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Recent Developments

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ATTORNEYS — California Lawyer's Failure To Be Admitted To Practice In New York Does Not Bar Recovery Of Fees. *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1966), *cert. denied*, 385 U.S. 987 (1966). The defendant, head of a New York theatre corporation, engaged the plaintiff, a California lawyer, to collaborate with his New York attorneys in preparation of an antitrust action in the District Court for the Southern District of New York. In this action to recover for legal services thus rendered, it was ruled no defense that plaintiff failed to make a motion for admission *pro hac vice* as provided for in the rules of the district court.[1] Over the objections of a strong dissent, it was held that, under the privileges and immunities clause of the Constitution, no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state. Since the defendant exercised his constitutional right to obtain expert legal assistance, his objection to paying the bill must fail.[2]

Generally, no one is entitled to recover compensation unless he has been duly admitted to practice before the court or within the jurisdiction in which the services were rendered.[3] This policy has been implemented in both New York and Maryland by legislation[4] and supported by judicial decision.[5] The holding in the instant case may have two far-reaching effects on this policy as pointed out in the concurring and dissenting opinions. First, "if Section 270 of the New

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1. Rule 3(c) of the General Rules for the Southern and Eastern Districts of New York provides: "A member in good standing of the bar of any state . . . may upon motion be permitted to argue or try a particular cause in whole or in part as counsel or advocate."

2. The court stated another ground upon which recovery could be based. By engaging Spanos under a contract which could be construed to contemplate court appearances, defendant impliedly assumed the obligation of having his New York lawyers make any motion necessary to render such appearances lawful. If such leave would have been sought, it probably would have been granted. Under 28 U.S.C. § 1654 the grant of leave would have insulated him from section 270 of the New York Penal Law with respect to any legal services reasonably incident to the activities the district court had authorized. "Spanos' contract was thus susceptible of being lawfully performed without his being admitted to the New York bar and cannot be considered an illegal bargain." Spanos v. Skouras Theatres Corp., 364 F.2d 161, 169 (2d Cir. 1966), *cert. denied*, 385 U.S. 987 (1966). See also Tuppela v. Mathison, 291 Fed. 728 (9th Cir. 1923); Cochran v. Burdick, 70 F.2d 754 (D.C. Cir. 1934), *cert. denied*, 293 U.S. 561 (1934).

3. Harris v. Clark, 81 Ind. App. 494, 142 N.E. 881 (1924); Harriman v. Strahan, 47 Wyo. 208, 33 P.2d 1067 (1934); Hardy v. San Fernando Valley Chamber of Commerce, 99 Cal. App. 2d 572, 222 P.2d 314 (1950); Taft v. Amsel, 23 Conn. Supp. 225, 180 A.2d 756 (Super. Ct. 1962); Appell v. Reiner, 81 N.J. Super. 229, 195 A.2d 310 (Ch. 1963). *But see* Cochran v. Burdick, 70 F.2d 754 (D. Cir. 1934), *cert. denied*, 293 U.S. 561 (1934); Niemeier v. Rosenbaum, 189 Wash. 1, 63 P.2d 424 (1936); Freeling v. Tucker, 49 Idaho 475, 289 P. 85 (1930).

4. N.Y. PENAL LAW § 270 (McKinney, 1965); MD. CODE ANN. art. 10, § 32 (1957).

5. See Spivak v. Sachs, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965).

York Penal Law is correctly construed to prevent Spanos' giving advice in New York on federal law, whether with or without the collaboration of a New York lawyer, then the Section is invalid under the privileges and immunities clause of the Constitution."[6] This same result of invalidating prohibitory legislation would obtain in Maryland and every other state in whose circuit this interpretation of the Constitution would be accepted. Second, the Constitutional guarantee vested in the citizen-client "must be read to include what is necessary and appropriate for its assertion."[7] That includes allowing out-of-state lawyers at the behest of a resident to advise on federal matters without admission to bar or court. This would have the effect, as pointed out by the dissent, of giving an attorney admitted to practice in any state an unrestricted license to practice federal law and give advice on federal law in all other forty-nine states.

