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ENJOINING THE USE OF A PERSON'S NAME.

A discussion of the power of a court of equity to enjoin the use of a person's name may be materially enhanced by a reference to the historical background underlying the use of names in general. A name has been defined as a word or words, designation or appellation, used to distinguish a person or thing or class from others; and, more particularly, one or more words used to distinguish a person.¹ Since ancient times a legal name has consisted of one Christian or given name, and of one surname, patronymic, or family name.² Formerly, the given name of a person was considered the more important of the two,³ but in modern times the surname has been so regarded.⁴

Surnames were frequently chance appellations, assumed by the individual himself, or given to him by others, for some marked characteristic, as for instance, his mental, moral or bodily qualities, some peculiarity or defect, or for some act done by the individual and well connected with his name among his fellow beings.⁵

At common law a man may lawfully change his name, or by general usage or habit, acquire a name other than that originally borne by him.⁶ The identity of the individual is the important consideration, and not the name he may bear or assume.⁷ The history of art and literature furnishes many examples of men who abandoned the name of their youth and chose the one made illustrious by their

¹ People *ex rel.* Yates v. Ferguson, 8 Cow. 102 (1827); Matter of Snook, 2 Hilt. 566 (1859); People v. County Board, etc., 75 App. Div. 110, 7 N. Y. Supp. 620 (1902).

² Smith v. U. S. Casualty Co., 197 N. Y. 420, 90 N. E. 947, 26 L. R. A. 1167 (1910); Russ v. Stratton, 11 Misc. 565, 32 N. Y. Supp. 767 (1895); Frank v. Levie, 5 Rob. 599 (N. Y. 1866); Matter of Snook, *supra* Note 1.

³ Pfauder v. Pfauder Co., 114 Misc. 477, 186 N. Y. Supp. 725 (1921); Matter of Snook, *supra* Note 1.

⁴ Meyer v. Fegaly, 39 Pa. 429, 80 Am. D. 534. It is interesting to note that surnames did not come into general use until the middle of the fourteenth century and that their growth was not engendered by reason of statute. The only exception to this seems to be a statute enacted during the fourth year of the reign of Edward IV which commanded that every Irishman dwelling within the English pale take an English surname.

⁵ Smith v. U. S. Casualty Co., *supra* Note 2.

⁶ *Supra* Note 2. It was held in this case that N. Y. Civil Rights Law, Sec. 60 through 64, added by L. 1920, ch. 935 Sec. 2, which relate to the change of names by judicial proceedings have in no way changed the common law rule relating to change of name except that a name once changed by judicial decree cannot again be changed without resorting to the courts.

See also Doe v. Yates, 5 Barn. & Ald. 544, in which it is held that one may lawfully take a surname for the purpose of bringing himself within the terms of a will which provides that no person can take the estate unless he bear such a name. The case was cited in Matter of Snook, *supra* Note 1, where the Court said that the situation would be a good reason for a change of name by judicial decree.

⁷ Gotthelf v. Shapiro, 136 App. Div. 1, 120 N. Y. Supp. 210 (1909); Bell v. Sun Printing Co., 42 N. Y. Supp. 567, 3 Abb. N. Case 157 (1877); Matter of Snook, *supra* Note 1.

writings or paintings. Voltaire, Molière, Danté, Petrarch, Richelieu, Loyola, Erasmus, Linnæus, and Balzac were assumed names.⁸

The first limitation on this right of a person to acquire and use a name other than that which was originally his, is that one may not assume a name where the result would be to defraud others through mistake of identity.⁹ Equity will enjoin the use of a name where there is a question of trade or business purpose involved.¹⁰ This must necessarily follow from the familiar doctrine recognized by the courts of this state that equity will enjoin the use of one's own name if such name be used fraudulently.¹¹

Statutory restrictions on the use of assumed names are numerous. In New York, it is a misdemeanor to obtain employment by a false statement in writing as to a person's name.¹² Failure to file a certificate setting forth the true name of the person or persons transacting business under an assumed name is a misdemeanor.¹³ In Massachusetts it is a misdemeanor to register in any hotel under any name but the true name of the person.¹⁴

On the other hand it has been held¹⁵ that one who has used an assumed name for a number of years, without being known or transacting business under any other name, even though he has not obtained a decree of a court changing his name, is not using a fictitious name within the meaning of a statute forbidding the transacting or conducting of business under an assumed name.

It is quite apparent that though there exists an absolute right to assume any name which we may choose, this prerogative may not be exercised when mistaken identity, resulting in positive injury, will follow. But will a court of equity enjoin the use of an assumed name where the only injury contemplated is a reflection upon the morals and character of the plaintiff?

⁸ S. Baring-Gould's *Famous Names and Their Story*. In his chapter on changed names the author gives many examples of men well known to history who changed their name by simply adopting a new one in place of the old.

