

Michigan Law Review

Volume 43 | Issue 3

1944

CORPORATIONS-WHERE NAME OF NEW CORPORATION IS THE EXISTING TRADE NAME OF ANOTHER

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Recommended Citation

Robert M. Barton S. Ed., *CORPORATIONS-WHERE NAME OF NEW CORPORATION IS THE EXISTING TRADE NAME OF ANOTHER*, 43 MICH. L. REV. 613 (1944).

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RECENT DECISIONS

This section is divided into two parts; notes and abstracts. The abstracts consist merely of summaries of the facts and holdings of recent cases and are distinguished from the notes by the absence of discussion.

NOTES

CORPORATIONS—WHERE NAME OF NEW CORPORATION IS THE EXISTING TRADE NAME OF ANOTHER—In 1928 plaintiff changed its official corporate name from the "City Fuel Company" to the "Staples Coal Company," but continued to utilize the old corporate name as a trade name in advertising and the retail sale of fuel oil. It made little, if any, use of the new title, since the general public was accustomed to dealing with it under the name it had used for seventeen years. Defendant was incorporated in 1943 as the "City Fuel Company" and began to engage in a similar business in the same general trade area of greater Boston. Plaintiff, fearing deception of the public and injury to its good will, brought a bill to enjoin defendant from using a corporate name identical with its trade name. *Held*, injunction granted against the use of the name in any of the localities where the plaintiff does business. Equity will protect the public from being misled and the business of the plaintiff from being diverted. The corporate franchise issued by the state to the defendant does not preclude such relief. *Staples Coal Co. v. City Fuel Co.*, (Mass. 1944) 55 N.E. (2d) 934.

Generally the worth of a name is not inherent, but its value is in what it identifies. A natural person, who has little to do with choosing his own name, has been allowed great leeway in associating his name with his commercial pursuits, even though the resultant designation is similar to or even identical to that used in an existing business.¹ Good faith and honesty seem to be the only limitations.² The name of a corporation, on the other hand, is born out of the deliberate selection of its founders. Here the courts are quicker to scrutinize the accuracy with which the name indicates the true identity of the new corporation and to guard against the harm which a misleading name might occasion. Often the problem is nipped in the bud by the state incorporation laws which prohibit the adoption by new corporations of names which might create confusion.³

¹ *De Nobili Cigar Co. v. Nobile Cigar Co.*, (C.C.A. 1st, 1932) 56 F. (2d) 324; *Horlick's Malted Milk Corp. v. Horlick's, Inc.*, (C.C.A. 9th, 1932) 59 F. (2d) 13; *Yale & Towne Mfg. Co. v. Rose*, 120 Conn. 373, 181 A. 8 (1935); *Fitzgerald's Atlantic Bar & Grill v. Fitzgerald*, 179 Misc. 472, 40 N.Y.S. (2d) 341 (1942). See also 39 MICH. L. REV. 1047 (1941).

² One court said that an individual may use his own name in his business, even though he may thereby interfere with or injure the business of another person of the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical or do anything calculated to mislead. Such inconvenience or loss as may result from the honest use of a person's name in his business, by reason of its interference with the business of another having the same name, is regarded as *damnum absque injuria*. *Russia Cement Co. v. Le Page*, 147 Mass. 206 at 208-209, 17 N.E. 304 (1888). Cases are collected in 47 A.L.R. 1189 at 1209 (1927).

³ 6 FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS, rev. and permanent ed., p. 12, § 2419 (1931); 32 Trade Mark Rep. 11 (1942); 38 MICH. L. REV. 1320 (1940).

The Massachusetts statute covering this situation⁴ was not available to the plaintiff in the instant case, because the official corporate names of the two concerns were not similar at all. The plaintiff had been doing business for years under a trade name of which the defendant's corporate name was an exact duplicate. The law does not prohibit the assumption and use by a corporation of a trade name different from the official corporation title;⁵ some states require registration of the assumed name, however.⁶ As the name is given constant use in trade and advertising it becomes an asset of great value, for with it the public associates fair dealing and a successful enterprise. When injunctive relief is sought to protect such a business name, the outcome usually rests upon the existence of unfair competition.⁷ Injury arising out of the similarity of names of rival concerns falls principally in two places: (a) On the general public which may be deceived into buying goods mistakenly believing the source to be in the complainant;⁸ (b) On the first corporation whose good will may be sapped and trade diverted.⁹ In awarding an injunction a court does not grant the suitor a special indulgence or monopoly but merely guards against confusion and the unfair infringement of the reputation of a business already built.¹⁰ Actual fraudulent intent on the part of the infringer is immaterial,¹¹ though it has been said to strengthen the plaintiff's case.¹² It has oft been repeated that it is not the name, but the business, that is being protected. If so, it should make no difference

⁴ Mass. Laws Ann. (1933) c. 155, § 9.

⁵ *Kansas Milling Co. v. Ryan*, 152 Kan. 137, 102 P. (2d) 970 (1940); *Brotherhood State Bank of Spokane v. Chapman*, 145 Wash. 214, 259 P. 391 (1927); 6 FLETCHER, *CYCLOPEDIA OF PRIVATE CORPORATIONS*, rev. and permanent ed., p. 89, § 2442 (1931).