There are serious policy considerations to be weighted against the general rule of no-admittance, no-practice. The requirement for specialized legal services often arises with regard to federal rights relating to income taxation, patents, copyrights, trademarks, and securities and labor regulation. With specialists available in these fields an abridgement of a client's rights occurs when he is prohibited by legislation from bringing those best qualified to the assistance of a resident attorney. The Association of the Bar of the City of New York takes even a broader stand in favor of increasing a lawyer's mobility in urging that the participation of a licensed in-state lawyer be irrelevant.[8] This need for mobility is strikingly pointed up in the "big case" where thousands of papers and files are involved and it becomes impossible to take the case to a lawyer in another state even though his services are greatly desired or required. Furthermore, the "federal matter on which the help of a non-resident specialist is sought may be pending in a different state or may not be a suit at all, and specialized legal advice may be needed without the delay or expense incident to admission by a federal court before which the attorney may not have any intention of practicing, even if that were available and would afford sufficient validation."[9]

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6. Spanos v. Skouras Theatres Corp., 364 F.2d 161, 171 (2d Cir. 1966), *cert. denied*, 385 U.S. 987 (1966). It should be emphasized that the constitutional guarantee is vested in the client and not the attorney. *Cf. In re* Taylor, 48 Md. 28 (1877); Ginsburg v. Kovrak, 392 Pa. 143, 139 A.2d 889 (1958), *appeal dismissed*, 358 U.S. 52 (1958); *But cf.* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), in applying permissible standards for admission to the bar, a state cannot exclude from the practice of law in a manner or for reasons that contravene the due process or equal protection clause of the fourteenth amendment.

7. Spanos v. Skouras Theatres Corp., 364 F.2d 161, 170 (2d Cir. 1966), *cert. denied*, 385 U.S. 987 (1966).

8. The court here retains the requirement as exists in most jurisdictions, including Maryland, of having the foreign attorney associated with one who is a member of the bar of that state. *But see In re* Roel, 3 N.Y.2d 224, 229, 144 N.E.2d 24, 26, 165 N.Y.S.2d 31, 35 (1959), *appeal dismissed per curiam sub. nom;* Roel v. New York County Lawyers Association, 355 U.S. 604 (1958), where the court said, "[A] foreign lawyer cannot give advice on foreign law directly to the public but may do so indirectly through a New York lawyer." See generally as to requirement of resident attorney: Homer D. Crotty, *Requirements for Admission to Practice in the Federal Courts*, 19 B. EXAMINER 243 (1950).

9. Spanos v. Skouras Theatres Corp., 364 F.2d 161, 170 (2d Cir. 1966), *cert. denied*, 385 U.S. 987 (1966).

Surely, states have an interest in seeing their residents represented by qualified counsel and have sought to maintain some standard of qualification by admittance regulation.[10] But in view of the high mobility and specialization of the bar, it is feasible for out-of-state attorneys to provide effective services in cases involving federal law. Allowing citizens to utilize these services would seem to represent little risk to state interests in light of generally prevailing rigorous requirements for admission to the bar[11] and in light of the fact that the interstate practitioner is typically especially competent.

CONFLICT OF LAWS — TORTS — Strict Application of Lex Loci Delicti. *White v. King,* 244 Md. 348, 223 A.2d 763 (1966). The plaintiffs, Mr. and Mrs. White, residents of Maryland, sued the defendant, also a resident of Maryland, for injuries sustained in Michigan when the defendant, who was driving them to the funeral of Mr. White's sister, apparently fell asleep at the wheel of his car and ran off the road. The trial court granted a directed verdict for the defendant on the grounds that the laws of Michigan governed. The court held that there was insufficient evidence of the defendant's gross negligence or wilful and wanton misconduct as required under the Michigan guest statute[1] to allow the case to go to the jury.

