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NOTES

EVIDENCE—DECLARATIONS AS TO DOMICILE—In *Holyoke* v. *Holyoke's Estate*,[1] the Supreme Court of Maine held, *inter alia*, that the declarations of the testator, disclosing an intention to change his domicile, are admissible in proceedings for the probate of his will only when the declarations have accompanied the acts which they explain.

It is well settled that the acquisition of a domicile in a given place depends upon two essential factors; the actual personal presence in the jurisdiction in question and the concurrent intention to make it his domicile.[2] Accordingly, the domicile of origin, or the prior domicile, is presumed to continue until another sole domicile has been acquired.[3] Since one of the elements in determining a change of domicile is a condition of mind, the "intention" of the person to make the given jurisdiction his permanent domicile,[4] the

[1] 87 Atl. Rep. 40 (Me. 1913).
[2] Carey's Appeal, 75 Pa. 201 (1874).
[3] Mather v. Cunningham, 105 Me. 326 (1909); Leach v. Pillsbury, 15 N. H. 137 (1844).
[4] *Supra.*

question arises as to the admissibility of his declarations in proof of such "intention." It is only natural that his declarations, oral and written, should be frequently resorted to in discovering his state of mind, his mental attitude, when he moved to the jurisdiction.

The courts differ in their rules governing the admission of such declarations. The early Massachusetts cases[5] laid down the principle that declarations of intention to make the state in question his domicile are admissible only when they accompany, qualify, or explain acts relevant to the issue of domicile. This rule limited the declarations to those made as part of the *res gestae*, in accordance with the Verbal Act doctrine.[6] Maine has always adhered to this doctrine.[7]

Massachusetts has, however, changed its attitude on this question;[8] and its courts now admit declarations whether they accompany relevant acts or not. In *Viles* v. *Waltham*,[9] the court said: "The intention of the party removing is competent to be proved as an independent fact, and anything which tends to show his intention in making the change may be shown, if it is free from objection on other particulars. . . . Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show the intention." This case, overthrowing the earlier doctrine in Massachusetts, has been followed in many jurisdictions.[10]

Even under this broader and more liberal rule the declarations must appear to have been made under natural circumstances and without apparent motive to deceive. Self-serving declarations and those made after the controversy has arisen are therefore excluded in all jurisdictions.[11]

N. I. S. G.

PARTNERSHIP — DISSOLUTION — PERMANENT INCAPACITY OF PARTNER—In *Barclay* v. *Barrie*,[1] the court affirmed a decree of dissolution against a copartnership not at will, before the expiration

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[5] Thorndike v. Boston, 1 Metc. 242 (Mass. 1840); Kilburn v. Bennett, 3 Metc. 199 (1841); Cole v. Cheshire, 1 Gray, 444 (1854).

[6] 3 Wigmore on Evidence, §§1727, 1784.

[7] Richmond v. Thomaston, 28 Me. 234 (1854); Belmont v. Vinalhaven, 82 Me. 524 (1890); Holyoke v. Holyoke's Estate, *supra*. In Illinois, Kreitz v. Behrensmeyer, 125 Ill. 141 (1888), follows the liberal rule, while Matzenbaugh v. People, 194 Ill. 108 (1902), appears to uphold the narrow doctrine of the early Massachusetts cases.

[8] Viles v. Waltham, 157 Mass. 542 (1893).

[9] 157 Mass. 542 (1893).

[10] Bigelow v. Bear, 64 Kan. 887 (1900); Baker v. Kelly, 41 Miss. 696 (1868); Chase v. Chase, 66 N. H. 588 (1891); Chambers v. Prince, 75 Fed. 176 (1891); *In re* Robert's Will, 8 Paige, 519 (N. Y. 1840).

[11] Watson v. Simpson, 8 La. Ann. 337 (1853); Cherry v. Slade, 2 Hawks, 400 (Eng. 1823).