⁹ *International Union Bank v. National Surety Co.*, 245 N. Y. 363, 157 N. E. 269 (1927).

¹⁰ *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129 (1892); *Falk v. American West Indies Co.*, 71 App. Div. 320, 75 N. Y. Supp. 964 (1st Dept., 1902); *National Distilling Co. v. Century Liquor, etc. Co.*, 183 Fed. 206 (C. C. A., 6th, 1910).

¹¹ *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769 (1895); *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489 (1875); *World's Dispensary, etc. v. Pierce*, 138 App. Div. 401, 122 N. Y. Supp. 818 (4th Dept., 1910); *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 Sup. Ct. 625, 35 L. ed. 247 (1890).

¹² N. Y. Penal Law, Sec. 939; *Morgan Munitions Supply Co. v. Studebaker Corp.*, 226 N. Y. 94, 123 N. E. 146 (1919).

¹³ N. Y. Penal Law, Sec. 440; as to what constitutes transacting business under this statute see *People v. Whiting*, 68 Misc. 306, 123 N. Y. Supp. 769 (1910).

¹⁴ Mass. Gen. Laws, ch. 140, Sec. 29; *Attorney General v. Tufts*, 239 Mass. 458, 131 N. E. 573, 17 A. L. R. 274 (1921).

¹⁵ *Ray v. American Photo Player Co.*, 46 Cal. App. 311, 189 Pac. 130 (1920).

In the recent case of *Baumann v. Baumann*¹⁶ the Court said:

“The most serious contention of the plaintiff is in relation to that part of the judgment which restrains the defendant Ray Starr Einstein from using the name ‘Baumann.’¹⁷ Upon marriage a woman takes her husband’s name. (*Chapman v. Phoenix National Bank*, 85 N. Y. 437, 439.)”

In the *Baumann* case,¹⁸ the situation presented was as follows: Plaintiff and defendant, Charles Ludwig Baumann, were married in New York in 1909, separated in 1921, and after a short reconciliation again separated in 1922. They have two children. The defendant Baumann obtained a Mexican divorce from plaintiff in December of 1924. He married the defendant Ray Starr Einstein in June of 1926 in the state of Connecticut. Defendants have ever since lived together as man and wife and defendant Einstein has been known as Mrs. Baumann, both she and defendant Baumann holding her out to be Mrs. Baumann.

The relief prayed for was a declaratory judgment which would declare the plaintiff to be the lawful wife of the defendant Baumann; that the defendants were not and never had been husband and wife; that an alleged divorce procured by defendant Baumann in Yucatan, Mexico, was null and void, and that an alleged marriage between the defendants subsequently had in Connecticut was null and void. Injunctive relief was asked for, enjoining defendants from representing or holding out that they were husband and wife and from representing or holding out that the defendant Baumann was divorced from plaintiff; also to restrain the defendant Einstein from assuming or using the name, “Baumann”; and to enjoin defendants from going through any marriage ceremony during plaintiff’s life.

The Trial Court¹⁹ granted plaintiff all the relief prayed for. On the unanimous affirmation of this decision by the Appellate Division²⁰ defendants appealed by permission to the Court of Appeals. By a divided court, the highest tribunal of the state modified the judgment by striking therefrom the restraining clauses.²¹

It is interesting to note that the Court of Appeals, although fully concurring in that part of the opinion of the lower court which declared the defendants not husband and wife, and that the plaintiff was the legal wife of Charles Ludwig Baumann, refused to enjoin the defendant Einstein from using the name of the plaintiff. In so holding,

¹⁶ 250 N. Y. 382, 387, 165 N. E. 819, 821 (1929).

¹⁷ The trial Court enjoined defendant Ray Starr Einstein from using the name “Baumann” in any form or combination. *Baumann v. Baumann*, 132 Misc. 217 (1928).

¹⁸ *Supra* Note 16.

¹⁹ *Supra* Note 17.

²⁰ 224 App. Div. 719, 229 N. Y. Supp. 833 (1st Dept., 1928).

²¹ *Supra* Note 16.

the court did not rely on the familiar doctrine that equity will not grant injunctive relief in cases where there are no property rights involved.²² It said:

“We do not find it necessary to discuss the question of the jurisdiction of equity to grant injunctive relief in cases where there are no property rights involved. *It is sufficient for the decision in this case that there exists no legal wrong which gives rise to correlative legal right.*” (Italics ours.)

When we consider that in the social and business world another is claiming the title Mrs. Charles Ludwig Baumann, and is being introduced as the wife of the plaintiff's husband, with all the attendant confusion and humiliation which must follow, it seems that a mere declaration of the plaintiff's status will be sadly lacking in effect, with respect to this continuing injury which the plaintiff suffers. The mere declaration that the plaintiff is the lawful wife of the defendant, Baumann, and that the defendant Einstein is not his wife, does not stop these defendants from holding themselves out to be husband and wife and holding the plaintiff out to be divorced.

