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NOTES.

CORPORATIONS—PAYMENT TO A DIRECTOR TO LOOK AFTER PARTICULAR INTERESTS—Is an agreement, made by a person having the right to nominate a director in a corporation, to pay compensation to that director for so acting, enforceable? This question arose in a recent English case, and the Supreme Court of Judicature by a divided bench, decided it in the affirmative.[1]

A corporation in financial difficulties applied to the defendant, a financier, to come to its assistance by supplying additional capital in payment of shares therein. He agreed to do so on condition that he be given two representatives on the board. The agreement with this condition was approved and ratified at a general meeting of shareholders. The defendant thereupon advanced the capital and appointed the plaintiff to act as representative with him on the board to look after his interests. He promised to pay the plaintiff for his

[1] Kregor v. Hollins, 109 L. T. Rep. 225 (1913).

services two hundred pounds a year as long as he remained director, and told him to see to it that the directors did not draw any fees from the company. Neither the directors nor the company knew of this private arrangement between the plaintiff and the defendant. After acting as the defendant's representative for a year and a half, the plaintiff resigned. He sued the defendant for compensation in accordance with their agreement. The defense was that the agreement was illegal, as it might have been used by the plaintiff against the interest of the company, his principal. The jury found that the agreement did not contemplate that the plaintiff should promote the interests of the defendant even though they were not identical with those of the company.

Opposed to the strong dissent of Lord Justice Vaughan Williams, the two other judges came to the conclusion that the agreement was not illegal or secret. They decided that when, at the general meeting, the shareholders approved the contract with the defendant, they also in effect gave their approval to any arrangements that might naturally arise under the contract for the purpose of giving effect to it. An arrangement to pay the plaintiff a salary was such as should have been contemplated, since the plaintiff was, at the defendant's request, performing services for him. The majority judges did not consider the agreement to pay the plaintiff a bribe to induce him to do anything wrong, but rather a payment for services rendered at defendant's request for the benefit of the company.

The dissenting Justice held that it was error for the court to have submitted to the jury the question as to whether the parties had contemplated that the plaintiff should look after the defendant's interests even where in conflict with those of the company. "In my opinion, if the agreement was such that it might possibly be employed to the detriment of the shareholders at large, one must not speculate as to whether in its application the plaintiff intended to use it for such purpose. . . . And I think that the question whether the agreement was illegal, or, in other words, inconsistent with the duty of the other director as trustee for the company, is a question of law and not of fact." He comes to the conclusion that this arrangement viewed in this manner was illegal, as a matter of law.

On the questions as discussed by the court, there are certain well-recognized rules as to the receipt of secret profits, gratuities, *etc.*, by a director of a corporation.[2] The doctrine in equity that a trustee will not be permitted, without the knowledge and consent of his *cestui que trust,* to speculate out of his trust or to retain any gain or secret profits which may have accrued to him personally from the trust relation, is applied with full force to directers of corporations.[3]

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[2] See 2 Thompson on Corporations, §1234, *et seq.*

[3] Robertson v. Bucklen & Co., 107 Ill. App. 360 (1903); Parker v. Nickerson, 112 Mass. 195 (1873); Barnes v. Brown, 80 N. Y. 527 (1880); Simons v. Vulcan Oil Co., 61 Pa. 202 (1869).

In accordance with this rule a corporation may compel a director to account to it for gains or secret profits resulting from contracts or dealings of third persons with the corporation.[4]

In such case, the director cannot interpose as his defense the fact that the transaction in which he made the secret profits was also of advantage to the corporation.[5] A director must likewise account for and surrender to the corporation any gifts, gratuities or bribes received by him for the purpose of influencing his official action in a matter pending before the board.[6]

Where, however, the profits are not secret nor illegal, there is no such obligation on the part of the director to account to the corporation. If, therefore, the director acts *bona fide* and honestly, and all the facts of the contract or transaction are known to the board of directors, who are informed of his connection with it, and such contract or transaction is advantageous to the corporation, he may retain such profits, provided, also, that his vote was not essential to complete the contract or transaction.[7] *A fortiori,* he may retain such profits if the stockholders are fully acquainted with all the facts and ratify the contract or transaction.[8]

The principal case can therefore be explained on the reasoning of the majority of the court,—that the arrangement between the plaintiff and defendant was contemplated by the stockholders when they ratified the agreement to give the defendant two representatives on the board of directors. In such case, the arrangement was not a breach of the duty which the plaintiff owed to his principal, the corporation; but it was rather within the purview of the original agreement.