[1] 102 N. E. Rep. 602 (N. Y. 1913).

of the term, at the instance of the partner continuing the business against a partner who had become incapacitated through paralysis subsequent to the formation of the agreement; upon the basis that every partner, independent of express provision, impliedly undertakes to advance the success of the copartnership by devoting to it within reasonable limits his time, efforts and ability. His copartners are entitled to this contribution and, if for any reason, he fails to fulfill his duties, they are thereby deprived of the benefits of the contract and the fruits of their joint enterprise, and equity has jurisdiction to afford the injured parties immediate relief from a situation surrounded with such serious responsibilities.[2]

By unanimous authority the elements requisite to obtain dissolution of a copartnership for a defined term, or rather of a partnership not at will, are: (*a*) complete incapacity;[3] (*b*) of a durable or probably permanent form, as opposed to fleeting, or temporary disabilities;[4] (*c*) relievable only in equity by decree for dissolution;[5] (*d*) subject under that flexible jurisdiction to a close scrutiny of the attending circumstances—the relief afforded to be governed thereby.[6]

Although insanity affords the most frequent illustration of the application of this principle, the relief is not confined to such cases, and the court may, as in the principal case, dissolve a partnership when a partner becomes in any way permanently incapable of performing his part of the copartnership contract.[7]

With regard to who may obtain such relief Lindley[8] says: "If the permanent incapacity arises from a cause other than unsoundness of mind, the court will not grant a dissolution at the instance of the person incapacitated, but the action must be brought by one of the other partners." It is submitted that this statement, while acquiesced in by a few writers and cases, is too broad, being rather by way of *dictum* and unsupported by precise authorities, except as applied to two other classes of cases where equity will decree a dissolution, viz.: (*a*) where the offending partner has been guilty

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[2] Water v. Taylor, 2 V. & B. 299 (Eng. 1813); Sayer v. Bennett, 1 Cox, 107 (Eng. 1784); Anon., 2 K. & J. 441 (Eng. 1856); Casky v. Casky, 5 Ky. Law R. 775 (1884); Griswold v. Waddington, 15 Johns. 57 (N. Y. 1818); Story on Partnership (7th ed.), §297: Gow on Partnership (Amer. ed.), 268-270.

[3] Jones v. Noy, 2 My. & K. 125 (Eng. 1833); Griswold v. Waddington, *supra;* Raymond v. Vaughn, 128 Ill. 256 (1889), 4 L. R. A. 440; Besch v. Frolich, 1 Ph. Ch. 172 (Eng. 1842); Story (7th ed.), §§296-297.

[4] Sadler v. Lee, 6 Beav. 323 (Eng. 1843); Leaf v. Coles, 1 De G. M. & G. 417 (Eng. 1851); Story, §297; Lindley on Partnership (8th ed., 1912), pp. 640, 654.

[5] See cases cited n. 2, *supra;* Raymond v. Vaughn, *supra,* n. 3; Whitwell v. Arthur, 35 Beav. 142 (Eng. 1865).

[6] Henn v. Walsh, 2 Edw. Ch. 129 (N. Y. 1833); Whitwell v. Arthur, *supra,* n. 5.

[7] Leaf v. Coles, *supra,* n. 4; Jones v. Lloyd, L. R. (18 Eq.), 265, 274 (Eng. 1874).

[8] Partnership (8th ed.), 654.

of conduct prejudicial to the business; or (*b*) otherwise conducts himself so that it is not reasonably practicable for the others to carry on the business with him.[9] In these latter instances, obviously, dissolution at the instance of the partner in default would be inequitable. But, it is submitted by all the analogies and equities applicable to dissolution in cases of mental incapacity,[10] there is no basic principle for refusing like relief at the instance of one in contractual default through unavoidable physical incapacity, as in the principal case.

