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EC-99-553
GST v KCPL
file per Judge Thompson

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DHR

January 20, 2000

Mr. Kevin Thompson
Deputy Chief Regulatory Law Judge
Missouri Public Service Commission
Truman State Office Building, Room 530
Jefferson City, MO 65101

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Re: GST Steel Company v. Kansas City Power & Light Company
Case No. EC-99-553

Missouri Public
Service Commission

Dear Judge Thompson:

Please find enclosed sections from Volumes 6 and 9A of the *Fletcher Cyclopedia of the Law of Private Corporations*, and their respective Cumulative Supplements, which you requested Mr. DeFord supply you with during the Order to Show Cause hearing of January 18, 2000.

While all the material attached is pertinent to your request, we ask that you pay particular attention to pages 153 through 159 (Vol. 6, §§2442 through 2444), and page 131 (Vol. 9A, §4495).

Should you require any additional information, we will be happy to comply.

Sincerely,

LATHROP & GAGE L.C.

By:

Kurt U. Schaefer

KUS/jf

Enclosures

cc: James W. Brew
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FLETCHER CYCLOPEDIA

OF THE LAW OF

PRIVATE CORPORATIONS

WILLIAM MEADE FLETCHER

1996 REVISED VOLUME

By TIMOTHY P. BJUR, J.D.,
BETH BUDAY, J.D. and
JAMES SOLHEIM, J.D.

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§ 2441.30 — State laws.

Most jurisdictions have statutes providing for the registration of trademarks, trade names and service marks.¹ Registration under state trademark statutes, like their federal counterpart, is prima facie evidence of ownership of the mark,² and provides statewide

[Section 2441.30]

¹ See e.g., Cal Bus & Prof Code § 14200; 765 ILCS 1035; Mass Gen L ch 110B; NY Gen Bus Law § 360.

U.S. *Polaroid Corp. v. Polaroid, Inc.*, 319 F2d 830 (applying Illinois law); *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F2d 541 (applying New York law); *Esquire, Inc. v. Esquire Slipper Mfg. Co.*, 243 F2d 540 (applying New York law); *Jean Patou, Inc. v. Jacqueline Cochran, Inc.*, 201 F Supp 861 (applying New York law), aff'd 312 F2d 125.

Evidence before the court appeared to be more than sufficient for the granting of a preliminary injunction under Illinois law. *Hyatt Corp. v. Hyatt Legal Services*, 736 F2d 1153 (CA7 1984).

Cal. *Ball v. American Trial Lawyers Ass'n*, 14 Cal App 3d 289, 92 Cal Rptr 228.

Ill. *Hyatt Corp. v. Hyatt Legal Services*, 736 F2d 1153 (CA7 1984); *Polaroid Corp. v. Polaroid, Inc.*, 319 F2d 830.

Mass. Under Massachusetts statute the likelihood of injury to business reputation or of dilution of distinctive quality of a trade name or trademark is ground for injunctive relief in cases of trademark infringement or unfair competition, notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services. *Great Scott Food Market, Inc. v. Sunderland Wonder, Inc.*, 348 Mass 320, 203 NE2d 376.

N.Y. *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F2d 541; *Esquire, Inc. v. Esquire Slipper Mfg. Co.*, 243 F2d 540; *Jean Patou, Inc. v. Jacqueline Cochran, Inc.*, 201 F Supp 861, aff'd 312 F2d 125.

Or. While other courts have construed similar antidilution statutes to permit consideration of confusion of source in determining whether injunctive relief is available, Oregon's statute clearly expresses that competition and confusion of source are immaterial. *Wedgwood Homes, Inc. v. Lund*, 58 Or App 240, 648 P2d 393.

Tex. *Sandy International, Inc. v. Hansel & Gretel Children's Shop*, 775 SW2d 802 (Tex App 1989), reh den.

See also *Callmann, Unfair Comp, Trademarks & Monopolies* § 25.50 (4th Ed).

² Fla. Prior registration under state statute is only prima facie evidence of exclusive ownership of particular service mark and, unless coupled with and supported by actual usage of the mark sufficient to vest in registrant's use a secondary meaning, will not defeat a similar use by competitor who has actually established and placed in operation business identified by such mark. *Abner's Beef House Corp. v. Abner's International, Inc.*, 227 So 2d 863 (Fla).

Under Florida statute, corporate owner of properly registered service mark containing name "Abner's"

protection.³ State registration, unlike federal registration, does not normally warrant a presumption of the validity of a registered mark or the exclusive right to use the marks due to the fact that the states generally lack adequate facilities for preexamination.⁴ The principal function of state trademark laws is to provide a form of registration for marks which are not used in interstate or foreign commerce and do not qualify for federal registration.⁵

§ 2442 Assumed or fictitious names.

It has been said that a corporation, when it comes into existence, acquires a legal name by which it is known and identified, and by which it conducts business.¹ If the corporation is not authorized by

bad exclusive right to use the mark in connection with its business in the state, and was entitled to enjoin unauthorized use of that name as part of its registered service mark where such use would result in confusion or deception. *Abner's International, Inc. v. Abner's Beef House Corp.*, 220 So 2d 683 (Fla App).

³ U.S. Plaintiff's federal registration of trademark "Burger King" gave it exclusive right to use that name in Illinois except in limited market area therein where defendant had actually used same name which it had registered under Illinois Trademark Act prior to plaintiff's federal registration, where defendant had operated only in that limited area and not throughout the state. *Burger King of Florida, Inc. v. Hoots*, 403 F2d 905.

⁴ U.S. *John Morrell & Co. v. Reliable Packing Co.*, 295 F2d 314; (CA7); *Hot Shoppes, Inc. v. Hot Shoppe, Inc.*, 203 F Supp 777 (MD NC).

See also *Callmann, Unfair Comp, Trademarks & Monopolies* § 25.50 (4th Ed).

⁵ See *Callman, Unfair Comp, Trademarks & Monopolies* § 25.50 (4th Ed).

[Section 2442]

¹ U.S. *Diamond National Corp. v. Lee*, 333 F2d 517.

Ida. *Colorado Milling & Elevator Co. v. Proctor*, 58 Idaho 578, 76 P2d 438, citing this treatise.

Ill. *Svenska Nat. Forbundet Chicago v. Swedish Nat. Ass'n*, 205 Ill App 428.

Ind. When a certain name is given to a corporation by its charter and adopted, the corporation can, in general, act by no other name. *Glass v. Tipton, T. & B. Turnpike Co.*, 32 Ind 376.

Kan. *Kansas Milling Co. v. Ryan*, 152 Kan 137, 102 P2d 970, citing this treatise.

La. *Ready Portion Meat Co. v. Michael's A Catering Experience*, 542 So 2d 207 (La App 1989).

N.Y. There was sufficient compliance with provisions of statute requiring corporation owning store to cause true, full name of such store to be publicly revealed and prominently and legibly displayed upon exterior of building, where exterior plate glass show window of restaurant owned by corporation bore thereon gold leaf lettering about an inch and one half in height the inscription: "Formerly Gasner's Restaurant, operated by H. & B."

law to conduct business under an assumed or fictitious name, its legal name is the only name which may be used by the corporation.²

Caterers, Inc. v. People v. Ferdinand, 172 Misc 595, 15 NYS2d 506.