N. I. S. G.

EQUITY JURISDICTION—MULTIPLICITY OF SUITS—The courts are not unanimous as to whether equity has jurisdiction to enjoin the prosecution of numerous actions arising out of the same tortious act,

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[4] Loudenslager v. Woodbury, *etc.,* Co., 56 N. J. E. 411 (1897); Coombs v. Barker, 31 Mont. 526 (1905); Perry v. Tuskaloosa, *etc.,* Co., 93 Ala. 364 (1890).

[5] Bird Coal & Iron Co. v. Humes, 157 Pa. 278 (1893); Parker v. Nickerson, *supra,* n. 3.

[6] Campbell v. Cypress Hill Cemetery, 41 N. Y. 34 (1865); *In re* Caerphilly Colliery Co. (Pearson's Case), L. R. 5 Ch. D. 336 (Eng. 1877); 2 Thompson on Corporations, §1237, *et seq.*

[7] Kregor v. Hollins, *supra;* Nathan v. Whitehill, 67 Hun. 398 (N. Y. 1893); Burland v. Earle, 85 L. T. 553 (Eng. 1902); Pneumatic Gas Co. v. Berry, 113 U. S. 322 (1885).

[8] *In re* British, *etc.,* Box Co., L. R. 17 Ch. D. 467 (Eng. 1881); Tenison v. Patton, 95 Tex. 284 (1902).

in order to prevent a multiplicity of suits. The case of *Davis* v. *Forrestal*[1] sustains the view that an injunction does not lie where the different plaintiffs have no community of interest in the subject-matter of the suits.

Among the first text writers to discuss this question was Mr. Pomeroy who drew the following classification wherein equity might interfere to prevent a multiplicity of suits.[2] (1) Where the injured party is obliged to bring a number of actions against the same wrongdoer, all growing out of the one wrongful act and involving similar questions of fact and law, *e. g.,* nuisance, waste and continued trespass. (2) Where one party institutes or is about to institute a number of actions against another, all depending upon the same legal questions and similar issues of fact, *e. g.,* where repeated actions of ejectment to recover the same tract of land have been brought. (3) Where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, *e. g.,* the case of several owners of distinct parcels of land suing to enjoin the collection of an illegal tax which has been laid thereon. (4) Where one party claims some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, he may procure the whole to be determined in one suit brought by himself against all the adverse claimants as co-defendants. Under "conclusions as to the third and fourth classes,"[3] the author states that in those suits, "which are strictly and technically 'bills of peace,' in order that a court of equity may grant the relief and thus exercise its jurisdiction on the ground of preventing a multiplicity of suits, there does and must exist among the individuals composing the numerous body, or between each of them and their single adversary, a common *right,* a community of interest in the *subject-matter* of the controversy, or a common *title* from which all their separate claims and all the questions at issue arise"; and then adds that the jurisdiction "has long been extended to other cases of the third and fourth classes, which are not technically 'bills of peace,' but 'are

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[1] 144 N. W. Rep. 423 (Minn. 1913). However, in refusing to take jurisdiction, the court considered the situation of the parties, their legal remedies in actions at law, the undoubted right of each to a jury trial, the limited number of suits necessary to settle the controversies involved, the different facts that would go to measure the damages between the different litigants even on plaintiff's showing, and the issues that might be anticipated from the defendants.

[2] 1 Pomeroy, Eq. Jurisp. (3rd Ed.), §245.

[3] 1 Pomeroy, Eq. Jurisp. (3rd Ed.), §§268, 269.

analogous to' or 'within the principle of' such bills"; and "the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject-matter,' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."

These conclusions of Pomeroy are reviewed and controverted in the much-famed case of *Tribette* v. *Illinois Cent. R. R. Co.*,[4] in which Chief Justice Campbell says that the cases cited in support of Pomeroy's view establish the proposition that "where each of several may proceed or be proceeded against in equity, their joinder as plaintiffs or defendants in one suit is not objectionable." But this is quite different from the proposition that equity will grant relief merely because many actions at law arise out of the same transactions or occurrence, and depend on the same matters of law and fact. Possibly the best reason for equity refusing to take jurisdiction is that the parties would be deprived of the constitutional guarantee, trial by jury. Every man has the right to try his case with its issue clear and well defined, but if a consolidation can be had without interfering with his right, it should be granted in a proper case; if it cannot be so had, it should be denied.[5]

The opinion of Justice Harlan in *Osborne, et al.*, v. *Wisconsin Cent. R. R. Co.*[6] supports the text of Pomeroy, but it will be noted

