

1963

Security Title Insurance Agency v. Security Title Insurance Company : Brief of Plaintiffs-Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Allen H. Tibbals; Earl P. Staten; Attorneys for Plaintiffs-Respondents;

McKay & Burton; Macoy A. McMurray; Attorneys for Defendant-Appellant;

Recommended Citation

Brief of Respondent, *Security Title Insurance Agency v. Security Title Insurance Co.*, No. 9925 (Utah Supreme Court, 1963).
https://digitalcommons.law.byu.edu/uofu_sc1/4294

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

APR 16 1964

LAW LIBRARY

IN THE SUPREME COURT
of the
STATE OF UTAH

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

Plaintiffs-Respondents

vs.

SECURITY TITLE INSURANCE
COMPANY, a California Corporation,

Defendant-Appellant

SEP 6 - 1963

Clerk, Supreme Court, Utah

Case No.
9925

BRIEF OF PLAINTIFFS - RESPONDENTS

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

ALLEN H. TIBBALS and
EARL P. STATEN,
Suite 604 - 315 E. 2nd South
Salt Lake City, Utah
Attorneys for Plaintiffs-Respondents

McKAY & BURTON and
MACOY A. McMURRAY,
720 Newhouse Bldg.
Salt Lake City, Utah
Attorneys for Defendant-Appellant.

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	3
STATEMENT OF FACTS	3
ARGUMENT	10
Point No. 1. The Words "Security Title" while words of general usage have acquired a secondary meaning as relating to the plaintiff's business in the State of Utah and the plaintiffs are entitled to protection from competing activities of the defendant using a name deceptively similar to the plaintiffs and employing the words "Security Title." The Court's finding and conclusions should be sustained.	11
Point No. 2. A domestic corporation is entitled to the protection of its name against use by a foreign corporation later entering the field in competition with the domestic corporation.	16
Point No. 3. Actual confusion is not a prerequisite to the issuance of an injunction to prevent use of a deceptively similar name by defendant.	18
Point No. 4. Plaintiff corporations are in direct competition with defendant and use of a deceptively similar name by defendant may unfairly divert plaintiff's business.	19
Point No. 5. No substantial loss will occur to defendant as a consequence of the injunction.	23
CONCLUSION	23

CASES CITED

American Home Benefit Association Inc. v. United American Benefit Association, 63 Idaho 754, 125 P2d 1010.....	16
Budget System Inc. v. Budget Loan & Finance Plan, 12 U2d 18, 361 P2d 512.....	15

TABLE OF CONTENTS—Continued

Page

TEXTS

American Law Reports Annotated, Vol. 66, at 948 et seq.....	15, 17, 18, 19
Fletcher Cyclopedia of Corporations, Permanent Edition:	
Vol. 6, Section 2425.....	14
Vol. 6, Section 2427.....	14
Vol. 6, Section 2437.....	17
Vol. 6, Section 2440.....	19

STATUTES

16-10-104 Utah Code Annotated 1953 as amended by Ch. 28 Laws of Utah 1961.....	13
---	----

IN THE SUPREME COURT
of the
STATE OF UTAH

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

Plaintiffs-Respondents

vs.

SECURITY TITLE INSURANCE
COMPANY, a California Corporation,

Defendant-Appellant

Case No.
9925

BRIEF OF PLAINTIFFS - RESPONDENTS

NATURE OF THE CASE

Plaintiffs and Defendant each claim the right to use the words "Security Title" in their respective corporate names and to enjoin the other permanently from the use thereof in the State of Utah. Plaintiffs claimed damages against the defendant based on defendant's use of the words "Security Title" in Utah and for interference by

* The Secretary of State was made a party to the action, but at pre-trial it was ordered that he was not a necessary party to the action and that he did not need to appear. He was left as a party to the action solely for the purpose of facilitating changing his records in conformity with the order of the Court. Accordingly no reference is made in the title to the fact that the Secretary of State was a party.

defendant with an application made by Plaintiff Security Title Guaranty Company to the Commissioner of Insurance of Utah for a license to do business in Utah as a title insurer. Defendant claimed plaintiffs had illegally held themselves out to the public as title insurers and that plaintiffs applications for protection of the name "Securiy Title Insurance Company" to the Secretary of State of Utah was deceptive and false and that the Secretary of State should be required to cancel the certificate based on the application.