The fact that a corporation came into being as the result of the consolidation of two other corporations does not warrant the use by such corporation of the name of either of the original corporations as a substitute for its corporate name. *Scarsdale Pub. Co. v. Carter*, 63 Misc 271, 116 NYS 731.

Ohio. The name designated in the articles of incorporation is binding on the corporation and the public. *Stanton v. Tax Commission of Ohio*, 26 Ohio App 198, 159 NE 340.

² U.S. *Diamond National Corp. v. Lee*, 333 F2d 517.

Rule that corporation must engage in business only under its proper corporate name, and may not lawfully transact business under assumed or fictitious name, does not make it illegal for corporation to use trade name, or what may be described as colloquial or nickname, or abbreviated name. *Great Atlantic & Pacific Tea Co. v. A. & P. Radio Stores, Inc.*, 20 F Supp 703.

Conn. *Woronicki v. Pariskiego*, 74 Conn 224, 50 A 562.

Ida. *Colorado Milling & Elevator Co. v. Proctor*, 58 Idaho 578, 76 P2d 438, citing this treatise.

Ill. *Sykes v. People*, 132 Ill 32, 23 NE 391; *Precision Components, Inc. v. Kapco Communications*, 131 Ill App 3d 555, 475 NE2d 1071.

If the defendant corporation had the power to use without authority of law a name different from its legal corporate name, it would have the right to use an indefinite number of such names, which would violate the public policy of the state. *Svenska*

Nat. Forbundet Chicago v. Swedish Nat. Ass'n, 205 Ill App 428.

In Illinois a corporation has no legal right to use any name other than that under which it was organized, and use by a corporation of a name different from its legal corporate name is against public policy. *Anzalone v. Durchslag*, 1 Ill App 3d 125, 273 NE2d 752.

Kan. Though corporation may have but one registered or legal name it is not prohibited from using a contraction of its name in advertising. *American Fence Co. of the Midwest, Inc. v. Gestes*, 190 Kan 393, 375 P2d 776.

There being no permission in general corporation code for it to do so, corporation may not, either in its articles of incorporation or by amendment thereto, obtain right to conduct its business under trade name or series of trade names in addition to its corporate name and title. *Kansas Milling Co. v. Ryan*, 152 Kan 137, 102 P2d 970, citing this treatise.

Mass. *Boston Rubber-Shoe Co. v. Boston Rubber Co.*, 149 Mass 436, 21 NE 875.

N.J. Sole shareholder was personally liable on contract where the corporation transacted business through unregistered alternate name. *African Bio-Botanica v. Leiner*, 264 NJ Super 359, 624 A2d 1003 (1993).

N.Y. In New York, no corporations save those created by law, and a corporation created within memory can regularly have but one name and, in all legal proceedings, the true name of the corporation must be used. *McGary v. People*, 45 NY 153.

In the absence of any legal prohibition or fraud, however, a corporation has the same freedom as an individual to adopt and use an assumed or fictitious name in conducting its business.³ A corporation conducting business under an assumed or fictitious name must

Corporation has no right to do business under assumed name. *People v. Ferdinand*, 172 Misc 595, 15 NYS2d 506.

Or. *Liggett v. Ladd*, 17 Or 89, 21 P 133.

³ U.S. Under Florida law, a corporation, like a natural person, can acquire a fictitious or trade name particularly where it has a secondary meaning. *Miami Credit Bureau, Inc. v. Credit Bureau, Inc.*, 276 F2d 565, citing this treatise.

Statute which prohibits any person from conducting business under an assumed name unless duly registered, does not apply to domestic or foreign corporations. *Shoppers Fair of Arkansas, Inc. v. Sanders Co., Inc.*, 207 F Supp 718.

Ariz. *Kitchell Corp. v. Hermansen*, 8 Ariz App 424, 446 P2d 934, citing this treatise.

Cal. *John Beard Memorial Foundation v. Krebs*, 96 Cal App 2d 597, 215 P2d 939.

Fla. *Miami Credit Bureau, Inc. v. Credit Bureau, Inc.*, 276 F2d 565.

Check which was drawn payable to "ROI, Inc." was properly endorsed "Marketing Associates, Inc. d/b/a ROI, Inc." where Marketing Associates operated under the trade name of "ROI, Inc." *Segel v. First State Bank of Miami*, 432 So 2d 1378 (Fla App), citing this treatise.

Ga. *American Exp. Travel Related Services Co., Inc. v. Berlye*, 202 Ga App 358, 414 SE2d 499 (1991); *Harris v. Sulcus Computer Corp.*, 175 Ga App 140, 332 SE2d 660; *John L. Hutcheson Memorial Tri-County Hospital v. Oliver*, 120 Ga App 547, 171 SE2d 649.

A trade name, acquired by a corporation, by user, in connection with and as descriptive of goods manufactured and sold by it, is not a corporate name. *Rome Machine & Foundry Co. v. Davis Foundry & Machine Works*, 135 Ga 17, 68 SE 800.

A corporation may transact business within its corporate powers in a name other than its legally authorized corporate name. *Moon Motor-Car Co. v. Savannah Motor-Car Co.*, 41 Ga App 231, 152 SE 611.

Ida. *Colorado Milling & Elevator Co. v. Proctor*, 58 Idaho 578, 76 P2d 438, citing this treatise.

Ill. *Texaco, Inc. v. Kane County Oil, Inc.*, 96 Ill App 2d 383, 238 NE2d 622.

Iowa. *Hickman v. Hygrade Packing Co.*, 185 NW2d 801 (Iowa); *Butler Mfg. Co. v. Elliott & Cox*, 211 Iowa 1068, 233 NW 669.

Kan. *American Fence Co. of the Midwest, Inc. v. Gestes*, 190 Kan 393, 375 P2d 775; *Kansas Milling Co. v. Ryan*, 152 Kan 137, 102 P2d 970, citing this treatise.

Ky. *Galt House, Inc. v. Home Supply Co.*, 483 SW2d 107 (Ky); *Griffith v. St. Walburg Monastery*, 427 SW2d 802 (Ky); *Meredith v. Universal Plumbing & Construction Co.*, 272 Ky 283, 114 SW2d 94, citing this treatise.

La. *Milton v. Del Corral*, 132 La 730, 61 So 771; *Ready Portion Meat Co. v. Michael's A Catering Experience*, 542 So 2d 207 (La App 1989); *Mas Nursing Inc. v. Burke*, 523 So 2d 909 (La App 1988).

A corporation may contract in an assumed name or a name acquired

by user or reputation, in the absence of statute prohibiting it from doing so. *National Oil Works, Inc. v. Korn Bros.*, 164 La 800, 114 So 639, citing this treatise.

Corporation may receive and indorse notes payable to it by another corporate name, no fraud being committed, and such indorsement will carry title. *Traders' Securities Co. v. Dutsch*, 19 La App 576, 137 So 75, 140 So 75.

Mass. General Motors Acceptance Corp. v. Halsey, 329 Mass 559, 109 NE2d 143; *Staples Coal Co. v. City Fuel Co.*, 316 Mass 503, 55 NE2d 934; *Blanchard v. Stone's, Inc.*, 304 Mass 634, 24 NE2d 688.

A corporation may acquire a right to the exclusive use of another name than its corporate name as a trade name. *Boston Rubber-Shoe Co. v. Boston Rubber Co.*, 149 Mass 436, 21 NE 875.

Mich. Walrath v. Campbell, 28 Mich 111.

