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Security Title Insurance Agency v. Security Title Insurance Company : Brief of Defendant-Appellant

Utah Supreme Court

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APR 13 1964

IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

SECURITY TITLE INSURANCE
AGENCY, now known as SECURITY
TITLE GUARANTY COMPANY,
and SECURITY TITLE COM-
PANY, Utah Corporations,

Plaintiffs-Respondents,

—vs.—

SECURITY TITLE INSURANCE
COMPANY, a California Corpora-
tion,

Defendant-Appellant.

AUG 19 1963

Clerk, Supreme Court, Utah

Case No. 9925

Brief of Defendant-Appellant

Appeal From the Judgment of the Third
District Court in and for Salt Lake County
Honorable Ray Van Cott, Jr., Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

SECURITY TITLE INSURANCE
AGENCY, now known as SECURITY
TITLE GUARANTY COMPANY,
and SECURITY TITLE COM-
PANY, Utah Corporations,

Plaintiffs-Respondents,

—vs.—

SECURITY TITLE INSURANCE
COMPANY, a California Corpora-
tion,

Defendant-Appellant.

Case No. 9925

Brief of Defendant-Appellant

DESIGNATION OF PARTIES

For convenience the parties will be referred to in this brief as they were designated in the trial court. The Appellant, Security Title Insurance Company, will be referred to either by name or as the Defendant, and the Respondents will be referred to by name or as the Plaintiffs.

Page references to the transcript of the trial proceedings will be referred to as (T.....).

STATEMENT OF THE KIND OF CASE

This is an action brought by the Plaintiffs against the Defendant, Security Title Insurance Company, seeking to restrain the latter company from carrying on its business as a title insurance company under its corporate name of "Security Title Insurance Company," or any related or similar name employing the words "Security Title" and for damages suffered by reason of alleged infringement of trade name and for damages suffered by reason of the Defendant having allegedly prevented the Plaintiff, Security Title Guaranty Company, from qualifying as a title insurance company in the State of Utah (T. 1-5, 46-48).

DISPOSITION IN LOWER COURT

Judgment was granted in favor of Plaintiffs restraining the Defendant "... from doing business in the State of Utah under the name, 'Security Title Insurance Company' or under any name employing the words, 'Security Title' in any combination therein, or from using said name or words in the solicitation, conduct or carrying on of the business of abstracting, land title examination, title insurance or any related activity." In addition the Defendant was ordered to forthwith remove or cause to be removed from the window of the premises of Stanley Title Company (Defendant's Utah agent) the name "Security Title Insurance Company." The Plaintiffs' claims for monetary damages were dismissed (T. 61-62). From the portion of the judgment granting injunctive relief in favor of the Plaintiffs, the Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of that portion of the judgment granting injunctive relief in favor of the Plaintiffs. The Defendant seeks to be allowed to continue to do business in this state under its corporate name, "Security Title Insurance Company," or at least in the name of "Security Title Insurance Company of Los Angeles, California."

STATEMENT OF FACTS

This is an appeal brought by Defendant, Security Title Insurance Company, from a judgment entered against it in the Third District Court restraining the company ". . . from doing business in the State of Utah under the name, 'Security Title Insurance Company,' or under any name employing the words, 'Security Title' in any combination therein, or from using said name or words in the solicitation, conduct or carrying on of the business of abstracting, land title examinations, title insurance, or any related activity."

The question primarily involved is whether or not the Defendant, Security Title Insurance Company, should be restrained from doing business in the State of Utah under its corporate name after having qualified to do so with the Insurance Commissioner of this state, and after having done business in this state for nearly two years.

Defendant, Security Title Insurance Company, is a title insurance company and actually engaged in the business of insuring titles to land, having been organized

in the State of California in 1920 (T. 315). Since that time it has constantly grown in size until today it is one of the large title insurance companies of the United States (T. 315). During the last few years it has expanded its operation into several other states (T. 315), and on December 6, 1960, it applied to the Utah State Insurance Commissioner for a certificate of authority to do business in the State of Utah as a foreign title insurer under its corporate name (Exhibit No. 22).

In the meantime, however, on December 1, 1944, the Plaintiffs were organized and commenced doing business in Salt Lake City, Utah (Exhibits Nos. 9, 21). On December 1, 1944, the Plaintiff Security Title Company was organized in this state and commenced doing business. On August 23, 1957, it changed its name to "Security Title Insurance Agency" (Exhibits Nos. 10, 21), and on June 27, 1963, its name was again changed to "Security Title Guaranty Company" (Exhibits Nos. 11, 21).

Neither of the Plaintiffs is a title insurance company, but merely acts as an agent in acquiring business for a title insurer.

Thus, by the time the Defendant, Security Title Insurance Company, applied to the Utah State Insurance Commissioner for a certificate of authority to do business in this state as a foreign title insurer under its corporate name, the Plaintiff companies had been organized in this state.

The filing of the application by the Defendant company for a certificate of authority was known to both of

the Plaintiff companies, both of which companies vigorously opposed the granting of the certificate (T. 190). As a matter of fact the Plaintiffs were represented by counsel in their efforts to prevent the qualification of the Defendant in the State of Utah (T. 190).

In the month of January, 1961, the Insurance Commissioner for the State of Utah approved the Defendant's application for a certificate of authority (Exhibit No. 22), and on March 25, 1961, in spite of the vigorous opposition of the Plaintiffs (T. 190), the Secretary of State of Utah issued its certificate, thus completing the Defendant's qualification as a title insurer in this state (T. 14, 35).

Thereupon, having failed in their efforts to prevent the Defendant's qualification in the State of Utah, the Plaintiff, Security Title Guaranty Company, resorted to an outright subterfuge in attempting to "pirate" the Defendant's own corporate name by registering the same as its own trade name (Exhibit No. 3). In other words, the Plaintiff, Security Title Guaranty Company, then known as Security Title Insurance Agency, filed an application with the Secretary of State for the registration of the Defendant's name, "Security Title Insurance Company," as its own trade-mark or service-mark (Exhibit No. 3). Mark Eggertsen, who signed the application under oath as president of Security Title Insurance Agency, declared in the application that the name "Security Title Insurance Company" had first been used by the Plaintiff as its trade name or trade-mark since December 1, 1944 (Exhibit No. 3). At the trial of the case

Mark Eggertsen admitted on cross-examination that Security Title Insurance Agency had, as a matter of fact, never used the name "Security Title Insurance Company" as a trade name or trade-mark (T. 192, 193). The information, therefore, contained in the Plaintiff's application was patently false (T. 192, 193).

Following its qualification in this state, the Defendant, subsequently, on April 4, 1961, entered into a contract with Stanley Title Company whereby the latter company undertook to act as agent in the State of Utah for the Defendant, Security Title Insurance Company (T. 371).

Stanley Title Company had been organized by George Stanley, one of the "oldtimers" in the abstracting and title insurance business (T. 363, 365).

On March 9, 1962, Stanley Title Company opened an office at 60 East Fourth South Street, Salt Lake City, Utah, which location had been recommended by Mr. Rogers of Zion Savings Bank (T. 372). This was a desirable location for Stanley Title Company to locate inasmuch as it was near the City and County Building and the Federal Building where records have to be constantly checked (T. 372). The Plaintiffs' offices are at 45 East Fourth South Street. On its front window in large print, running across the center of the window, Stanley Title Company had printed the words, "Stanley Title Company." Immediately underneath the words "Stanley Title Company" in large lettering are the words, "Title Insurance . Abstracts . Escrows." In small letter-

ing down in the lower right hand corner of the window were printed the words, "State Agent for Security Title Insurance Company, Los Angeles, California." (Exhibit No. 23).

All of the business done by the Defendant, Security Title Insurance Company, in the State of Utah since its qualification has been handled through Stanley Title Company (T. 322). The Defendant has not solicited any business, nor done any advertising. Stanley Title Company, the Utah agent of the Defendant, has done business in its own name, that is, "Stanley Title Company," merely identifying its agency relationship with the Defendant on the front window of its business as noted on Exhibit 3, and on its letterheads as shown on Exhibit No. 23.

A point to be kept in mind and which we contend is vital to the decision in this case is that the title insurance business is not a business dealing with the public generally, but on the contrary is a specialized type of business, generally handled by experts and professionally qualified people who generally have occasion to deal with most of the local title companies, know with whom they are dealing, and are generally aware of the respective connections with the various title insurance companies who actually issue the title insurance policies (T. 205, 206, 292, 373, 374, 376, 427, 436, 439).

On June 18, 1962, the Plaintiff, Security Title Insurance Agency, now known as Security Title Guaranty Company, applied to the Commissioner of Insurance of

the State of Utah, for a certificate of authority to do business as a domestic title insurer in this state (Exhibit No. 4). The Defendant, of course, immediately filed an objection with the office of the Insurance Commissioner to the granting to Security Title Guaranty Company a certificate authorizing the latter company to conduct business as to title insurer (Exhibit No. 5).

On June 4, 1962, the Plaintiffs instituted suit against the Defendant with the aforementioned results (T. 1, 61).

It is from this judgment that the Defendant appeals.

Since this is an equity case, the appeal may be on questions of law and fact (Constitution of Utah, Article 8, Section 9). On review this Court, analogous to a trial de novo on the record, should determine from a fair preponderance or greater weight of the evidence whether or not the findings of the trial court are supported thereby. *Corey v. Roberts*, 82 U. 445, 25 P.2d 940; *Lawley v. Hickenlooper*, 61 U. 298, 212 P. 526; *Budget System, Inc. v. Budget Loan and Finance Plan*, 12 Utah 2d 18, 361 P.2d 512.

ARGUMENT

POINT NO. I

THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT NOS. 12 and 14, IN MAKING CONCLUSIONS OF LAW NOS. 2 AND 3, AND IN RESTRAINING THE DEFENDANT.

A. Findings of Fact Nos. 12 and 14, Conclusions of Law Nos. 2 and 3 and Decree.

Findings of Fact Nos. 12 and 14, Conclusions of Law Nos. 2 and 3, and the Decree are so inter-related that they are considered together under this Point of Argument.

Findings of Fact Nos. 12 and 14 are as follows :

“12. The words or name ‘Security Title’ are synonymous with the business of plaintiff corporations. The use by others than those associated with plaintiff companies of words ‘Security Title’ in the same general area of business activity, land title examinations, abstracts and title insurance or any part or function thereof is and will be confusing to those who have occasion to deal with such companies.

* * *

“14. If permitted to do so without restraint by this Court, defendant corporation could under the name ‘Security Title Insurance Company’ engage in direct competition with plaintiff corporations and the affiliates thereof in all parts of the land title business to the irreparable injury of plaintiffs.”

