SEC'Y OF STATE:
NAMES:
FICTITIOUS NAMES:

An individual doing business under a firm name, which includes only the surname, a word descriptive of the business and the word "company," should register under the Fictitious Names Registration Act. A person using both the surname and Christian name is not required to register.

October 27, 1949

FILED
83

Honorable W. Randall Smart
Supervisor of Corporations
Office of Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Mr. Smart:

This is in reply to your request for an opinion which reads as follows:

> "We are sending inquiries to companies operating in the state which are not registered under the Fictitious Name Act (Chapter 140, Article 3, Section 15466, etc., R.S. 1939).
>
> "Some of these companies are answering they are not subject to the requirements therein, in that, they are operating under their own names. For example, the following letter was received.
>
> "September 8, 1949
>
> "Mr. Walter H. Toberman, Secretary of State
> Office of Secretary of State
> Jefferson City, Missouri
>
> Dear Sir: Attn: W. Randall Smart
> Corporation Supervisor
>
> Received your letter 'Fictitious Name Act', I quote your letter in part-
>
> > "'In the event you are operating as a partnership or doing business as an individual, you should register under the Fictitious Name Act.'
>
> "As I am operating under my own name, I do not see why I should register.
>
> "Please advise.

Yours respectfully,

KLASEK LETTER COMPANY
Chas. W. Klasek

"We would appreciate your opinion on this question. Would the name 'Klasek Letter Company' be subject to registration under the Fictitious Name Act, where the sole owner is one Charles W. Klasek? We believe it should be registered.

"Also, would you please let us have your opinion as to what words, names or phrases of words or names, all inclusive, constitute operating under your own or true name, which would exempt the registration therein under this act.

"In view of the large number of unregistered business concerns in the state and our special effort at this time to effect a compliance with this act, we would appreciate your opinion at your earliest convenience."

The Missouri statutes requiring the registration of fictitious names are as follows:

"Sec. 15466. 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. 15467. 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 residence 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 reregistration 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."
>
> "Sec. 15470. Definition of word.--For the purposes of this article the word 'person' shall be construed to include both male and female, plural and singular, partnerships, associations and corporations, as the circumstances of the case may require."

Section 15469 provides a penalty for failure to register, and is as follows:

> "Any person who shall engage in or transact any business in this state under a fictitious name, as in this article defined, without registering such name as herein required, shall be deemed guilty of a misdemeanor."

Fictitious name statutes have been enacted in virtually all the states. The general purpose of such statutes is set out in 45 A.L.R. at page 204, which reads as follows:

> "The remedial purpose of such statutes is that the public may have ready means of information as to the personal or financial responsibility behind the assumed or fictitious name. Sagal v. Frylar (1951) 89 Conn. 293, L.R.A. 1915E, 747, 93 Atl. 1027.

> "What the legislature had in view in enacting the Illinois statute subjecting to a fine persons assuming a corporate name for the purpose of soliciting business, without being incorporated, was to prevent persons from obtaining a fictitious credit by advertising themselves as being a corporation when they were not incorporated. Edgerton v. Preston (1884) 15 Ill.App. 23; First Nat. Bank v. Cox (1908) 140 Ill.App. 98.
>
> "It was said in Humphrey v. City Nat. Bank (Ind.) supra, that the obvious purpose of the statute was to give information as to the persons who should be named as defendants and served with process, in case suit were brought on a cause of action arising out of any business done in the assumed name or out of any contract made in such name.
>
> "The object of the statute is to enable the public, as well as those who deal with the concern, to ascertain definitely who is the real person or persons behind the business, in case litigation arises; it is a part of the public policy of the state and is intended to protect and safeguard the rights of its citizens. Warren Oil & Gas Co. v. Gardner (1919) 184 Ky. 411, 212 S.W. 456; Acme Drilling Co. v. Gorman Oil Syndicate (1923) 198 Ky. 576, 249 N.W. 1003.
>
> "The object of such statute is to prohibit persons from concealing their identity in their business transactions under the cloak of assumed or fictitious names; if the identity is not disclosed in the name or designation employed, then it must be disclosed in the public record provided for that purpose. Canonica v. St. George (1922) 64 Mont. 200, 208 Pac. 607."

The Missouri statute was passed by the 50th General Assembly and became effective May 24, 1919. The Act carried an emergency clause which reads as follows (Laws of Missouri, 1919, page 622):

> "Sec. 7. Emergency.--Whereas there is no adequate law i 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."

