  
“has followed, an injunction may rightfully be  
“issued, and ought to be issued.”

The foregoing case of *Williams v. Johnson*, like the case of *Perry Davis v. Perry & Burke*; *Same v. George Kendall*; *Howard v. Henriques*; *Marsh v. Billings*; *Knott v. Morgan*; *Christy v. Murphy*; *Genin v. Chadsey* (not yet reported), serves to illustrate that a “name,” “mark,” “device,” or “symbol,” adopted as a trade mark, may, and does, by long use by one party, become so associated, and in such a way connected with the name of the party who adopts it, and so far denotes some article of his manufacture, or hotel, or some place of amusement he may keep, or some line of carriages he may own, that one is inseparable from the other, and, in the language of LORD LANGDALE, does in fact “*distinguish their property.*”

In the case of *Howard v. Henriques*, 3 Sandford, Superior Court, 726, N. Y., where the plaintiff claimed the right to the exclusive use of the name, “Irving House” as a trade mark or designation for his hotel. Howard was highly distinguished as a hotel keeper, and the “Irving House” was popular.

The learned Court, in granting the injunction restraining the defendant from using the name, says:—

“ Every man may and ought to be permitted  
 “ to pursue a lawful calling in his own way,  
 “ provided he does not encroach upon the  
 “ rights of his neighbors, or the public good.  
 “ But he must not, by any deceitful or other  
 “ practice, impose upon the public, and he must  
 “ not, by dressing himself in another man’s gar-  
 “ ments, and by assuming another man’s name,  
 “ endeavor to deprive that man of his own indi-  
 “ viduality, and thus despoil him of his gains,  
 “ to which, by his industry and skill, he is  
 “ fairly entitled.”

We think that the principle of the rule is the same, to whatever subject it may be applied, *and that a party will be protected in the use of a name which he has appropriated and by his skill rendered valuable*, whether the same is upon articles of personal property which he may manufacture, or applied to a hotel, where he has built up a prosperous business.

On a subsequent hearing to dissolve the injunction, Justice CAMPBELL says:—

“ The three of my associates, the Chief Jus-  
 “ tice (OAKLEY) and Justices DUER and MASON,  
 “ who were present at the argument, together  
 “ with Justice SANDFORD, who granted the in-  
 “ junction, concur with me in the opinion that  
 “ the injunction must stand.”

The same doctrine was held in Massachusetts, in the case of *Marsh v. Billings*, 7 Cush. 332, where the plaintiff claimed the right to the exclusive use of the name "Revere House," as a sign for his carriages, and also as a badge to be worn by his porters and hackmen.

The same question upon substantially similar facts, in relation to a hotel in New York, known as the "New York Hotel," came before the Superior Court of that city, and was in like manner disposed of by that Court.

Upon the like grounds, similar protection was extended to the proprietors of places of public amusement, *Christy v. Murphy*, 12 How. Pt. R. 77.

We find in the *Boston Journal* the following report of an interesting trade-mark case, decided recently, involving the right to use a name for an imitation article, which was calculated to deceive the unwary:—

#### COCOAINE.

*Joseph Burnett, et al. v. Edward Phalon, et al.*

In the Superior Court of the City of New York, before Judge Pierrepont, upon a bill praying for a permanent injunction in the above-named case, and upon a full hearing of the testimony therein,

a decree in favor of Messrs. Burnett & Co. has been made, and a perpetual injunction ordered.

The following is an extract from the opinion of Judge Pierrepont : —

“ The Cocoaine, as he (plaintiff) called it,  
 “ had a great sale, and after its reputation was  
 “ established, through the energy, skill, and  
 “ money of the plaintiffs, the defendants then  
 “ commenced the sale of their mixture, under  
 “ the designation of Phalon & Son’s ‘Cocoine.’ ”

“ Was this contrivance ‘calculated to mis-  
 “ lead the bulk of the unwary purchasers, and  
 “ thus to benefit the defendants, to injure the  
 “ plaintiffs, and to deceive the public?’ ”

“ I have no doubt that an honest answer  
 “ from the defendants would be affirmative.”