The Court of Appeals of Maryland affirmed the trial court's finding that the Michigan law was controlling, but held that the facts as substantiated at the trial concerning the negligent actions[2] of the defendant-host-driver were such that the question of whether or not

10. In Ginsburg v. Kovrak, 392 Pa. 143, 139 A.2d 889, 892 (1958), the Supreme Court of Pennsylvania said:

> The practice of law is not open to all and sundry, nor is it an inherent or vested right. It is a personal privilege subject to exacting tests as to moral character and mental grasp of legal principles. The lives, liberties, and property of the public are at stake, and the State may attach conditions to an attorney's license aimed at the public's protection.

The United States Supreme Court has upheld state legislation imposing reasonable professional requirements as conditions precedent to the granting of a license to practice. Graves v. Minnesota, 272 U.S. 425 (1926). In Dent v. West Virginia, 129 U.S. 114, 122 (1889), the Court said the purpose of licensing requirements is to protect the public against ". . . the consequences of ignorance and incapacity as well as of deception and fraud."

11. The dissent in Ginsburg v. Kovrak, 392 Pa. 143, 139 A.2d 889, 896 (1958) said: [S]urely it must be known that in the District of Columbia, where Kovrak [plaintiff-attorney] was first admitted to practice law, the authorities conduct law examinations for applicants to the bar just as the State Board of Law Examiners in Pennsylvania conducts examinations. Surely it must be known that no one will be admitted to practice law in the District of Columbia, or Hawaii, or Alaska, or any other territory of the United States without its having been affirmatively demonstrated that the applicant has moral quality.

See generally 55 GEO. L.J. 371 (1966).

1. MICH. STAT. ANN. § 9.2101 (1960).

2. The evidence submitted at the trial substantiated the fact that the defendant-host-driver had engaged in strenuous activities prior to the journey, had been warned numerous times by passengers about his sleepiness, but had refused to relinquish the wheel, had driven all except 2½ hours of the 500 mile trip, had driven off the road momentarily, and had nearly run into an overpass just a short time before the accident.

the driver was in fact guilty of gross negligence within the exception to the Michigan guest statute[3] should have been submitted to the jury.

In applying the Michigan law over Maryland's, the Maryland court emphatically reaffirmed its practice of applying the doctrine of *lex loci delicti*. Under that rule, when an accident occurs in another state, substantive rights of the parties, even though they are domiciled in Maryland, are to be determined by the law of the state where the alleged tort took place.[4]

The court's reasoning behind its retention of the much criticized rule[5] admittedly followed the rationale of the recent Delaware case, *Friday v. Smoot*,[6] where it was said that any alteration or rejection of such a well-established rule must rightly "fall within the peculiar province of the General Assembly."[7] Although the court found it impossible to break away from the strict application of the rule, it specifically and respectfully recognized the recent and voluminous criticism that has been focused upon the rule.[8] While Maryland's staunch adherence to the doctrine of *lex loci delicti* allowed her to remain as one of the great majority of states which still applies the rules,[9] a number of jurisdictions have rejected the static rule of law and have commenced to develop a new approach by applying the law of the state which has the most significant relationship with the occurrence and parties to determine their rights and liabilities in tort.[10]

3. MICH. STAT. ANN. § 9.2101 (1960).

4. *E.g.*, Mroz v. Vasold, Jr., 228 Md. 81, 178 A.2d 403 (1962); Doughty v. Prettyman, 219 Md. 83, 148 A.2d 438 (1959). While both of these cases involved guest statutes of other states, the rationale of *lex loci delicti* was not questioned and the decisions were based upon its application.

5. See note 8 *infra*.

6. 211 A.2d 594 (Del. 1965). Here the plaintiff, a resident of Delaware, received personal injuries in an accident, occurring in New Jersey involving the automobile of the defendant, a Delaware resident, in which the plaintiff was riding at the time as a non-paying guest. The court held to the principle of *lex loci delicti* and specifically refused to overturn it in favor of the new "significant interest" rule as exemplified by Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