DISPOSITION IN THE LOWER COURT

Plaintiffs were granted an injunction permanently enjoining 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" and from using said name or words in solicitation, conduct or carrying on of the business of abstracting, land title examination, title insurance or any related activity in the State of Utah. The defendant was directed to cause the removal from the window of the premises occupied by its agent at 60 East 4th South, Salt Lake City, Utah, the name "Security Title Insurance Company". The defendant was granted 90 days from the date of the decree in which to withdraw from the State of Utah or to qualify under another name. During this ninety day period the Court allowed defendant a limited use of the corporate name of defendant employing the words "Security Title", which privilege has now been extended by subsequent order during the pendency of

this appeal. Plaintiffs claims for damages were dismissed. The counterclaim of the defendant was dismissed.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek affirmance of the judgment of the Court below.

STATEMENT OF FACTS

The statement of facts contained in defendant's brief is so slanted and biased that it is not acceptable to plaintiffs. In defendant's statement of facts at page 3 of its brief counsel states the primary question is whether defendant should be restrained after "* * * having done business in this state for nearly two years." The facts are that the Company qualified to do business March 25th, 1961 (R. 1, par. 3, R. 9, par. 6). The first time the name "Security Title Insurance Company" was publicly displayed in connection with the business of Stanley Title, agent of defendant, was when the office was moved across the street from the plaintiffs at 60 East Fourth South on March 9th, 1962. (R. 372 & 386) The complaint in this action was filed June 4th, 1962. (R. 5)

At page 4 of its brief, counsel states, "During the last few years it (defendant) has expanded its operation into several other states * * *" The facts as testified to by Mr. Bruce M. Jones, member of the board of directors, associate counsel and corporate secretary of defendant company, "* * * in the past about three years I think we have expanded not only into about eight or nine additional counties in California, but also into Utah, Wash-

ington, and just a few months ago the Security Title Insurance Company policies were first written through a title company in Hawaii." (R. 319)

Again on page 4 of his brief counsel for defendant makes a statement, "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 clear cut implication and the thought which defendant is obviously trying to leave is that the plaintiff companies were hurriedly thrown together to block or thwart the expansion of defendant into Utah. The fact is that Mark Eggertsen commenced a business in Provo, Utah under the name "Security Title and Abstract Company" June 1st, 1942. (R. 123) From that time to the present day the name "Security Title" has been used continuously by plaintiffs and their early predecessor in the business of abstracting, land title examinations, title insurance and related activities throughout the state of Utah. (R. 123 to 130 inc.) The plaintiff companies had thus not only been "organized" as stated in defendant's brief but had been in continuous operation for almost nineteen years prior to defendant's advent into the State of Utah.

In directing an accusation of "piracy" against plaintiffs in the statement of facts of the defendant at page 5 of its brief it is stated that "* * * having failed in their efforts to prevent defendant's qualification in the State of Utah, the Plaintiff Security Title Guaranty Company re-

sorted to an outright subterfuge in attempting to 'pirate' the defendant's own corporate name by registering the same as its own trade name. Ex. No. 3". The facts are that the defendant did not qualify in the state of Utah until March 25, 1961. On January 19, 1961 Mark Eggertsen, president of Security Title Insurance Agency executed an application for registration of trade name or service mark. This application was duly filed with the Secretary of State seeking protection of the name "Security Title Insurance Company" on January 24th, 1961 and the same date a certification of trade mark registration was issued. (Ex. 3 & 17) In a further distortion of the facts surrounding this matter counsel for the defendant seeks to make it appear that the affidavit of Mr. Eggertsen on which the action of the Secretary of State was taken was false because on cross examination he elicited from Mr. Eggertsen the statement that the Company had itself never used the name "Security Title Insurance Company" and would therefore imply no basis or justification for Mr. Eggertsen's effort on behalf of plaintiff's to protect the name. The defendant neglects to mention that several of the defendant's witnesses as well as some of the exhibits show that the people dealing with plaintiff companies had long applied the name "Security Title Insurance Company" to the plaintiffs. (R. 197, 198, 199, 356, 406, 416) (Ex. 32)