⁶ E.g., Ga. Code Ann. (Park, 1936) § 106-301. *National Brands Stores v. Muse & Associates*, 183 Ga. 88, 187 S.E. 84 (1936). See also *Meredith v. Universal Plumbing & Construction Co.*, 272 Ky 283, 114 S.W. (2d) 94 (1938) where a corporation transacting business under an assumed name was entitled to record that name, even though not compelled to do so.

⁷ In the principal case the plaintiff was not able to base his claim on Mass. Acts, 1943, c. 295 which extends injunctive relief to a corporation whose corporate name or trade name has been assumed by another corporation, because the statute was not approved until after the incorporation of the defendant.

⁸ *Household Finance Corp. of Del. v. Household Finance Corp. of W. Va.*, (D.C. W.Va. 1935) 11 F. Supp. 3; *Atlanta Paper Co. v. Jacksonville Paper Co.*, 184 Ga. 205, 190 S.E. 777 (1937); *Long's Hat Stores Corp. v. Long's Clothes Inc.*, 224 App. Div. 497, 231 N.Y.S. 107 (1928). Reasonable likelihood of such deception seems to be all that it is necessary to show. 7 THOMPSON, *CORPORATIONS*, 3d ed., p. 737, § 5705 (1927).

⁹ "The name under which a business is carried on is inextricably entwined with its reputation and good will." *Louis' Restaurant v. Coffey*, 132 Misc. 690, 230 N.Y.S. 82 at 85 (1928); *McGhan v. McGhan*, 115 Fla. 414, 155 S. 653 (1934).

¹⁰ Query—If the defendant in the instant case had merely incorporated under the name of the City Fuel Company but had used an entirely different trade name in dealing with the public, would the court force the name to be changed? Probably not, if no material injury to the business of the first corporation would result.

¹¹ 7 THOMPSON, *CORPORATIONS*, 3d ed., p. 738, § 5705 (1927). See cases collected in 66 A.L.R. 948 at 954 (1930).

¹² *Driverless Car Co. v. Glesener-Thornberry Driverless Car Co.*, 83 Colo. 262, 264 P. 653 (1928).

that the name identifying the business to the public is a corporate, trade, or popular name.¹³ Nor will the receipt of a corporate charter from the state pave the way for unlimited use of the name adopted by a newly formed corporation. While a corporate name is in some respects regarded as a property right,¹⁴ it cannot be used to invade the rights of others any more than the name of a natural person.¹⁵ By the act of incorporation the state does not adjudicate the legality of the name taken; ¹⁶ this is left for the courts to decide.¹⁷ If an injunction is issued, its scope is usually co-extensive with the market and good will of the complainant,¹⁸ for there can be no confusion where the plaintiff is not known.

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¹³ Where "Terminal Barber Shops, Inc." had built up a chain of beauty shops using the trade name, "Terminal" defendant was enjoined from using that word in similar business. *Terminal Barber Shops, Inc. v. Zoeborg*, (C.C.A. 2d, 1928) 28 F. (2d) 807. In *Great Atlantic & Pacific Tea Co. v. A. & P. Meat Market*, 138 Misc. 224, 244 N.Y.S. 535 (1930) defendant was restrained from using as its corporate name the popular name of the plaintiff. In similar vein is *Atlas Assurance Co. v. Atlas Ins. Co.*, 138 Iowa 228, 112 N.W. 232 (1907). Contra, "The plaintiff must stand or fall on its corporate name." *Central Mutual Auto Ins. Co. v. Central Mutual Insurance Co.*, 275 Mich. 554 at 561, 267 N.W. 733 (1936).

¹⁴ *Standard Oil Co. of New Mexico v. Standard Oil Co. of Calif.*, (C.C.A. 10th, 1932) 56 F. (2d) 973; *Children's Bootery v. Sutker*, 91 Fla. 60, 107 S. 345 (1926); *Saunders System Co. v. Drive It Yourself Co.*, 158 Ga. 1, 123 S.E. 132 (1924).

¹⁵ In *Empire Trust Co. v. Empire Finance Corp.*, (Kan. City, Mo., Ct. App. 1931) 41 S.W. (2d) 847 at 849 the court said, "Defendant also contends that the name acquired by the grant of the charter is a vested right which cannot be taken away without its consent, and that the right to use the name conferred by the charter is a franchise. We cannot allow this contention. There may be circumstances under which the rule contended for would apply, but it does not apply where the offending corporation adopts and uses the name of an older corporation in such a way or manner that the public may be deceived or confused as to which of the corporations it is dealing with."

¹⁶ *Peck Bros. & Co. v. Peck Bros. Co.*, (C.C.A. 7th, 1902) 113 F. 291; *American Clay Mfg. Co. v. American Clay Mfg. Co.*, 198 Pa. 189, 47 A. 936 (1901); *Diamond Drill Contracting Co. v. International Drill Contracting Co.*, 106 Wash. 72, 179 P. 120 (1919).

¹⁷ It is interesting to note that the courts do not pass upon what change the defendant might make in the name he uses to avoid the injunction. Fine distinctions are frowned upon. The defendant should rely wholly upon the merits of his own product and steer clear of any resemblances in denomination. See NIMS, UNFAIR COMPETITION AND TRADE MARKS, 3d ed., p. 940, § 318 (1929).

¹⁸ See instant case at 939; *Terminal Barber Shops v. Zoeborg*, (C.C.A. 2d, 1928) 28 F. (2d) 807; and collections of cases in 66 A.L.R. 948 at 962 (1930) and 115 A.L.R. 1241 at 1245 (1938).