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[4] 70 Miss. 182, 187 (1892). It is conceded that later Mississippi decisions have in effect departed from the Tribette Case, but they have not done so expressly. See in particular Hightower Crawford, *et al.*, v. Railroad Co., 83 Miss. 708, 717 (1903); Whitlock v. Railroad Co., 91 Miss. 779, 784 (1907); G. & S. I. R. Co. v. Barnes, 94 Miss. 484, 510 (1909). However, the case of Cumberland Telephone & Telegraph Co. v. Williamson, 57 So. Rep. 559, 563 (Miss. 1912), unqualifiedly affirms the decision in the Tribette Case, conceding it to be "the leading authority in the world upon the question of the jurisdiction of equity to prevent a multiplicity of suits." Mr. Pomeroy, in his third edition on Equity Jurisprudence, devotes a great deal of space and attention to the Tribette Case, and adds two new sections (251½ and 251¾) to that edition to set himself right in this matter. Although he does criticise some things said by Chief Justice Campbell in that case, yet, in the notes to his text, he admits that the decision was correct.

[5] Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 249 (1908).

[6] 43 Fed. Rep. 824, 827 (1890). In Wyman v. Bowman, 127 Fed. Rep. 257, 263 (1904), general passages occur which are perhaps broad enough to uphold Pomeroy's view, but the case may be distinguished on its facts. The case of Hale v. Allison, 188 U. S. 56 (1902), contains language in the nature of a *dictum* at the foot of page 78 tending to uphold the doctrine laid down by Pomeroy, at least in part, in some cases; but on the previous page the general rule as laid down by him is distinctly repudiated.

that in this case equity had jurisdiction for other reasons than to avoid a multiplicity of actions. Later decisions [7] in the federal courts have repudiated Pomeroy's doctrine, and cite with approval the leading Mississippi case.[8]

The better view and the one supported by the weight of authority is that of the principal case to the effect that equity will not take jurisdiction where there is no community of interest in the subject-matter.[9] The distinction between what does and what does not constitute a community of interest is well illustrated by the following quotation: "Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the downflow of the water, and may unite to restrain it or abate it as a nuisance; but they cannot hence unite in an action for damages, for, as to the injury suffered, there is no community of interest." [10] The "right" controverted must be of a peculiar character. It must be a common right, enjoyed in common by several persons, and in such a manner that the invasion of the right of one is really an invasion of the rights of all, such as a right of fishery.[11]

The trend of modern decisions seems to abandon the old and technical forms and for the sake of lessening litigation and saving time and expense, courts of equity will assume jurisdiction wherever they find that the consolidation will not confuse the issue, will not bring so many questions or varied interests into a case that they cannot be as well decided as if the cases were tried separately, and will not work a practical denial of a trial by jury.[12]

W. G. S.

LIBEL—PRIVILEGE—REPORT BY TRADE PROTECTION SOCIETY—An unusual decision has lately come down from the Court of Appeals of England [1] upon the question of privilege of communication as a defense in actions of libel and slander against mercantile agencies. The defendant was a mutual association of tradesmen, main-

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[7] Washington County, Neb., v. Williams, 111 Fed. Rep. 801, 812 (1901); Kansas City S. R. Co. v. Quigley, 181 Fed. Rep. 190, 196 (1910).

[8] Tribette v. Illinois Cent. R. Co., *supra*, n. 4.

[9] 1 High, Injunctions (4th Ed.), §65a; Southern Steel Co. v. Hopkins, 174 Ala. 465 (1911); Roanoke Guano Co. v. Saunders, 173 Ala. 347 (1911), overruling Southern Steel Co. v. Hopkins, 157 Ala. 175 (1908); Vandalia Coal Co. v. Lawson, *supra*, n. 5; Tribette v. Illinois Cent. R. Co., *supra*, n. 4; Ducktown v. Fain, 109 Tenn. 56 (1902); Illinois Steel Co. v. Shroder 133 Wis. 561 (1907).

[10] Bliss, Code Pl. (3rd Ed.), §76.

[11] 2 Story, Eq. Jurisp. (13th Ed.), §§854-856.

[12] Cases cited, *supra*, n. 9.

[1] Greenlands Lt'd v. Wilmshurst, *et al.*, 109 L. T. Rep. 487 (1913).

taining an office and secretary for securing information as to solvency and credit of customers generally. In this instance, inquiry having been made by one of the members concerning the standing of the plaintiff, the secretary wrote to a collecting agency in the plaintiff's city making inquiry. The report, for which a payment was made by the secretary, being unfavorable was forwarded to the first inquirer. Later it was found to be false; the jury finding express malice in the making of it by the collecting agency. Upon the plea of privileged communication entered by the mercantile association, Vaughn Williams, L. J., held the occasion of the communication was in nowise privileged. The information had been obtained for a fee from one who was neither servant nor agent of the group or any member of it. The court placed its decision alternatively upon *McIntosh* v. *Dun*,[2] saying "if it be law that persons who supply information and make a profit thereby, cannot set up privilege as a defense, it seems to follow that if a person buys information he cannot rely upon the information so bought as information given on a privileged occasion." The decision, Bray, L. J., dissenting, was admittedly contrary to the rule of Scotland,[3] Ireland,[4] Canada[5] and the American jurisdictions.