At page 7 of its brief defendant states that the defendant did all of its business through Stanley Title Company which agency has done business in its own name " * * * 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 23." No mention is made of the preliminary title reports used by defendant until about sixty to ninety days prior to trial wherein the words "SECURITY TITLE" were emphasized out of all proportion to the other lettering on the form. (Ex. 15, R. 397)

Again in his argumentative statement of facts at page 7 of defendant's brief wherein counsel argues that this business is "* * * generally handled by experts * * *" he ignores the fact that his own witnesses introduced as experts in the field did not know the correct name of defendant's company and of plaintiffs but recognized that "Security Title" meant Mark Eggertsen's companies. (R. 406, 416, 423, 430, 439, 441)

At page 8 of defendant's brief counsel makes reference to the application filed with the Insurance Commissioner of Utah by Security Title Insurance Agency, now known as Security Title Guaranty Company, one of the plaintiffs herein and says in regard thereto, "* * * 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. Ex. No. 5". Counsel carefully neglects to mention the basis for the protest of defendant as set forth in the exhibit referred to. "* * * The similarity of the names "Security Title Insurance Company" and "Security Title Guaranty Company" is apparent. There is little doubt that the latter name is

deceptively similar to the first and were the application to be granted, the use of such a similar name would, without doubt, cause confusion and deceive the public. * * *"
(Ex. 5)

The pertinent facts are that the the defendant is a California Corporation the name of which is Security Title Insurance Company. (R. 1, 8, 315) The Company was and now is in the business of issuing title insurance policies and performing the necessary related functions of title examination, preparation of preliminary reports, maintaining title plants and so forth (R. 315 to 317 inc.) as a strictly California operation except for a brief period of operation in Nevada in the year 1960 until its qualification to do business in the state of Utah, March 25th, 1961. (R. 330, R. 9 Par. 6) June 1st, 1942 Mark Eggertsen formed Security Title and Abstract Company, a Utah Corporation and commenced doing business in Provo, Utah. (R. 123, 157) Thereafter on December 1st, 1944 Mark Eggertsen and Robert G. Kemp with others formed Security Title Company, a Utah corporation and commenced business in Salt Lake City, Utah. (R. 123, 124, Ex. 9) By name changes the original Security Title Company has now become known as Security Title Guaranty Company, one of the plaintiffs herein. (R. 125 to 127 inc., Ex. 21) The present Security Title Company the other plaintiff herein was formed August 23rd, 1957 by Mark Eggertsen and others. (R. 128, Ex. 20) Through agents authorized by contract with plaintiff Security Title Guaranty Co. to utilize the words "Security Title" in the names under which they

do business, as well as through the company now known as Security Title Guaranty Company, one of the plaintiffs, state wide coverage in Utah in the field of abstracting, land title examinations, title insurance and related activities is and has been provided by plaintiff companies and has been publicized by plaintiffs through various advertising media since 1945. (R. 136, 139, 140) (Ex. 12) Plaintiff companies have established a good and substantial reputation in this field under the name "Security Title" and "Security Title Insurance Company", though the word "insurance" has been applied by popular usage, and custom, not by reason of any attempt by plaintiffs to act as insurers in the strict legal sense. (R. 284 to 287, 299, 304, 357, 358, 393, 406, 416, 423, 430, 439 441) George Stanley, Vice President of defendant company admitted that the plaintiff companies and Stanley Title as agent of defendant were in direct competition in so far as the public is concerned and the purchasers of title insurance. (R. 393) Plaintiff Companies and their authorized agents or related Companies were the only users of the name "Security Title" in the state of Utah until the defendant Company qualified and thereafter commenced doing business in this state through Stanley Title Company. (R. 441 423, 406, 358, 299, 272, 244) Stanley Title Company entered into a contract with defendant company to act as its Utah Agent April 4, 1961. (R. 371) Despite this fact the Stanley Title Company has never utilized the name of the defendant, "Security Title Insurance Company" at