Conclusions of Law Nos. 2 and 3 are as follows :

“2. The defendant, its respective officers, agents, servants and employees and all persons whomsoever acting by or for the defendant should be restrained from the use of the words or names ‘Security Title’ in any way within the State of Utah, in connection with the business of land titles, abstracts or title insurance, and defendant should be permanently enjoined from doing business as a title insurer in the State of Utah under the name Security Title Insurance Company or under any name in which the words ‘Security Title’ appear in any combination whatever.

"3. Defendant should be ordered to remove forthwith the name 'Security Title Insurance Company' from the office window at 60 East 4th South Street, Salt Lake City, Utah and should be allowed a period of 90 days in which to either qualify under another name as a title insurer in the State of Utah or to withdraw therefrom. During such period defendant or its agent, Stanley Title, should be permitted to use the preliminary report forms such as exhibit 35, and the letterheads which bear the name Security Title Insurance Company in small letters, but during such 90 day period no enlargement of use of said names should be permitted and thereafter defendant should be permanently restrained from use of such name or any name embodying the words 'Security Title' in doing business in the State of Utah."

The Decree entered by the trial court provided in part as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant, Security Title Insurance Company, its respective officers, agents, servants and employees and any person or corporation acting by or for defendant in any capacity be, and each of them is hereby prohibited, restrained and enjoined from doing business in the State of Utah under the name, 'Security Title Insurance Company,' or under any name employing the words, 'Security Title' in any combination therein, or from using said name or words in the solicitation, conduct or carrying on of the business of abstracting, land title examination, title insurance or any related activity.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant forthwith

remove or cause to be removed from the window of the premises occupied by said Stanley Title Company, agent of defendant, at 60 East 4th South, Salt Lake City, Utah, the name 'Security Title Insurance Company.' ”

B. Contention of Defendant, Security Title Insurance Company.

The Defendant contends that having qualified as a foreign insurer in this state with the Insurance Commissioner it thereupon was and is free to use its corporate name in the pursuit of its business as long as it does not do so in such a way as to cause or probably cause confusion. The evidence, as will be pointed out hereafter, does not support Findings Nos. 12 and 14, Conclusions of Law Nos. 2 or 3, nor upon the Decree as entered. On the contrary the record shows that both Plaintiffs and Defendant deal generally with a professional, informed clientele; that the Plaintiffs and Defendant are not competitors inasmuch as the Defendant is a title insurance company, while the Plaintiffs are merely title insurance agencies; that the words “security” and “title” are in common use and generic in character; that the Defendant has, since its operation, taken considerable care to properly identify itself so that in nearly two years of operation there has been no confusion, nor is there any reasonable probability of confusion in the future.

C. Review of Law Controlling the Case.

The Court's attention is first invited to the legal principles controlling the case. The essential inquiry is

whether or not there is confusion or a probability of confusion. In considering this question, the Court should examine, among other things, the nature of the business and the class of persons patronizing the same, how the names are actually being used, the nature of the words involved in the names, and the competition or lack thereof between the parties.

(1) *The Essential Question.*

The essential question is always whether or not there is confusion or a probability of confusion.

Said the court in *Federal Securities Co. v. Federal Securities Corp.*, 276 P. 1100 (Ore., 1929), 66 A.L.R. 934, 946:

“The ultimate question is always whether trade is being unfairly diverted, and whether the public is being cheated into the purchase of something which it is not in fact getting; the courts interfere solely to prevent deception.

* * *

“When it has been found that there is a similarity of names, a court does not cease its inquiries and at once grant relief, but proceeds to ascertain whether the other facts are such that deception and injury are likely.”

(2) *The Importance of the Nature of the Business.*

The nature of the business involved and the class of persons patronizing the same are particularly important.

“The class of persons who patronize the particular business or who buy the particular kind

of article manufactured, such as servants or children, on the one hand, or persons skilled in the particular trade on the other, must be considered in determining the question of probable deception; in every case the court should determine the question by placing itself in the position of the average person to whom the appeal for patronage is directed. Furthermore, the apprehension of confusion because of similarity of names is less in noncompetitive than in competitive businesses." 87 C.J.S., Trade-Marks, Etc., Sec. 92, page 332.

Authorities on this point have been collected by the annotator in 115 A.L.R. 1241, 1245:

"As was pointed out in the original annotation, the status of the corporations in the commercial field—e.g., the character of the business and of the products, and the place where the business is carried on—often has an important bearing on the right of a corporation to protection against the use of its name by another corporation.

"This principle has been applied in two recent cases in connection with the differences between the business of insurance corporations and the business of ordinary trading or commercial corporations.

"Thus, in *Standard Acci. Ins. Co. v. Standard Surety & C. Co.* (1931; D.C.) 53 F. (2d) 119, it was held that since the business of casualty insurance and surety companies is conducted through insurance agents or brokers or with the insurance experts of large concerns rather than with the general public, a greater degree of similarity is permitted in respect of the corporate names of such companies.

“And in *Central Mut. Auto Ins. Co. v. Central Mut. Ins. Co.* (1936) 275 Mich. 554, 267 N.W. 733, it was said: ‘There is probably greater latitude allowed to banks and insurance companies in the similarity of corporate names than in the case of ordinary mercantile corporations.’”

See also *Federal Securities Co. v. Federal Securities Corp.*, 276 P. 1100 (Ore., 1929), 66 A.L.R. 934; 66 A.L.R. 948, 962.

(3) *The Significance of the Nature of the Name.*

The nature of the names themselves must also be considered. In *Truck Ins. Exchange v. Truck Ins. Exchange*, 1940, 165 Or. 332, 107 P.2d 511, 523, both the plaintiff and the defendant used the term “Truck Insurance Exchange” in their respective business names. Plaintiff sought to enjoin the use of the term by defendants as a part of its business name. In denying relief the court said:

“No one can dip into the common vocabulary and, selecting some generic or descriptive words which commonly designate the business activities in which people engage, as, for instance, grocery store, appropriate the words to himself and thereby forbid their use by others who desire to launch similar enterprises. The words ‘Truck Insurance Exchange,’ which both the plaintiff and one of the defendants employ as their names, is a term of that kind and, therefore, incapable of exclusive appropriation.

* * *

“It is always the business, and not the name, which is protected in suits of this character.”

A greater degree of similarity will be allowed where the names are geographical or descriptive. Said the court in *Federal Securities Co. v. Federal Securities Corp.*, 276 P. 1100 (Ore., 1929) :

“A great degree of similarity in names will be tolerated where they are geographical or descriptive than where the first corporation’s name is fanciful and arbitrary.”

It is also important to note that mere similarity is not sufficient to warrant an injunction. There must be a use of the similar name which causes mistake as to identity before a court of equity will permit an injunction to issue, and then the injunction will issue only as to the particular use and not as to the similarity.

In *Employers’ Liability Assur. Corp. v. Employers’ Liability Ins. Co.*, 10 N.Y Supp. 845, 847, the court said:

“The rule as to the use of names where both parties are entitled to the same name, and in cases where no fraud or deceit is charged or proven, (as in this case) has been stated in *Meneely v. Meneely*, 62 N.Y. 427, and it is there held that such confusion as results merely from similarity will not be a ground for injunction, but where, even innocently, a defendant so uses his name as to cause mistake as to identity, and to induce the public to believe that he is the plaintiff, the general use of the name will not be enjoined, but the particular manner of the use which causes the mistake, confusion, and consequent injury will be.”

The Supreme Court of California has similarly held in the case of *American Automobile Ass’n. v. American Automobile O. Ass’n.*, 13 P.2d 707, 712:

“Since plaintiff had no exclusive property right by way of trade-mark in the use of the name, it follows that the mere similarity of names does not establish the fraud. It must be such a misuse of the name by advertising and soliciting as amounts to fraud, and without this proof no relief may be granted,”

With regard to similarity of names the Court should take cognizance of the words in the name that are descriptive and if it is the descriptive words that cause the confusion, there are no grounds for an injunction.

In *Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*, 10 N.Y. Supp. 845, 846, the court said:

“The words (Employers Liability) have become descriptive of one kind of insurance business, just as the words ‘fire,’ ‘marine,’ ‘accident,’ ‘life,’ indicate other kinds of insurance. ‘ . . . those words, therefore, have become the general designation of a certain kind or department of the insurance business, and do not express proprietorship or origin, and, while the plaintiff was the pioneer in this particular branch of underwriting, and the first to use the words referred to, it has not shown such a present exclusive right as would justify the injunction on that ground.’ ”

As stated by the Supreme Court of the United States in *Del. & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581:

“True, it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its applica-

tion to his goods as it is to those of another who first applied it and who, therefore, claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth."

(4) *How the Names Are Actually Being Used.*

The Court's attention is invited to such cases as *Saunders v. Sun L. Assur. Co.* (1894) 1 Ch. (Eng.) 537, noted in 66 A.L.R. 948, 983, where the defendant company was ordered to print the words "of Canada" in as prominent lettering as the preceding words; *Farmers Loan & T. Co. v. Farmers Loan & T. Co.* (1888) 21 Abb. N.C. 104, 1 N. Y. Supp. 44, noted in 66 A.L.R. 948, 982, where the court permitted the use of the words, "Farmers Loan & Trust Co.," providing the words "of Kansas" were added; *International Trust Co. v. International Loan & T. Co.* (1891) 153 Mass. 271, 10 L.R.A. 758, 26 N.E. 693, and noted in 66 A.L.R. 948, 982, where the requirement was simply made that there be adequate identification; and the case of *Federal Securities Co. v. Federal Securities Corp.*, 276 P. 1100 (Ore., 1929), 66 A.L.R. 934, where the plaintiff sought to enjoin the defendant from the use of its corporate name, the decree of the Circuit Court was upheld, dismissing the complaint and allowing the defendant to continue to do business in the State of Oregon, but ordered the defendant to continue the practice of using the phrase "of Illinois" in connection with its name, and directed that it should be in type, as large, at least, as the defendant's name, and in an equally conspicuous place.

(5) *Competition or Lack Thereof.*

The Court's attention is invited to *Truck Insurance Exchange v. Truck Insurance Exchange*, 107 P.2d 511, 165 Or. 332 (1940), where the plaintiff was authorized "... to maintain an agency for the issuing, writing and selling policies of insurance issued by the regularly incorporated insurance companies. . .", and the defendant solicited insurance business in a different way as an insurance exchange. The court held at page 524:

"Even if we assume that the plaintiff conducted an insurance agency, that type of business and the one in which the defendants are engaged are so different that, unless the defendants change their business or their methods, the possibility of the public being misled is too remote to entitle the plaintiff to an injunction; at least the record fails to indicate that any member of the public has been misled."