“ If Burnett’s Cocoaine had proved destruc-  
 “ tive to the human hair, Phalon’s ‘Cocoine’  
 “ would not have been introduced under that  
 “ designation. It was the *success* of the former  
 “ that introduced the latter; and when one  
 “ intentionally (as in this case) so closely imi-  
 “ tates the trade mark of another, the law pre-  
 “ sumes it to have been done for the purpose  
 “ of inducing the public to believe that the  
 “ article is that of him whose trade mark is  
 “ imitated, and for the purpose of supplanting  
 “ him in the good will of his trade or business.  
 “ (*Taylor v. Carpenter*, 2 Sandford, Ch. Reports,  
 “ 603, affirmed in the Court of Errors.) ”

“ Every man has a right to the reward of his  
 “ skill, his energy and his honest enterprise,

“ and when he has appropriated as his trade  
“ mark letters combined into a word before  
“ unknown, and has used that word, and long  
“ published it to the world as his adopted  
“ ‘trade mark,’ he has acquired rights in it  
“ which the courts will protect.”

“ The proof is clear that the plaintiffs had,  
“ for nearly two years, advertised their mix-  
“ ture in nearly every newspaper in this city,  
“ and had published in the same papers that  
“ they had adopted the word ‘Cocaine’ as  
“ their trade mark. The defendant was him-  
“ self a witness, and he did not suggest that  
“ these notices had not been brought home to  
“ his knowledge; *the conclusion is irresistible,*  
“ *that he was aware of their publication, and that*  
“ *he intentionally adopted ‘Cocaine’ as a close*  
“ *imitation of ‘Cocaine’ and for the purpose of*  
“ *deriving profit from the simulated trade mark.*

“ No one can appropriate a word in general  
“ use as his trade mark and restrain others  
“ from using that word. Burnett cannot ac-  
“ quire a property in the word gin, wine,  
“ brandy, or ale, or any other word known to  
“ the language, *and in common use,* to desig-  
“ nate things or the qualities of things.

“ But the word appropriated by the plaintiffs  
“ is not of that character, and it is no hardship  
“ to the defendant to be restrained from its use  
“ as a trade mark; he can adopt another desig-  
“ nation for his mixture,—there is no necessity  
“ whatever for this close imitation of the plain-  
“ tiffs’ mark; and the defendant can scarcely

“ have any other motive than by this similitude  
“ to derive advantage from the plaintiff’s toil.  
“ To this he has no right. There are some  
“ features of novelty in this case, but the  
“ general principles which govern it are well  
“ settled.

“ The plaintiffs are entitled to judgment and  
“ an injunction must issue.”

We find also the following report in the New York papers of January 10, 1861, of a recent trade-mark case of some interest, for the right to the trade mark, “Live and let live.” It will be noticed that, like all cases of this kind, judgment was rendered for plaintiff.

#### SUPERIOR COURT. — SPECIAL TERM.

*Hon. Murray Hoffman, Justice.*

TRADE MARK “LIVE AND LET LIVE.”

*Erastus Genin v. George W. Chadsey and Myron A. Decker.*

The plaintiff moved upon his complaint, and the affidavits of P. T. Barnum and John Genin for an injunction order to restrain the defendants from using upon their signs the name “Live and let Live.”

It was shown that the plaintiff was the present proprietor of the oyster and dining saloon, at No.



214 Broadway, and that his saloon, for upwards of fourteen years, had been known by the name "Live and let Live;" that such name had appeared upon the signs at such saloon for that period of time, and also upon the bills of fare used therein; that two large board signs which rested upon either side of the Broadway entrance contained the following inscription: "The Captain's Live and let Live Oyster and Dining Saloon." That the defendants carried on the oyster and dining saloon, No. 212 Broadway, next door to plaintiff's, and that on the 6th day of December, 1860, they put the name "Live and let Live" upon their signs at their Fulton Street and Broadway entrances. Their signs at the Broadway entrance occupied the same relative position as the plaintiff's, and now contains the inscription, "G. W. Chadsey & Co.'s Great Eastern Live and let Live Dining Saloon."

