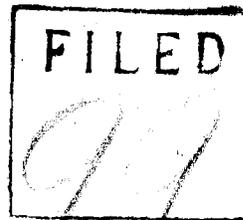


FICTITIOUS NAMES: More than one person may register the same fictitious name.

June 7, 1940

6-10



Honorable Carl F. Wymore  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated June 6, 1940, as follows:

"I would like to have an opinion on the following set of facts;

An individual doing business under a fictitious name has registered that name with The Secretary of State as provided by sections 14342-14346 of the Revised Statutes of Missouri. Now a second individual wishes to register under the same name. Can more than one individual register under the same name? Is it discretionary with the Department of State to accept such registration or is the name registered upon the filing of the affidavit and the presentation of the registration fee? I would also like to know if this second individual who has attempted to register under a name that has been adopted, previously, would be acting in violation of the above section of our statutes if he engaged in business under the name he presented for registration."

The two statutes which must be considered are Sections 14342 and 14343, R. S. Mo. 1929, which are as follows:

"Sec. 14342. Fictitious names. -- That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as hereinafter required.

Sec. 14343. Registration required, when -- how. -- Every person who shall engage in business in this state under a fictitious name or under any name other than the true name of such person shall, within five days after the beginning or engaging in business under such fictitious name, register by verified statement of all parties concerned, upon blanks furnished by the secretary of state, such name in the office of the secretary of state, together with the name or names and the resident of each and every person or corporation interested in or owning any part of said business, and setting forth the exact interest therein of each and every such person or corporation: Provided, that if the interest of any person named in the original registration of such fictitious name shall change or cease to exist, or any other person shall become interested therein, such fictitious name shall be reregistered within five days after any change shall take place in the ownership of said business or any part thereof as set forth in the original registration, and such re-registration shall in all respects be made as in the case of original registration of such fictitious name: Provided, that the provisions of this section shall not apply to farmers'

mutual insurance companies nor farmers' mutual telephone companies."

There is no language in either of the above sections, or in any of the other sections under the same title, indicating that there may not be similar names registered under these sections. There are several cases in which the "fictitious name" statutes have been discussed and an effort made to determine the legislative intent. In all of these cases, the courts have emphasized that these statutes are not an attempt to restrict business in any manner, and all recognize the rule that the right to do business under any name, in the absence of fraud, is inherent in every person and partnership.

The statutes are fully discussed in *Ditzell v. Shoecraft*, 274 S. E. 880. In that opinion, we find the following, l. c. 883:

"Under points and authorities, plaintiffs charge that the court erred in admitting evidence concerning the failure of consideration, and in giving respondent's declarations of law (a) to (g), inclusive, and in effect declaring void and forfeiting all contracts and transactions of those engaged in business using a trade-name without registering it. In support of this contention it is asserted that the language and purpose of the act proclaim that it is a regulation to secure registration, not to restrict business; an enactment for the benefit of those extending, not those securing, credit. It is an elementary rule that, in construing a statute, its purpose must be examined, the evils it is intended to correct, and the extent of the whole act, its history, and practical intent.

It has been held that the right to do business is inherent in every person and partnership, and, in the absence of fraud, any name may be used. Palmer v. Leivy (Mo. App.) 205 S. W. 244. The powers of the Legislature are narrowly confined. It has power to regulate but not to prohibit business. The purpose of the act is clearly defined in the legislative declaration relative thereto, which is found in Session Laws of 1919, p. 622, sec. 7, as follows:

'Whereas there is no adequate law in this state governing the transaction of business under a fictitious name, and whereas hundreds of thousands of dollars are annually lost to honest business by the use of fictitious names, and, whereas the use of a fictitious name affords a convenient vehicle for the perpetration of fraud an emergency is declared to exist within the meaning of the Constitution; therefore, this act shall take effect and be in force from and after its approval.'

Nothing could be more clear than this plain declaration as to the purpose and scope of the act. Its history may be stated briefly as follows: It was introduced into the House of Representatives as House bill No. 675, and, as introduced, contained sections 1 to 7. Section 3 made failure to register, as required by the statute, a complete defense for the recovery of money by persons using fictitious name. This section, in its entirety, was stricken out by the House, and the bill was passed with its original sections intact save section 3. The original bill also, in section 5 thereof, made the violation of the act a misdemeanor punishable by a fine of \$10 to \$50; this section,

however, was amended by striking out the fine, thus leaving a violation of the act a misdemeanor, which under the general statute carries a maximum fine of \$1,000, or a year's imprisonment, or both, Section 3701, R. S. 1919.

It seems evident to us that the intent of the Legislature was to restrict the penalty for violation of the statute to a fine or imprisonment, or both, as provided in misdemeanor cases (section 3701), and that those violating the act were not to be further punished by having all their rights forfeited.

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A few jurisdictions, in construing similar statutes, hold the contracts void. But a majority, Missouri included, have held that such a statute, containing a prohibition, and making its violation a misdemeanor, is for the benefit of those giving credit to one using the fictitious or assumed name, and not for the protection of those procuring credit from persons violating the law." (Italics ours.)

The portion of the opinion which we have underlined seems to indicate that 'an attempt by the legislature to limit the use of any fictitious name to one individual would be invasion of his rights under our system of government.

In Palmer v. Leivy, 205 S. W. 244, cited in the above opinion, we find the following, l. c. 248:

"If a man signs a bond by a name by which he was never called or known, or which he had never used before, he would be bound by it.' Thomas v.

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Wyatt, 31 Mo. 188, loc. cit. 192, 77  
Am. Dec. 640. Matters of contract  
may be entered into by a person by  
any name he may assume. Taylor v.  
Bowen, supra, loc. cit. 620."

A search of all other cases in which the "fictitious name" statutes are discussed fails to reveal that the courts have attempted to add to said statutes to prevent the use of the same fictitious name by more than one person. While it seems to us that the public might be best served and fraud prevented by restricting the use of a fictitious name to one individual or partnership, it is apparent that the legislature, so far, has not attempted to do so, and as far as our search reveals, any number of persons may register the same fictitious name.

It is our conclusion that the Secretary of State should accept the registration of a fictitious name even though another person has previously registered the same fictitious name with that official.

Respectfully submitted,

ROBERT L. HYDER  
Assistant Attorney General

APPROVED:

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COVELL R. HEWITT  
(Acting) Attorney General

RLH:VC