The occasion here falls under the classification, common to most writers,[6] of conditional or qualified privilege. This is not the case of a general publication to a large group, some of whom have no interest in the communication; but is made upon specific inquiry to a member of the association who has an interest in knowing the credit ratings of a single person. While the two English cases have thrown great doubt upon whether there is ever any privilege in making communications of mercantile agencies, under the English law, there can be few accepted cases found in America which are in accord.[7] Generally defamatory statements of a mercantile agency made by it or its agents in answer to inquiries from interested subscribers in confidence and good faith are privileged.[8] This rule, of

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[2] 99 L. T. Rep. 64 (1908).

[3] Bayne v. Stubbs, 3 F. 408; Keith v. Lauder, 8 F. 356; Barr v. Musselburgh Merch. Ass'n (1912) Sess. Cas. 174.

[4] Fitzsimmons v. Duncan, 2 Ir. Rep. 483, 498 (1908).

[5] Lemay v. Chamberlain, 10 Ont. 638 (1886); Todd v. Dun, 12 Ont. 791 (1888).

[6] Odgers on Libel and Slander (4th Ed.), 234; Starkie on Slander and Libel, 320; Townshend on Slander and Libel, 417, *et seq.*

[7] Beardsley v. Tappan, 5 Blatch. C. C. Rep. 498 (U. S. 1867); but this case is effectively criticized and rejected in Trussell v. Scarlett, 18 Fed. Rep. 214, to which is appended a case note by Francis Wharton.

[8] Erber v. Dun, 12 Fed. Rep. 526 (1882); Pollansky v. Minchener, 81 Mich. 280 (1890); King v. Patterson, 49 N. J. L. 419 (1887); Ormsby v. Douglas, 37 N. Y. 477 (1868); Laning v. Lonsdale, 48 Wis. 348 (1879); Trus-

course, gives ample protection against indiscriminate publication among subscribers generally who have no interest in the mercantile standing of the plaintiff.[9] In ruling the question of privilege, the American courts usually proceed from the broad view of the question as enunciated in *Harrison* v. *Bush*,[10] that "a communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminatory matter which, without this privilege, would be slanderous and actionable. . . . Duty cannot be confined to legal duties which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation." One merchant desiring to enter into a transaction with a purchaser has an interest in knowing, and a right to know their character and standing, and to secure this may inquire of another merchant, and if such merchant or other person communicates in good faith, the information he has, the occasion is privileged.[11] He may require the services of another to secure him this information,[12] and is but a logical step, in view of efficient business administration to allow the union or association of several having a common agent to secure such information and place it at the confidential disposition of the members of the association in response to a specific inquiry. "In short, the inquiry is not, how did the defendant acquire the information, nor whether he received compensation for the information he had gained, but was the occasion one which justified him in giving such information as he possessed to the applicant." [13]

But the Court of Appeals took the view that duty or justification could not be shown to exist among the members when the actual communication was secured for a payment; that the duty to make the communication must attain the rank of a duty to society, to do what is for the good of society.

J. C. A.

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sel v. Scarlett, *supra*, n. 7; Sunderlin v. Bradstreet, 46 N. Y. 188 (1871); Lewis v. Chapman, 16 N. Y. 369, 375 (1857); Denney v. N. W. Credit Ass'n, 104 Pac. Rep. 769 (Wash. 1909).

[9] No privilege in such communications, Erber v. Dun; Trussell v. Scarlett; Ormsby v. Douglas; Laning v. Lonsdale, *supra*, n. 8; Taylor v. Church, 8 N. Y. 452 (1853); Mitchell v. Bradstreet Co., 116 Mo. 226 (1893); Com. v. Stacey, 8 Phila. 617 (1871); Gassett v. Gilbert, 6 Gray 94 (Mass. 1856).

[10] 5 E. & B. 344 (Eng. 1855).

[11] Cases cited, *supra*, n. 8; Odgers, 243; Errant on Mercantile Agencies, pp. 32-42.

[12] Ormsby v. Douglas, 37 N. Y. 485 (1868).

[13] Ormsby v. Douglas, *supra*, n. 12.