7. Friday v. Smoot, 211 A.2d 594, 597 (Del. 1965).

8. See generally *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212–57 (1964). This symposium contains six excellent articles authored by: David Cavers, Elliot Cheatham, Brainerd Currie, Albert Ehrenzweig, Robert Leflar, and Willis Reese; *The Impact of Babcock v. Jackson on the Conflict of Laws*, 52 VA. L. REV. 302 (1966); Note, *Wilcox v. Wilcox: The Beginning of a New Approach to Conflict of Laws in Tort Cases*, 1966 WIS. L. REV. 913; 77 HARV. L. REV. 355 (1963); Note, *Lex Loci Delicti Rejected in Torts, Conflict of Laws*, 25 MD. L. REV. 238 (1965); Note, *New York and the Conflict of Laws: A Retreat*, 18 STAN. L. REV. 699 (1966); Comment, *The Aftermath of Babcock*, 54 CALIF. L. REV. 1301 (1966); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959); Weintraub, *A Method for Solving Conflict Problems — Torts*, 48 CORNELL L.Q. 215 (1963).

9. Annot., 95 A.L.R.2d 12 (1964).

10. *E.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). Two motorists, both New York domiciliaries on a vacation trip into Canada had an accident. Under the guest statute of Ontario there could be no recovery by a guest from his host, while under the law of New York which had no guest statute, the plaintiff could recover. The court held that the rule of *lex loci delicti* did not apply and applied the New York law, the law of the forum. The court stated: "Comparison of the relative 'contacts' and 'interests' of New York and Ontario in this litigation, vis-à-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and the interest of Ontario is at best minimal." *Id.* at 284.

Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966). Here plaintiff and defendant, a married couple domiciled in Massachusetts, had an automobile accident

The first forthright rejection of the *lex loci delicti* doctrine was taken by the New York Court of Appeals in the landmark decision of *Babcock v. Jackson.*[11] The court formulated a new rule which would give "controlling effect to the law of the jurisdiction which, because of its relationship or contacts with the occurrence or parties, has the greatest concern with the specific issue raised in the litigation."[12] The question as to the specific test the court utilized in determining which state had the most compelling interest in having its law apply has provided legal scholars and jurists ample material for extended debate.[13] This interest or contact weighing has been described as a "grouping of contracts" or "center of gravity" test. The inadequacy of the language in the *Babcock* decision as exemplified by these ambiguous catchwords used to describe this delicate principle of choice of law has left a very unclear picture as to the method by which the court is to weigh or count these contacts or interests. This uncertainty has been largely centered around the question of whether or not this weighing should be accomplished through a qualitative or quantitative analysis of the contacts. While the new rule in the *Babcock* case has admittedly not acquired the degree of clarity and predictability that its predecessor possessed, its basic concept has been generally praised.[14] The *Restatement of Conflicts*[15] has adopted a new rule incorporating a rationale seemingly similar to that espoused in *Babcock v. Jackson,* and thus has tentatively rejected the old *Restatement of Conflicts,*[16] which followed the *lex loci delicti* theory.

Judge Oppenheimer, in writing for the majority in *White v. King,* made special mention of the fact that in several of the jurisdictions where the *lex loci delicti* rule had been discarded, the rule which was to take its place still seemed to be in the process of development.

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while driving in New Hampshire. New Hampshire allows suits between husband and wife, while Massachusetts retains the common law doctrine of interspousal immunity. The action was brought in New Hampshire and the Supreme Court of New Hampshire held, in rejecting the strict application of *lex loci delicti,* that Massachusetts' interest in having its law of interspousal immunity apply outweighs New Hampshire's interest in allowing recovery for injuries suffered by foreign motorists on a New Hampshire highway.

Wilcox v. Wilcox, 26 Wisc. 2d 617, 133 N.W.2d 408 (1965). Here Mr. and Mrs. Wilcox, the defendant and plaintiff respectively, both residents of Wisconsin, were returning from a vacation trip when they became involved in an automobile accident in Nebraska. Mrs. Wilcox brought suit in the Wisconsin court against her husband, alleging negligence on his part. Nebraska law permitted suits by a guest against a host only if the host had been guilty of gross negligence, while the Wisconsin law permitted such suits when only ordinary negligence was alleged. The Wisconsin Supreme Court held that the Wisconsin law, the law of the forum, applied because Wisconsin had the most significant relationship with the host-guest statute.

In Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964), the Supreme Court of Pennsylvania disregarded *lex loci delicti* and held that the Pennsylvania law of damages would take precedence over Colorado law in an action in assumpsit for negligent breach of contract of carriage causing death of Pennsylvania decedent in a Colorado plane crash while on a flight from Pennsylvania to Arizona. Note, 25 MD. L. REV. 238 (1965).

11. 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).
12. 12 N.Y.2d at 481, 240 N.Y.S.2d at 749, 191 N.E.2d at 283.
13. *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212–57 (1964).
14. *Ibid.*
15. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).
16. RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 378, 384 (1958).

The fact that New York, as the leading advocate of the new approach in conflict of law cases, has experienced difficulty in creating a flexible yet coherent rule (as shown in its recent Court of Appeals cases of *Babcock v. Jackson* and *Dym v. Gordon*[17]) avowedly affected the decision in the case at hand. The prospect of entering into this confused and uncertain judicial arena of change confessedly provided the court with adequate reason "not to substitute for a rule which was easy of application for one where all manner of graduation of important contacts may be present."[18] The court, applying its own reasoning from *Cole v. State,*[19] stated that it felt it wise to await any radical departure absent legislative action "unless and until what we deem a sound, practical alternative is evolved. . . ."[20] It would thus appear that when the cloud hanging over the *Babcock* rule, namely, the *Dym* decision, is cleared up, and the other jurisdictions have further crystalized their approach to the conflict of laws cases in tort, the Maryland Court of Appeals might consider with greater favor the rejection of a rule which has been so conclusively branded obsolete.

NEGOTIABLE INSTRUMENTS — Right Of Stop Payment On A Bank's Personal Money Order Under The Uniform Commercial Code. *Garden Check Cashing Service, Inc. v. First National City Bank,* 25 App. Div. 2d 137, 267 N.Y.S.2d 698 (1966). In April 1962, the defendant bank sold a "Register Check-Personal Money Order." The instrument was issued with the name of the bank and the number of the money order preprinted thereon. The amount was placed on the instrument by check writing equipment, but the instrument was blank as to the name of the payee and the name of the purchaser. No bank officer or employee signed the instrument on behalf of the bank. The purchaser lost the instrument, reported the loss, and obtained a cashier's check for the amount of the lost instrument. Someone who had apparently found the lost instrument filled in the blanks and cashed it with the plaintiff, a licensed check cashier. The latter was not able to collect on the instrument because payment was stopped. The plaintiff contended that the instrument was an obligation of the bank, similar to a cashier's check which would be accepted in advance by the act of issuance.[1] The defendant argued that the instrument was similar to an ordinary personal check due to the absence of the signature of an officer of the issuing bank, which is required in the case of the cashier's check. The court in applying the Negotiable Instru-

17. 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792. See generally 25 MD. L. REV. 238 (1965); 18 STAN. L. REV. 699 (1966); 22 N.Y.U. INTRA L. REV. 119 (1967); 1966 CALIF. L. REV. 1301 (1966).
18. 244 Md. at ____, 223 A.2d at 766 (1966).
19. 212 Md. 55, 58, 128 A.2d 437, 439 (1957).
20. 244 Md. at ____, 223 A.2d at 767.

1. The question of whether a money order is a check or a bank obligation is discussed in Bailey, *Bank Personal Money Orders As Bank Obligations,* 81 BANKING L.J. 669 (1964).

ments Law held[2] that the instrument was similar to a personal check and the purchaser had a clear right to stop payment prior to acceptance by the bank, a right accorded by statute.[3]

Other courts, however, have described the bank money order as a bank obligation similar to a cashier's check, devoid of any right of countermand,[4] or have ruled that the placement of the words "Personal Money Order" would seem to indicate that the bank would honor the order no matter who signed the face of the instrument, thus setting up a rule of estoppel.[5] Support for the estoppel rationale lies in the fact that banks, by calling their instruments "Personal Money Orders," appear to be holding themselves out as offering backing similar to instruments sold by the United States Post Office Department;[6] therefore, they should be ordered to honor them rather than injure an innocent holder who accepted the bank's credit.