In order to determine the question submitted, we have examined cases from various jurisdictions in which the question before the Court was whether or not the use of the surname followed by a descriptive term of the business and the word "company" was fictitious so as to require registration under statutes similar in nature. An extensive annotation in 45 A.L.R. at page 198 covers many cases in which this point was before courts for determination. However, in almost every instance where a court held that the use of a surname without the Christian name was not in violation of such statute, two features were present: (1) The statute in question covered only partnerships and by its own terms was not applicable to individuals (See: Wetenhall v. Chas. S. Mabrey Const. Co., 209 Calif. 293, 286 Pac. 1015; Vagin v. Brown, 146 Pac. (2d) 923), or (2) the statute provided for a severe penalty in the nature of a refusal to enforce contracts of such a business. The Missouri statute by its terms applies to individuals as well as partnerships, and the Missouri Supreme Court, in the case of Kusnetzky v. Security Insurance Company, 281 S.W. 47, held that a failure to register a fictitious name does not make a contract entered into by a party under a fictitious name unenforcible.

As seen above, the wording of the statute providing for registration of a fictitious name is, in part, as follows:

> "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."

Thus, we have a legislative declaration that a fictitious name is any name other than the true name of a person engaging in a business. The immediate question for consideration is whether or not the use of the surname without the Christian name is in compliance with the statute.

In 38 Am. Jur. at pages 595 and 596, the text is as follows:

> "Originally, there was no such thing as a surname, or family name, and a person was identified only by his given or Christian name. The insufficiency of the Christian name to distinguish the particular individual, where there were many bearing the same name, led necessarily to the giving of surnames; subsequently, a man was distinguished, in addition to his Christian name, in the great majority of cases, by the name of his estate, the place where he was born, where he dwelt, or whence he had come, or else from his calling as John the smith, or William the tailor, in time abridged to John Smith and William Taylor. * * *
>
> "At the present time, according to the custom of English-speaking people, each person bears a family name, which is continued from parent to child, and to which is prefixed one or more words constituting his more specifically personal appellation and distinguishing his from others of the same family appellation. The former is spoken of as the surname, and the latter as the given or Christian name, and is ordinarily selected from his in infancy by his parents. * * *"

And, again, at page 596:

> "The Christian or first name is, in law, denominated the 'proper name,' and has been used from early times to distinguish a particular individual from his fellows. It is usually conferred upon a person at birth or at baptism, and was originally the only name which was recognized in law. Consequently, it has always been considered an essential part of a person's name, and the giving of a wrong Christian name to a person, in legal proceedings or in conveyances, generally constitutes an error which may invalidate a judgment or deprive the record of an instrument of its effect as notice. It has been held that the law knows but one Christian name for a single individual."
>
> (Underscoring ours.)

Thus, from the above, we see that in the early days there was no such thing as a surname and the method of identification of persons was by use of the Christian name. The surname was added for further identification of an individual. As stated in the text, the Christian name was originally the only name which was recognized in law and so has always been considered an exssential part of a person's name.

In the case of Turner v. Gregory, 52 S.W. Rep. 234, the Supreme Court of Missouri indicated that the above rule is the one which would be adopted in this state. At l.c. 235, the Court said:

> "* * * What shall be considered the name of a defendant is not always so plain. One general rule has been to hold the first Christian name as essential, and to hold that the middle name is not part of the man's name, or at least not necessary to his designation. * * *"

In the case of In re Conde et al., 61 Atl. (2d) 198, the Supreme Court of New Jersey in the course of an opinion at l.c. 199, said:

> "* * * At common law a legal name consisted of a given and of a surname or family name. * * *"

In the case of Dunn & McCarthy, Inc. v. Pinkston, 175 S.E. 4, the Supreme Court of Georgia had for consideration the question whether or not a retailer by the name of James A. Pinkston, Jr., trading in the name of Pinkston Company was doing business in violation of the Fictitious Names Registration Act. The Act in question provided, in part, l.c. 5:

> "'it shall be unlawful for any person, persons, or partnership to carry on, conduct, or transact any business in this State under an assumed, fictitious, or trade-name, or under any other designation, name, or style, other than the real name or names of the individual or individuals conducting or transacting such business, * * *.'"

The Court, in disposing of the case, necessarily ruled that the individual was in violation of the law for not registering the trade name under which he was doing business. James A. Pinkston, when trading in the name of Pinkston Company, was conducting a business in a name other than the real name of the individual.

