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Trusts

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law. The court of appeals' opinion expressed some doubt concerning the trial court's classification of the term "House of Beauty" as a generic term descriptive of a kind of business. The opinion states that: "Its meaning could be circumscribed by its adoption and exclusive use as a trade name identifying a particular business enterprise, thus becoming the property of the user as a trade name."[7] But there was no serious evidence in the record that plaintiff had used the term sufficiently to have acquired a secondary meaning.[8]

Prior Ohio authorities support this statement that descriptive words, when identified with a particular business, are entitled to protection, whether they are fanciful[9] or in the common domain,[10] when used by a competitor in a manner so as to confuse the public, or when proposed to be used with the probable result of confusion.

This litigation should be a reminder that the facts and circumstances of each unfair competition case are all important. It also emphasizes the importance of the ability of the plaintiff to establish by the weight of the evidence the existence of a secondary meaning to his business name, and the evidence of actual damage arising from the defendant's use of a confusing trade name, or the probability of future damage flowing from its use.

MAURICE S. CULP

TRUSTS

TESTAMENTARY TRUSTS — WHEN TRUST COMPANY REQUIRED TO GIVE BOND

Winters National Bank & Trust Company v. Ross[1] involves an analysis by the Ohio Supreme Court of the various statutory provisions concerning the posting of bond by trust companies when acting as testamentary trustees. The court stated that unless dispensed with by the will creating the trust, a trust company must give bond in the amount set forth in Ohio Revised Code section 2109.04 before letters of appointment may be issued to it as testamentary trustee. As to any time after the issuance of letters of appointment, however, they held the requirement of bond from a trust company to be solely within the discretion of the probate court.

7. *Id.* at 341.

8. For over a year prior to plaintiff's entry into business, there had been a beauty shop known as "Mary Ellen's House of Beauty" operated in Parma. The opinion of the court of appeals points out that there were at least ten other beauty shops in Greater Cleveland which used the words "House of Beauty" as a part of their business names. *Ibid.*

9. Cloverleaf Restaurants Inc. v. Lenihan, 79 Ohio App. 493, 72 N.E.2d 761 (1946).

10. Cleveland Opera Co. v. Cleveland Civic Opera Ass'n, 22 Ohio App. 400, 154 N.E. 352 (1926).

Bequest to Charitable Corporation

The court of appeals in *In re Bicknell's Estate*[2] held that a bequest to a Massachusetts college "in trust," the principal to be retained forever and the income to be used as needed for furnishing and decorating the college buildings, did not create a trust, but created a gift to the college, subject to the enforceable obligation to use the money for the purpose of the gift. Enforcement of the terms of the gift was ruled to rest with the authorities of the state of Massachusetts, wherein the gift was to be administered. The reason assigned by the court for the failure of the bequest as a trust was that there was no separation of the legal and equitable interests in the property involved, since the college was both sole trustee and sole beneficiary. There is creditable authority for the court's position with respect to the merger of the legal and equitable interests and the consequent failure of the trust.[3] However, it is urged that a better view is that the persons or charitable corporations who benefit directly from such trusts are not the sole beneficiaries thereof, but that society, or some segment of society, also should be regarded as a beneficiary. In other words, the immediate recipients of these trusts are merely the conduits through which society receives the advantages of the trusts. Even if this latter theory were adopted, the result of a gift rather than a trust still could be attained, for the modern view is that a conveyance or bequest to a charitable corporation creates a gift, the terms of which are enforceable, but does not create a trust.[4]

Charitable Trusts — Doctrines of Cy Pres and Deviation

Testatrix, in *Cheney v. State Council of Ohio Junior Order of United American Mechanics*,[5] bequeathed in one item of her will

> . . . Three Hundred Dollars ($300.00) to the Epworth Methodist Church of Marion, Ohio; the sum of Three Hundred Dollars ($300.00) to the Marion Masonic Temple Company of Marion, Ohio, and Five Hundred Dollars ($500.00) to the Junior Order of American Mechanics of Marion, Ohio.

Testatrix' deceased husband had been a member of each of the three organizations listed in her will. At the time of the testatrix' death, the Junior Order of American Mechanics of Marion, Ohio no longer existed. However, the State Council of Ohio Junior Order of United American Mechanics was in existence, and claimed the bequest on the ground that it is one and the same as the beneficiary named in

1. 169 Ohio St. 335, 159 N.E.2d 603 (1959). See also discussion in *Wills and Decedents' Estates* section, p. 447 *infra.*
2. 108 Ohio App. 51, 160 N.E.2d 550 (1958).
3. See St. Joseph's Hosp. v. Bennett, 281 N.Y. 115, 22 N.E.2d 305 (1939).
4. See RESTATEMENT, TRUSTS § 348 comment *f* (2d ed. 1959); SCOTT, TRUSTS § 348.1 (2d ed. 1956).
5. 162 N.E.2d 242 (Ohio P. Ct. 1959).

the above item of testatrix' will. Held: Neither the doctrine of cy pres nor the doctrine of deviation applies, and the $500.00 in question lapses and passes under the residuary clause of the textatrix' will. The court ruled that "the absence of a general charitable intent precludes the application of the doctrine of cy pres."[6] They found that the testatrix had no general charitable intent because the objects of her bounty in the item involved were limited to religious and fraternal orders in Marion, Ohio, of which her husband had been a member, and because she manifested no intent to adopt the state organization, although it was in existence at the time of the execution of her will. With respect to the doctrine of deviation, the court stated that it had been limited to cases in which its application would carry out the general purpose named by the settlor, and in which a simple change incident to the method of administration would not alter the purpose or object of the trust, nor vary the class of beneficiaries, nor divert the fund from the charitable purposes named by the donor. "To apply the doctrine of deviation to the case at bar," said the court,

> would alter the testatrix' intention to benefit an organization in Marion, Ohio to one of a general charitable intent to benefit the entire Ohio order of such association and would, moreover, vary the class of beneficiaries to an extent not contemplated by her, thus resulting in a diversion of the fund from the limited charitable purpose named by her.[7]

In *Kingdom v. Saxbe*[8] the court found that the testator had a general charitable purpose to educate young people by a combination of college courses and religious training, and had a particular charitable purpose to accomplish this by means of a poly-technic industrial school. However, it was impossible to carry out the precise method set forth by the testator. Therefore, the court held that the doctrine of deviation *should* be applied and a change made from the operation of a school to the operation of a scholarship foundation in order to accomplish the testator's general charitable purpose.

Evidence Required

Thomas v. Thomas[9] and *Richmond v. Hallock*[10] held that an oral, express trust of land must be established by clear and convincing evidence. The same degree of proof was required by the court in *Eckenroth v. Stone*,[11] with respect to the impressing of a constructive trust upon realty.

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6. *Id.* at 245.
7. *Id.* at 246.
8. 161 N.E.2d 461 (Ohio P. Ct. 1958).
9. 108 Ohio App. 193, 161 N.E.2d 416 (1958). See also discussion in *Real Property* section, p. 414 *supra.*
10. 158 N.E.2d 914 (Ohio C.P. 1956).
11. 158 N.E.2d 382 (Ohio Ct. App. 1959).