In the instant case, the court noted that section 3–401 of the Uniform Commercial Code would seem to eliminate these conflicting rules because of the absence of a bank signature on the instrument, which, on the face of the Code, is the *sine qua non* of liability.[7] The bank would not be primarily liable on the instrument until there is certification or acceptance.[8] However, the Code does not preclude the theory that the imprinted name of the bank constitutes the bank's signature. This would seem to create a new type of negotiable instrument similar to a cashier's check (accepted in advance by the act of issuance) and not enumerated by the Code.[9] While the literal interpretation of section 3–401 of the Uniform Commercial Code provides a

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2. The cause arose prior to the effective date of the Uniform Commercial Code in New York, and the court's decision is therefore based upon the Negotiable Instruments Law and applicable case law. However, the court cites the Uniform Commercial Code throughout its decision and implies that the same result would be reached under the Code.

3. UNIFORM COMMERCIAL CODE § 4–403. Maryland formerly had a stop payment statute. MD. CODE ANN. art. 13, § 211 (1957), *repealed*, MD. CODE ANN. art. 95B, § 10–102 (1963).

4. Cross v. Exchange Bank Co., 110 Ohio App. 219, 168 N.E.2d 910 (1958); Rose Check Cashing Service, Inc. v. Chemical Bank New York Trust Co., 43 Misc. 2d 679, 252 N.Y.S.2d 100 (1964). The discussions of these courts are aimed at reiterating the standing of the cashier's check rather than attempting to distinguish it from the money order. The similarity which they observed is that in both situations the payee is paid from bank funds.

5. Rose Check Cashing Service, Inc. v. Chemical Bank New York Trust Co., 40 Misc. 2d 995, 244 N.Y.S.2d 474 (1963).

6. The Post Office Department makes no procedure available for a purchaser to stop payment on a lost order, thus a holder in due course is assured of payment. The purchaser must wait sixty days before requesting a determination of disposition and a refund. 39 C.F.R. § 3961.1(g)(2)(i)(a)(b) (1966). *Cf.* United States v. First Nat'l Bank of Boston, 263 F. Supp. 298 (D. Mass. 1967).

7. The court pointed out that the novel feature of the instrument was that the prospective names of drawer and payee were blank. UNIFORM COMMERCIAL CODE § 3–401(1)(a) requires that any writing to be a negotiable instrument within the article must be signed by the maker or drawer. UNIFORM COMMERCIAL CODE § 3–401(1) states that no person is liable on an instrument unless his signature appears thereon.

8. UNIFORM COMMERCIAL CODE § 3–409, § 3–410 (acceptance), § 3–411 (certification).

9. UNIFORM COMMERCIAL CODE § 3–104, comment (1), states, "[A]mendment of this section may not be necessary, since 'within this article' in subsection (1) leaves open the possibility that some writings may be made negotiable by other statute or by judicial decision. The same is true as to any new type of paper which commercial practice may develop in the future."

workable answer to the problem created, it should be emphasized that the estoppel doctrine is still arguable under the Code and might meet with greater success in the future.[10] At least, the instant case should not be considered as unalterably foreclosing the matter, and issuing banks would probably be well advised to limit their liability on "Personal Money Order" by a statement thereon that the issuer assumes no liability over and above that of the drawee bank on an ordinary check.[11]

TRADE REGULATION — Limitations On A Man's Right To Use His Own Name In His Business. *David B. Findlay, Inc. v. Findlay,* 18 N.Y.2d 12, 271 N.Y.S.2d 652, 218 N.E.2d 531 (1966). The parties to this action are brothers. Their family has been in the art business nearly one hundred years. In 1938 the brothers, who had been associated with their father, severed business relations and agreed that each could use the name "Findlay Galleries, Inc." for their respective branches, defendant Wally's in Chicago and plaintiff David's in New York City. In October, 1963, Wally purchased New York premises at 17 East 57th Street and informed David of his plans to open a gallery. David, who had been situated at 11-13 East 57th Street at least since 1936 and who had built a reputation under the name "Findlay Galleries" and "Findlay's on 57th St." objected to Wally's use of the name "Findlay" on 57th Street. Wally apparently paid heed; signs and advertisements proclaimed the coming opening of "W. C. F. Galleries, Inc." But in September, 1964, the sign on the building changed to "Wally Findlay Galleries" affiliated with "Findlay Galleries, Inc." David sought an injunction. Wally opened his gallery.