(6) *Analysis of Leading Cases.*

Standard Acc. Ins. Co. v. Standard Surety & Casualty Co. of New York, 53 F. 2d 119 (District Court, S.D. New York, 1931), is a leading case in this area of the law. Involved was a suit to restrain the defendant from using its corporate name, "Standard Surety & Casualty Co. of New York," or any other name containing the word "Standard," on the ground that such use would constitute unfair competition with the plaintiff, which had the name "Standard Accident Insurance Company." Both companies were insurance companies engaged only in the casualty and surety fields throughout the United

States and were in direct competition with each other. The plaintiff was incorporated in 1884 in Michigan and had been licensed to do business in every state for many years and in New York since 1888. The defendant was incorporated in 1928 in New York, and its business had been gradually increasing. The question presented was whether the defendant by the mere use of its own corporate name in the casualty insurance and surety fields infringed any rights of the plaintiff. The court took cognizance of the exceedingly valuable good will of the plaintiff, but also noted that the defendant's name was chosen in good faith and without any desire to have it confused with the plaintiff's. The court also noted the strong similarity between the names and the use by each company of the word "Standard":

"There is, of course, a strong similarity between the two names. While they have only one word in common, 'Standard,' that is the dominant element in each and, though not highly distinctive, is sufficient to cause some confusion in the minds of the general public. It is a common descriptive word connoting stability, general recognition, and conformity to established practice; and it to some extent suggests that the company issues the statutory standard form of policies."

The court then considered the nature of the businesses involved and the type of people with whom each dealt:

"In determining the effect of this similarity, due weight should be given to the system employed by casualty and surety companies in getting business. Unlike the life insurance companies, they make no direct appeal to the general

public. The applications are brought to them by brokers or agents who have generally secured the business without regard to the company in which it is to be placed. At least 95 per cent of all the persons who apply to the agents and brokers are not at all concerned about what company is to issue the policy; faith in the broker or agent and in the state insurance department is substituted for reliance upon the reputation of the individual company. As to them, the name of the company is not considered and its possible confusion with another is immaterial. The remaining 5 per cent of the applicants (whose business, however, is 15 to 20 per cent of the total) are practically all insurance experts, such as insurance managers of large industrial corporations, and they choose the company after an investigation of its record and resources. With them a mere similarity in names would generally be insufficient to cause confusion.

“The good will of casualty and surety companies is, therefore, not so closely tied up to their names as is that of commercial companies or even life insurance corporations, and a similarity is not so important to them. The brokers, agents, and insurance managers who actually decide in what company to place the business are sufficiently familiar with the personnel, location, etc., of the various companies that they could not be misled by mere similarity of names as the general public would be. This is shown by the large number of insurance companies with very similar names.”

The court then made the following conclusion :

“The conclusion that must be drawn, therefore, is that the possibility of confusing the general public is by no means the test to be applied, and that the professional insurance men and ex-

perts who are in a sense the plaintiff's public, are not likely to be misled merely by the degree of similarity in this case."

The court thereupon held that the plaintiff was not entitled to appropriate to its exclusive use so common and desirable a word as "Standard."

Central Mut. Auto Ins. Co. v. Central Mut. Ins. Co., 267 N.W. 733 (Mich. 1936) is a more recent and most significant decision. In this case the plaintiff, a domestic insurance company with its principal place of business in Detroit, Michigan, sought to restrain the defendant, a foreign insurance company admitted to do business in the State of Michigan, from using the name "Central Mutual Insurance Company" in the State of Michigan.

The question in the case was whether the name of the defendant so closely resembled the name of the plaintiff that its use should be enjoined. The case has a striking similarity to the instant case inasmuch as the defendant company had been admitted to do business in the State of Michigan by the Commissioner of Insurance. On this point the court stated:

"The action of the commissioner of insurance indicates he was not impressed that confusion would arise from defendant's admission to do business in the state. *Young & Chaffee Furniture Co. v. Chaffee Bros. Furniture Co.*, 204 Mich. 293, 170 N.W. 48. The action of the commissioner of insurance in authorizing defendant to do business in this state is the action of a public official to whom has been delegated the power of preventing

any wrong to plaintiff by reason of the similarity of the name of defendant with that of plaintiff, and his action is entitled to respect. His determination, while not final and conclusive, is entitled to great weight and is not to be set aside or overthrown without positive proof of substantial injury or probable injury to plaintiff. Mere fear or possibility of injury is not sufficient. *Young & Chaffee Furniture Co. v. Chaffee Bros. Furniture Co.*, supra."

The court then turned to the vital question of confusion :

"There may be some confusion resulting from the similarity of the names of plaintiff and defendant, but the confusion of which the court takes cognizance must be something more than that resulting from carelessness or ignorance on the part of the uninformed. The strong arm of a court may not, in equity and good conscience, be invoked on account of anything over which defendant has no control. Defendant is not an insurer against the ignorance or carelessness of particular individuals and may be enjoined from the use of its corporate name after admission to do business in the state by the commissioner of insurance by that name, only upon a showing the similarity of its name to that of plaintiff will mislead, or probably mislead, the public to the detriment or injury of plaintiff. *Federal Securities Co. v. Federal Securities Corporation*, 129 Or. 375, 276 P. 1100, 66 A.L.R. 934; 6 *Fletcher on Corporations* (1931 Ed.) p. 55.

"There is probably greater latitude allowed to banks and insurance companies in the similarity of corporate names than in the case of ordinary mercantile corporations. *New York Trust Co. v. New York County Trust Co.*, 125 Misc. 735,

211 N.Y.S. 785; *Standard Accident Ins. Co. v. Standard Surety & Casualty Co.* (D.C.) 53 F. (2d) 119."

The court then pointed out that it could only consider the corporate names as such and not popular abbreviations of the same:

"Plaintiff claims that notwithstanding its corporate name it has become known by the name 'Central Mutual Insurance Company' and as 'Central Mutual,' and its insurance policies as 'Central' policies. This is immaterial. The plaintiff must stand or fall on its corporate name. The statutes above quoted recognize the corporate name only. *Detroit Savings Bank v. Highland Park State Bank of Detroit*, 201 Mich. 601, 167 N.W. 895."

Then the court said:

"The cases of confusion in business between the two insurance companies here involved are, under the proof, trivial in character, and within the rule of *Saunders v. Sun Life Assurance Company of Canada* (1894), 1 Ch. 537; *Standard Accident Ins. Co. v. Standard Surety & Casualty Co.*, supra; *New York Trust Co. v. New York County Trust Co.*, supra."

The court concluded by holding in favor of the defendant and reversing the trial court which had restrained the defendant.

Another leading case is *Lawyers Title Ins. Co. v. Lawyers Title Ins. Corporation*, 109 F.2d 35, cert den 309 U.S. 684, 60 S. Ct. 806, 84 L. Ed. 1028. This case involved a suit by *Lawyers Title Ins. Co.* against *Lawyers Title*

Ins. Corporation for an injunction restraining the defendant corporation from using its corporate name in engaging in the business of insuring real estate titles in the District of Columbia. The corporate names of the plaintiff and defendant were identical except in the difference in the words "Company" and "Corporation."

On appeal the judgment dismissing the action in favor of the defendant was affirmed. The defendant attempted to induce the plaintiff to become its agent in the District of Columbia, but the plaintiff declined. Failing to find another satisfactory agent, defendant qualified in the District of Columbia in 1935 and in 1938 opened its own office less than a block distant from the plaintiff's. The following excerpt from the opinion sets forth the pertinent findings of the trial court:

"The trial court found that defendant's entrance into the District was 'in the process of the natural and logical development of its business,' not only for expansion but to give more efficient service to existing customers; that the location of its office was selected, not to divert business *unfairly* from plaintiff, but because of its nearness to offices of real estate brokers and others having title business; that defendant did not choose its name originally in order to lure business from plaintiff (in fact at that time it had no intention of competing with plaintiff); and that defendant has done all that reasonably could be required of it to prevent confusion of identity with plaintiff.

"Evidence sustaining the latter finding shows that on defendant's office door, letterheads, forms, signs, advertising and telephone listings, it has added to the statement of its corporate name dis-

tinguishing matter, such as 'Home Office—Richmond, Virginia Washington Branch.' Similary distinguishing identification is made orally in answering telephone calls. Distinctive type, color and arrangement, not similar to those used by plaintiff, are employed in signs, letterheads, forms, etc.

"The court found further that title certificates and policies are obtained in Washington principally by real estate brokers and lawyers for their clients, and by banks, insurance companies, loan and trust companies and building associations, all of whom are experienced in title matters. will not be misled by the similarity of names, and constitute a discriminating clientele; that there is no evidence disclosing any injury to plaintiff by defendant's conduct; and that there is no reasonable probability that plaintiff will suffer injury on account of confusion of identity with defendant, in view of the dissimilarity in publicity created by defendant."

Pursuant to these findings the court denied relief to the plaintiff and dismissed the bill on three grounds: (1) that plaintiff has not shown such similarity of names by which it and defendant are known publicly as to deceive plaintiff's customers and divert their business to defendant; (2) that defendant has done all that reasonably could be required to prevent confusion of identities; and (3) that the services in question are rendered to a discriminating clientele, who will not be misled by "any fortuitous similarity" of the corporate names.

The Court of Appeals held that the findings of fact were sustained by the evidence and that the judgment of the trial court was right. The court noted that the

names were practically identical and that there was no deliberate attempt by one competitor to simulate another or employ a crafty scheme for luring away business by deception. Said the court:

“Their subjective attitudes, if material, are not fraudulent or dishonest.”

The court noted the essential question in this case in the following language:

“The naked question is whether plaintiff has an exclusive right, by virtue of prior appropriation in this jurisdiction, to use the name which each has acquired lawfully and with honest purpose.”

The court observed the plaintiff's contention, which is essentially the contention of the plaintiff in the instant case:

“Plaintiff contends, however, that it has acquired in its name a more absolute right, unqualified by necessity for showing such injury or danger of public confusion. Defendant's right to do business in the District is not, and could not well be, disputed. But if defendant does so, plaintiff asserts, in effect, that it must use a new name, different from that in which it has been incorporated and with which it has built good will in many places. It is the name, therefore, and not merely the business which is done in it, to which plaintiff claims exclusive title and use. Prior in tempore prior (et solus) in jure est summarizes plaintiff's view.”

Said the court: “We find no authority to sustain a right so absolute.” The court refused to recognize an

absolute right to the name created merely by incorporation effective to exclude others regardless of time and circumstance. The court viewed the decision as one to be based on principles of unfair trade. The court did note a lack on the part of the plaintiff in building and maintaining good will exclusively and distinctively about its present corporate name. The court further noted that the probability of confusion was "reduced further by the experienced and discriminating character of the clientele to which defendant and the plaintiff's combination appeal, and the care defendant has taken to add distinguishing matter to its name in publicity and solicitation." The court noted that occasional misunderstanding might occur despite these precautions, but said: ". . . there is nothing to show probability of more than that, and in itself that does not justify the drastic relief here sought."