The plaintiff alleged that, by skill and good management, his saloon had acquired favor with the public, and was extensively patronized and generally known as the old and long established "Live and let Live;" and that the defendants' sole object in appropriating the name of the plaintiff's saloon was to mislead the public and

attract business which legitimately belonged to him. That the use of the same name by the defendants would necessarily result in pecuniary loss to the plaintiff.

The defendants, on the other hand, claimed that "Live and let Live" was an old motto used to signify an economical rate of charges, which they had as good right to use as the plaintiff; also that the same motto was in use at three other oyster saloons in the city. They also disclaimed any intention to mislead the public.

Justice Hoffman decided to grant the injunction.

*E. W. Dodge*, for plaintiff; *James W. Culver*, for defendants.

We might accumulate cases almost without number, but those we have cited would seem sufficient for honest and intelligent minds.

In addition to the foregoing cases, reported at some length, we quote the following points, from the "UNITED STATES DIGEST OF DECISIONS OF THE COURTS OF COMMON LAW, EQUITY, AND ADMIRALTY," some of these points were made in the cases cited by us, and are in addition to the part we quote:—

“A manufacturer may, by priority of appropriation of *names, letters, marks, or symbols of any kind* to distinguish his manufactures, acquire a property therein, as a *trade mark*, for the invasion of which an action for damages will lie, and in the *exclusive use* of which he may have protection, when necessary, by injunction.”

*Stokes v. Landgraff*, 17 Barbour, N. Y., 608.

“In all cases where names, signs, marks, brands, labels, words, or devices of any kind can be advantageously used to designate the goods or property, or particular place of business of a person engaged in trade or manufactures, or any similar business, he may adopt and use such as he pleases, which have not been before appropriated, and no other can lawfully imitate them. If any one does so, *he is liable for damages*, and may be *restrained by injunction*.” — *Ib.*

“An injunction will lie to restrain one in the use of the trade mark of another.”

*Amoskeag Mg. Co. v. Spear*, 2 Sandford Sup. Ct., 599.

“Every manufacturer, and every merchant for whom goods are manufactured, has an unquestion-

able right to distinguish the goods that he manufactures or sells by a peculiar mark or device, in order that they may be known as his mark in the market for which he intends them, and that he may thus secure the profits which their superior repute as his may be the means of gaining." "His trade mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale." — *Ib.*

*"His own as well as the public interest requires that he should be protected in the exclusive use of his trade mark." — Ib.*

"He who affixes to his own goods an imitation of an original trade mark, by which those of another are distinguished and known, seeks, by deceiving the public, to divert and appropriate to his own use the profits to which the superior skill of another has given him the exclusive title." — *Ib.*

*"Such act is a fraud upon the public and upon the owner of the trade mark, and in the case of the latter, there is a fraud coupled with a damage, against which the legal remedy may not be adequate and complete relief." — Ib.*

“An imitation may be only *partial*, and where it is so, if it is calculated to mislead the public, and is manifestly intended for that purpose, an injunction will be granted.” — *Ib.*

“No person has a right to use the names, marks, letters, or other symbols which another has previously got up, or been accustomed to use in his trade, business, or manufactures.

*Coates v. Holbrook*, 2 Sandford Ch. R. 586.

*Taylor v. Carpenter*, 2 Sandford Ch. R. 603.

“Equity will restrain such fraudulent use of trade marks by injunction, and will decree an account for damages.”— *Ib.*

“It is no defence to such suit that the simulated article is equal in quality to the genuine.”

*Coates v. Holbrook*, 2 Sandford Ch. Reports, 586.

*Partridge v. Menck*, 2 Sandford Ch. R. 622.

*Taylor v. Carpenter*, 11 Paige, 293.

“Nor that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase that the article is spurious or an imitation.”