The trial court, after making very detailed findings, enjoined Wally from using the names "Wally Findlay Galleries," "Findlay Galleries" and any other designation which included the name "Findlay" in the conduct of an art gallery on East 57th Street, the particular area in which the use of the name would cause confusion. The Appellate Division and the New York Court of Appeals affirmed.

Every man has the right to use his own name.[1] On this fundamental principle, the law of unfair competition imposes the limitation

10. One of the problems with the Uniform Commercial Code comments is their failure to adequately handle the doctrine of estoppel which exists alongside the code. The comments to Uniform Commercial Code § 3-401 do not provide for the possibility of estoppel. The doctrine of estoppel is mentioned in a limited context in comment (2) of § 3-104 and in comment (1) of § 3-401. For a criticism of the Code comments see generally Skilton, *Some Comments On The Comments To The Uniform Commercial Code,* 1966 WIS. L. REV. 597, 610.

11. Bailey, *supra* note 1, at 678.

1. See Neubert v. Neubert, 163 Md. 172, 174, 161 Atl. 16, 17 (1932). Brown Chemical Co. v. Meyer, 139 U.S. 540, 542-43 (1891), is often cited and limited in surname cases (see, *e.g.,* the cases cited by dissent in *Findlay,* 271 N.Y.S.2d at 657, 218 N.E. at 535). The Supreme Court stated that "an ordinary surname cannot be appropriated as a trade mark by any one person as against others of the same name, who are using it for legitimate purposes." But the court held that no confusion was created by the facts in that case, at 545, and, therefore, there was no need to apply the propounded rule of law. See generally 3 CALLMAN, THE LAW OF UNFAIR COM-

that no man may use even his own name to perpetrate fraud and to steal another's trade.[2]

To determine whether the right to use one's own name may be qualified, careful factual inquiry must determine whether the original user of the name had established such a reputation and business that his name had acquired a secondary meaning.[3] That occurs when a personal surname has become so identified with a business or a product as to become nearly synonymous with it and the use of that name by a rival could not help but create confusion.[4] No intent by the defendant to pass off his business or wares as the plaintiff's is essential for relief to be granted a plaintiff.[5]

To limit the confusion to the public mind caused by similarity of names for one's business enterprise, product or service, courts initially applied an explanatory phrase rule[6] whereby a statement disclaiming connection with the original was required to be appended to the trade-name label, letterhead and sign. This method, as with the device of simply adding the first name to the surname already in use,[7] often did not result in sufficient differentiation to prevent deceit[8] and frequently

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PETITION AND TRADEMARKS § 85.2 (2d ed. 1950); 1 NIMS, UNFAIR COMPETITION AND TRADEMARKS §§ 67–81a (4th ed. 1947), presenting an excellent and extensive discussion of the development of the case law limiting the basic right to use one's own name.

2. Finchley, Inc. v. Finchley Co., 40 F.2d 736, 738 (D. Md. 1929). In A. Weiskittel & Son Co. v. Harry C. Weiskittel Co., 167 Md. 306, 173 Atl. 48 (1934), where defendant was using an explanatory phrase, infrequent minor confusion was found, and therefore the court did not issue an injunction. *Accord* Baltimore Bedding Corp. v. Moses, 182 Md. 229, 34 A.2d 338 (1943). Statutory restrictions in Maryland concerning the fraudulent use or imitation of trade-names are not applicable to individuals possessing similar names. MD. CODE ANN. art. 27, § 191 (1957).