The court's observations on the generic character of the words and the status of the corporation, are likewise apparent:

"We have made no point of the fact that plaintiff's name appears to be composed of generic words, which could not be registered as a trademark and which considerable authority indicates cannot be appropriated exclusively by incorporation. Nor do we think it material that defendant is a foreign corporation competing with domestic ones, since the District of Columbia has no statute placing the former on a peculiar basis and we deem the case to be governed by conceptions of unfair trade, which make no distinction in this respect between domestic and foreign companies."

The annotator in 66 A.L.R. 948 at page 983 has cited other cases involving insurance companies. In each instance noted, the defendant companies were permitted to continue to operate:

“ — ‘Commercial Union Assurance Co., Limited,’ and ‘Commercial Union Life Insurance Co. of New York’ (the first company was authorized to carry on only a fire and marine insurance business, while the second company was purely a life insurance company; but the court said that, independently of this difference, the names were not so similar as to mislead), *Commercial Union Assur. Co. v. Smith* (1888) 2 N.Y. Supp. 296;

“ — ‘Continental Insurance Company of the City of New York’ and ‘Continental Fire Association of Ft. Worth, Texas’ (reliance was placed upon the different plans under which the two companies did business, the former issuing policies for fixed premiums only, and the latter doing business on the mutual plan; and upon the fact that the business was all done through agents, who were well aware of the difference in names), *Continental Ins. Co. v. Continental Fire Asso.* (1900) 41 C. C. A. 326, 101 Fed. 255;

“ — ‘Guardian Fire & Life Assurance Co.’ and ‘Guardian Horse, Vehicle, & General Insurance Co.’ (upon an offer by defendants to assume the latter name instead of ‘Guardian & General Insurance Co. (Limited),’ which was held to constitute an infringement, the court said that this would be satisfactory), *Guardian F. & L. Assur. Co. v. Guardian & G. Ins. Co.* (1880) 50 L. J. Ch. N.S. (Eng.) 253;

“ — ‘London & Provincial Law Assurance Society’ and ‘London & Provincial Joint-Stock Life Insurance Co.’ (where the first company was a

society of lawyers, and the second company was composed of mercantile men; and where length of usage of the name by the first company was not shown), *London & P. Law Assur. Soc. v. London & P. Joint-Stock L. Ins. Co.* (1847) 11 Jur. (Eng.) 938;

“ — ‘London Assurance’ and ‘London & Westminster Assurance Corporation (Limited),’ *London Assurance v. London & W. Assur. Corp.* (1863) 32 L.J. Ch. N.S. (Eng.) 664;

“ — ‘Society of Motor Manufacturers & Traders, Ltd.,’ and ‘Motor Manufacturers’ & Traders’ Mutual Insurance Co., Ltd.’ (the facts that the companies were not engaged in the same line of business, and that the words used were generic, however, were the principal ground for the decision), *Society of Motor Mfrs. & Traders v. Motor Mfrs’ & T. Mut. Ins. Co.* (1925) 1 Ch. (Eng.) 675;

“ — ‘Sun Life Assurance Society’ and ‘Sun Life Assurance Co. of Canada’ (the defendant company was ordered, however, to print the words ‘of Canada’ in as prominent lettering as the preceding words; the defendant company had been in existence for several years in Canada, although it had not done any business in England; and the court expressly noted that it was not a case of a newly organized company seeking to benefit by the name of an older company), *Saunders v. Sun L. Assur. Co.* (1894), 1 Ch. (Eng.) 537;

“ — ‘Travelers Insurance Co.’ and ‘Travelers Insurance Machine Co.’ (the character of the words as generic terms, and the fact that the corporations were not in the same line of business, were the principal grounds for the decision, however), *Travelers Ins. Mach. Co. v. Travelers Ins. Co.* (1911) 142 Ky. 523, 134 S.W. 877 (rehearing in (1911) 143 Ky. 216, 136 S.W. 154);”

Banks and trust companies, like insurance companies, have been permitted to have a greater degree of similarity in their names, and the annotator in 66 A.L.R. 948 at page 982 notes three such decisions:

“ — ‘Farmers Loan & Trust Co.’ and ‘Farmers Loan & Trust Co. of Kansas’ (temporary injunction issued, forbidding the use of the words ‘Farmers Loan & Trust Co.,’ but permitting such use if the words ‘of Kansas’ were added), *Farmers Loan & T. Co. v. Farmers Loan & T. Co.* (1888) 21 Abb. N.C. 104, 1 N.Y. Supp. 44;

“ — ‘Fidelity Bond & Mortgage Co.’ and ‘Fidelity Bond & Mortgage Co. of Texas’ (in this case, however, the evidence showed that the former company did very little business in Texas, and had not exclusively appropriated the field, and this seemed to be more the controlling factor than the dissimilarity in names), *Fidelity Bond & Mortg. Co. v. Fidelity Bond & Mortg. Co.* (1929; D.C.) 33 F. (2d) 580;

* * *

“ — ‘International Trust Co.’ and ‘International Loan & Trust Co. of Kansas City,’ or ‘International Loan & Trust Co. of Kansas City, Mo.’ (words ‘of Kansas City’ or ‘of Kansas City, Mo.,’ being made equally conspicuous with preceding words), *International Trust Co. v. International Loan & T. Co.* (1891) 153 Mass. 271, 10 L.R.A. 758, 26 N.E. 693;”

The case of *International Trust Co. v. International Loan & Trust Co.*, 26 N.E. 693 (Mass., 1891) is particularly in point. The plaintiff was a Massachusetts corporation organized and doing business in that state. The defendant was a Missouri corporation, originally char-

tered under the name of "National Loan & Trust Company," which name was later changed by vote of the stockholders to "International Loan & Trust Company." The plaintiff sought to enjoin the defendant from carrying on its business in Massachusetts under its corporate name, contending that the name of the defendant was so nearly identical with the name of plaintiff that it was liable to mislead, and had in fact misled, the public, especially persons having occasion to deal with plaintiff.

At the hearing the plaintiff introduced testimony tending to show that defendant's corporate name would mislead, and in fact had misled, the public, but the presiding justice ruled, apart from that evidence, that the defendant's corporate name was so nearly identical with the plaintiff's as to mislead. The defendant contended that the name under which it had in fact done business in the state of Massachusetts was not "International Loan & Trust Company" but "International Loan & Trust Company of Kansas City," or "International Loan & Trust Company of Kansas City, Missouri," and that this name was not so nearly identical with plaintiff's as to mislead.

The evidence showed that with a few minor exceptions in all its circulars and advertisements the words "Kansas City" were printed in conspicuous type and in connection with the name. The court was of the opinion that defendant's corporate name was so nearly identical with plaintiff's that it would mislead, but took cognizance of the fact that even if there were a similarity of corpo-

rate names, the defendant in carrying on its business had always appended further identifying words. The following language of the court is most significant:

“On the other hand, even if the corporate name of a foreign corporation was the same, or nearly identical with that of a domestic corporation, but it did not carry on its business under such name, but under a different and dissimilar one, there would seem to be no reason why it should be enjoined. No harm would be done, and nobody would suffer. We think, also, the question whether the names are so nearly identical as to mislead must be settled by the application of the principles which apply to analogous cases respecting trade-marks. As already noted, the presiding justice found that the words ‘of Kansas City’ had been printed, with a few minor exceptions, in all its circulars and advertisements, in conspicuous type, and in connection with the name. It also appears from the reported evidence that the sign upon the windows of the office in Boston was ‘International Loan & Trust Company of Kansas City, Missouri,’ in letters, as we infer, all of large size; that on the letter and note and account heads used by it were printed in large letters of equal size the words, ‘International Loan & Trust Co., of Kansas City, Mo.’; that the imprint on envelopes mailed by it to parties was ‘International Loan & Trust Co., of Kansas City, Mo.,” all in letters of the same and of a fair size; that upon the envelopes furnished to return to it the same title was printed, the words ‘of Kansas City, Mo.,’ being composed of letters somewhat smaller than those used in the rest of the description, but of blacker and more solid appearance, so that its correspondents could not fail to have their attention called to it; and that upon the state-

ments of its condition it was described as the 'International Loan & Trust Co., of Kansas City, Mo.' With the exception of some certificates of deposit, which we assume were used in its corporate name, although there is no evidence to that effect, and the use of the words 'International Loan & Trust Co.,' as part of their connection with the signature to its correspondence, there is nothing that shows that either the words 'of Kansas City' or 'of Kansas City, Mo.' have not been invariably used in connection with the corporate name. We think the fair result of this evidence is that the words 'of Kansas City' or 'of Kansas City, Mo.' have formed almost as component a part of the name actually used by the defendant in carrying on its business in this state as the words 'International' or 'Loan' or 'Trust.' And we do not see how a name or title or description consisting of the words 'International Loan & Trust Company, of Kansas City,' or the same words with the contraction 'Mo.' added, can be said to be the same as, or so nearly identical with 'International Loan & Trust Company,' as to mislead. Two out of the four witnesses called by the plaintiff (being the only ones whose attention was directed to the matter) admitted that the addition of the words 'of Kansas City' would remove any ambiguity or trouble. It is not sufficient that some person might possibly be misled, but the similarity must be such that 'any person with such reasonable care and caution as the public generally are capable of using and may be expected to exercise would mistake the one for the other.' *Gilman v. Hunnewell*, 122 Mass. 139, 148; *Partidge v. Menck*, 2 Sandf. Ch. 625; *Snowden v. Noah Hopk.* Ch. 347; *McLean v. Fleming*, 96 U.S. 245, 251; *Farmers' L. & T. Co. v. Farmers' L. & T. Co. of Kansas*, 1 N.Y. Supp. 44; *Gail v. Wackerbarth*, 28 Fed. Rep. 286."

The court then made the following disposition of the case :

“The result upon the whole case, then is that the injunction is to be modified so as to restrain the defendant from doing under its corporate name any business in this state the same as or similar to that which the plaintiff is authorized to carry on, leaving the defendant free to engage in any business which its charter admits under the name of ‘International Loan & Trust Company, of Kansas City,’ or ‘International Loan & Trust Company, of Kansas City, Mo.,’ and, as thus modified, the injunction is to issue.”

In the case of *Federal Securities Co. v. Federal Securities Corp.*, Supra, where the plaintiff sought to enjoin the defendant in the use of its corporate name, the Supreme Court of Oregon upheld the decree of the trial court which permitted the defendant to continue to do business in the State of Oregon but ordered the defendant to continue the practice of using the phrase “of Illinois” in connection with its name and directed that it should be printed in type, as large, at least, as the defendant’s name and in an equally conspicuous place.

D. Review of Evidence.

(1) Nature of Businesses Involved.

A review of the evidence demonstrates that the case should be governed by the legal principles discussed.