its place of business in Heber City, Utah, or at its previous office in Salt Lake City, but first started using the name "Security Title Insurance Company" on its office window when it moved to the office location at 60 East Fourth South, in Salt Lake City, which location is on the south side of Fourth South Street almost directly across the street from the location of plaintiffs' offices for the past eleven years, 45 East Fourth South Street. (R. 141-2, 386-7) By letter dated July 25th, 1958 Mark Eggertsen advised the defendant through F. Wendell Audrain, Vice President, that plaintiff companies were opposed to the defendant qualifying to do business in the State of Utah under any name using the words "Security Title". (Ex. 13) Despite this fact defendant company did apply December 6th, 1960 to do business in the State of Utah as a foreign title insurer. (Ex. 22) The application was protested by plaintiff companies. (R. 149) Sometime in January, 1961 the Commissioner of Insurance issued his certificate of approval. (Ex. 22) Qualification with the Secretary of State was not had until March 25th, 1961. (R. 9 Par. 6) Immediately prior to the commencement by the Agent of defendant company publicly to use the name Security Title Insurance Company in connection with its operation in Utah, plaintiffs by letter dated March 6, 1962, from their attorney notified defendant that plaintiffs were opposed to defendant doing business in Utah under the name of Security Title Insurance Company or any name which includes the words "Security Title". (Ex. 33)

Receipt of this letter of plaintiffs' attorney was acknowledged on March 12th, 1962 by defendant. (Ex. 34)

Plaintiffs commenced this action seeking to enjoin the defendant from the use of the name Security Title Insurance Company or from use of any name in the state of Utah employing the words "Security Title" by filing a complaint in the District Court of Salt Lake County on June 4th, 1962. (R. 3) During the period of Stanley Title Company's operation as agent for the Security Title Insurance Company they have processed only 70 applications for title insurance with the defendant company, (R. 390) and the premium income in total received by the defendant company from Utah operations is less than \$10,000.00. (R. 393)

ARGUMENT

By way of introduction, plaintiffs believe that the defendant's brief neither correctly states the law applicable to the matter before this court, nor does it accurately summarize the testimony of the witnesses. A detailed rejoinder to all of the allegations of the defendant's brief would neither be helpful to the Court, nor in compliance with the Court order that briefs be confined to fifty pages or less. Accordingly we shall argue the plaintiff's case under our own headings. To the extent that space permits, and the exigencies of the case require we shall point out what plaintiffs consider to be the fallacies in the defendant's argument.

POINT 1

THE WORDS "SECURITY TITLE" WHILE WORDS OF GENERAL USAGE HAVE ACQUIRED A SECONDARY MEANING AS RELATING TO THE PLAINTIFFS' BUSINESS IN THE STATE OF UTAH AND THE PLAINTIFFS ARE ENTITLED TO PROTECTION FROM COMPETING ACTIVITIES OF THE DEFENDANT USING A NAME DECEPTIVELY SIMILAR TO THE PLAINTIFFS AND EMPLOYING THE WORDS "SECURITY TITLE". THE COURT'S FINDING AND CONCLUSIONS SHOULD BE SUSTAINED.