That valid dissolution in cases of complete incapacity of any nature may be had in no way other than by decree in equity has never been doubted in England since Lord Kenyon's ruling in *Sayer* v. *Bennett*.[11] Parsons, in his work on Partnership,[12] while recognizing the existence of the English rule, strongly advocated that "insanity, certain, complete and hopeless of itself and at once dissolves the partnership." But he is supported by only two cases,[13] apparently briefly considered; the more prevalent ruling being in accord with that of the English courts.[14]

J. C. A.

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—Whether mistake is a ground for depriving the defendant of the protection of the Statute of Frauds in a bill for specific performance is a much vexed question, and one on which there is more conflict than harmony of opinion. In *Wirtz* v. *Guthrie*,[1] the defense to a bill for specific performance of an agreement for the sale of land, was that the gross rent of the premises was not what the defendant had been lead to believe. The plaintiff then offered to prove by oral testi-

[9] Lindley: Partnership, 640, 655-658.

[10] The insane partner has the right to come into equity by committee to have the partnership dissolved upon the grounds, (*a*) of complete incapacity to perform his agreement, Jones v. Noy, *supra*, n. 3; and (*b*) as ruled in Jones v. Lloyd, *supra*, n. 7, "By the act of God that bargain (contract of copartnership) has become incapable of performance, and he is not able to exercise that supervision over the conduct of the business and care of the property" . . . necessary to protect his interest.

It is suggested that these reasons apply with equal force to cases of complete incapacity through physical disability. Furthermore the objection that the physically incapacitated partner remains *sui juris*, as contrasted with one mentally incapacitated, and therefore has means to protect himself at law, is of no great weight and is not insurmountable in equity, when it is observed that a lunatic also may sue at law by committee and has, nevertheless, relief in chancery.

[11] 1 Cox 107 (Eng. 1784).

[12] Parsons: Partnership (1st ed.), 465.

[13] Davis v. Lane, 10 R. H. 156, 161 (1839); Isler v. Baker, 6 Humph. 85 (Tenn. 1845).

[14] Raymond v. Vaughn, *supra*, n. 3; Casky v. Casky, *supra*, n. 2; Story (7th ed.), §§296-298; Henn v. Walsh, 2 Edw. Ch. 129 (N. Y. 1833).

[1] 87 Atl. Rep. 134 (N. J. 1913).

mony that one lot had been omitted by mistake from the agreement and asked that the contract be reformed to include this lot and then enforced. To this the defendant set up the Statute of Frauds. The court held that though in the case of an executed contract the party who had received the benefit of the mistake would be prevented in equity from holding it; yet in mere executory agreements which do not disturb the legal title, the statute would not be broken in upon.

The English Chancery Courts lay down the doctrine that, irrespective of the Statute, the plaintiff may not introduce parol evidence for the purpose of reforming the written contract and then have it enforced.[2] In this country a more lenient rule prevails and a great number of courts have granted reformation and enforcement.[3] In support of this doctrine Chancellor Kent said:[4] "Why should not the party aggrieved by mistake have relief as well when he is plaintiff as well as when he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake were to prejudice one party or the other." But in the American jurisdictions, where the statute requires the contract to be in writing, a distinct conflict exists. In these contracts all possible errors requiring verbal variation may be reduced to two general groups: (*a*) by means of the error the contract may include certain subject matter which was not intended by the parties to come within its operation; (*b*) the contract may omit, through error, certain subject matter which was intended to come within its operation.

A reformation and enforcement based upon parol evidence in the first groups of cases does not conflict with the statute, since the court does not make a parol contract but simply narrows the operation of one already made. In the second group, it is asserted that by reformation the contract is made to include subject matter not in the original agreement, and the court has virtually made a new contract and enforced it in direct conflict with the statute.[5] The courts adopting this view, limit their relief to cases in the first group. By carrying this doctrine to its logical conclusion it would seem that equity must always make way for the statute, thereby preventing the establishment and enforcement of parol contracts which the defendant's actual fraud had prevented from being reduced to writing. Other courts, however, make no distinction between the two groups and grant relief in both.[6] The latter view is favored by Pomeroy, who

[2] Townshend v. Stangroom, 6 Ves. Jun. 728 (1801). Woollam v. Hearn, 7 Ves. Jun. 211 (1802).