Mo. Coca-Cola Bottling Co. v. Groesper, 691 SW2d 395 (Mo App); *State v. Kelly*, 408 SW2d 383 (Mo App).

Nev. All Nite Garage, Inc. v. A.A.A. Towing, Inc. of Reno, 85 Nev 193, 452 P2d 902.

N.J. B. Di Medio & Sons, Inc. v. Camden Lumber & Millwork Co., Inc., 23 NJ Super 365, 93 A2d 46, citing this treatise.

N.M. Spain Management Co. v. Packs' Auto Sales, Inc., 54 NM 64, 213 P2d 433, citing this treatise.

N.Y. Sample, Inc. v. Perrath, 41 AD2d 118, 341 NYS2d 683; Anti-Defamation League of B'Nai B'Rith v. Arab Anti-Defamation League, 72 Misc 2d 847, 340 NYS2d 632; *People v. Ferdinand*, 172 Misc 595, 15 NYS2d 506; *Mail & Express Co. v.*

Parker Axles, 204 App Div 327, 198 NYS 20.

Okla. Oklahoma Operating Co. v. Shipley, 171 Okla 484, 43 P2d 445.

Pa. Miscellaneous, Inc. v. Klein's Fashions, Inc., 452 Pa 62, 305 A2d 22; *W.F. Meyers Co., Inc. v. Stoddard*, 363 Pa Super 481, 526 A2d 446.

When a corporation elects to carry on a branch of its business in an assumed name, it is liable for the acts of agents, acting within the scope of their authority, who contract in the assumed name with relation to such branch of the business, in all cases where the contract would have been binding if made in the actual name of the corporation. *Phillips v. International Text Book Co.*, 26 Pa Super 230.

S.C. Corporation which obtained license in its corporate name from state highway department for motor truck could not be relieved from responsibility arising from operation of truck because of its transfer of assets to another corporation and subsequent dissolution where it continued to do business under its trade name. *Long v. Carolina Baking Co.*, 193 SC 225, 8 SE2d 326.

Tenn. Kemmons Wilson, Inc. v. Allied Bank of Texas, 836 SW2d 104 (Tenn App 1992).

Tex. Nichols v. Seale, 493 SW2d 589 (Tex Civ App); *W.B. Clarkson & Co. v. Gans S.S. Line*, 187 SW 1106 (Tex Civ App).

Wash. Seattle Ass'n of Credit Men v. Green, 45 Wash 2d 139, 273 P2d 513, citing this treatise; *Brotherhood State Bank of Spokane v. Chapman*, 145 Wash 214, 259 P 391; *Tradewell Stores, Inc. v. T.B. &*

be authorized to do business in the state.⁴

In many states, a person or entity doing business under an assumed or fictitious name is subject to specific statutory regulations.⁵ These provisions may not be applicable to corporations.⁶ The

M., Inc., 7 Wash App 424, 500 P2d 1290.

W. Va. Grafton Grocery Co. v. Hoime Brewing Co. of Grafton, 60 W Va 281, 64 SE 349.

Ida. Colorado Milling & Elevator Co. v. Proctor, 58 Idaho 578, 76 P2d 438, citing this treatise.

Kan. Kansas Milling Co. v. Ryan, 152 Kan 137, 102 P2d 970, citing this treatise.

Ky. Meredith v. Universal Plumbing & Construction Co., 272 Ky 283, 114 SW2d 94, citing this treatise.

La. Hy-Grade Investment Corp. v. Robillard, 196 So 2d 558 (La App).

W. Va. Simpson v. Grand International Brotherhood of Locomotive Engineers, 83 W Va 355, 98 SE 580.

Ariz. Ariz Rev Stat Ann §§ 44-1236, 44-1460.

Ark. Ark Code Ann § 4-27-404.

Cal. Cal Bus & Prof Code § 17910 et seq.

Colo. Colo Rev Stat § 7-71-101.

Conn. Conn Gen Stat § 35-1.

Fla. Fla Stat § 865.09.

Ga. Ga Code Ann §§ 10-1-490, 10-1-493.

Ill. 805 ILCS 5/4.15.

Ind. Ind Code §§ 23-15-1-1, 23-15-1-3.

Ky. Ky Rev Stat Ann § 365.015.

La. La Rev Stat Ann §§ 51:281, 51:283.

Me. Me Rev Stat Ann tit 13-A, § 307.

Mass. Mass Gen L ch 110, §§ 4; 5.

Mich. MSA § 21.200(217); MCL § 450.1217.

Minn. Minn Stat §§ 333.01-333.06.

Mo. Mo Rev Stat §§ 417.200, 417.210.

Mont. Mont Code Ann § 30-13-201 et seq.

Neb. Neb Rev Stat § 87-208 et seq.

Nev. Nev Rev Stat § 602.010 et seq.

N.H. NH Rev Stat Ann § 349:1 et seq.

N.J. NJ Rev Stat § 14A:2-2.1.

N.Y. NY Gen Bus Law §§ 130, 133.

N.C. NC Gen Stat §§ 66-68.

Ohio. Ohio Rev Code Ann §§ 1329.01-1329.06.

Okla. Okla Stat tit 18, § 1140.

Or. Or Rev Stat § 648.005 et seq.

Pa. 64 Pa Cons Stat § 301 et seq.

R.I. RI Gen Laws § 7-1.1-7.1.

Tenn. Tenn Code Ann § 48-14-101(d).

Tex. Tex Bus Corp Act Ann art 2.05(B).

Utah. Utah Code Ann § 4-2-5 et seq.

Va. Va Code Ann § 59.1-69 et seq.

Wash. Wash Rev Code § 19.80.001 et seq.

W. Va. W Va Code § 47-8-2 et seq.

Wis. Wis Stat § 134.17.

Wyo. Wyo Stat §§ 40-2-101 to 40-2-109.

⁴U.S. Sparks v. Porter, 270 F Supp 953 (applying Florida law).

⁵Fla. President was not personally liable for back rent where business incorporated under assumed name shortly after execution of lease. *Langworthy & Assoc., Inc. v. Meadowlawn Pharmacy, Inc.*, 629 So 2d 892 (Fla App 1993).

Sparks v. Porter, 270 F Supp 953.
Ga. National Brands Stores, Inc. v. Muse & Associates, 183 Ga 88, 187 SE 84.

Georgia statute relating to registration of trade names did not apply to promissory note payable to "J.F. Darby, trading as the J.F. Darby Lumber Company" where it appeared from face of instrument that it was taken by payee in his true name and not in such trade name. Stewart v. Darby Banking Co., 183 Ga 888, 190 SE 28.

Georgia Trade Name Registration Act did not abolish right of holder in due course to maintain action on negotiable instrument which was taken by payee in trade name which payee had failed to register under act. Peoples Loan & Finance Corp. v. Latimer, 183 Ga 809, 189 SE 899; Southern Security Co. v. American Discount Co., 184 Ga 82, 190 SE 350. Corporation is a "person" within meaning of act. Constitution Pub. Co. v. Lyon, 52 Ga App 434, 183 SE 653.

Kan. Kansas Milling Co. v. Ryan, 152 Kan 137, 102 P2d 970, citing this treatise.

Ky. Meredith v. Universal Plumbing & Construction Co., 272 Ky 283, 114 SW2d 94.

Some of the statutes prohibiting persons from carrying on business under an assumed name until a statement has been filed in a designated public office giving the name to be used and the names and addresses of the persons so engaged expressly except domestic corporations. Kozy Theatre Co. v. Love, 191 Ky 595, 231 SW 249.