The words "Security Title" were used in Utah in the corporate name of a corporation engaged in the business of abstracting, land title examinations and agent for title insurers, by Mark Eggertsen, President of Plaintiffs, when he formed Security Title and Abstract Company June 1st, 1942 and commenced doing business in Provo, Utah. (R. 123, 270, 358) Plaintiff Security Title Guaranty Company was formed in November, 1944 by Robert G. Kemp and Mark Eggertsen under the name, Security Title Company. (R. 123 Ex. 9) The name "Security Title" in combination with words such as "Insurance Agency," "Guaranty Company" or "Company" has been continuously used by plaintiffs in connection with the business of abstracting, land title examinations and title insurance on a state wide basis in the State of Utah either through wholly owned subsidiaries, agents or licensees from that time to the present. (R. 183) The name "Security Title" is much used in this industry by many different corporations in many different locales. (R. 182-3) In Utah the name has become associated with the business of plaintiffs. (R. 358) Even the defendant's

own witnesses so testified. Mr. Horsley, an attorney called by Defendant testified on cross examination, "Q. Now, Mr. Horsley, in this area among attorneys if we speak of Security Title, who do we mean? A. We mean Mark Eggertsen's company." (R. 423) Mr. Ellertson another witness called by defendant testified, "* * * We know Stanley is the Stanley Title Company as we know Mark as the Security Title all of these years. * * *" (R. 439) Mr. George W. Brown manager of the Federal Land Bank Association of Provo, Utah for more than twenty years called by the defendant as a witness testified,

"Q. I show you, Mr. Brown, what is a portion of Ex. 32; an envelope bearing the date of February 27, 1961 and ask to whom you would deliver this envelope if it were left to you to deliver that piece of mail?

"A. I would deliver it to Mark Eggertsen's office.

"Q. And how would you happen to do that?

"A. Well, I have known Mark Eggertsen's Company as such, as indicated on this envelope for some time.

"Q. And how is it indicated on the envelope?

"A. Security Title Insurance Company." (R. 416)

In Utah until the qualification of the defendant, March 25th, 1961, the plaintiff companies and their affiliated agents and licensees have been the only ones using the words "Security Title" in connection with the business of land titles, abstracting or title insurance. (R. 358, 269-70, 307, 312) The State of Utah as of the date

of defendant's qualification as a foreign corporation authorized to do business in Utah had no statutory prohibition to the use by a foreign corporation of a name deceptively similar to the name of a corporaion already doing business in the state. Such a prohibitory act was passed by the 1961 legislature when it enacted the new Corporation Code and the act is now in effect but did not become effective until some months after defendant's qualification. (16-10-104 UCA 1953 as amended by Chapter 28 Laws of Utah 1961) Plaintiffs believe the defendant designedly took advantage of this loophole in the Utah law and sought to profit by the excellent reputation enjoyed by the plaintiffs in this area under the name "Security Title" by utilizing the words "Security Title" and its own corporate name "Security Title Insurance Company" in developing its business in this State. George Stanley had been at one time an agent for plaintiff Security Title Guaranty Company. (R. 275) Later he chose to affiliate with the defendant Security Title Insurance Company even though he had opportunities with other, even larger companies. (R. 391-2) When Stanley Title Company became the agent in Utah for defendant Security Title Insurance Company, Mr. Stanley did not immediately commence public display of the name Security Title Insurance Company on his place of business, he waited until he moved his headquarters just across the street from the plaintiffs' office on East Fourth South in Salt Lake City, Utah. (R. 386-7) The intention of the Defendant Company to profit by the unfair competitve use of the name "Security

Title" is illustrated by the use made of the words "Security Title" on a form known as a Preliminary Report Form supplied to its agent, Stanley Title Company from its home office in California. That form on the Reverse side thereof without any justifiable reason set up the words "Security Title" in bold print several times larger than the accompanying words "Insurance Company". (R. 387 Ex. 15)

The law on this problem is not overly complex or difficult of application. Fletcher Cyclopedia of Corporations, Permanent Edition, Vol. 6., Section 2425 states:

"The right of a corporation to equitable protection of its name against use by another rests upon the fact that it first occupied the field under that name. * * * The protection accorded is largely coextensive with the field in which the corporation operates. Previous use of the corporate name in another part of the country may not defeat the right in the territory in which the subsequent appropriation and user occur, * * *