[3] Keisselbrack v. Livingston, 4 Johns. Ch. 144 (N. Y. 1819). Gillespie v. Moon, 2 Johns. Ch. 585 (N. Y. 1817). Smith v. Allen, 1 N. J. Eq. 43 (1830). Hendrickson v. Ivins, 1 N. J. Eq. 562 (1832).

[4] Keisselbrack v. Livingston, *supra*, n. 3.

[5] Glass v. Hurlbert, 102 Mass. 24 (1869). Elder v. Elder, 10 Me. 80 (1833).

[6] Note 3, *supra*.

claims it is supported by the great weight of authority.[7] And in following it out he argues that if the rule applies to deeds which have actually conveyed title, then *a fortiori* it may be applied to mere executory contracts. But the cases to which he refers seem to be those of executed agreements. Moreover there are both decisions[8] and statements by writers,[9] that no court has ever reformed an executory contract on parol evidence and specifically enforced it with the variations.

It is interesting to note the *dictum* of Lord Hardwicke to the effect that the plaintiff in a bill for specific performance might have been allowed the benefit of disclosing a mistake to the court, "because it was an executory agreement only."[10]

T. S. P.

TRADE-NAMES—UNFAIR COMPETITION—In *Briggs Co. v. National Wafer Co.*,[1] the court applies the rule that the user of a trade-name which has acquired a secondary meaning, is entitled to injunctive protection against the piracy of that name by competitors; but the protection granted will be only co-extensive with the area in which that secondary meaning has been recognized by the ultimate purchasers of the class of goods in question. This is the logical result of the present development of the law of unfair competition. There can be no unfair trade unless there be competition.[2] The gist of the action is passing off the goods of one manufacturer or dealer as the goods of another, *i. e.*, of trading upon the reputation of a competitor.[3]

Although it is agreed that a trade-mark is a species of property,[4] it is by no means settled whether a trade-name is likewise to be regarded as property.[5] A trade-name which is geographical,

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[7] Pom. Eq. Juris., §866.

[8] Macomber v. Peckham, 16 R. I. 485 (1889). Safe Deposit Co. v. Diamond C. & C. Co., 83 Atl. Rep. 54 (Pa. 1912).

[9] Adams Eq. (5th Am. ed.) 171.

[10] Joynes v. Statham, 3 Atk. 388 (Eng. 1746).

[1] 102 N. E. Rep. 87 (Mass. 1913). As to contemporaneous use of trade-marks in different localities, see 58 Univ. of Pa. Law Rev. 115 (1909).

[2] Sartor v. Schaden, 125 Iowa, 696 (1904); Eastern Outfitting Co. v. Manheim, 59 Wash. 428 (1910).

[3] Ford v. Foster, L. R. 7 Ch. 611, 623 (1872); Singer Mfgers. v. Wilson, 3 A. C. 376 (1877); Glove Co. v. Rubber Co., 128 U. S. 598 (1888); N. E. Awl & N. Co. v. Needle Co., 168 Mass. 154, 155 (1897); Regis v. Jaynes, 185 Mass. 458, 462 (1904); Fox Co. v. Glynn, 191 Mass. 344, 349 (1906); Reading Stove Works v. Howes, 201 Mass. 437 (1909).

[4] 57 U. of Pa. Law Rev. 251 (1909).