In a recent Pennsylvania case, Alleman v. Lowengart, et al., 63 Pa. D. & C. 430, the court was considering the question whether or not the J. J. Alleman Electric Company was such a name as to be within the purview of the Fictitious Names Act. We quote extensively from that case because the court reviews the authorities on the subject. The court said, l.c. 431:

> "The position of plaintiff is that he was not required to register under the Fictitious Names Act of 1945 because the name, J. J. Alleman Electric Company, was not such a name as is within the purview of the act since it disclosed the name of the only person interested in the business. The first question which we must determine is whether J. J. Alleman Electric Company is a fictitious name within the purview of the Fictitious Names Act of 1945. Whether or not the name, J. J. Alleman Electric Company, is a fictitious name when the only person interested in the business transacted under that name is J. J. Alleman, depends entirely on the effect of the word 'Company'. In Webster's New International Dictionary 'company' is defined as 'An association of persons for a joint purpose or performance, esp. for carrying on a commercial or industrial enterprise or business'. 'Those members of a partnership firm whose names do not appear in the firm name.' Collog. In Bouvier's Law Dictionary, Baldwin's Cen. Ed., 'company' is defined as 'An association of a number of individuals for the purpose of carrying on some legitimate business.' We find no appelate court decision in Pennslyvania which holds that the use of the word 'company' in a trade name, for a business owned entirely by one individual whose name appears in the trade name, constitutes a fictitious or assumed name within the purview of either the Fictitious Names Act of June 28, 1917, P.L. 645, as amended by the Act of June 29, 1923, P.L. 979, 54 PS 21, or the Fictitious Names Act of 1945, supra. Both of these acts use the same words 'No individual or individuals shall hereafter carry on or conduct any business in this Commonwealth under any assumed or fictitious name, style, or designation, unless . . .,' so the decisions under the older act in regard to this particular matter are relevant in the interpretation of the later act. The Superior Court, however, in Snaman v. Maginn,

77 Pa. Superior Ct. 287, 289, seems to assume that one person, E. U. Snaman, trading as the Snaman Realty Company, was trading under an assumed or fictitious name. There was no contention otherwise, so, although the direct question was not raised, as the case was decided on the premise that plaintiff was doing business under an assumed name without complying with the Act of June 28, 1917, P.L. 645, supra, it is at least some authority for the conclusion that where one person does business under a trade name, including the word 'company', he is trading under an assumed or fictitious name.

"In the case of Ferraro et al. v. Hines, Director Gen. of R.R., etc., 77 Pa. Superior Ct. 274, it was held that two persons operating under the name 'A. Ferraro & Company', were operating under an assumed or fictitious name, as 'company' did not disclose the names of the other person or persons interested in the business.

"In Commonwealth to use of Hagerling Motor Car Co. v. Palmer et al., 3 D. & C. 650, Judge Hargest of Dauphin County held flatly that L. H. Hagerling, sole owner, doing business as 'Hagerling Motor Car Company', was within the purview of the Fictitious Names Act of 1917, supra. He states on page 651:

"'In Mangan v. Schuylkill County, 273 Pa. 310, it is held that the word "fictitious", as used in this act of assembly, is explanatory of "assumed", and means "pretended", "not real", "arbitrarily invented or devised". "The Hagerling Motor Car Company" is certainly within this definition. An individual cannot be a company. This name implies a corporate existence rather than a single individual trading in that capacity. Therefore, it is a pretended and arbitrarily devised name. The word "company" gives no notice as to who compose it'.

"The basis of the decision is clearly that the fact that the word 'company' is used in the trade name, even though only one person, whose surname is also part of the trade name, is the sole proprietor, makes the trade name a

fictitious or assumed name within the purview of the Fictitious Names Act of 1917, supra.

"In Stevens v. Meade, 13 D. & C. 9, it was held that Albert Stevens, trading as Albert Stevens Hardwood Flooring Company, was not a fictitious name. It is a little difficult to ascertain from the opinion whether the court held that 'Albert Stevens, trading as Albert Stevens Hardwood Flooring Company' is not a fictitious name or 'Albert Stevens Hardwood Flooring Company' is not a fictitious name.

"We realize that in other jurisdictions under similar acts, although somewhat different in their provisions, the word 'company' is held not to constitute a fictitious name if the name of the sole proprietor is also part of the trade name. For instance, 'McCreery Machinery Company', in McCreery v. Graham et al., 121 Wash. 466, 209 Pac. 692, and 'George W. Merrill Automobile Company', in Merrill v. Caro Inv. Co., 70 Wash. 482, 127 Pac. 122, were held not to be assumed names. See 45 A.L.R. 260-262. In a late case, Tate v. Atlanta Oak Flooring Co., et al., 18 S.E. (2d) 903 (Va.), the Supreme Court of Appeals of Virginia held that A. E. Tate, the sole owner of the business trading as 'A. E. Tate Lumber Company' was not trading under an assumed or fictitious name within the purview of the Virginia statute forbidding any person from conducting or transacting business under any assumed or fictitious name without registration. However, it is clear in this case that, under the provisions of the statute in question, a person making a contract while trading under a fictitious name without registration was precluded from recovering on the contract. This may have largely influenced the court in giving the statute a very strict interpretation.