Ibid Sec. 2427

"* * * Although a corporation's name is composed in whole or in part of generic or descriptive words, it may enjoin others who subsequently enter the field from unfair competition or dealing under an identical or similar name. Again, names and words even of a generic or descriptive character may by prior combination and association with a particular enterprise acquire such a meaning as to render their subsequent use by others misleading and confusing, and the courts will in such case prevent their use at the instance of the corporation first appropriating them in its name.
* * *

The annotating authority in 66 ALR at Page 951 speaking on the subject of protection of a corporate name says :

“It is a universally recognized rule that a corporation is entitled to protection against the use of the same or a similar name by another corporation. * * *”

This Honorable Court has in the recent case of *Budget System Inc. v. Budget Loan and Finance Plan*, 12 U 2d 18, 361 P2d 512, had before it a case similar to the case at bar. In that case the Court quoted with approval from the Idaho case of *American Home Benefit Association Inc. v. United American Benefit Association*, 63 Idaho 754, 125 P 2d 1010,

“* * * it is well settled that when a person has adopted, as the name of a business a term originally geographical, and, by his efforts and expenditures, has developed a reputation and good will for such business and its products, so that such name has come to mean, in the minds of the general public, that particular business and its products, such name thereby acquires a “secondary meaning”, as indicating such business, and its owner is entitled to protection, in its use, by a court of equity. * * *”

We believe that the evidence here clearly supports the application of these same principles to the case before the court. That Plaintiff Corporations have spent years, and large sums of money in the development of the words “Security Title” as being synonymous with their business in the State of Utah is not disputed. (R. 132 to 146 inc. Ex. 12, 24, 25, at page 45, 26, 27, 28, 29, 30, 31 and pps 245 to 267 inc.)

POINT 2.

A DOMESTIC CORPORATION IS ENTITLED TO THE PROTECTION OF ITS NAME AGAINST USE BY A FOREIGN CORPORATION LATER ENTERING THE FIELD IN COMPETITION WITH THE DOMESTIC CORPORATION.

The restriction on the use of a deceptively similar name to that of a previously established domestic corporation by a foreign corporation even in the absence of statute is well recognized.

“All of the other necessary elements being present, a domestic corporation may enjoin a foreign corporation doing business in the state from using an identical or similar name in carrying on such business.

Foreign corporations, it has been held, are not privileged over domestic ones in the matter of the use of names similar to those of existing corporations even though the statute, while preventing the creation of a corporation under a name prejudicial to the rights of an existing corporation, makes no reference to the rights in the state of a foreign corporation bearing such a name, and the mere absence of such reference will not oust a court of equity of its general jurisdiction which it possesses independently of statute, over the subject. While it may be that a foreign corporation, having a name the same as that under which a natural person is doing a local business of the same character in the state, may have the right to carry on its business under its corporate name in a different locality, it cannot by reason of its compliance with the state laws relative to foreign corporation to go into the same locality and there do business under such name. In other words, compliance by a foreign corporation with the state laws applying, does not entitle such corporation to go into any part of the state

that it may choose and there do business under its corporate name to the injury of the owner of a local business conducted under the same or similar name. * * *” Fletcher Cyclopedia of Corporations, Perm. Ed., Vol. 6, Sec. 2437.

In an annotation on the subject, “Protection of Corporate Name,” appearing in 66 ALR 948, at page 1007 the annotating authority says with respect to the rights of a domestic corporation to restrain a foreign corporation from use of a deceptively similar name even in the absence of statute,

“There would seem to be no doubt as to the right of a domestic corporation to relief against a foreign corporation.”

Defendant seeks to take some comfort and shelter from the fact that the Insurance Commissioner and the Secretary of State of Utah both permitted the qualification of defendant over the protest of plaintiffs. The authorities take the position, however, that this is not any protection against suit by an older corporation to protect its name from the encroachments of another entering the field.