*Coates v. Holbrook*, 2 Sandford Ch. Reports, 586.

“A commission merchant, who sells a spurious article, knowing its character, is liable to a suit to restrain its further sale by the proprietor of the trade mark, and will be subjected to the costs of such suit.” — *Ib.*

“One found guilty of pirating trade marks must pay the cost of the suit to restrain him.”

*Taylor v. Carpenter*, 2 Sandford, Ch. R. 603.

“Where one intentionally uses or closely imitates another’s trade marks on merchandise or manufactures, the law presumes that he did it fraudulently, for the purpose of inducing the public, or those dealing in the article, to believe that the goods are those made and sold by the latter, and of supplanting him in the good-will of his trade or business.” — *Ib.*

“On a bill to restrain one from the use of trade marks, the question is not whether the complainant was the original inventor of the mark alleged to have been pirated, nor whether the article sold under the pirated mark is of equal value with the genuine, but the ground is, that the complainant has an interest in the good will of his trade or

business, and having taken a particular label or sign, indicating that the article sold under it was made by him and sold under his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to pirate upon the good will of his friends or customers, by using such label or sign without his consent or authority.”

*Partridge v. Menck*, 2 Sandford, Ch. Reports, 622.

“Where a manufacturer adopts a certain trade mark, and stamps it upon the article manufactured, he is entitled to the exclusive use of it, and a Court of Equity will restrain by injunction, any other person who pirates such trade mark from using the same.”

*Taylor v. Carpenter*, 11 Paige, 292.

“And where the person pirates a trade mark for the fraudulent purpose of passing off his own article for that of him whose mark he has taken, and to supplant him in the good will of the business, he will be liable also to respond in damages for the injury thus caused.” — *Ib.*

11 “Where there is a strong resemblance in matter, color, and arrangement, the court will presume that

it is not fortuitous, but that it was intentional, with a view to mislead purchasers."

*Flavel v. Harrison*, 19 Eng. Law and Equity, 15.

"It might be offered in mitigation of vindictive damages, if requested; and a long delay of the plaintiffs to prosecute, after knowing the wrong, might be competent proof to show their acquiescence in it; but could be no absolute bar to a recovery, unless extended to the period of the statute of limitations."

*Taylor v. Carpenter*, 2 W. & M. I., U. S. Reports.

From the foregoing facts in the case, and the law in regard to *Trade Marks*, we believe we have established clearly, and beyond a legal or equitable doubt —

*First*, That Perry Davis first compounded the medicine called the PAIN-KILLER; that he originated the word PAIN-KILLER, and adopted it as the trade mark of his manufacture.

*Second*, That courts of Law and Equity recognize property in trade marks, and protect it by damages in suits at law, and by injunctions in equity, and by costs in both courts, and indeed in many States the use of another's trade mark is made a criminal offence.



*Third,* Such action for damages are not barred by lapse of time, and neglect to prosecute for a period short of the Statute of Limitations.

*Fourth.* It is not necessary that the imitation should be complete or perfect. It is sufficient for the Court to enjoin, or for a jury to punish with damages, if the imitation be such as to mislead the unwary. Lord Langdale, in *Croft v. Day*, 7 Bevan, 84, says: "The question in such cases is, whether the contrivance of the defendants were calculated to mislead the bulk of the *unwary* public," and in *Crawshay v. Thompson*, 4 Man. G. 357, it is stated as follows: "The question was, whether the defendant's marks have so close a resemblance to the plaintiff's as to be calculated to deceive the unwary and to injure the sale of the plaintiff's goods." The American cases hold the same doctrine. (See *Clark v. Clark* and the *Amoskeag Manufacturing Co. v. Spear*, quoted above.)