[5] Lord Herschell in Reddaway v. Banham (1896), A. C. 199, 209; and Holmes, J., in Chadwick v. Cowell, 151 Mass. 190, 194 (1890), refuse to recognize any right of property in a trade-name; *contra*, Lord Westbury in Wotherspoon v. Currie, L. R. 5 H. L. 508 (1872); Munger, J., in Wolf Bros. v. Hamilton-Brown Shoe Co., 165 Fed. 413 (1908); Day, J., in Am. Wash-

generic, or descriptive cannot constitute a valid trade-mark.[6] But if a trade-name has been used so long by one to indicate and to distinguish his particular goods or business, and has come to signify in the minds of the ultimate purchasers or parties the goods or business of him, it is said to have acquired a secondary meaning.[7] No fixed, definite period of time is required; it is purely a question of fact in each instance. Do prospective purchasers when asking for "Boston Wafers," as in the principal case, desire wafers of the plaintiff's manufacture? Or do they merely desire any wafers, actually or supposedly, made in Boston? If the former be true, the trade-name "Boston Wafers" has acquired a secondary meaning among these purchasers; if the latter be true, it has not acquired a secondary meaning, but is used in its simple, primary sense.

A tradesman whose trade-name has established a secondary meaning is protected by equity in the sole use of that name.[8] The fundamental test in each instance is whether the purchasing public is liable to be misled into buying the defendant's goods, thinking that it is getting the plaintiff's.[9] The "ordinary purchaser" or "ulti-

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board Co. v. Saginaw Mfg. Co., 103 Fed. 281 (1900), and Braley, J., in Regis v. Jaynes, 185 Mass. 458 (1904). It is submitted that Lord Herschell and Holmes, J., are correct; those *contra* seem to have confused trade-names with trade-marks. Cf. Friedman v. Hollander Co., 238 Pa. 397 (1913), as to confusion between trade-names and trade-marks.

[6] Canal Co. v. Clark, 13 Wall. 311 (U. S. 1872); Shaver v. Heller, 108 Fed. 821 (1901); Cohen v. Nagle, 190 Mass. 4 (1906); 57 U. of Pa. Law Rev. 272 (1909).

[7] Lee v. Haley, L. R. 5 Ch. 155 (1869); Wotherspoon v. Currie, L. R. 5 H. L. 508 (1872); Montgomery v. Thompson (1891), A. C. 217; Reddaway v. Banham, *supra;* Birmingham Vinegar Co. v. Powell, L. R. (1897) A. C. 710; Elgin Watch Co. v. Ill. Watch Case Co., 179 U. S. 665 (1900); French Republic v. Saratoga Vichy Co., 191 U. S. 427 (1903); Herring Safe Co. v. Hall's Safe Co., 208 U. S. 554 (1907); Bissell Plow Works v. Bissell Plow Co., 121 Fed. 357 (1902); Ball v. Best, 135 Fed. 434 (1905); Wolf Bros. v. Hamilton-Brown Shoe Co., *supra;* Merriam v. Saalfield, 198 Fed. 369 (1912); Lynn Shoe Co. v. Auburn Lynn Shoe Co., 100 Me. 461 (1905); Viano v. Baccigalupo, 183 Mass. 160 (1902); Cohen v. Nagle, *supra;* Suburban Press v. Suburban Pub. Co., 227 Pa. 148 (1910).

[8] If a surname has been used as the trade-name of a business or of an article of merchandise, and has, as such, acquired a secondary meaning, a person of that name will be restrained from using it in his own business, subsequently established, if any fraudulent intent or *mala fides* on his part can be shown. Fine Cotton Spinners v. Harwood Co. (1907), Ch. 184; International Silver Co. v. Rogers, 72 N. J. Eq. 933 (1907); 53 U. of Pa. Law Rev. 585 (1905); 55 U. of Pa. Law Rev. 518 (1907). Similarly Brown, J., in a *dictum* in French Rep. v. Vichy Co., 191 U. S. 427 (1903), held that, in the absence of actual fraudulent intent, an inhabitant of a place, the name of which has been previously used as a part of a trade-name and has as such acquired a secondary meaning, may use such geographical name in his own business conducted within those geographical limits.