“The defense has frequently been interposed, in actions to restrain the use of similar corporate names, that the granting of a charter or a certificate of incorporation is conclusive as to the right to use the name conferred thereby.

This view, however, has been generally rejected. The position has been taken, that although the corporation derives its rights from the state, the state does not intend that the rights conferred by it shall be used tortiously, to the injury of other corporations, and that, if the name of the

corporation is such as to injure another corporation having a similar name, its use may be enjoined, despite the grant from the state. * * * In the case of certificates of incorporation, or certificates to do business in the state, issued by the secretary of state or other officials of the executive department, in which the question of the conclusiveness of the certificates depends somewhat upon the wording of statutory provisions, it is generally held, under the ordinary form of the statutes, that the certificates are not conclusive as to the right to the use of the corporate name." 66 ALR 1014.

Since, as we have previously pointed out, there was no statutory coverage of this matter in the State of Utah at the time of the qualification of the defendant, we believe the action of the Insurance Commissioner and of the Secretary of State afford no protection to the defendant.

POINT 3.

ACTUAL CONFUSION IS NOT A PRE-REQUISITE TO THE ISSUANCE OF AN INJUNCTION TO PREVENT USE OF A DECEPTIVELY SIMILAR NAME BY DEFENDANT.

Defendant throughout the trial of the case, and on this appeal has attempted to establish the claim that the plaintiffs are not entitled to relief because no confusion between plaintiff companies and the defendant can be shown to have actually existed. While we believe that an unbiased reading of the record will sustain the position that confusion most certainly does exist, yet we wish to point out to the court that the right to relief is not predicated on that basis alone. The deceptive simi-

larity of the names is conceded by the defendants in their letter to the Insurance Commissioner over the signature of David L. McKay, (Ex. 5) and again by Mr. Bruce M. Jones, Secretary of the defendant corporation called upon to testify who verified the deceptive similarity of the names. (R. 339-340).

Fletcher Cyclopedia of Corporations, permanent edition, Vol. 6, page 122, Sec. 2440 states:

“A corporation should use all possible promptness in applying for injunctive relief against the use of its name or a similar name by another, and it is the duty of a corporation, the name of which has been unlawfully imitated by a competitive company, to seek relief before the rights of innocent third parties have intervened. Thus, where the defendant has chosen a name which clearly constitutes an encroachment upon plaintiff’s rights in its corporate name, plaintiff need not defer its suit until defendant has actually begun business, but may institute suit even though defendant has done nothing but file its articles of incorporation and receive a certificate therefore. * * *”

In 66 ALR p. 972, the annotating authority says:

“Actual confusion need not be shown but it is sufficient to show that confusion is probable, or likely to occur. This rule is universally recognized.”

POINT 4.

PLAINTIFF CORPORATIONS ARE IN DIRECT COMPETITION WITH DEFENDANT AND USE OF A DECEPTIVELY SIMILAR NAME BY DEFENDANT MAY UNFAIRLY DIVERT PLAINTIFFS’ BUSINESS.

In a further effort to avoid the consequences of its

act, the defendant has attempted to make it appear that plaintiff corporations and defendant are not actually in competition because the defendant is a title insurer and the plaintiff corporations are not insurers. An analysis of the record shows, however, that the plaintiffs and defendant are in direct competition. We have no doubt that the commencement of the instant law suit had a salutary effect on the competitive activities of the defendant corporation and its agent, Stanley Title Company. But the fact remains that when asked directly, George Stanley, Vice President of the defendant admitted that one could get a title insurance policy by coming into his office on East Fourth South where the name of defendant corporation is displayed on the window, and could do exactly the same thing by going across the street to the place of business of the plaintiff corporations and that there would be no difference in the procedures. (R. 392-3) Mr. Bruce M. Jones, Secretary of the Defendant corporation admitted that the defendant maintained title plants, and knew of no restriction which would prevent the defendant, from entering into the abstract business if it so desired. (R. 341 to 343)