TRADEMARKS—UNFAIR COMPETITION—EXCLUSIVE RIGHTS IN A GEOGRAPHICAL NAME—The distinction between prohibitive relief from infringement of a technical trademark and regulative relief from unfair competition, established comparatively recently in the courts, is of great importance to the manufacturer seeking protection, and concerns both the facts to be proved in order to make out a case and the extent of the relief to be granted. A trademark is usually held to be a property right, the mere infringement of which will give a right to relief.[1] Relief from unfair competition is not based on an infringement of a property right, but rather, as its name indicates, the right to be free from an injurious competition which passes the bounds of fairness.[2] Whereas in a "technical trademark" case the complainant need only show his right to the trademark and the infringement thereof, in an "unfair competition" case he must show an intent to injure and actual damage resulting from the deceit of the public.[3] The gist of the action in the latter class of cases is the palming off on the public the goods of one man as the goods of another; if the public is not deceived, the competition cannot be called unfair. The relief granted against unfair competition can only be co-extensive with the actual competition,[4] whereas the protection of a trademark will not be limited to the district in which the complainant's goods are sold.[5]

It is settled law that a geographical name can never become a valid trademark.[6] If it has acquired a secondary meaning, it may be entitled to some protection from unfair competition, but never to the complete protection which is given a trademark, because to allow this would be to give one man a monopoly of the goods of the particular kind produced in the plate in question.[7] An exception to this strict rule has been made in the case of a geographical name which

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[1] Lawrence Mf'g Co. v. Tennessee Mf'g Co., 138 U. S. 537, 548 (1890); Derringer v. Plate, 29 Cal. 292 (1866); Dennison Mf'g Co. v. Thomas Mf'g Co., 94 Fed. Rep. 651-659 (1899).

[2] Dennison Co. v. Thomas Co., *supra*, n. 1.

[3] Church v. Russ, 99 Fed. Rep. 276 (1900); Lawrence Co. v. Tennessee Co., *supra;* Elgin Watch Co. v. Ill. Watch Co., 179 U. S. 665 (1900); Goodyear Co. v. Goodyear Co., 128 U. S. 598 (1888).

[4] Briggs v. National Wafer Co., 215 Mass. 100 (1913). For a discussion of the geographical extent of protection against unfair competition see 62 U. OF PA. LAW REV. 50 (November, 1913).

[5] Derringer v. Plate, 29 Cal. 292 (1866); Kidd v. Johnson, 100 U. S. 617 (1879); Hygeia Water Co. v. Consolidated Ice Co., 144 Fed. Rep. 139 (1906). The recent case of Hanover Star Milling Co. v. Allen and Wheeler Co., 208 Fed. Rep. 513 (1913), is *contra* to these cases, but seems to be unsupported by authority. The case is based on what appears to be an unwarranted application of "unfair competition" rules to a "trade-mark" case.

[6] Canal Co. v. Clark, 80 U. S. 311, 327 (1871).

[7] Elgin Watch Co. v. Ill. Watch Co., 179 U. S. 665 (1900).

has been fancifully and arbitrarily appropriated. Such words have been held to be good trademarks, on the theory the word is not within the rule unless it is used in a geographical sense, as indicative of the place of origin of the goods.[8] Thus the words "German" and "Vienna" when fancifully used have been held to be susceptible of appropriation as trademarks.[9] A word is not a geographic name merely because some portion of the earth's surface is called by it.[10]

The recent decision in *Apollo* v. *Perkins*[11] refuses to recognize this exception and holds that no geographical name whether used merely fancifully or to designate the place of origin of the goods can be the subject of a valid trademark. In this case protection was sought for the name "Nubia" as applied to cigarettes. "Nubia," although the name of a province in Africa, had been arbitrarily selected as a name for the cigarettes and was in no way related to them or to the tobacco from which they were made. It was held that regulative relief against unfair competition might be granted if the facts necessitated it, but that it was not entitled to prohibitive relief as a trademark. It is submitted that this decision is opposed to the great weight of authority, and that the two cases cited by the court do not bear it out. These cases[12] were not concerned with a geographical name arbitrarily selected, but with a name used in geographical sense, which they properly held cannot become a trademark.

The result of the decision in *Apollo* v. *Perkins* would seem to be more logical, though less equitable, than the weight of authority to which it is opposed. The inconsistency of the rule allowing the appropriation of a geographical name as a trademark can be shown by an example. Suppose A has a trademark in the name "X," a geographical name, but arbitrarily selected. B, who lives in X, desires to manufacture the same article and calls it "X," the true name of the place of manufacture. If, as by hypothesis, A has trademark rights in the name "X," this right is exclusive and he will be entitled to protection against B. The result, therefore, will be in conflict with the fundamental rule concerning geographical names as trade-

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[8] *In re* Magnolia Metal Co.'s Trade-Mark (1897), 2 Ch. 371 (Eng.); Drake v. Glessner, 68 Ohio St. 337 (1903); Colgate v. Adams, 88 Fed. Rep. 899 (1898); Carmel Wine Co. v. Palestine Wine Co., 161 Fed. Rep. 654 (1908); Sanders v. Utt, 16 Mo. App. 322 (1884); Rose v. McLean Pub. Co., 24 Ont. App. Rep. 240 (1897).

