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Equity--Injunction--Trade Names and Unfair Competition--Action to Enjoin the Use of Name (Hotel New Yorker Corp. v. Pusateri et al., 87 F. Supp. 294 (W.D. Mo. 1950))

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the contingency.[4] The courts will not apply this doctrine to cases in which the contingency should have been foreseen.[5]

In applying this doctrine the court follows an unbroken line of cases holding that performance of a contract is excused when prevented by a governmental order. In one case a defendant was excused from paying rent on an electrical advertising display when its illumination was prohibited by fuel conservation orders.[6] In another the breach of a contract to return a person to Norway was excused when prevented by war restrictions.[7] A contract of carriage by sea was dissolved when governmental action caused the loss of the ship prior to the time of voyage.[8] Performance of contracts for the delivery of cotton goods at a set price was excused when the Office of Price Administration fixed a maximum price lower than that specified in the contract.[9] The failure to deliver gold to England was held not to constitute a breach of contract since the imminence of war between England and Germany created a grave danger that the ship would be captured if the terms of the contract were performed.[10]

In discounting the contention that the action of the Maritime Commission should have been foreseen, the court points out that the contingency primarily responsible for the breach in this case was the Pearl Harbor disaster which was hardly foreseeable. The case therefore falls directly in line with those excusing performance made impossible by a governmental order.

W. J. N.

EQUITY—INJUNCTION—TRADE NAMES AND UNFAIR COMPETITION—ACTION TO ENJOIN THE USE OF NAME.—Plaintiff's Hotel New Yorker, established in 1930 in New York City, contains some 2500 rooms and maintains a large budget for advertising and publicity on a national scale. Of its national and international clientele, several thousand yearly are drawn from Missouri and several hundred from Kansas City. Almost continuously since 1920 the defendants had operated various restaurants including one called the "New

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[4] Lion Brewery of New York City v. Patrick Loughran, 131 Misc. 331, 226 N. Y. Supp. 656 (Sup. Ct. 1928).

[5] Madeirense Do Brazil S/A v. Stulman-Emrick Lumber Co., 147 F. 2d 399 (2d Cir. 1945); Browne v. Fletcher Aviation Corp., 67 Cal. App. 2d 855, 155 P. 2d 896 (1945).

[6] 20th Century Lites v. Goodman, 64 Cal. App. 2d 938, 149 P. 2d 88 (1944).

[7] Borup v. Western Operating Corp., 130 F. 2d 381 (2d Cir. 1942).

[8] Texas Co. v. Hogarth Shipping Co., 256 U. S. 619, 631 (1921).

[9] Kramer v. Uchitelle, 288 N. Y. 467, 43 N. E. 2d 493 (1942).

[10] The Kronprinzessin Cecille, 244 U. S. 12 (1917).

Yorker Bar and Restaurant" in Kansas City where they have acquired there a local reputation as restaurateurs. In 1948 they sold this "New Yorker Bar" and rented a small hotel nearby which they called the "Hotel New Yorker." After being requested by plaintiffs to cease using this name the defendants continued to display an exterior sign designating the establishment as "Pusateri's New Yorker Hotel." *Held,* judgment for defendants. The court found as a fact that the words "Hotel New Yorker" had acquired a secondary meaning connoting plaintiff's hotel.[1] Nevertheless the court found there would be no reasonable possibility of confusion or deception, at least in Kansas City, and refused to enjoin defendants' use of the name "Pusateri's New Yorker Hotel." *Hotel New Yorker Corp. v. Pusateri* et al., 87 F. Supp. 294 (W. D. Mo. 1950).

A geographical name is not protected as a common law trade name [2] unless it is first found as a fact [3] that the name has acquired a "secondary" meaning which in trade or common usage is a symbol for something other than its geographical denotation.[4] A trade name whose secondary meaning so identifies its owner is a valuable property right.[5] One who would adopt it in a place from which even a small part of the owner's trade is drawn [6] must distinguish from its secondary meaning.[7] The addition of a personal name is perhaps a greater wrong because the added name is thereby imbued with the owner's good will.[8] In the ultimate analysis, such is the law which protects the consumer, be he reasonable and prudent or ignorant and credulous.[9]

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[1] Western Auto Supply Co. v. Knox, 93 F. 2d 850 (10th Cir. 1937); R. W. Eldridge Co., Inc. v. Southern Handkerchief Mfg. Co., 93 F. Supp. 179 (W. D. S. C. 1938).