It is first noted that the parties are not common ordinary businesses dealing with the general uninformed

public. The Defendant is a title insurance company. The Plaintiffs are title insurance agencies. Insofar as title insurance companies and title insurance agencies are concerned, the customer clientele is largely made up of experts and professional personnel such as banks, savings and loan companies, insurance companies, other lending institutions, persons engaged in the real estate business, and lawyers, etc. (T. 374).

Jesse Ellertson, the president of Title Insurance Agency of Utah, Inc., one of the prominent title insurance agencies of this state, testified that 95% of his business comes from such professional sources (T. 437). George Stanley of the Stanley Title Company, Defendant's agent, testified that only 12 out of the last 1140 jobs done came from non-professional sources (T. 376); and Mark Eggertsen, president of Plaintiff companies even conceded that about 75 to 80% of his business likewise came from that source (T. 212).

(2) Parties Are Not in Competition.

Furthermore, it is to be noted that the Defendant is a title insurance company engaged in the business of actually issuing title insurance policies (T. 315). Neither of the Plaintiffs are title insurance companies, but are mere title insurance agencies engaged in the business of dealing in land titles, abstracts and acting as agents for title insurers (T. 124-128). Hence, strictly speaking, the Plaintiffs and Defendant are not engaged in competition. While this may not be decisive, it is a factor. See 66 A.L.R. 934, 964, 967.

(3) *Words, "Security" and "Title" are Generic and in Common Use.*

In addition the words, "security" and "title," are both generic or descriptive words in common use (T. 182-183). This again, while not a decisive factor, is a matter to be considered for a greater similarity in names will be tolerated when names are geographical or descriptive than where the first corporation's name is fanciful and arbitrary. See *Federal Securities Co. v. Federal Securities Corporation*, *Supra*.

(4) *No Confusion in Nearly Two Years.*

The most remarkable fact about the case at bar is that in nearly two years of operation by the Defendant, there has not been one instance of confusion. By the time the three-day trial of the case had been concluded, the Plaintiffs had failed to point to one single instance of confusion that had arisen since the Defendant qualified to do business in March of 1961.

The lack of confusion was even admitted by Mark Eggertsen, who on cross-examination conceded that since the Defendant had been doing business in this state, there was no known instance of confusion between the Defendant, the Plaintiff companies, and the Stanley Title Company as the Defendant's agent. Mark Eggertsen's testimony was as follows:

"Q. Do you know of any instance where anyone has actually ordered a policy or abstract and then because of your contact with them you have

learned that they thought in the course of the whole transaction they were dealing with the Security Title Insurance Company of California?

"A. No. Unless some of their own offices who have referred business to us might have thought so.

"Q. But you don't know of no individual that — at least no information has come to your attention that thought they were dealing with Security Title Insurance Company when they actually were dealing with your office?

"A. Oh, I couldn't say. It is very possible they could have.

"Q. I know. But you don't know of any instance?

"A. No.

"Q. Do you know of anyone who has dealt with your office and in the course of the transaction it became apparent to you that they thought they were dealing with somebody connected with Mr. Stanley here in the City? In other words, that have thought that you were connected with or associated in any way with the Stanley Title Company?

"A. The only confusion we have had in that respect to this point is that one or two of these institutional offices have called and said that Mr. Stanley had approached them in the solicitation of business, and named the company, that is, the defendant, as his underwriter, and was there any relationship between them and us?

"Q. All right. Do you know of any of those that have ever ordered a policy or have ever

ordered an abstract and a policy has ultimately been issued? In other words a transaction completed in your office wherein it became apparent to you by what was said or done that the person with whom you were dealing thought he was dealing with Mr. Stanley?

“A. No—truthfully no. And I know what you are heading to, but go ahead.” (T. 214-215)

“Q. Do you know of anyone who has purchased any policy of title insurance, or arranged for any policy of title insurance, or abstract, through the Stanley Title that you have later met and discussed the matter with and from what was said or done at least you concluded that the person was confused and had mistaken Mr. Stanley’s operation for yours?

“A. No.” (T. 216)

“Q. I take it that what you really have in mind, Mr. Eggertsen, is that there has been to date no basic confusion and what you really want to avoid is a probability of confusion in the years to come?

“A. Yes. I knew you were leading up to that.” (T. 218-219)

Nor has there been so much as one instance of confusion in the office of Defendant’s agent, the Stanley Title Company (T. 381, 382, 383, 448, 449, 456, 457, 458).

Not one of the Plaintiffs’ witnesses had ever been confused, nor did any of them know of any confusion that had resulted from the Defendant doing business in the state through Stanley Title Company.

(5) *Neither Is There Any Reasonable Probability of Confusion In The Future.*

a. *No Confusion in Nearly Two Years.*

The nearly two-year history of no confusion certainly evidences lack of any probable confusion in the future.

b. *Analysis of Names Involved.*

The Court's attention is again invited to the names involved. The Plaintiffs' names are "Security Title Company" and "Security Title Guaranty Company," the latter name being a recent change from "Security Title Insurance Agency." The name, "Security Title Company," gives no implication whatsoever that it is a title insurance company or that the company has anything to do with insurance. The name, "Security Title Insurance Agency," clearly evidences that that company is not a title insurer, but that its activities are devoted solely to those of an agency. Indeed, since both of the Plaintiff companies are mere title insurance agencies, it would be unlawful for either company in any way to hold itself out as a title insurer. Section 31-5-15, Utah Code Annotated, 1953, provides as follows:

"31-5-15. *Name in which business conducted—Subrogation — Limitations on assumption of name.* — (1) Each insurer shall conduct its business in its own legal name, except that in subrogation actions it may sue in the name of its assured.

(2) No insurer shall assume or use a name deceptively similar to that of any other authorized insurer.

(3) No person who is not an authorized insurer shall assume or use any name, which deceptively infers or suggests that it is an insurer." (See also Section 31-27-6, Utah Code Annotated, 1953.)

On the other hand the Defendant's name unmistakably shows that it is a title insurance company.

(c) How Defendant Has Actually Used Its Name.

But that is not all. The Defendant has, in addition, always used the further identifying words, ". . . of Los Angeles, California." There has been no attempt whatsoever to infringe on the business of the Plaintiff companies. The Defendant has engaged in no advertising whatsoever calculated to confuse its business with that of the Plaintiffs. It has done business through its local agent, Stanley Title Company, and it is the latter name which has been prominently used. Reference is made to Exhibit 23 which shows the business location of Stanley Title Company and the use of that name, "Stanley Title Company," in large letters as identifying the business operated by George Stanley. The Defendant's name appeared only in small print in the lower right-hand corner of the window and was used in connection with other words clearly identifying its agency relationship to Stanley Title Company and its location as being in Los Angeles, California.

It must be remembered that it is the local title insurance agencies which procure business for the title insurance carriers. The title insurance carriers them-

selves have little contact with the general public, but rather rely on local insurance agencies to procure business for them. By the time preliminary title reports are ordered and issued, contacts with the title insurance agencies have been such that the chances for confusion resulting thereafter are nil.

The Defendant has only permitted the use of its name on title insurance binders, on policies of title insurance, on letterheads of Stanley Title Company, and on the window of Stanley Title Company. In each instance its status as an insurance company as such and its agency relationship to the Stanley Title Company has been apparent.

The Court's attention is again invited to the cases where the use of similar names was permitted so long as the companies added or continued to add the location identification such as: "of Canada" (*Saunders v. Sun L. Assur. Co.* (1894) 1 Ch. (Eng.) 537, noted in 66 A.L.R. 948, 983); "of Kansas" (*International Trust Co. v. International Loan & T. Co.* (1891) 153 Mass. 271, 10 L.R.A. 758, 26 N.E. 693); and "of Illinois" (*Federal Securities Co. v. Federal Securities Corp.*, 276 P. 1100, 66 A.L.R. 934).

(d) *Pertinent Testimony of Each Witness Reviewed.*

As already pointed out, not one of the witnesses had ever been confused, and not one of them testified that he knew of any confusion that had resulted from the Defendant's doing business through the Stanley Title Com-

pany. When asked to give their opinions, all of the witnesses, with one exception, testified that based on their experience, there would be no confusion among those who generally deal with title insurance companies. The pertinent testimony of each witness who testified on the question of confusion and the probability of confusion in the future is as follows:

Mark Eggertsen:

Mark Eggertsen was responsible for and is the president of both of Plaintiff companies (T. 121, 122, 128, Exhibits 20, 21). He knew of no confusion up to the time of the trial (T. 215, 218). His position was that he just wanted to avoid the probability of confusion in the future (T. 219).

Don H. Henager:

Don H. Henager is the secretary-treasurer of the Plaintiff, Security Title Company (T. 243). He testified that there had been some confusion in his mind resulting from the doing business in this state of the Defendant, Security Title Insurance Company, by reason of mail addressed to "Security Title Insurance Company" at the Plaintiffs' address (T. 245). He stated, however, that he always opened such mail (T. 262) and that in not one instance had he found any mail that was actually intended for the Defendant (T. 262). Nor did he know of any instance where any mail had been sent to the Defendant which was intended for either of the Plaintiffs (T. 263).

Lucille R. Wright:

Lucille R. Wright is the vice president of Security Title Guaranty Company and senior vice president of Security Title Co. (T. 269). She testified that she had been requested by Mr. Allen H. Tibbals to take samples of mail addressed to the office of the Plaintiffs in the name of "Security Title Insurance Company" (T. 276). Exhibit No. 32 contained four of such samples (T. 276). On cross-examination she admitted, however, that none of the envelopes caused any confusion (T. 276-279). She further testified that the persons who route the title insurance are generally familiar with the title insurance agencies (T. 282).

Patrick J. Sullivan:

Patrick J. Sullivan is the vice president of the McGhie Abstract & Title Company of Salt Lake City (T. 283). He was asked if having two companies using the words, "Security Title" created confusion. The Defendant's objection to the question was overruled and Mr. Sullivan stated: "I would think so." (T. 285-286). He stated that mail addressed in the name of "Security Title Insurance Company" without any address or any identification would, after the Defendant's having commenced doing business, be confusing to him (T. 287). He was asked whether the industry would find it confusing to have two companies utilizing the words "Security Title" in business (T. 288). Objection was again made on the ground that the question called for a conclusion and on the further grounds that there was no characterization as to how the words might be used. He answered that he

thought it would be confusing (T. 288). Yet he testified that he was well aware of the fact that the Plaintiffs were not insurance companies (T. 290). He was aware of the fact that to address either of the Plaintiff corporations as "Security Title Insurance Company" would be totally in error (T. 290). Exhibit No. 32 was not confusing to him (T. 290). Then Mr. Sullivan admitted that as to whether or not there would be any confusion in the use of the words, "Security Title" would perhaps depend on how the words were used (T. 290). If other words were used with "Security Title" for identification, it might be such as to cause no confusion (T. 291). He confirmed the fact that the bulk of title insurance is ordered by people in banks, lending institutions, insurance companies, real estate agencies, lawyers, etc. (T. 292). His attention was then directed to Exhibit No. 23 (T. 291), and over objection of Plaintiffs' counsel he finally admitted that he wouldn't think such a use would confuse the people who usually order title insurance (T. 292). Then he took an apparently inconsistent position and testified that the same words as are on the window of Stanley Title Company would to a lot of people be confusing on preliminary title reports and policies; that is, the words, "Security Title," make it confusing, and such identification wouldn't make it completely clear because there were a lot of people in Salt Lake City "that thinks the name of Security Title Company of Salt Lake City is Salt Lake City Title Insurance Company, since they ordered policies from them. I would think the whole thing is rather confusing to the general public." (T. 293). However, if by a "lot of people" Mr. Sullivan meant people other than the professional clientele we have referred

to, then his testimony may not be inconsistent. On cross-examination he admitted, however, that he had never been confused (T. 295).