[9] Fleischmann v. Schuckmann, 62 How. Pr. 92 (N. Y. 1881); Walter Baker & Co. v. Baker, 77 Fed. Rep. 181 (1896).

[10] *In re* Magnolia Metal Co.'s Trade-Mark, *supra*, n. 8.

[11] 207 Fed. Rep. 530 (1913), reversing decree granted in 197 Fed. Rep. 476.

[12] Elgin Watch Co. v. Ill. Watch Co., 179 U. S. 665 (1900); New York & R. Cement Co. v. Coplay Cement Co., 44 Fed. Rep. 277 (1890), *Id.* 45 Fed. Rep. 212.

marks, *viz.*, that no man can acquire such rights in a name as to enable him to restrain another from truthfully calling his goods by the name of their place of origin. But the result of the decision in *Apollo* v. *Perkins*, if followed to its logical extreme, will not be found entirely satisfactory. If, as this case holds, no geographical name can ever become a trademark, it will mean that a man who has fancifully selected as a trademark a name which he believes he has himself invented may later be denied protection because the name happens to be the name of a small town or district—a fact of which he was wholly ignorant at the time he applied the name to his product. This is obviously unfair to the manufacturer, and it is no answer to say that he may yet be protected against unfair competition. That protection is far inferior to that to which a trademark is entitled, and if a man adopts what he conceives to be a fancy name for his product, it is submitted that he should not be disentitled to protection merely because the name happens to be a geographical name.

The best solution of the problem is probably that arrived at by Judge Gaynor in *Clinton Metallic Paint Co.* v. *New York Paint Co.*[13] A geographical name "may be exclusively appropriated as a mere arbitrary or fanciful name for an article generally known not to be of such place or country and not represented to be such, against every person subsequently offering a similar article, except such article be of such place or country. One so using such a name arbitrarily or fancifully may only have another restrained from using it in the same way, but not from using it truthfully, viz., in its actual meaning." This rule, though perhaps not entirely consistent with the theory that a trademark is an exclusive right, will avoid the difficulties of the two other rules discussed and will work out substantial justice between all the parties.

T. R., Jr.

WILLS—SIGNING—In view of the enormous amount of litigation that has arisen over the signing of wills it is rather extraordinary that no court has stopped to really analyze the fundamental meaning of the word. In order to sign an instrument two things must occur. There must be, first, an actual marking of the paper. And in the case of wills it has been held that this may be done by a mark[1] or an engraved name[2] or false name[3] and under many

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[13] 50 N. Y. S. 437 (1898). See also Newman v. Alford, 51 N. Y. 189 (1872).

[1] Taylor v. Dening, 3 Nev. & P. 228 (Eng. 1838); Schieffelin v. Schieffelin, 127 Ala. 14 (1899); Rook v. Wilson, 142 Ind. 24 (1895); Scott v. Hawk, 107 Iowa, 723 (1898); Nickerson v. Buch, 12 Cush. 332 (Mass. 1853); *In re* Cozzen's Will, 61 Pa. 196 (1869).

statutes may be done by some one else for the testator. Secondly, there must be an intent not merely to sign, as is usually stated, but an intent to affix this mark to a *completed* instrument in order to give it validity. For if it is intended that the instrument shall be added to or filled in, it is spoken of as signing in blank and not signing. But no statute provides for signing a will in blank.

Under the Statute of Frauds a will was merely required to be signed, and it was unimportant in what part of the instrument the signature appeared. So a will beginning—"*I, John Stanley*"—was held sufficiently signed if the testator did not intend any further signing.[4] And under similar statutes this construction has been followed in America,[5] even when the will was not written by the testatrix,[6] since it was written at her direction and the intention that it should be a signature was clear. But without a clear intent to make it such it is no more than a formal recital of the name.[7] In every case it is essential that the testator shall have the intent when he signs that the name shall give validity to the whole instrument.[8] Clearly that intent cannot apply to more than the testator has in mind at the time, therefore in order to give validity to words written afterwards he must at that time intend to write additional words.

In a recent New Jersey case, however, where a testator after writing and signing his will, inserted a bequest of an automobile, then published and acknowledged his signature and had it attested, the majority of the court held that the will with the interlineation had been signed within the meaning of the statute.[9] The New Jersey

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[2] Goods of Emerson, L. R. 9 Ir. 443 (1882); Jenkins v. Gaisford, 3 Sw. & Tr. 93 (Eng. 1863).