La. National Oil Works, Inc. v. Korn Bros., 164 La 800, 114 So 659; Mas Nursing Inc. v. Burke, 523 So 2d 909 (La App 1988).

Nev. Nevada statute relating to the filing of a certificate of doing business under a fictitious name does not apply to corporations. McCulloch Corp. v. O'Donnell, 83 Nev 396, 433 P2d 839; All Nite Garage, Inc. v. A.A.A. Towing, Inc. of Reno, 85 Nev 193, 452 P2d 902.

N.Y. New York Penal Law, which requires persons conducting or transacting business under an assumed name to file in the office of the county clerk a certificate setting forth the true name of the owners of the business, expressly excludes corporations from its operation. People v. Ferdinand, 172 Misc 595, 15 NYS2d 506.

Tex. Stanley v. State, 145 Tex Crim 32, 165 SW2d 458.

Wash. Tradewell Stores, Inc. v. T.B. & M., Inc., 7 Wash App 424, 500 P2d 1290.

Although Washington statute providing for the filing of assumed names was expressly not applicable to corporations, it did not prohibit a corporation doing business under an assumed name from filing such name, and the fact that it had made such filing was not evidence that it had intended to abandon its corporate status. Seattle Ass'n of Credit Men v. Green, 45 Wash 2d 139, 273 P2d 513, citing this treatise.

Washington assumed-name statute exempted a corporation from the requirement of filing an assumed-name certificate if the corporation identified itself in its pleadings both as to its true corporate name and its assumed name under which it transacted business. Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc., 71 Wash 679, 430 P2d 600.

Model Business Corporation Acts⁷ and corporation statutes in most states regulate the use of assumed or fictitious names by foreign corporations.⁸ Statutory provisions regulating the use of an assumed or fictitious name generally require a filing with the state setting forth the assumed or fictitious name.⁹ Such statutes serve

⁷ Model Bus Corp Act § 108(c)(1); Model Bus Corp Act (1984) § 15.06 (a)(2).

⁸ Ala. Ala Code § 10-2B-15.06. Alas. Alaska Stat § 10.06.723.

Ariz. Ariz Rev Stat Ann § 10-1506(A)(1)(b).

Ark. Ark Code Ann § 4-27-1506 (A)(2).

Cal. Cal Corp Code § 2106(b).

Colo. Colo Rev Stat § 7-115-106 (2).

Del. Del Code Ann tit 8, § 371(c).

D.C. DC Code Ann § 29-399.2 (1).

Fla. Fla Stat § 607.1506(1)(b).

Ga. Ga Code Ann § 14-2-1506 (a)(2).

Haw. Haw Rev Stat § 415-108 (1)(C).

Ida. Idaho Code § 30-1-108(b) (1).

Ill. 805 ILCS 5/4.05(a)(3)(i).

Ind. Ind Code § 23-1-49-6(a) (2).

Iowa. Iowa Code §§ 490.401(5), 490.1506(1)(b).

Ky. Ky Rev Stat Ann § 271B.4-010(5), 271B.15-060(1) (b).

La. La Rev Stat Ann § 12:303(A) (3).

Md. Md Code Ann Corps & Assns § 2-106(c).

Miss. Miss Code Ann § 79-4-15.06(a)(2).

Mo. Mo Rev Stat § 351.584.

Mont. Mont Code Ann § 35-1-1031.

Neb. Neb Rev Stat § 21-20,173 (1)(b).

N.H. NH Rev Stat Ann § 293-A:15.06(a)(2).

N.J. NJ Rev Stat § 14A:2-2(3).

N.M. NM Stat Ann § 53-17-3(B) (1).

N.C. NC Gen Stat § 55-15-06(a) (2).

N.D. ND Cent Code § 10-22-03 (3)(a).

Ohio. Ohio Rev Code Ann § 1703.04(B)(1).

Or. Or Rev Stat § 60.717(3).

Pa. Pa Stat Ann tit 15, § 4123(b) (1)(i).

S.C. SC Code Ann § 33-15-106 (a)(2).

S.D. SD Codified Laws Ann § 47-2-38(1)(c).

Vt. Vt Stat Ann tit 11A, § 15.06 (a)(2).

Va. Va Code Ann § 13.1-762(B) (2).

Wash. Wash Rev Code § 23B.15.060(2)(b).

W. Va. W Va Code § 31-1-51(b) (1).

Wis. Wis Stat § 180.1506(1).

Wyo. Wyo Stat § 17-16-1508 (a).

⁹ U.S. Bechtel v. Robinson, 886 F2d 644 (CA3 1989) (construing Delaware law); Horneco Developments v. Markborough Properties, Ltd., 709 F Supp 1137 (SD Fla 1989) (applying Florida law).

Colo. Where an action brought by a corporation, doing business under an assumed name, is dismissed for the sole reason that it has failed to comply with the statutory provisions requiring the filing of a certificate to authorize the doing of business under an assumed name, and where the corporation after such dismissal complied with the

the primary purposes of preventing public deception and permitting

statute, it can maintain a new suit upon the same transaction against a plea of res judicata. *Admiral Corp. v. Trio Television Sales*, 138 Colo 157, 330 P2d 1106.

Del. *Bechtel v. Robinson*, 886 F2d 644 (CA3 1989).

Fla. President was not personally liable for back rent where business incorporated under assumed name shortly after execution of lease. *Langworthy & Assoc., Inc. v. Meadowlawn Pharmacy, Inc.*, 629 So 2d 892 (Fla App 1993).

Although a corporation generally must file its fictitious name, the state recognizes as an exception to this filing requirement a corporation that does business under the name in which it was incorporated. *Homeco Developments v. Markborough Properties, Ltd.*, 709 F Supp 1137 (SD Fla 1989).

Ill. *Precision Components, Inc. v. Kapco Communications*, 131 Ill App 3d 555, 475 NE2d 1071.

Ind. Corporation which conducts business under any other name or designation is required to file certificate of assumed name. *Parker v. Red Johnson Farm Service, Inc.*, 384 NE2d 1129 (Ind App).

Kan. *Kansas Milling Co. v. Ryan*, 152 Kan 137, 102 P2d 970, citing this treatise.

Mich. Fact that stockholder, after corporation was dissolved, transacted business under an assumed name without complying with state laws, does not affect his title or interest in the property which formerly belonged to the corporation, nor give defendant any right to misappropriate property either of corporation or of such stockholder. *Pontiac Trust Co. v. Newell*, 266 Mich 490, 254 NW 178.

A person who deposits money of her own in a bank in the name of a proposed corporation which is never formed, under an agreement with the bank that it is to remain her property until the proposed corporation is formed, and is to be paid out only on checks countersigned by a particular person, is not thereby doing business under an assumed name so as to preclude her from recovering the amount of the deposit for failure to comply with statutory requirements in relation to persons doing business under assumed names. *Hamburger v. Bank of Detroit*, 218 Mich 173, 187 NW 535.

Mont. Shareholders in a corporation that has not complied with the fictitious name statute may be barred from maintaining an action under such name. *Stott v. Fox*, 246 Mont 301, 805 P2d 1305 (1990).

A corporation which was acting under an assumed name without registration did not have access to the state courts. *Marketing Specialists, Inc. v. Service Marketing of Montana, Inc.*, 693 P2d 540 (Mont).