In evaluating Mr. Sullivan's testimony it is apparent that he had never been confused, nor had he heard of anyone who had ever been confused. In what context the words "Security Title" were used would be significant. He was certainly inconsistent when he stated that the words on the window would not be confusing, but stated that the same words on the preliminary title reports and title insurance policies would be confusing to a "lot of people," unless he meant people other than the professional clientele. The fact that the Plaintiffs received mail addressed in the name of "Security Title Insurance Company" cannot be of any help to the Plaintiffs in this case, as such name is not the corporate name of either of the Plaintiffs and simply evidences an ignorance in the minds of the senders of such mail as to the nature of the business and the correct names of the Plaintiffs. The Plaintiffs must stand or fall on their own corporate name (*Central Mut. Auto Ins. Co. v. Central Mut. Ins. Co.*, Supra). As already pointed out, the statutes of this state prohibit a person or company not an insurance company from using any name that infers that it is such (Sec. 31-5-15 and Sec. 31-27-6, U.C.A., 1953).

Since it would thus be illegal for the Plaintiffs to use the name "Security Title Insurance Company," the Plaintiffs cannot claim the benefit of such name when they are so referred to by some uninformed member of the public.

As a further aid to evaluating Mr. Sullivan's testimony, the trial court should have and this court ought to take into consideration that he was a client of counsel for the Plaintiffs (T. 298).

Glen M. Acomb:

Mr. Acomb is a member of the bar of this state and Chief Deputy Salt Lake County Recorder (T. 299). Mr. Acomb was asked if another company were to utilize in the land title field or title insurance field the words "Security Title," whether this would, in his opinion, create any confusion in the office of the County Recorder. (T. 300).

The Defendant's objection to the question was overruled and Mr. Acomb replied that he thought it would; that in the processing of documents and the return of documents, just the name of Security Title is shown and that would be confusing if there were two companies of the same name. (T. 300).

He testified further that documents bearing the words "Security Title Insurance Company," "Security Title Guaranty Company," and "Security Title Agency" would be sent to the Plaintiffs (T. 300). However, on cross-examination, he testified that the identification of the Defendant on the window of Stanley Title Company would not be confusing to the public who generally deal with title insurance matters (T. 302). Neither was Exhibit No. 15, one of Stanley Title Company's preliminary report forms, considered by him to be confusing (T. 303). Incidentally, the Preliminary Report Form,

Exhibit No. 15, has been superseded by a newer form even further removed from the possibility of confusion (T. 388, 396, 397). The words "Security Title" used as they were on the window and title insurance policies, with other words identifying and distinguishing the Defendant company, would not be confusing (T. 303). The crux of the whole question was summed up in his observation on cross-examination to the effect that whether or not there would be confusion would depend on how the words were used (T. 303, 304).

Weston Garrett:

Mr. Garrett is the manager of Security Title and Abstract Company in Provo, Utah (T. 305). He testified that he knew of no instances of confusion in the Provo area between the Plaintiff and Defendant companies (T. 308). In his opinion the words "Security Title" identified his company in that area; that is, the Security Title and Abstract Company.

Mr. Garrett's testimony could be of little help to the Plaintiffs for not only did he know of no confusion, but there was nothing to show from his testimony that there would be any probability of confusion by the Defendant in using its corporate name with the further identifying and distinguishing words that have already been referred to.

Gordon Gurr:

Mr. Gurr resides in Kaysville, Utah, and now maintains an office in Farmington, Utah, where he operates the intermountain division of the Plaintiff Security

Title Company (T. 310). He was asked on direct examination if the Defendant corporation were to be permitted the unlimited use of its corporate name, "Security Title Insurance Company," whether, in the best of his judgment and experience as an abstracter and title man, this would cause any confusion with respect to the Plaintiff companies. (T. 312-313). Over objection, he testified that his company had used the words "Security Title" by themselves for so long that if someone else used these names this would be confusing (T. 313).

Such testimony can be of little help to the Plaintiffs for the Defendant has never undertaken "the unlimited use" of its corporate name. Neither has it ever used the words "Security Title" by themselves. The Defendant has always been careful in the use of its name, has always used further identifying and distinguishing words in connection with its corporate name, and has never used the words "Security Title" by themselves.

Raymond G. Willie:

Mr. Willie is a Vice President of the First Security Bank of Utah in the Mortgage Division (T. 355). He stated that the bank had ordered and requested title insurance from the Plaintiff, which company he referred to as "Security Title Insurance Company" (T. 356). He stated that he refers to Mr. Eggertsen's company as "Security Title Insurance Company" (T. 356). He states that Mr. Eggertsen's company is commonly referred to in the bank as "Security Title Insurance Company" (T. 356). He stated that he had never actually inquired as to whether or not "Security Title Insurance Company"

was the correct name of the Plaintiffs' company (T. 356). That he had never particularly cared (T. 356). He stated that Mr. Stanley had solicited the bank's business, but he had no recollection of Mr. Stanley having solicited through the name of the Defendant company. He was then asked on direct examination:

"... do you find that the possibility of two companies doing business under the name of 'Security Title' in the State of Utah would be productive of confusion?" (T. 358)

Over objection he was allowed to answer the question and stated:

"Well, that is a very difficult question to answer, Mr. Tibbals. I am sufficiently familiar with title insurance that it doesn't confuse me. Yet, on the other hand, I can readily see where someone that wasn't, didn't order as many title policies as First Security might well be confused, yes." (T. 358-359)

He was then shown Exhibit No. 32 and asked whether he would "be able to tell from the name of the insurance company whether that is the company represented by Mr. Stanley or the one that is represented by Mr. Eggertsen." "No, you couldn't," he replied, "the names are identical except for the addresses." (T. 359).

On cross-examination he admitted that he knew of no confusion between the business conducted under the name of Stanley Title Company which had designated on its window "State Agent for Security Title Insurance Company," and the operation of Mr. Eggertsen at 45 East Fourth South Street (T. 361). His attention was

directed to Exhibit No. 32 and reference was made to all of the identification on the envelopes and indicated that no confusion would be caused (T. 361). On cross-examination he was asked:

“Now I was interested in your statement that you refer to the plaintiff company, Security Title Company, as Security Title Insurance Company, is that the way you refer to that company consistently?” (T. 361)

He replied:

“That is right. They issue title insurance and that is what we order. Consequently we think of it in terms of Security Title Insurance Company.” (T. 361)

In summary Mr. Willie pointed to no confusion that has existed and confirmed the fact that First Security Bank had never been confused; and that Exhibit No. 32, considered as a whole, was not confusing. Any confusion that did exist, as far as he was concerned, seems to stem from the fact that the Plaintiffs have permitted themselves to be erroneously identified in the public mind as an insurance company. Again we emphasize that the Plaintiffs must stand on their own corporate names and cannot have the benefit of the Defendant's name or the benefit of other words suggesting that the Plaintiffs are insurance companies, whether such words are used intentionally by the Plaintiffs or carelessly by some uninformed member of the public (Sec. 31-5-15, U.C.A., 1953).

On the same question of confusion or the probability

of confusion the Defendant's witnesses testified as follows:

George B. Stanley:

George B. Stanley is the President of Stanley Title Company, which company is the Defendant's agent in the State of Utah (T. 363, 371). He testified that the professional clientele is well acquainted with the title insurance agencies (T. 376). He stated that 40 per cent of his title insurance business has been referred to him up here in Salt Lake City by the Defendant company, and that he wants to identify his company as being the state agent for Security Title Insurance Company of Los Angeles (T. 377). He wanted it explicitly understood that he was but an agent of the California company (T. 378). He has never observed in handling the mail and telephone calls any confusion (T. 382).

There simply has been no confusion (T. 383). The use of the name, "Security Title Insurance Company," as associated with other words of identification as presently used on the window, title insurance policies and preliminary title reports would not be likely to cause confusion (T. 384).

Paul Mendenhall:

Paul Mendenhall is engaged in the real estate business and has been since 1954 (T. 400). His business is very substantial (T. 401). His attention was then directed to Exhibit No. 23 portraying the window of the Stanley Title Company (T. 404), and to the designation of the

Defendant in the corner of the window, and he was asked whether that was intended to cause any confusion in his mind; that is, the Security Title Insurance Company doing business through Stanley Title Company as compared with Mr. Eggertsen's companies. His reply was "No" (T. 404). He was asked whether in his real estate transactions involving title insurance he had ever known of any case of confusion. Again his reply was "No" (T. 404-405). We then sought to elicit from Mr. Mendenhall the type of testimony that Mr. Tibbals had elicited from witnesses for the Plaintiffs by asking Mr. Mendenhall:

"In your opinion would people who act in your capacity in this area; that is, the real estate people and among the circles in which you travel, in which you move, in your opinion and judging from your experience, would they be inclined to be deceived by the designation or identification of the title insurer on the window of Stanley Title Company?" (T. 405)

Mr. Tibbals' objection to the question was sustained.

He then testified that if similar words of identification as appeared on the window of Stanley Title Company appear on title insurance policies or preliminary title reports, that such, as far as he was concerned, would cause no confusion. (T. 405).

George W. Brown:

Mr. Brown is presently the manager of the Federal Land Bank Association of Provo, Utah (T. 407). The Federal Land Bank is involved in making real estate loans to farmers and ranchers, etc. (T. 408). He testi-

fied of the care and attention given by the Federal Land Bank to determining the qualifications of a title insurance company (T. 409-410). He is familiar with a number of title insurance agencies and familiar with the parties in this action. He has had good business experience with both the Stanley Title Company and the Security Title & Abstract Company of Provo, which latter company is affiliated with the Plaintiffs (T. 410). He was well acquainted with the Defendant company for whom the Stanley Title acts as an agent (T. 411). He has never been confused in his dealings with Stanley Title Company (T. 411). There has been no confusion in the way the Defendant, Security Title Insurance Company, is identified with the Stanley Title Company operation (T. 412). He has never heard anything that would indicate that there has ever been any confusion in the dealings of the Federal Land Bank. Such confusion would normally be brought to the attention of the company (T. 412-413). He testified that the words "Security Title" alone used by another company improperly could cause confusion (T. 413-414), but whether or not such confusion would exist would depend on how the words were actually used (T. 414).