3. RESTATEMENT, TORTS § 730, comment *b* (1938), formulates the issue in terms of whether the use, though honest, created or tended to create confusion for the consuming public. (Factors important in determining the reaction of prospective purchasers are enumerated in § 731.) See American Plan Corp. v. State Loan & Finance Corp., 365 F.2d 635 (3d Cir. 1966), where the Court of Appeals, in a decision by Chief Judge Staley, found that tradename infringement existed because the name had acquired a secondary meaning and because confusion was proven likely to result from the use by defendant in the conduct of his business of a name identical when shortened to that of corporate plaintiff. The court issued a preliminary injunction and remanded the case.

4. See Chayt v. Darling Retail Shops Corp., 175 F. Supp. 462, 469–70 (D. Md. 1959); Lockwood v. Friendship Club, Inc., 95 F. Supp. 614, 618 (D. Md. 1951); Fox Fur Co., Inc. v. Fox Fur Co., Inc., 59 F. Supp. 12, 16 (D. Md. 1944).

5. See Car-Freshener Corp. v. Marlenn Prods. Co., Inc., 183 F. Supp. 20, 43 (D. Md. 1960); Edmondson Village Theatre, Inc. v. Einbinder, 208 Md. 38, 46, 116 A.2d 377, 380–81 (1955).

6. Neubert v. Neubert, 163 Md. 172, 174–75, 161 Atl. 16, 17 (1932), is parallel to the *Findlay* case. The court found that by reason of plaintiff's use of his surname over a period of twenty-five years in connection with his business of packing and shipping oysters he had built up for the business a reputation signified by that name. He therefore was entitled to demand that others, who had the same surname and were starting to conduct a similar business under that name, should accompany their use of that name by an explanation that their business was distinct from that in which plaintiff was engaged. Donnell v. Herring-Hall-Marvin Safe Co., 208 U.S. 267, 274 (1908), held that a descendant has the right to use the family name used in a particular business by an ancestor if accompanied by an explanatory statement.

7. Guth v. Guth Chocolate Co., 224 Fed. 932, 934 (4th Cir. 1915), held on appeal from the District Court of Maryland that an injunction should issue to restrain use of the same name in competition in the chocolate business.

8. See, *e.g.*, the Baker chocolate litigation, described in 1 NIMS, UNFAIR COMPETITION AND TRADEMARKS § 70, at 203–04 (4th ed. 1947), which illustrates the futility from a practical point of view of the explanatory phrase rule or the rule compelling the use of the first name to distinguish the original from the new. *E.g.*, Walter Baker

increased the confusion. Therefore, the decision in the instant case is in line with the increasingly prevalent view that once secondary meaning of the plaintiff's work and confusion are established, a court may issue an injunction prohibiting absolutely the use of the name in the geographical and commercial area in which its use injures the plaintiff.[9]

& Co., Ltd. v. Sanders, 80 Fed. 889, 895 (2d Cir. 1897), where the phrase the court required was "W. H. Baker is distinct from and has no connection with the old chocolate manufactory of Walter Baker & Company." Walter Baker & Co., Ltd. v. Baker, 87 Fed. 209, 211 (S.D.N.Y. 1898), which proscribed the use of "Baker" in juxtaposition with chocolate but permitted indication on the package that the goods were prepared or sold by Wm. P. Baker of New York.

9. "The defendant has the right to use his name. The plaintiff has the right to have the defendant use it in such a way as will not injure his business or mislead the public. Where there is such a conflict of rights, it is the duty of the court so to regulate the use of his name by the defendant that, due protection to the plaintiff being afforded, there will be as little injury to defendant as possible." 218 N.E.2d at 535, quoting World's Dispensary Medical Ass'n v. Pierce, 203 N.Y. 419, 425, 96 N.E. 738, 740 (1911). In the *Findlay* case an injunction issued prohibiting Wally (defendant) from using the name "Findlay" in the limited area of East 57th Street. (In fact, the name on the canopy outside Wally's gallery on East 57th Street has been changed to "Wally F. Galleries.") See generally CALLMAN, UNFAIR COMPETITION AND TRADEMARKS § 85.2, at 1680 (2d ed. 1950), where the author applauds the recent cases which have granted injunctive relief in trade-name cases where the parties had identical names.