The Defendant's counsel has further asserted that a broader latitude should be allowed defendant in doing business under its corporate name in Utah even though it may be deceptively similar to the plaintiffs names, because the bulk of the business is done through a select group of personnel not likely to be confused by the similarity in names. Even a casual reading of the record dispels this unlikely theory. Mr. Ray Willie, Vice Presi-

dent of First Security Bank of Utah N. A. and mortgage loan officer for twenty years of the twenty two years he had been in banking stoutly maintained that the name of Mark Eggertsen's company was "Security Title Insurance Company." (R. 356) Mr. Paul Mendenhall, a witness for defendant and a realtor when asked to whom he would deliver an envelope said he would deliver it to Mark Eggertsen's office and when asked why said, "Because it says Security Title Insurance Company." (R. 406) Mr. Brown, Manager of the Federal Land Bank in Provo, produced as a witness for defendant when asked the same question made the same reply. (R. 416) Mr. Horsley, an attorney at law, asked to whom he would deliver the envelope addressed solely to Security Title Insurance Company, Salt Lake City, Utah, said, "I don't know. I would take it to Eggertsen I suppose." (R. 423) This same witness stated that when attorneys spoke of "Security Title" in his area they referred to Mark Eggertsen's company. (R. 423) Mr. MacDonald of Walker Bank & Trust Company in the real estate loan department since 1939, when asked to whom he would direct an application for a title insurance policy if he was simply asked by the customer to send it to "Security Title" said he would have to ask another question. When asked how long it had been that he would have had to ask such a question for clarification, he admitted that this would only have been necessary since "Mr. Stanley has been doing business as an agent for Security Title Insurance Company." (R. 430) We believe an unbiased examination of the facts will not sustain the position of the

defendant that no confusion exists, or that the persons charged with placement of title insurance are so discerning that no harm would flow to the plaintiffs from the fact that defendant employs the words "Security Title" in its name.

POINT 5.

NO SUBSTANTIAL LOSS WILL OCCUR TO DEFENDANT AS A CONSEQUENCE OF THE INJUNCTION.

This being an equitable proceeding one of the facets on the case with which the court must concern itself is whether or not a great and substantial loss would be incurred by the defendant if the injunction sought by the plaintiffs was to be granted. We submit that the admissions of the defendant through its officers clearly show that no substantial loss would be incurred. The defendant company is primarily a California operation. (R. 330) It has grown in that state until its assets as testified to by Mr. Bruce M. Jones, Secretary of the Company, Associate Counsel and Director, are approximately \$27,500,000.00, and its gross income is approximately \$20,000,000.00 per year and in the last year of its business it handled 165,000 title orders. (R. 315) George Stanley, Vice President of the defendant admitted that since its inception in Utah March 25th, 1961 the Company had received only 70 title insurance orders and the gross premium income would be less than \$10,000.00. (R. 390 & 393) Clearly then, the defendant company has not built any custom or trade in the State of Utah which would be seriously impaired if it was to be enjoined from use of the name Security Title Insurance Company in this state.

CONCLUSION

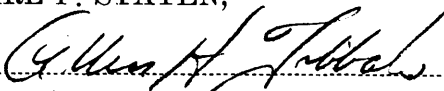
We submit to this Honorable Court that the decision of the lower court is in accord with the recognized and established principles of law applicable to the case, and is supported by the evidence. We respectfully ask the affirmance of the lower court's decision, and the sustaining of the injunction granted by the lower court barring defendant from use of the words "Security Title" in the State of Utah as provided by the decree of the lower Court.

Respectfully submitted,

ALLEN H. TIBBALS

EARL P. STATEN,

by

A handwritten signature in cursive script, appearing to read "Allen H. Tibbals", written over a horizontal dotted line.

ALLEN H. TIBBALS

Attorneys for Plaintiffs-Respondents

Suite 604 - 315 E. 2nd South

Salt Lake City, Utah