John W. Horsley:

Mr. Horsley is a local attorney who has practiced in this area for eleven years (T. 418). He has handled a lot of real estate transactions and is well acquainted with the attorneys in this area (T. 418). Real estate transactions with which he has been connected have frequently involved title insurance (T. 419). He testified

that title insurance companies were well known among attorneys here in the city (T. 420). When his client does not have a preference of a title insurance company, he frequently suggests one (T. 419). He was shown Exhibit No. 23—the picture of the front window of the Stanley Title Company — and he testified that there would be no confusion caused by the Defendant being identified as the insurance company for whom Stanley Title Company acted as agent (T. 420, 421). He stated that there would be no confusion arise in his mind by the use of the words, “Security Title Insurance Company of Los Angeles, a California corporation,” if those words appeared on a policy of title insurance issued through the Stanley Title Company or on a preliminary title report as opposed to a title insurance policy issued through Mr. Eggertsen’s office (T. 421). He was asked whether, in his general experience in the profession among attorneys, as to whether there would be any deception caused thereby. He replied:

“Well, I should think most lawyers would know the difference between an insurer and an agent.” (T. 421)

The difference between Mr. Stanley’s title company and Mr. Eggertsen’s, with the identification of the Defendant as shown on the window of Stanley Title Company, would cause no confusion (T. 421).

A. Melvin McDonald:

Mr. McDonald has been affiliated with the Walker Bank and Trust Company since 1939, and is now a vice president of the bank in charge of real estate loans and

all of the branches of the bank (T. 424). He supervises the real estate loan division of the bank and approves real estate loans and the disbursing of funds in connection with real estate loans (T. 425). The real estate operation of the bank is of considerable magnitude (T. 425). He frequently finds himself dealing with title insurance (T. 426). The bank always requests financial statements giving the financial status of title insurers (T. 426). He was acquainted with the Plaintiffs, the Stanley Title Company, and was familiar with the fact that the Defendant was the insurer represented by the Stanley Title Company (T. 427-428). His attention was directed to the photograph of the Stanley Title Company, Exhibit No. 23, and he stated that the same would cause no deception in his mind because he was perfectly familiar with the operation of both offices (T. 428). He further testified that judging from his experience and background in the mortgage loan business, that other men likewise engaged in such a capacity in institutions of the city would likewise be familiar with both operations and not confused (T. 428). He further testified that the identification of the Defendant as "Security Title Insurance Company of Los Angeles, California," if it appears on a title report or title policy would not cause any confusion to him or others similarly engaged (T. 428). He was not at all confused by Exhibit No. 32 (T. 431).

Jesse M. Ellertson:

Mr. Ellertson is connected with the title insurance business and abstracting business and operates a company known as Title Insurance Agency of Utah, which

company has an underwriting agreement with the Kansas City Title Insurance Company. He has been in the business for twenty years at the same address on Main Street in Salt Lake City (T. 434). His company is one of the well-established and older companies engaged in the business in this area (T. 434). He was acquainted with the parties in this case (T. 435). He pointed out that the clientele of his company generally comes from what he referred to as institutional business; that is, mortgage lending institutions, small loan institutions, the legal profession and real estate firms (T. 435). He is well acquainted with the title insurance agencies in this area (T. 436). His clientele is typical of the title insurance business (T. 436). Ninety-five per cent of his business comes from these institutional clients (T. 436). The institutional or professional clientele is very interested in the actual company that underwrites or issues the title insurance policies. He emphasized how important his affiliation with Kansas City Title was in selling his business (T. 437). The title insurance business is a service type of business (T. 437), as opposed to buying a piece of merchandise wholesale and selling it retail (T. 438). Title insurance businesses are not in the business of dealing with a commodity (T. 438). His attention was directed to Exhibit No. 23, the photograph of the front window of the Stanley Title Company, and particularly to the identification of the Defendant on the window. When asked whether such identification would cause deception among the clientele dealing with title insurance companies, he stated:

“Oh, I wouldn’t think so. There are occasions

but I don't think this would confuse anyone, the use of it that way."

Neither would such words of identification on policies of title insurance cause any confusion (T. 439). His attention was then directed to Exhibit No. 35, a preliminary title report, and his attention was directed to the words, "Stanley Title Company," and other words identifying the Defendant, "State Agent for Security Title Insurance Company of Los Angeles, California." He stated that among the clientele and personnel with whom he dealt and title insurance companies deal generally, such identification of the insurer would not cause deception or confusion. (T. 440).

Paul B. Stanley:

Paul Stanley is Vice President of Stanley Title Company, the agent for the Defendant company (T. 446). He comes in contact with customers or clientele served by the company (T. 447). He processes the mail (T. 448), and frequently handles the telephone (T. 448). There has never been any circumstance or observation that has led him to believe that there has been any confusion (T. 448). There has never been any mail sent to the office of Stanley Title Company, the contents of which were obviously intended for the Plaintiffs (T. 449). He has never seen as much as one piece of mail misdirected. He had never observed anything in any transaction that evidenced to him any confusion (T. 449). Defendant's identification on the window of Stanley Title Company was, in his opinion, not calculated to cause any confusion among the people with whom they deal (T. 449-450).

Azel T. Sorensen:

Mr. Sorensen is engaged in the real estate business (T. 451). He has occasion to handle or be involved in placing orders concerning titles to property (T. 451). He stated that realtors generally place the title insurance when the need for such arises in their transactions (T. 451-452). He and most real estate men are acquainted with the title insurance agencies (T. 452). His attention was directed to Exhibit 23 and the words thereon identifying the Defendant. He stated that such never confused him (T. 453) and neither would such words on preliminary title reports or title policies. He had known the Defendant company in Los Angeles, California (T. 453).

Burton M. Stanley:

Burton M. Stanley is the Secretary-Treasurer and Title Officer of Stanley Title Company. He has considerable contact with clientele of the Stanley Title Company and accepts title insurance orders (T. 456). He does considerable work over the telephone and likewise handles the mail. His desk is the first one to receive the mail (T. 456). Since the operation of Stanley Title Company as the agent for Defendant, he has never seen anything or had anything brought to his attention by any person which would indicate that there was any confusion (T. 456-457). There has never been any mail misdirected (T. 457). There has never been anyone with whom he has dealt or with whom he has completed a transaction who has indicated that he was confused as to with whom he was dealing (T. 457).

Lynn M. Stanley; Frances Harrison; George B. Stanley:

Lynn M. Stanley of the Stanley Title Company was then called as a witness, whereupon Mr. Tibbals, counsel for the Plaintiffs, entered into a stipulation that Lynn M. Stanley would state that he had never been confused or heard of any party that had been confused, never heard of any confusion, and that there is nothing that is being confused (T. 458). The same stipulation was made applicable to Frances Harrison (T. 458), another employee of Stanley Title Company.

It was then stipulated that if George B. Stanley were recalled to the stand, that he would state that this was all of his personnel in the organization that handles the mail, telephone, or clientele of the company (T. 459).

By way of summary of all of the foregoing testimony, it is apparent that there has never been any confusion. Neither have the Plaintiffs' witnesses carried the burden of showing that there is a probability of confusion arising out of the way the Defendant company has carried on its business thus far in the State of Utah. There is evidence that the use of the words "Security Title" alone might cause some confusion. There is testimony that the Plaintiffs have sometimes been referred to as "Security Title Insurance Company." Suffice it to say that the Defendant has never used the words, "Security Title" alone, but has always used its full corporate name and in addition other words of identification. Furthermore, it is again pointed out that the Plaintiffs have no right whatsoever to claim any benefit of the name "Security

Title Insurance Company.” If any of the public has been confused as to the status of the Plaintiffs and referred to the Plaintiffs or either of them as insurance companies, then it can only be said that such misapprehension is the very thing that our statutes have been designed to guard against. The Plaintiffs are not entitled to hold themselves out as insurance carriers (Section 31-5-15, Utah Code Annotated, 1953). The Plaintiffs cannot identify themselves as “Security Title Insurance Company” for such is not the name of either company and to do so would be in direct violation of the statutes of this state. If the Plaintiffs cannot so identify themselves, certainly no benefit can flow to them by being so referred to by the careless and uninformed.

(e) *The Plaintiffs Must Stand Or Fall on Their Own Corporate Names.*

At the trial of the case the Plaintiffs introduced in evidence four envelopes (Exhibit No. 32) which had been received by the Plaintiffs. A point was made of the fact that in three of the four instances the envelopes were addressed to “Security Title Insurance Company” at the Plaintiffs’ address at 45 East 4th South Street, Salt Lake City, Utah. Counsel for the Plaintiffs argued that the Plaintiff companies, having been thus identified in the minds of the senders of the envelopes, which persons represent a portion of the public, nothing but confusion would result from the Defendant pursuing its business in the State of Utah under its corporate name.

The Plaintiffs, however, cannot claim the benefit

of any name other than their own corporate name. See *Central Mut. Auto Ins. Co. v. Central Mut. Ins. Co.*, Supra, where the plaintiff claimed that notwithstanding its corporate name, it had become known by the name "Central Mutual Insurance Company," and as "Central Mutual," and its insurance policies as "Central" policies. Said the court:

"Plaintiff claims that notwithstanding its corporate name, it has become known by the name 'Central Mutual Insurance Company' and as 'Central Mutual,' and its insurance policies as 'Central' policies. This is immaterial. The plaintiff must stand or fall on its corporate name. The statutes above quoted recognize the corporate name only. *Detroit Savings Bank v. Highland Park State Bank of Detroit*, 201 Mich. 601, 167 N.W. 895."