N.J. Sole shareholder was personally liable on contract where the corporation transacted business through unregistered alternate name. *African Bio-Botanica v. Leiner*, 264 NJ Super 359, 624 A2d 1003 (1993).

Pa. Foreign corporation authorized to do business in Pennsylvania which had obtained certificate to carry on its retail-store business thereunder fictitious or trade name failed to sustain burden of proof that such name had acquired secondary meaning, thus not entitled to injunctive relief against domestic corporation's use of similar name prior in registration. *Miscellaneous*,

accuracy in naming and serving parties in litigation.¹⁰

A plaintiff by the mere act of incorporation cannot invoke the common-law principles of unfair competition to enjoin a corporation from continuing to conduct business under a similar assumed name.¹¹

A contract entered into by or with a corporation under an assumed name may be enforced by either party, if the identity of the corporation is established by sufficient evidence.¹² The validity of a contract

Inc. v. Klein's Fashions, Inc., 452 Pa 62, 305 A2d 22.

Tenn. *Kemmons Wilson, Inc. v. Allied Bank of Texas*, 836 SW2d 104 (Tenn App 1992) (discussing Texas law).

Tex. *Kemmons Wilson, Inc. v. Allied Bank of Texas*, 836 SW2d 104 (Tenn App 1992).

Vt. *Corner Garage v. Pullen*, 96 Vt 458, 120 A 863.

¹⁰ U.S. *Bechtel v. Robinson*, 886 F2d 644 (CA3 1989) (construing Delaware law).

Cal. Purpose of California statute, under which corporation filed certificate that it was doing business under fictitious trade name, was not to estop creditors who did not rely on the public record nor to provide shield to persons doing business under fictitious names against their creditors who did not avail themselves of information contained in the prescribed statutory record. *J & J Builders Supply v. Caffin*, 248 Cal App 2d 292, 56 Cal Rptr 365.

Del. "Common name" statutes protect the residents of the state from the activities of unidentifiable associations engaged in business under assumed or common names. *Bechtel v. Robinson*, 886 F2d 644 (CA3 1989).

Ga. Failure to register other or assumed name in accordance with statute will result in corporation's loss of right to prevent others from using it. *National Brands Stores*,

Inc. v. Muse & Associates, 183 Ga 88, 187 SE 84.

Failure to record such assumed name does not relieve corporation from its liability as signer of contract. *Atlanta Butchers Abattoir & Stock Yard Co. v. Reaves*, 54 Ga App 138, 187 SE 162.

Ill. *Precision Components, Inc. v. Kapco Communications*, 131 Ill App 3d 555, 475 NE2d 1071.

Tex. If a party fails to file an assumed name certificate he cannot maintain a suit in a Texas court under that name. *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 SW2d 596 (Tex App 1994).

Va. *Leckie v. Seal*, 161 Va 216, 170 SE 844, 847.

¹¹ Ky. *Galt House, Inc. v. Home Supply Co.*, 483 SW2d 107 (Ky).

Common law protection of names against unfair competition or trademark infringement, see § 2422 et seq.

¹² U.S. *El Rancho, Inc. v. First Nat. Bank of Nevada*, 406 F2d 1205 (applying Nevada law); *Davis v. Tex-O-Kan Flour Mills Co.*, 186 F2d 50 (applying Texas law).

Ariz. *Kitchell Corp. v. Herman*, 8 Ariz App 424, 446 P2d 934.

Cal. One who purchases goods from a corporation under a certain corporate name is estopped to defend an action for the purchase price on the ground that the name used by the corporation in the trans-

action was not its true name and that it has not complied with statutory regulations governing the use of fictitious names. *Curtin v. Salomon*, 80 Cal App 470, 251 P 237.

Ga. *Atlanta Butchers Abattoir & Stock Yard Co. v. Reeves*, 54 Ga App 138, 187 SE 162; *Golden's Foundry & Machine Co. v. Wight*, 35 Ga App 85, 132 SE 138.

Where it appeared that corporation which executed reconveyance as release of security deed was identical corporation which as grantee had held security deed, deed so executed as reconveyance was lawful and binding act of corporation, effectual for purpose intended, regardless of difference in name. *Smith v. Hedenberg*, 189 Ga 678, 7 SE2d 234.

Promissory note payable to "J.F. Darby, trading as the J.F. Darby Lumber Company," is not void and unenforceable against maker thereof because trade name was not registered as required by statute. *Stewart v. Darby Banking Co.*, 183 Ga 888, 190 SE 28.

Ida. *Colorado Milling & Elevator Co. v. Proctor*, 58 Idaho 578, 76 P2d 438, citing this treatise.

Ill. *Mount Palatine Academy v. Kleinschmitz*, 28 Ill 133.

A corporation will not be denied relief in equity by reason of the fact that it was doing business and made the contract involved in a name other than its corporate name in the absence of a showing that the adverse party sustained injury or loss thereby. *Standard Distilling & Distributing Co. v. Springfield Coal Mining & Tile Co.*, 146 Ill App 144, affd 239 Ill 600, 88 NE 236.

Ind. *Hasselman v. Japanese Development Co.*, 2 Ind App 180.

Iowa. *Butler Mfg. Co. v. Elliott & Cox*, 211 Iowa 1068, 233 NW 669.

Kan. *Kansas Milling Co. v. Ryan*, 152 Kan 137, 102 P2d 970, citing this treatise.

Ky. *Meredith v. Universal Plumbing & Construction Co.*, 272 Ky 283, 114 SW2d 94, citing this treatise; *Neff v. Covington Stone & Sand Co.*, 55 SW 697 (Ky), rev'd on another point, 56 SW 723.

Check signed by corporate agent, "Agent's Disbursing Account," is signed in trade name within meaning of statute making such person liable to same extent as if he had signed in his own name. *National Deposit Bank of Owensboro v. Ohio Oil Co.*, 250 Ky 288, 62 SW2d 1048.

La. A corporation may contract to provide services under a name other than its registered corporate name and yet recover payment for those services under its registered corporate name, upon proof that it operated under the trade name it used in providing those services. *Mas Nursing Inc. v. Burke*, 523 So 2d 909 (La App 1988).

Use of trade name "Li'l General Stores" in execution of sublease did not make contract void for lack of capacity where it was established that "Li'l General," though not a legal entity itself, was operating division of bona fide parent corporation. *Cuoco v. Pik-a-Pak Grocery Corp.*, 379 So 2d 856 (La App).

Mass. *Merrimac Chemical Co. v. Moore*, 279 Mass 147, 181 NE 219.

Corporation may assume trade name and conduct business under name other than one designated in its charter, and is bound to persons who have dealt with it under such assumed name. *Blanchard v. Stone's, Inc.*, 304 Mass 634, 24 NE 688.

A corporation may assume or be known by different names, and con-

does not depend on whether the name of the corporation is known to be fictitious, but upon whether the name is used in good faith. ¹³ The

tract accordingly, and contracts so entered into will be valid and binding if unaffected by fraud. *William Gilligan Co. v. Casey*, 205 Mass 26, 91 NE 124.

Mich. *Ferry v. Cincinnati Underwriters*, 111 Mich 261, 69 NW 483.

Mo. *State v. Kelly*, 408 SW2d 383 (Mo App).

Nev. *El Rancho, Inc. v. First Nat. Bank of Nevada*, 406 F2d 1205.