[9] Reddaway v. Banham, *supra;* Holeproof Hosiery Co. v. Wallack Bros., 190 Fed. 606 (1911); Notasema Hosiery Co. v. Straus, 201 Fed. 99 (1912); Am. Waltham Watch Co. v. U. S. Watch Co., 173 Mass. 85 (1899); Richard v. Caton College, 92 N. W. Rep. 958 (Minn. 1903); Centaur Co. v. Link,

mate consumer," and not the middle man, is to be regarded as the purchasing public;[10] and the class of persons who constitute the purchasers of the particular article must be taken into account.[11] Furthermore, actual deception need not be shown;[12] the liability of the ordinary purchaser of the goods to take the defendant's for the plaintiff's is sufficient.[13] And in applying the test the fact that the defendant's intent was *bona fide* or fraudulent is entirely immaterial.[14] Nor is it material that the purchasers who use the name in its secondary sense, do not in fact know the plaintiff's name;[15] or that the defendant's goods are in reality superior to the plaintiff's;[16] or that the purchasers are indifferent whether they get the plaintiff's or the defendant's goods.[17] But before any question can properly arise, there must be competition. The conflicting trade-names must be applied to goods of the same class, although not necessarily of the same species.[18] Equity will not relieve against competition that is not unfair; on the contrary it will encourage legitimate trade rivalry.[19] In most instances the trade is greater in territorial extension than the recognition of the trade-name's secondary meaning, and beyond the latter limits such tradesman has no ground for complaint. His trade-name, if used at all, must necessarily be used in its primary sense, and any competitor who can otherwise lawfully employ his trade-name, has as much right to do so as he himself

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62 N. J. Eq. 147 (1901); Busch v. Gross, 71 N. J. Eq. 508 (1905); Higgins v. Higgins, 144 N. Y. 462 (1895); Jurgens Co. v. Woodbury, 106 N. Y. Supp. 571 (1907); Eastern Outfitting Co. v. Manheim, 59 Wash. 428 (1910).

[10] Edge v. Nicolls, L. R. (1911) A. C. 693; Yale & Towne Mfg. Co. v. Alder, 154 Fed. 37 (1907); Forster Mfg. Co. v. Cutter-Tower Co., 211 Mass. 219 (1911).

[11] Edge v. Nicolls, *supra;* Mellwood Distillery Co. v. Harper, 167 Fed. 389 (1908); Legal Aid Soc. v. Co-operative Legal Aid Soc., 33 N. Y. Supp. 926 (1903).

[12] Notaseme Hosiery Co. v. Straus, *supra;* Reading Stove Works v. Howes, *supra;* Forster Mfg. Co. v. Cutter-Tower Co., *supra;* Parsons v. Gillespie (1898), A. C. 239, seems to require plaintiff to show the actual deception of the public.

[13] Johnson v. Ewing, L. R. 7 A. C. 219 (1882); Dutton v. Cuffles, 117 N. Y. 172 (1907).

[14] North Cheshire Brew. Co. v. Manchester Brew. Co., L. R. (1899) A. C. 83; Saxlehner v. Eisner & M. Co., 179 U. S. 19 (1900); Mantitowac Packing Co. v. Numser, 93 Fed. 196 (1899); Van Hoboken v. Mohrs, 112 Fed. 528 (1901); Dymert v. Lewis, 144 Iowa, 509 (1909); N. W. Knitting Co. v. Garon, 112 Minn. 322 (1910); Portuondo Cigar Co. v. Cigar Co., 222 Pa. 116 (1908).

[15] Birmingham Vinegar Co. v. Powell, L. R. (1897) A. C. 710; Edge v. Nicolls, *supra.*

[16] Reading Stove Works v. Howes, *supra.*

[17] Reading Stove Works v. Howes, *supra.*

[18] Atlas Mfg. Co. v. Street, 204 Fed. 398 (1913); N. W. Knitting Co. v. Garon, *supra;* Richardson v. Richardson, 8 N. Y. Supp. 52 (1889).