Although, as we have already observed,²³ defendant Einstein was free to choose any name, is there not something unsound in a rule which would deny to a court of equity the power to enjoin the masquerade of another's name and title and the infringement of the mingled personal property rights which include the name and constitute the matrimonial status? By affirming the declaratory judgment, the Court of Appeals conceded that the defendant Einstein having no marital right to the name “Baumann,” was assuming the use of the name. The modern trend of equity seems opposed to the decision in the case.

In *People ex rel. LaFolette v. Hinkle*,²⁴ which was an action to enjoin the unauthorized use of plaintiff's name in the title of a political party, the Court said:

“Nothing so exclusively belongs to a man or is so personal and valuable to him as his name. His reputation and the character he has built up are inseparably connected with it. Others can have no right to use it without his express consent, and he has a right to go into any court at any time to enjoin or prohibit any unauthorized use of it. *Nor is it necessary that*

²² A discussion of this doctrine would have been of great interest in view of the growing amount of legal literature which points to the fact that the time has come for a square denunciation of this arbitrary rule of equity. In this connection see Chaffee, *Progress of the Law* (1921), 34 *Harv. L. Rev.* 388, 407; Long, *Equitable Jurisdiction to Protect Personal Rights*; see also *Vanderbilt v. Mitchell*, 72 N. J. Eq. 927, 67 *Atl.* 103 (1907).

²³ *Supra* Note 2.

²⁴ 131 *Wash.* 86, 89, 229 *Pac.* 317, 319 (1924).

it be alleged or proved that such unauthorized use will damage him. This the law will presume." (Italics ours.)²⁵

The decision in the Baumann case does not seem in line with the progressive spirit of our present Court of Appeals. Perhaps the Court feared that a contrary decision might be a dangerous precedent, or perhaps the familiar cry that equity should not control the morals of the people by injunction, moved the Court to the instant decision. But is a court of equity to refuse injunctive relief when the positive result of granting it would be the promotion of good morals?

The attitude of the Court on this and similar questions which arise from domestic relations is assuming more importance each day. While a declaratory judgment may serve to fully protect the rights of the plaintiff in many cases, its effect is deadened when the parties reside in a large city, when the coercive force of an injunction is needed to protect that which every ordinary person aspires to, is entitled to, and which a court of equity should protect, a good name.²⁶

BERTRAM R. BERNSTEIN.

WAIVER OF A WAIVER.

The doctrine of waiver is essentially an equitable one and it is founded on the strong antagonism of the courts to forfeitures.¹

²⁵ Interesting decisions which involved the question of injunctive relief with respect to the use of a name are *Burns v. Stevens*, 236 Mich. 443, 210 N. W. 482 (1926) (where plaintiff and defendant had lived together for many years although not married, and the Court gave injunctive relief restraining the defendant from holding herself out as plaintiff's wife); *B. P. O. E. v. Improved B. P. O. E.*, 205 N. Y. 459, 98 N. E. 756 (1912) (where use of a name similar to plaintiff's was enjoined, although no question of trade, industry or business was involved); *Edison v. Edison Polyform*, 73 N. J. Eq. 136, 67 Atl. 392 (1907) (plaintiff was not a business competitor of defendant and no question of unfair competition was raised); *Blanc v. Blanc*, 21 Misc. 268, 47 N. Y. Supp. 694 (1897) (the Court punished defendant for contempt for failing to observe that part of a divorce decree which enjoined her from further use of plaintiff's name).

²⁶ In *Greenberg v. Greenberg*, 218 App. Div. 104, 218 N. Y. Supp. 87 (1st Dept., 1926), an action to enjoin defendant husband from procuring a Mexican divorce which concededly would be invalid in New York, the Court said: "The mere fact that the husband has secured a divorce from his wife gives grounds for suspicion at least of the virtue and fidelity of the latter, on the part of the general public, in the domicile of both parties, who are unacquainted with the infinite variety of causes for which divorce may be granted in other jurisdictions and have heard only of the statutory ground for divorce in this state. A wife who has given no ground for divorce in this state where she and her husband have always lived during their married life, *should not be exposed to the humiliation and doubt as to her status raised by a judgment of divorce in another state, even if fraudulently obtained and invalid here.*" (Italics ours.)

¹ *Draper v. Oswego County Relief Assn.*, 190 N. Y. 12, 82 N. E. 755 (1907); *Stackhouse v. Barnston*, 10 Ves. 466 (1805), "Waiver at law and in equity are the same thing"; *Commercial, etc. v. New Jersey, etc.*, 61 N. J. Eq. 446, 49 Atl. Rep. 157 (1901).