[2] Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665 (1901); The President, etc., of the Delaware and Hudson Canal Co. v. Clark, 13 Wall. 311 (U. S. 1871).

[3] RESTATEMENT, TORTS § 716, comment b (1937).

[4] Western Auto Supply Co. v. Knox, 93 F. 2d 850 (10th Cir. 1937); Trappey v. McIlhenny Co., 281 Fed. 23 (5th Cir. 1922) (connoting a unique appropriator); Baglin v. Cusanier Co., 221 U. S. 580 (1910); La Republique Francaise v. Saratoga Vichy Springs, 107 Fed. 459 (2d Cir. 1901) (connoting a unique product); Grand Rapids Furniture Co. v. Grand Rapids Furniture Co., 127 F. 2d 245 (7th Cir. 1942) (connoting a unique process).

[5] Hanover Star Milling Co. v. Metcalf, 240 U. S. 403 (1915); Yale Electric Corp. v. Robertson, 26 F. 2d 972 (2d Cir. 1928).

[6] Sweet Sixteen Co. v. Sweet "16" Shop, Inc., 15 F. 2d 920 (8th Cir. 1926); *accord,* Stork Restaurant, Inc. v. Marcus, 36 F. Supp. 90 (E. D. Pa. 1941).

[7] L. E. Waterman Co. v. Modern Pen Co., 236 U. S. 88 (1914); S. C. Johnson and Sons, Inc. v. Johnson, 116 F. 2d 427 (2d Cir. 1940).

[8] Shaver v. Heller and Merz Co., 108 Fed. 821 (8th Cir. 1901); *accord,* Menendez v. Holt, 128 U. S. 514 (1888).

[9] Stork Restaurant, Inc. v. Sahati, 166 F. 2d 348 (9th Cir. 1948); Coca-Cola Co. v. Chere-Cola Co., 273 Fed. 755 (App. D. C. 1921); Florence Mfg. Co. v. J. C. Dowd and Co., 178 Fed. 273 (2d Cir. 1910)

Under another and possibly out-moded viewpoint,[10] relief will depend on facts extrinsic to the meaning acquired by the name. Here the test is: would a reasonably prudent purchaser probably be confused as to the source of the goods or services.[11] Here such elements as good faith, geographical location, relative size, the products or services involved and so on become important.

The court in the instant case applied the "prudent purchaser" test and based its decision on the ground that defendants' own name, coupled with its established reputation in the local restaurant trade, was sufficient to distinguish the two hotels and to obviate any reasonable possibility of local confusion. This conclusion was buttressed by taking judicial notice of the "undoubted" existence of other hotels named "New Yorker" and of the actual existence of other hotels which are operated in different cities although under substantially identical names.[12]

It is submitted that the addition of defendants' name, even with their local reputation as restaurateurs, is an insufficient distinction. They could as easily secure the benefits of that reputation to their hotel business without using plaintiff's name. With "all infinity" to choose from,[13] why permit the use of "New Yorker" for a hotel in Kansas City when it is so flagrantly fictitious?[14]

Perhaps more cogent is the precedent established permitting any number of "Hotels New Yorker" distinguished only by the owner's name. The protection of plaintiff's name would then be so narrowly circumscribed both as to area and as to trade that plaintiff's property in its name would be virtually destroyed and its reputation necessarily injured.

C. J. M.

NATURALIZATION — GOOD MORAL CHARACTER AS A CONDITION PRECEDENT.—Petitioner, a tavern keeper, was a native Syrian, fifty-eight years old, a resident of the United States and Louisiana for forty-six years, married and the father of eight American-born chil-

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[10] See the opinion of Learned Hand, J., in Ely-Norris Safe Co. v. Mosler Safe Co., 7 F. 2d 603, 604 (2d Cir. 1925).

[11] American Steel Foundries v. Robertson, 269 U. S. 372 (1926); Howe Scale Company v. Wyckoff, Seamans and Benedict, 196 U. S. 118 (1905). *Accord*, Eastern Construction Co. v. Eastern Engineering Corp., 246 N. Y. 459, 159 N. E. 397 (1927).

[12] *But cf.* Ritz Carlton Hotel Co., Inc., *et al.* v. Ritz Carlton Hotel Corp., 66 F. Supp. 720 (S. D. Fla. 1946) (a Florida hotel enjoined on behalf of a New York hotel).

[13] Florence Mfg. Co. v. J. C. Dowd and Co., *supra* note 9 at 75.

[14] *See* La Republique Francaise v. Saratoga Vichy Springs, 107 Fed. 459 (2d Cir. 1901).