"In our opinion the use of the word 'company' in a trade name, although the full name of the individual operating under the trade name is disclosed in it, in addition to the word 'company', constitutes a fictitious or assumed name within the purview of the Fictitious Names Act of 1945, supra. The word 'company' clearly

> indicates an association of persons carrying on a business and, as only one person is carrying on the business under a name which indicates an association, such person necessarily is conducting the business under an 'assumed or fictitious name, style, or designation'. * * * *"

We have been unable to find any cases from Missouri courts directly on the point in question. However, in 1946, the District Court for the Western District of Missouri, through Judge Reeves, indirectly ruled on the question before us. In the case of Cummings v. Riley Stoker Corporation, et al., 6 F.R.D. 5, the Court was considering the question of jurisdiction of a case which had been removed to the Federal Court. The plaintiff filed a motion to remand. In the course of the opinion the following facts and comments thereon is set out, l.c. 5 and 6:

> "The motion to remand is supported by the above mentioned affidavit of Elmer L. Hughes, and which affidavit stated that he had been doing business in Kansas City, Missouri, 'for the past twenty-three years; that he as an individual has done business under the name of "Hughes Machinery Company"; that his place of business is now located at 4034 Broadway, Kansas City, Missouri; that "Hughes Machinery Company" is not now and never has been a corporation organized under the laws of the State of Missouri or the laws of any other state.'
>
> * * * * * * * * *
>
> "The petition for removal does not allege fraudulent joinder. It does not, therefore, challenge the good faith of the plaintiff. The averment is that there is no such an entity as Hughes Machinery Company. Apparently the sheriff, in making his return, had reason to believe that E. C. Waldsmith was manager of both the Riley Stoker Corporation, as well as Hughes Machinery Company, the trade name of Elmer L. Hughes. This may logically be inferred from his return.
>
> "The rule is, as announced by all of the authorities, that a nonresident defendant, in seeking removal, must allege facts which compel the conclusion that the joinder is fraudulent, that is to say, bad faith on the part of the

> plaintiff. Chesapeake & Ohio R. Co. v. Cockrell, 232 U.S. 146, 34 S. Ct. 278, 58 L. Ed. 544. Doubtless the nonresident defendant relies on the mere averment which is true, that there is no such corporate entity as Hughes Machinery Company, and he was served in his fictitious name. Whether in thus transacting business he complied with Article 3, Chapter 140. R.S. Mo. 1939, Mo. R.S.A., does not appear. By Section 15466 it is required 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.'
>
> "Other sections of the statute make it a misdemeanor for a person to transact business in this way without such registration. Assuming that Elmer L. Hughes, as Hughes Machinery Company, was registered with the secretary of state, the records there, while available to the plaintiff would not necessarily be such notice as would challenge his good faith in joining and using the fictitious name adopted by the said Hughes as a corporation. The name is such as may ordinarily be employed by a corporation, and it was a reasonable inference that it was a corporation. The plaintiff was endeavoring to join a local defendant and apparently there was one to be joined."

Thus, it is seen that when a similar question was presented to the Federal District Court, at least one Judge was of the opinion that the name "Hughes Machiney Company" should have been registered with the Secretary of State under the Fictitious Names Registration Act. In view of this case, other authorities above and in the view of the evident purpose of the state, we believe that when an individual is transacting business under a name such as the Klasek Letter Company, he is transcting business in a name other than his true name, and the name should be registered with the Secretary of State and the necessary information should be given in accordance with the provisions of Section 15467, R. S. Mo. 1939. When a name is so registered, persons having business relations with such a firm may easily

be apprised of the make-up of that firm and the addresses of the persons interested therein are made available.

We believe that the above disposes of the main question in your request. The only other name which would conceivably be questioned would be the case wherein a sole owner operated a business using his full name, for example, Charles W. Klasek Letter Company. In answer to this, we refer you to the recent case of Tate v. Atlante Oak Flooring Company, 18 S.E. (2d) 903, in which case the Supreme Court of Appeals of Virginia held that a sole owner trading under the name of "A. E. Tate Lumber Co." sufficiently dislocsed the true name of the individual transacting the business so as not to require the filing of a certificate under the Fictitious Names Act. Under the principles of law set out above, we believe that the same rule would apply in Missouri, and that such an individual would not be required to register under Section 15466, R. S. Mo. 1939. However, in such cases if there were others interested in a business being conducted under such a name as Charles W. Klasek Letter Company, and Charles W. Klasek was not the sole owner, the Act would necessarily require registration for such persons would be doing business under a name other than their true name.

CONCLUSION

Therefore, it is the opinion of this department that a sole owner doing business under a firm name, which includes only the surname and a word descriptive of the business and the word "company," should register under the Fictitious Names Registration Act.

We further believe that a sole owner doing business under a firm name which consists of the surname and the Christian name of that individual with a word or words descriptive of the business and the word "company" is not required to register by the provisions of the Fictitious Names Registration Act.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General