[3] *In bonis* Redding, 2 Rob. 339 (Eng. 1850); Long v. Zook, 13 Pa. 400 (1850).

[4] Lemayne v. Stanley, 3 Lev. 1 (Eng. 1680); Morrison v. Turnour, 18 Ves. 176 (Eng. 1811).

[5] Armstrong v. Armstrong, 29 Ala. 538 (1857); Kolowski v. Tausz, 103 Ill. App. 528 (1902); Upchurch v. Upchurch, 16 B. Mon. 102 (Ky. 1855); Booth v. Timoney, 3 Dem. Sur. 416 (N. Y. 1885) (construing the New Jersey Statute); Adams v. Field, 21 Vt. 256 (1849).

[6] Sarah Miles' Will, 4 Dana, 1 (Ky. 1836).

[7] Catlett v. Catlett, 55 Mo. 330 (1874); Ramsey v. Ramsey, 13 Grat. 664 (Va. 1857); Warwich v. Warwich, 86 Va. 596 (1890) (the statute requiring intent in this case being no more than declarative of the common law).

[8] This becomes especially important in cases where the statute requires the will to be signed at the end, for in order to find the end the court must first determine what the testator contemplated as the completed instrument. Heise v. Heise, 31 Pa. 246 (1858); Hays v. Harden, 6 Pa. 413 (1847); Glancy v. Glancy, 17 Ohio, 134 (1866); Baker v. Baker, 51 Ohio, 217 (1894). And a large part of the conflict of decisions on this point is due to the difference of opinion as to what constituted the whole will in the testator's mind.

[9] *In re* Bullivant's Will, 88 Atl. Rep. 1093 (N. J. 1913).

statute [10] requires that a will "shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses . . . who shall subscribe." The court argued that inasmuch as a testator may adopt as his signature a mark he could equally well adopt his own signature previously made, and that this acknowledgment when attested would satisfy the statute.

Great stress is laid on the fact that whereas the statute requires the witnesses to subscribe, the testator need only sign, but in so doing the court has failed to appreciate the second half of the meaning of the word sign. Obviously the testator's intention when he signed was that the will was completed as it stood, and not that the signature should include what he might think of later. Consequently the bequest of the automobile was not signed by the previous signature and the acknowledgment cannot amount to a signing, since no matter what the intent may be there is no actual marking of the paper. This is practically the view taken by Garrison, J., in the dissenting opinion. He held that the acknowledgment can not amount to more than affirming the signature as of the time when written.

When the statute requires signing at the foot or end of the will, the case under its exact facts has gone the other way.[11] And since the basis of the decision is that an acknowledgment of a prior signature is not the equivalent of an actual signing, the decision would seem in point, in spite of the difference in the statute.

T. S. P.

WILLS—VESTED REMAINDERS—After a gift of a life estate, there was a provision that, in the event of the death of the beneficiaries, that portion of the property devised to their use should be equally divided among the three named children of the testatrix's brother, "or as many as might be living at that time." It was held [1] that the children living at the death of the testatrix took a vested estate, subject to be divested upon the death of one or more of them during the continuance of the life estate.

This decision seems to be wholly in accord with principle and authority. In England, in several cases practically the same words were used and the court without hesitation held the interest to be vested.[2] In America, the particular provision has rarely been be-

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[10] 4 Comp. St. 1910, p. 5867, pl. 24.

[11] Casement v. Fulton, 5 Moore P. C. 130 (Eng. 1845); Matter of Foley, 76 Misc. Rep. 168 (N. Y. 1912).

[1] White v. Smith, 89 Atl. Rep. 272 (Conn. 1914).

[2] Sturges v. Pearson, 4 Mad. 411 (Eng. 1819); *In re* Saunders' Trust, 1 L. R. Eq. Cas. 675 (1866); Penny v. Commissioners, L. R. [1900] App. Cas. 628.

fore the court.[3] However, American cases are not infrequent where the gift over is either to a number of persons or the survivors, or survivor of them, or to a number of persons, with the provision that, in case of death of any of those designated before the estate should rest in enjoyment, the children or issue of such deceased should take in his or her stead. These cases generally hold that the members of the original group take vested interests, subject only to a divesting in the event of their death before the time arrives when the gift takes effect in possession.[4] Such a provision in favor of a number of persons or survivors of them at the termination of the preceding estate is regarded as the same in legal effect as that which appears in the will under construction.[5] The cases have simply followed the apparent analogy between the two situations and have looked upon a limitation over, such as made in this case, or one to several persons or the survivor of them, as creating a vested interest in the original donees with a substitutionary provision in the event of the death of one or more of them before the time of the vesting in possession. Furthermore, in its essence the situation created is like that which results from a limitation over to a single person, and in the event of his death to others, as for example, his children or issue. Gifts over of this latter character are frequent and held to create a vested interest in the original donee subject to a divesting.[6]