The Court's attention is further invited to Sections 31-5-15 and 31-27-6, Utah Code Annotated, 1953, which provide that no person who is not an authorized insurer shall assume or use any name which deceptively infers or suggests that it is an insurer. Certainly the Plaintiffs cannot claim the benefit of the Defendant's own name by reason of any carelessness on the part of particular individuals. The Defendant is not an insurer against such ignorance or carelessness. The observation of the annotator in 115 A.L.R. 1241, 1247, is in point:

"And as supporting the further statement made in the original annotation that the test has frequently been said to be whether the similarity is such as to mislead a person using ordinary care and discrimination, attention is called to the following language in *Central Mut. Auto Ins. Co.*

v. Central Mut. Ins. Co. (1936) 275 Mich. 554, 267 N.W. 733: 'There may be some confusion resulting from the similarity of the names of plaintiff and defendant, but the confusion of which the court takes cognizance must be something more than that resulting from carelessness or ignorance on the part of the uninformed. . . . Defendant is not an insurer against the ignorance or carelessness of particular individuals, and may be enjoined from the use of its corporate name after admission to do business in the state by the commissioner of insurance by that name, only upon a showing the similarity of its name to that of plaintiff will mislead, or probably mislead, the public to the detriment or injury of plaintiff.' See also United States Plywood Co. v. United Plywood Corp. (1932) 19 Del. Ch. 27, 161 A. 913, where it was said: 'The name "United Plywood Corporation" ought not to be confused by any reasonably intelligent or ordinarily observant person with "United States Plywood Co." ' "

(6) *The Case of Budget System, Inc. v. Budget Loan and Finance Plan, Infra, is Distinguishable.*

In reaching its decision the trial court relied on the case of *Budget System, Inc. v. Budget Loan and Finance Plan*, 12 U. 2d 18, 361 P.2d 512 (1961) (T. 461). In that case the plaintiff sought to enjoin the defendant loan company from using the word "budget" in its name. Since 1945 the plaintiff, Budget System, Inc., had operated a small loan business at 854 South State Street in Salt Lake City. Previously for about five years it had done business at 763 South State Street. The defendant corporation, Budget Loan and Finance Plan, continued

its small loan business at 802 South State Street, commencing in November, 1958. The trial court found that the word "budget" in defendant's name since 1955 had caused and would continue to cause confusion and deception to the public in the Salt Lake City area among present and potential customers; that the similarity of the name was a deceptive use by the defendant, an unfair trade practice and would result in probable damage to plaintiff's business. The trial court rendered judgment in favor of the plaintiff and the decree was affirmed on appeal. The case, however, is clearly distinguishable from the instant case in at least the following particulars:

(a) The employees of the parties themselves, as well as patrons of each, had suffered actual confusion in the separate offices.

(b) The defendant emphasized the word "budget" in letterheads and outdoor electrical signs.

(c) The appeal of both plaintiff and defendant businesses as small loan operations was to an undiscerning segment of the general public.

(d) The plaintiff and defendant companies were in actual competition with each other.

In short, the businesses conducted by the parties in the Budget case were quite unlike the businesses involved in the instant case, which appeal to a skilled, professional clientele. In the Budget case there had been actual confusion. In the instant case there has been no confusion.

In the Budget case the defendant had actually emphasized by the use of neon lights the name "Budget" which was the word in controversy. In the instant case the Defendant has clearly identified and distinguished its business from that of the Plaintiffs. In the Budget case there was an apparent intent to deceive the public. In the instant case there has been no such intent. In the Budget case the parties were direct competitors appealing to an undiscerning segment of the public. In the instant case the parties are not competitors and deal with a most informed part of the public.

(7) *Attitude of the Defendant.*

The Defendant is a well-established title insurance company (T. 315). It has enjoyed a substantial growth (T. 315) and for meritorious reasons has qualified to do business in this state (T. 319). Expansion and diversification are important to the welfare of the company (T. 319). The company has thought that confusion between its operation and the Plaintiff companies was quite unlikely (T. 324). The absence of confusion since the Defendant has qualified in the state justifies the thinking of those responsible for the management of the Defendant. The management of the Defendant is very much interested in there being no confusion (T. 324). The Defendant, Security Title Insurance Company, is well known as a title insurer, enjoying an excellent public image and reputation (T. 324-325). It is the fourth largest title insurance company in the United States, having a substantial financial position (T. 325). The Defendant does not wish to be confused with anyone,

particularly when there cannot be any control over that person or company with whom confusion exists (T. 325).

The Defendant has always used its full corporate name and in addition thereto appended additional words of identification and distinction. The testimony of Bruce Jones, the Secretary and a Director of the Defendant, clearly sets forth the attitude of the company:

“We wish to be known solely by what we do and what we are, and not by what anybody else does. And if we thought there was any chance of confusion we would take whatever steps we thought were necessary to eliminate it.” (T. 325)

The following testimony was then elicited from Bruce Jones.

“Q. Now are you willing to take such steps then as you would consider reasonable to avoid any confusion between your company, the defendant, and the plaintiff companies?

“A. Anything that was reasonable and to the extent we felt at all necessary — yes, we would.” (T. 325)

* * *

“Q. I believe then your attitude is simply to identify yourself, is that correct?

“A. That is correct.” (T. 326)

In other words, the Defendant having qualified with the Insurance Commissioner in this state simply desires to remain here and legitimately pursue its business, and is willing to take whatever steps necessary to identify and distinguish its operation from that of the Plaintiffs’.

POINT NO. II.

THE FINDINGS MADE BY THE TRIAL COURT, EVEN IF PROPER, DO NOT SUPPORT THE BROAD INJUNCTION IMPOSED AGAINST THE DEFENDANT.

Even if the Findings as entered are proper, they do not support such a broad injunction against the Defendant as was entered by the trial court.

The Defendant has been restrained from “doing business in the State of Utah under the name, ‘Security Title Insurance Company,’ or under any name employing the words, ‘Security Title’ in any combination therein, or from using said name or words in the solicitation, conduct or carrying on of the business of abstracting, land title examination, title insurance or any related activity.”

It must be remembered that the Defendant has been authorized by the Insurance Commissioner of the State of Utah to do business in this state. The court in *Sears, Roebuck & Co. v. All State's Life Insurance Co.*, 246 F.2d 161, 170, stated:

“That a determination by such an administrative tribunal is of great relevance and should be given great weight in a regulated industry.”

See also *Central Mutual Auto Ins. Co. v. Central Mutual Insurance Co.*, 275 Mich. 554, 267 N.W. 733.

As already pointed out in this brief, the Defendant should not be restrained from exercising this grant of authority unless in identifying itself in carrying on its business it has caused or will likely cause confusion. Assuming that the Findings as made were appropriate,

then the door should be left open for the Defendant to endeavor to further identify itself. See *International Trust Co. v. International Loan & Trust Co.*, 26 N.E. 693 (Mass., 1891); *Farmers Loan & T. Co. v. Farmers Loan & T. Co.*, (1888) 21 Abb. N.C. 104, 1 N.Y. Supp. 44; *Saunders v. Sun L. Assur. Co.* (1894) 1 Ch. (Eng.) 537.

The Defendant's corporate name is "Security Title Insurance Company." This is the name by which it has qualified with the Insurance Commissioner to do business in the State of Utah. However, it has always further identified itself with such words as "of Los Angeles" or "a California corporation." If such words are inadequate to identify the Defendant, then the Defendant should be given an opportunity to clothe its name with additional identifying and distinguishing words to entirely remove the possibility of confusion between the Defendant and either of the Plaintiff corporations.

The Plaintiffs would like to have a monopoly on the words "Security Title" irrespective of the context in which used. This, of course, is wholly improper. All the Plaintiffs have a right to expect is freedom from actual or probable confusion. See *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U.S. 554, 52 L.Ed. 616, 28 Sup. Ct. Rep. 350, 66 A.L.R. 934, 942; *L. E. Waterman Co. v. Modern Pen Co.*, 235 U.S. 88, 59 L. Ed. 142, 35 Sup. Ct. Rep. 91, 66 A.L.R. 934, 943.

"The right of a corporation to protection against the use of the same or a similar name by another corporation is intimately connected with the right to protection for a trademark or a tradename, and the right to protection against unfair competition. Indeed, in a great many in-

stances, as will be hereafter noted, the principles to be applied in the two classes of cases are practically identical." 66 A.L.R. 948, 950.

If Finding No. 12 means that the use of the words "Security Title" alone are confusing, then the court is reminded that the Defendant has never so used the words. The Defendant has always used its full corporate name and then added further words of identification.

If Finding No. 12 means that the words "Security Title" in any conceivable context would be confusing, then such a finding is totally unsupported by the evidence, for the words at the trial were only considered in the context theretofore actually used by the Plaintiffs and the Defendant. Even if such testimony were in the record, such would be completely speculative. What witness could even state that the words "Security Title" would be confusing in any context? And if such testimony had been given, and it was not, the same would be rank speculation. To cite possible examples of the use of the words "Security Title" in a name used in a context that would clearly distinguish the name from the plaintiffs is simply to illustrate the obvious.

The only use Finding No. 12 could refer to is the use of the corporate name alone or with the further identifying words as actually employed by the Defendant, to-wit, "... of Los Angeles, California" or "... a California corporation." As already pointed out and for the reasons noted, the Defendant contends that such use and identification is sufficient.

Finding No. 14 is patently valueless. What the Defendant "could" do or might possibly do is not sufficient

to sustain the injunctive relief granted the Plaintiffs. Confusion or probable confusion is the test. The distinction between "could" and "probable" from an evidentiary standpoint is so well known to the law, and the insufficiency of the former as a basis for a judgment so beyond dispute as to require no further comment.

POINT NO. III

THE TRIAL COURT ERRED IN MAKING FINDING NO. 13 THAT "NO SUBSTANTIAL LOSS TO THE DEFENDANT CORPORATION WOULD RESULT FROM DENIAL OF THE RIGHT TO THE USE OF THE NAME 'SECURITY TITLE' IN THE STATE OF UTAH."

Finding No. 13 in its entirety is as follows :

"13. Defendant corporation has to date written something less than 70 title insurance policies in the State of Utah calling for a premium income of less than \$10,000.00. No substantial loss to defendant corporation would result from denial of the right to it of use of the name 'Security Title' in the State of Utah."

Nothing in the record justifies the last sentence of the finding.

The right of the Defendant to do business in the State of Utah now and in the years to come certainly cannot be measured by the policies issued or the premium income to date. Bruce Jones, the Secretary and a Director of Security Title Insurance Company, testified of the importance to the company of its continuing to do business in the State of Utah (T. 319). His testimony was unrefuted. The company to date has gone to considerable expense and much difficulty in qualifying in Utah. Obvi-

ously, as the economy of this state continues to increase so, likewise, will the value of the Defendant's right to do business in the state increase.

SUMMARY

In summary, the Defendant, Security Title Insurance Company, contends that the trial court committed error in making Findings of Fact Nos. 12 and 14, in making Conclusions Nos. 2 and 3, and in restraining the Defendant as was done. The Defendant has endeavored to use only its full corporate name and has always used additional words of identification. The nature of the Defendant's business in the manner in which it has engaged in such has resulted in no confusion in nearly two years. There is no reasonable probability of such in the future. Even if the Findings complained of were proper, the broad injunction imposed against the Defendant was not justified. The Judgment and Decree of the trial court in restraining the Defendant should be reversed and the Defendant should be permitted to continue its business in this state.

Respectfully submitted,

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