*Fifth.* Such imitations will be punished, though unintentional; as in *Millington v. Fox*, the defendant supposed the name "Crawley" was the name of a particular kind of steel. Yet its being the name applied to designate the manufacture of a person, Lord Cottenham enjoined the defendant. So in our case, the name PAIN-KILLER might by

some persons be supposed to be the name of a *kind* of medicine, merely, whereas in truth and fact, it is the name of a medicine first compounded by Perry Davis, — a name or mark original with him, and used to *designate his medicine or manufacture*, and so generally known in the market, and therefore its use by others would be enjoined by any court which followed the precedents we have cited, — which, in other words, administered the law as applied in this country and England, for the protection of this class of property.

*Sixth.* These rules apply to the seller as well as to the manufacturer.

*Seventh.* The Courts will restrain a party from imitating another's Labels, Wrappers, Directions, Showbills, &c.

*Blofield v. Paine*, 4 Barnwell & Adolphus.

*Coffeen v. Brunton*, 425 McLean, 516 and 256.

The authorities before referred to establish conclusively the right of Perry Davis to be protected in the exclusive use of the name PAIN-KILLER, when used upon labels, wrappers, show-cards, directions, &c., designating the name of a medicine.

But if the question were an original one, the

right is perfectly clear upon principle. The term PAIN-KILLER, as understood in the Drug Market of the United States, has as well defined a signification as any preparation known in Pharmacy. It has passed into use among thousands of families. The masses, always impatient, especially in our country, of superfluous words, denominate the preparation which they purchase, as PAIN-KILLER; whoever the manufacturer may be, it nevertheless is PAIN-KILLER. To say that, among at least thousands of purchasers, there would be a nice inquiry as to the *name of the manufacturer*, would be to contradict the experience of all engaged in the trade.

From our observation for the last twenty years, we believe it decidedly against the interest of any party who gets up a good medicine, to use the name or in any way indicate that it is like some other in the market.

The fact is prominent, that communities, ever jealous and particularly of a new medicine, look with suspicion upon an imitation, or that which bears any signs of such. We have known a great many cases where imitations in one way or other have been tried, not only of our medicine, but others, but never yet have known the first person

who was successful or made money by such a course. *It savors of fraud*, and no explanation can dispel the impression.

The language of Judge PIERREPONT, in the case of *Burnett v. Phalon*, is very plain on this point. He says:—

“ Was this contrivance calculated to mislead  
“ the bulk of the unwary purchasers, and thus  
“ to benefit the defendants, to injure the plain-  
tiffs, and to deceive the public ?

“ I have no doubt that an honest answer from  
“ the defendants would be affirmative.

“ If Burnett’s Cocaine had proved destruc-  
“ tive to the human hair, Phalon’s Cocaine  
“ would not have been introduced under that  
“ designation. It was the *success* of the former  
“ that introduced the latter. It is no hardship  
“ to the defendant to be restrained from its use  
“ as a trade mark ; he can adopt another desig-  
“ nation for his mixture,— there is no necessity  
“ whatever for this close imitation of the plain-  
“ tiff’s mark ; and the defendant can scarcely  
“ have any other motive than by this similitude  
“ to derive advantage from the plaintiff’s toil.  
“ To this he has no right.”

Precisely so it is with all who pirate our name PAIN-KILLER. If it had proved a MAN-KILLER, no other PAIN-KILLER would have been heard of in the market.

Although we are not desirous of entering into lawsuits with any one, yet we owe a duty to ourselves and to the public, and that duty is to protect our rights to the name PAIN-KILLER, as our *trade mark*, and those who persist in using it will find, as in the language of Judge PIERREPONT, that it is (in the opinion of the courts) "no hardship to be restrained from its use as a trade mark."

For this purpose we have all the law and equity on our side. We have the will and disposition, if necessary, and we have the money. In short, we have every requisite necessary to protect our rights, and we hereby give NOTICE that we shall prosecute, to the extent of the law, any party using the name PAIN-KILLER in any way as applied to a medicine. The law provides for the protection of our rights, and we must apply it when other and more agreeable means fail.

J. N. HARRIS & Co., of Cincinnati, Ohio, are duly authorized to use our name in the prosecution for any infringement.

PERRY DAVIS & SON.

PROVIDENCE, January, 1861.