N.Y. *Mail & Express Co. v. Parker Axles*, 204 App Div 327, 198 NYS 20.

A corporation formed for the purpose of owning a newspaper can enforce a contract made in the name of the instrumentality through which the corporation speaks, rather than in the correct title of the corporation. *Mail & Express Co. v. Parker Axles*, 204 App Div 327, 198 NYS 20.

Okla. *Oklahoma Operating Co. v. Shipley*, 171 Okla 484, 43 P2d 445.

S.C. *Long v. Carolina Baking Co.*, 193 SC 225, 8 SE2d 326.

Tenn. *Kammons Willson, Inc. v. Allied Bank of Texas*, 836 SW2d 104 (Tenn App 1992); *Bill Walker & Associates, Inc. v. Parrish*, 770 SW2d 764 (Tenn App 1989), citing this treatise.

Tex. *Nichols v. Seale*, 493 SW2d 589 (Tex Civ App); *W.B. Clarkson & Co. v. Gans S.S. Line*, 187 SW 1106 (Tex Civ App).

Davis v. Tex-O-Kan Flour Mills Co., 186 F2d 50.

Generally, use of a trade name under which a corporation does business is not a sufficient disclosure of the identity of the corporate principal nor of the fact of agency, as

where contract is signed in trade name by corporate agent's individual signature. *Lachmann v. Houston Chronicle Pub. Co.*, 375 SW2d 783 (Tex Civ App).

Utah. *North Point Consolidated Irr. Co. v. Utah & S.L. Canal Co.*, 16 Utah 246, 52 P 168.

Wash. *Brotherhood State Bank of Spokane v. Chapman*, 145 Wash 214, 259 P 391.

W. Va. *Milligan Coal Co. v. Polowy*, 108 W Va 458, 151 SE 429; *MacQuoid v. West Virginia Newspaper Pub. Co.*, 105 W Va 20, 141 SE 398, citing this treatise; *Board of Education of Walton Dist., Roane County v. Board of Trustees, Walton Lodge No. 132, I.O.O.F.*, 78 W Va 445, 88 SE 1099; *Grafton Grocery Co. v. Home Brewing Co. of Grafton*, 60 W Va 281, 54 SE 349.

The identity of a corporation entering into a contract under an assumed name may be established by the ordinary methods of proof. *Marmet Co. v. Archibald*, 37 W Va 778, 17 SE 299.

Wis. *Woodrough & Hanchett Co. v. Witte*, 89 Wis 537, 62 NW 518.

¹³ *Ariz. Kitchell Corp. v. Hermansen*, 8 Ariz App 424, 446 P2d 934, citing this treatise.

La. *Ready Portion Meat Co. v. Michael's A Catering Experience*, 542 So 2d 207 (La App 1989).

Under a statute criminally penalizing one for not registering any assumed name one uses, a party contracting with that individual may not use the fact of the statutory violation as a defense to avoid payment for services rendered or goods sold. *Mas Nursing Inc. v. Burke*, 523 So 2d 909 (La App 1988).

use of a trade name is not itself sufficient disclosure to a contracting party of the identity of an undisclosed corporate principal and the fact of agency.¹⁴

§ 2443 Pleading requirements.

As fully discussed elsewhere in this treatise, a suit by or against a corporation generally may brought under the name in which it transacts business, whether the name is its legal corporate name¹ or an assumed or fictitious name.²

§ 2444 Effect of misnomer.

A corporation is identified by its name,¹ which usually consists of several words. An omission or misdescription of one or more of the words in a corporate name is not so likely to confuse, mislead, or deceive, as would be the case with the name of an individual.² As discussed in a preceding section of this chapter,³ a corporation may transact business under several different names. Consequently, the misnomer of a corporation generally will not be treated by the courts as material, if the identity of the corporation is reasonably clear or can be ascertained by sufficient evidence.⁴ In other words, slight

¹⁴ Ill. Precision Components, Inc. v. Kapco Communications, 131 Ill App 3d 555, 475 NE2d 1071.

N.Y. Seller of merchandise was entitled to recover balance due from individual, apparently representing store operating under trade name, as agent for undisclosed corporate principal. Judith Garden, Inc. v. Mapel, 73 Misc 2d 810, 342 NYS2d 486.

Tex. Lachmann v. Houston Chronicle Pub. Co., 375 SW2d 783 (Tex Civ App).

The name Turtle Creek Racquet Club in an advertising contract requiring the advertiser to print the company name exactly as it should appear is not a per se trade name. Lassiter v. Rotogravure Committee, Inc., 727 SW2d 8 (Tex App).

Liability of corporate officers on contracts for undisclosed corporate principals, see § 3036.

[Section 2443]

¹ See § 4492.

² See § 4494.50.

[Section 2444]

¹ See § 2414.

² Ill. Marquette Nat. Bank v. B.J. Dodge Fiat, Inc., 131 Ill App 3d 356, 475 NE2d 1057.

N.H. Newport Mechanics' Mfg. Co. v. Starbird, 10 NH 123.

³ Authority to conduct business under assumed or fictitious name, see § 2442.

⁴ U.S. Chew v. First Presbyterian Church of Wilmington, Del., 237 F 219; In re Goldville Mfg. Co. of Goldville, S.C. (Ex parte South Carolina Loan & Trust Co.), 118 F 892; Clement v. Lethrop, 18 F 885.

Ala. Smith v. Tallahassee Branch of Cent. Plank-Road Co., 30 Ala 650; Douglass v. Branch Bank of Mobile, 19 Ala 659; Redstone Land & Devel-

opment Co. v. Boatwright, 209 So 2d 221 (Ala App).

Ark. Meek v. United States Rubber Tire Co., 244 Ark 359, 425 SW2d 323.

Conn. Seaboard Commercial Corp. v. Leventhal, 120 Conn 62, 178 A 922.

See also Woronicki v. Palski, 74 Conn 224, 50 A 562.

Del. Elbert v. Wilmington Turngemeinde, 7 Boyce (30 Del) 355, 107 A 215.

Fla. Sweet v. Ranger Realty Co., 108 Fla 249, 146 So 199; Laws v. Ranger Realty Co., 110 Fla 149, 148 So 583; American Ladder & Scaffold Co. v. Miami Ventilated Awning Co., 150 So 2d 268 (Fla App), citing this treatise.

Ga. Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga App 380, 170 SE2d 724.

President of corporation was not individually liable on contract merely because he executed it on behalf of "Hawkins Plumbing Company, Inc." rather than using proper name of "Hawkins Heating and Plumbing Company, Inc." Gawjubs v. Turner, 186 Ga App 50, 303 SE2d 164, citing this treatise.

Ill. Northwestern Distilling Co. v. Brant, 69 Ill 658; Chadsey v. McCreery, 27 Ill 253; Schmisser v. Rehhan, 294 Ill App 172, 13 NE2d 627.

Ind. Glass v. Tipton, T. & B. Turnpike Co., 32 Ind 376.

Iowa. Hickman v. Hygrade Packing Co., 185 NW2d 801 (Iowa).

Ky. Kentucky Seminary v. Wallace, 15 B Mon 35.

Md. Chilton v. Brooks, 71 Md 445, 18 A 868; Coulter v. Western Theological Seminary, 29 Md 69.

Mass. Melledge v. Boston Iron Co., 5 Cush 158; Commercial Bank v. French, 21 Pick 488.