[19] Flagg Mfg. Co. v. Holway, 178 Mass. 83 (1901).

has.[20] In the absence of validity as a trade-mark and of a secondary meaning, a tradesman, as to his trade-name, has no rights which others are bound to respect or the courts to enforce.[21]

P. N. S.

LEGAL ETHICS—The following questions were recently answered by the New York County Lawyers' Association Committee on Legal Ethics:

QUESTION:

Is it a breach of professional ethics for a lawyer—who knowingly permits it—to allow his client, whom he represents, to act as a "dummy" in a transaction, *i. e.*, the making of a loan on bond and mortgage; in other words, when the application for the loan is made, the property to be mortgaged stands in the name of A & B, and, when the loan is closed, the mortgage is given to C—to whom, in the meantime, the property was transferred—and two days after the recording of the mortgage the property is transferred by C to A & B (the former owners), who thereby escape liability, although the loan was in fact made to A & B, and presumably, C, was financially irresponsible?

ANSWER:

In the opinion of the Committee: As the question does not import that there is any deception or misrepresentation or any imposition upon any one, or that the contract is in any way unlawful, and parties are at liberty to make lawful contracts upon such terms and with such persons and upon such security as may be agreed, the Committee is of the opinion that the question disclosed no breach of any lawyer's duty; the lawyer should, however, explain to his client, "the dummy," the liability which he incurs.

QUESTION:

Do you deem it improper professional conduct for a lawyer to advertise for business in the following form? You will note that he does not mention his profession.

"AVOID LITIGATION.

"I act as adviser, arbitrator, adjudicator and special confidential agent to diplomatically adjust all difficulties and disputes for individuals, corporations or heirs. Bond given when matters of trust are placed with me. Bank references. .... Appointment by 'phone: ...."

ANSWER:

In the opinion of the Committee, the advertisement referred to is improper, notwithstanding its opening words "Avoid litigation."

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[20] Investor Pub. Co. v. Dobison, 82 Fed. 56 (1897); Hainque v. Cyclops Iron Works, 136 Cal. 351 (1902); Cohen v. Nagle, 190 Mass. 4 (1906); Miskell v. Prokop, 56 Neb. 628 (1899); Ball v. Broadway Bazaar, 121 N. Y. App. 546 (1907); Bingham School v. Gray, 122 N. C. 699, 707 (1898).

[21] Cellular Clothing Co. v. Maxton (1899) A. C. 326, 342; Carroll v. McIlvaine, 183 Fed. 22 (1910); Sartor v. Schaden, 125 Iowa, 696 (1904); Corwin v. Daly, 7 Brew. (N. Y.) 222, 235 (1860); Eastern Outfitting Co. v. Manheim, *supra*.

QUESTION:

A gave Mrs. C an option on a piece of property. She threatened suit for the return of the option money. A called on his attorney, stated the facts to him, asking him to defend him in the suit should one be brought. The lawyer agreed to do this. No payment was made for retainer, and none asked, as A was absolutely responsible financially, and had had business relations with this attorney before, under similar circumstances.

Subsequent to this, Mrs. C saw the junior partner of this law firm who commenced suit against A. A called on the junior partner and protested against his taking the case against him. The junior partner pleaded justification by saying that when he commenced suit he was ignorant of any arrangement between A and his partner, and further that there was no payment for retainer.

First: Was the junior partner justified in taking the case against A?

Second: Could he withdraw from the suit and in case the suit went on, could the senior partner defend A, as per original agreement between himself and A?

ANSWER:

In the opinion of the Committee, that if in ignorance of A's relationship with the senior member, the junior member took Mrs. C's case, there was nothing in his conduct justifying criticism: but upon discovery of the fact, each party was disqualified from acting for either of the parties in the controversy.