The Connecticut court recognized and was governed by the distinction between a limitation over to such of the members of a group of designated persons as might be living at the death of a life tenant and one to the group of the survivors or survivor of them. If the alternative language used is to be interpreted as equivalent to the first, the cases are in accord in holding that there could be no vesting before the death of the life tenant.[7] Such, however, is neither the interpretation nor the effect which the courts have given to the provision like that before us and similar ones. In the first the identity of the person is left to future ascertainment; it speaks as of the future and deals only with conditions which may then exist. The latter, including that of the case under discussion, on the con-

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[3] Weatherford v. Boulware, 102 Ky. 466 (1897).

[4] Jeffers v. Lampson, 10 Ohio St. 102 (1859); Darling v. Blanchard, 109 Mass. 176 (1872); Thaw v. Ritchie, 136 U. S. 519 (1890); Heilman v. Heilman, 129 Ind. 59 (1891); Crane v. Bollis, 49 N. J. Eq. 373 (1892).

[5] Brown v. Kenyon, 3 Mad. 410 (Eng. 1818); *In re* Saunders' Trust, *supra*, n. 2.

[6] Allen v. Almy, 89 Atl. Rep. 205 (Conn. 1913).

[7] Doe d. Planner v. Scudamore, 2 B. & P. 289 (Eng. 1800); McBride v. Smyth, 54 Pa. 245 (1867), in which it was said that a gift to such of a number of persons as may meet a defined description is not a gift to all the persons whether they meet the description or not; Thomson v. Ludington, 104 Mass. 193 (1870); Andrews v. Rice, 53 Conn. 566 (1885); Robinson v. Palmer, 90 Me. 246 (1897).

trary, speak in the present and give as of the present to persons in existence when they speak. Future contingencies which may arise during the continuance of the intervening estate are provided for, but only in a substitutionary way. The primary provision is that all shall take. That which may by possibility defeat the result is alternative. This distinction is clearly brought out by Gray, in his work on perpetuities,[8] where he says: "Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or the gift to, the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus, on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent."

Where a remainder is given to A or his heirs, or to a class or their heirs, and possession only is postponed, the present rule is that the remaindermen who survive the testator take vested interests, which are not defeated by their death during the life tenancy.[9] In such case if any die during the life tenancy, their interests pass to their representatives. Should the mere fact that, instead of allowing the representatives to take, a substitutionary gift is provided for make any difference? In vested remainders the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. In contingent remainders the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined and the remainder never take effect.[10] The remainder in question is limited to ascertained persons in being at the time with present capacity of taking possession were the particular estate to determine. Those entitled to the remainder were subject to no condition precedent which would prevent its taking effect in possession if the particular estate were to terminate immediately.[11] The contingency, if we so regard it, in this case was plainly subsequent and had nothing to do with the vesting of the interest. The remainder, being vested according to the legal meaning of the words of gift, is not to be held contingent by virtue of subsequent provision of the will, unless the provisions necessarily require it.[12]

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[8] Gray, Rule against Perpetuities, §108.

[9] Underhill, Wills, Vol. 1, p. 477.

[10] 2 Blackstone, 168, 169.

[11] In Ducker v. Burham, 146 Ill. 9 (1893), it is said: "Whether the condition is really precedent or subsequent depends upon whether it is corporated into the gift, or description of, the remainderman, or is added as a separate clause afterwards, which words have already given a vested interest."

[12] McArthur v. Scott, 113 U. S. 340 (1885).

The decision also finds support in the policy of the law, which favors the vesting of estates. The language of an instrument is always, if possible, construed as creating a vested rather than a contingent remainder.[13] When it is doubtful whether the words of contingency applied to the gift itself, or to the time of enjoyment, they will be construed as applying to the latter.[14] Moreover, to create a contingent remainder the intent to that end on the part of the testator must be so clearly indicated as to practically leave no room for construction.[15]

S. L. M.

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[13] Tiffany on Real Property, p. 275; Smith's Appeal, 23 Pa. St. 9 (1854); Heilman v. Heilman, *supra*, n. 4; Farnam v. Farnam, 53 Conn. 261 (1885), where it is said, it ought to be given that construction if its language will fairly admit of it.

[14] Robinson v. Palmer, *supra*, n. 7; Eldridge v. Eldridge, 9 Cush. 516 (Mass. 1852).

[15] Gardner on Wills, 508.