Mich. Bil-Gel Co. v. Thoma, 345 Mich 698, 77 NW2d 89; St. Matthews Evangelical Lutheran Church v. United States Fidelity & Guaranty Co., 222 Mich 256, 192 NW 784; Thatcher v. West River Nat. Bank, 19 Mich 196.

Minn. Clarke v. Milligan, 58 Minn 413, 59 NW 955.

Confusion in sometimes using the name "Minnesota Annual Conference" and sometimes "Minnesota Annual Conference of the Methodist Episcopal Church" was unimportant. Parker College v. Minnesota Annual Conference, 182 Minn 501, 235 NW 12.

Mo. Adler v. Kansas City, S. & M.R. Co., 92 Mo 242, 4 SW 917; Martin v. Signal Dodge, Inc., 444 SW2d 29 (Mo App).

N.H. Newport Mechanics' Mfg. Co. v. Starbird, 10 NH 123.

N.J. Hoboken Bldg. Ass'n v. Martin, 13 NJ Eq 427.

N.M. State v. Regents of University of New Mexico, 32 NM 428, 258 P 571, citing this treatise.

N.Y. House of Good Shepherd v. Rector, etc., of Church of Good Shepherd in City of Binghamton, 207 App Div 129, 201 NYS 796; Mail & Express Co. v. Parker Axles, Inc., 204 App Div 327, 198 NYS 20.

N.C. Gordon v. Pintsch Gas Co., 178 NC 435, 100 SE 878; Ashville Division No. 15 v. Aston, 92 NC 578.

Ohio. Milford & C. Turnpike Co. v. Brush, 10 Ohio 111.

Pa. Berks & D. Turnpike Road v. Myers, 6 Serg & R 12.

S.C. Griffin v. Capital Cash, 310 SC 288, 423 SE2d 143 (SC App 1992).

Tenn. Life & Casualty Ins. Co. v. City of Nashville, 175 Tenn 688, 137 SW2d 287; Precious Blood Society v. Elsythe, 102 Tenn 40, 50 SW 759.

departures from the name used by the corporation,⁵ such as the omission of a part of its name⁶ or the inclusion of additional words,⁷ generally will not affect the validity of contracts or other business transactions as long as the identity of the corporation can be reasonably established from the evidence.⁸ It is the intent of the parties

Tex. Houston Land & Loan Co. v. Danley, 131 SW 1143 (Tex Civ App).

Suit against corporation by wrong corporate name is still suit against such corporation. *Adams v. Consol. Underwriters*, 133 Tex 26, 124 SW2d 840.

Va. Culpeper Agr. & Mfg. Co. v. Digges, 6 Rand 165.

W. Va. Marmet Co. v. Archibald, 37 W Va 778, 17 SE 299.

Wis. Woodrough & Hanchett Co. v. Witte, 89 Wis 537, 62 NW 518.

⁵ **U.S.** Chew v. First Presbyterian Church of Wilmington, Del., 237 F 219.

Ark. Meek v. United States Rubber Tire Co., 244 Ark 359, 425 SW2d 323.

Ill. Marquette Nat. Bank v. B.J. Dodge Fiat, Inc., 131 Ill App 3d 356, 475 NE2d 1057.

Mass. Simpionbato v. Royal Ins. Co., Ltd., 253 Mass 606, 149 NB 666.

Mo. Deck & Decker Personnel Consultants, Ltd. v. Pigg, 555 SW2d 705 (Mo App).

Tex. Fact that corporate seal does not exactly coincide with name typed in blanks on printed form does not invalidate contract. *Texas Elec. Service Co. v. Commercial Standard Ins. Co.*, 592 SW2d 677 (Tex Civ App).

⁶ **Ala.** Omission of the word "Corporation" from the name of a corporate mortgagee in a chattel mortgage does not invalidate it. *Spicer v. State*, 24 Ala App 162, 133 So 58.

Cal. People v. Sierra Buttes Quartz Min. Co., 39 Cal 511.

Ill. An insignificant discrepancy between the corporate designation on the note and the demand account did not create a bar to the garnishment of the demand account. *Marquette Nat. Bank v. B.J. Dodge Fiat, Inc.*, 131 Ill App 3d 356, 475 NE2d 1057.

Ky. Pendleton v. Bank of Kentucky, 1 TB Mon 171.

Mo. The omission of the word "Company" from the name of the corporation sued would be deemed such an imperfection as was curable under the statute. *Brassfield v. Quincy, O.&K.C.R. Co.*, 109 Mo App 710, 83 SW 1032.

⁷ **Del.** Elbert v. Wilmington Turngemeinde, 7 Boyce (30 Del) 355, 107 A 215; *Lapham v. Philadelphia, B.&W.R. Co.*, 4 Pennw 421, 56 A 366.

Tex. Western Bank & Trust Co. v. Ogden, 42 Tex Civ App 465, 93 SW 1102.

⁸ **U.S.** It is clear under Ohio law, that if an incorrect corporate name appears, the corporation is nevertheless bound if it is obvious that the name was given in error and that the corporation sought to be bound is the corporation intended in the guarantee. *In re B-F Bldg. Corp.*, 182 F Supp 602.

Ill. Pilsen Brewing Co. v. Wallace, 214 Ill App 540.

La. Where a name, other than the regular corporate name by which corporation was incorporated, is

that controls.⁹ Error in the use of the corporate name will not be permitted to frustrate the intent which the name was meant to convey.¹⁰

used in written contract, and no agency is disclosed, contract is prima facie not that of corporation, but this presumption may be rebutted by evidence from another source, and this rule applies to promissory notes. *Stephens v. Bracklin*, 16 La App 272, 134 So 326.

Mass. Melledge v. Boston Iron Co., 5 Cush 158.

Mich. All Saints Polish Nat. Catholic Church v. Gerald, 271 Mich 187, 259 NW 885.

Mo. Deck & Decker Personnel Consultants, Ltd. v. Pigg, 555 SW2d 705 (Mo App); *H.W. Underhill Const. Co. v. Nilson*, 3 SW2d 399 (Mo App), citing this treatise.

Fact that corporate name was incorrect in contract signed by its president in his official capacity did not entitle plaintiff to hold president on the contract. *Wired Music, Inc. v. Wiemann*, 468 SW2d 668 (Mo App).

N.M. A slight discrepancy in the corporate name of a corporation will not invalidate a contract with it, if it appears therefrom, or can be established by parol, what corporation it was that made the contract. *State v. Regents of University of New Mexico*, 32 NM 428, 258 P 571, citing this treatise.

N.Y. Humble Oil & Refining Co. v. Jaybert Esso Service Station, Inc., 30 AD2d 952, 294 NYS2d 190; *Mail & Express Co. v. Parker Axles, Inc.*, 204 App Div 327, 198 NYS 20.

Ohio. *In re B-F Bldg. Corp.*, 182 F Supp 602.

Tex. Departure from strict name of corporation will not avoid its contracts if its identity substantially appears. *Texas Elec. Service*

Co. v. Commercial Standard Ins. Co., 592 SW2d 677 (Tex Civ App).

Omission of word, "Company," from signature of corporation to contract, does not invalidate contract, where omission in no way tended to indicate different entity, or to mislead. *Houston Press Co. v. Bowden Bros.*, 51 SW2d 438 (Tex Civ App).

Va. Contracts may be made by and with a corporation by a mistaken name, if the mistake be only in syllables et verbis, and not in sensu et re ipsa. *Culpeper Agr. & Mfg. Society v. Digges*, 6 Rand (Va) 165.

W. Va. Board of Education of Walton Dist., Roane County v. Board of Trustees, Walton Lodge No. 132, I.O.O.F., 78 W Va 445, 88 SE 1099.

Evidence relating to name and identity of corporation, see § 4591.

⁹ **U.S.** B-F Bldg. Corp. v. Coleman, 284 F2d 679, citing this treatise.

Mo. Deck & Decker Personnel Consultants, Ltd. v. Pigg, 555 SW2d 705 (Mo App); *Guess v. Russell Bros. Clothing Co.*, 231 SW 1015 (Mo App).

¹⁰ **Del.** Washington Fire Co. No. 7, City of Wilmington, Del. v. Yates, 13 Del Ch 32, 115 A 365.

Ill. Marquette Nat. Bank v. B.J. Dodge Fiat, Inc., 131 Ill App 3d 356, 475 NE2d 1057.

Va. Assignment of rights for services rendered under construction contract was effective despite assignor's erroneous designation of contractor as "Commercial Industries, Inc." rather than its true name "Commercial Industrial Construc-

Issues concerning the misnomer of a corporation generally arise in connection with litigation. The various pleading issues, including misnomers in the complaint,¹¹ objections to misnomers,¹² and amendments to correct misnomers,¹³ are fully discussed in the chapter on actions by and against corporations. The impact of misnomers on service of process¹⁴ and evidentiary matters¹⁵ are also discussed in that chapter. The impact of misnomers on criminal indictments against corporations is discussed in the chapter covering the criminal liability of corporations.¹⁶

Courts have applied this general principle to various types of contracts and transactions, including surety and fidelity bonds,¹⁷ guaranty agreements,¹⁸ insurance policies,¹⁹ negotiable instruments,²⁰ mortgages,²¹ tax documents,²² leases,²³ share

tion, Inc." *Lataif v. Commercial Industrial Const., Inc.*, 233 Va 59, 286 SE2d 159, citing this treatise.

¹¹ See § 4494.

¹² See § 4545.

¹³ See § 4566.

¹⁴ See § 4446.

¹⁵ See § 4591.

¹⁶ See § 4961.

¹⁷ Ky. The omission of the words "and company" in naming a corporation does not invalidate the bond of a corporate officer. *Pendleton v. Bank of Kentucky*, 1 B Mon 171.

Mich. A surety on a building contractor's bond could not insist in an action on the bond that there was a want of identity of plaintiff's and defendant's principal in the bond because the building contract was with the Singer Chimney & Construction Company and defendant's undertaking was for a default of the Singer Chimney Company, and because the bond was given to St. Matthew's Evangelical Lutheran Congregation instead of the Evangelical Lutheran St. Matthew's Church, where the surety could not have been at any time in doubt as to the identity of the parties. *St. Mat-*

thew's Evang. Luth. Church v. United States Fidelity & Guaranty Co., 222 Mich 256, 192 NW 784.

¹⁸ N.Y. *Humble Oil & Refining Co. v. Jaybert Esso Service Station, Inc.*, 30 AD2d 952, 294 NYS2d 190.

¹⁹ Mass. *Simpsonbate v. Royal Ins. Co.*, 253 Mass 606, 149 NE 666. N.C. *Belk's Dept. Store of New Bern, N.C., Inc. v. George Washington Fire Ins. Co.*, 208 NC 267, 180 SE 63.

²⁰ Ill. Misnomer of corporate noteholder in note did not defeat recovery thereon. *Schmisseur v. Rebhan*, 294 Ill App 172, 13 NE2d 627.

Kan. Under Kansas statute, variance between name of payee in body of note as "Anderson Merc. Co.," and indorsement as "W.O. Anderson Merc. Co.," is not fatal to validity of indorsement. *First Nat. Bank of Hays v. Menze*, 135 Kan 143, 10 P2d 19.

Mass. *General Motors Acceptance Corp. v. Haley*, 329 Mass 559, 109 NE2d 143 (trust receipt).

Tex. "Houston Loan & Land Company" is liable on notes executed by it as the "Houston Land & Loan Company." *Houston Land &*

subscription agreements,²⁴ security agreements or financing statements,²⁵ deeds and conveyances,²⁶ contract assignments,²⁷ and testamentary bequests.²⁸ The addition or omission of the term "Inc."

Loan Co. v. Danley, 131 SW 1143 (Tex Civ App).

²¹ See § 3121.

²² Fla. Inadvertent misnomer of purchaser of tax sale certificate was no bar to enforcement of certificate. *Laws v. Ranger Realty Co.*, 110 Fla 149, 148 So 583; *Sweet v. Ranger Realty Co.*, 108 Fla 249, 146 So 199.

²³ N.Y. *Shargood Corp. v. G.R. Kinney Co., Inc.*, 248 App Div 294, 285 NYS 371.

Execution and formal requirements of leases, see § 2981.

²⁴ See § 1479.

²⁵ U.S. Under Colorado law, financing statement which erroneously identified corporate secured party as its closely-related, wholly-owned subsidiary was valid where no searching creditor would have been misled. *In re Colorado Mercantile Co.*, 299 F Supp 55.

Colo. *In re Colorado Mercantile Co.*, 299 F Supp 55.

N.Y. *In re Nara Non Food Distributing Inc.*, 66 Misc 2d 779, 322 NYS2d 194, affd 36 App Div 2d 796, 320 NYS2d 1014 (abbreviation of corporate debtor's name in financing statement not misleading).

Misspelling of corporate debtor's name in filed financing statement was so misleading under circumstances of case as to render security interest ineffective under Uniform Commercial Code *John Deere Co. of Baltimore, Inc. v. William C. Pahl Const. Co.*, 59 Misc 2d 872, 300 NYS2d 701.

²⁶ U.S. Thus where the word "Church" was erroneously inserted in the name of a religious corporation, party to a deed, instead of the

word "Congregation," such variation was not fatal, it appearing that the two designations applied to the same corporation. *Chew v. First Presbyterian Church of Wilmington, Del.*, 237 F 219.

Del. *Washington Fire Co. No. 7 v. Yates*, 13 Del Ch 32, 115 A 365, citing this treatise.

If it can be ascertained from the grant or conveyance, or from proper evidence from another source, what corporation is intended, the mistake in its name is not fatal. *Elbert v. Wilmington Turngemeinde*, 7 Boyce (30 Del) 355, 107 A 215.

Ill. To sustain grants to or by corporations some latitude is permitted in the use of their names, it being usually sufficient to use the name in substance, though not the same in exact words and syllables. *Sykes v. People*, 132 Ill 32, 23 NE 391.

Where a deed is made to a corporation by a name other than its true one, the corporation may sue in its true name and aver in the declaration that the defendant made the deed to it by the name appearing in such deed. *Northwestern Distilling Co. v. Brant*, 69 Ill 658, 661.

N.Y. *New York African Society v. Varick*, 13 Johns (NY) 38.

S.C. *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.*, 76 SC 76, 56 SE 654.

²⁷ Va. *Lataif v. Commercial Industrial Const., Inc.*, 233 Va 59, 286 SE2d 159.

²⁸ U.S. Property bequeathed to "Georgetown University, in the District of Columbia" was permitted to go to "The President and Directors of

will not be considered material where it is apparent that such abbreviations

Georgetown College," in such district where there was therein no university incorporated under the name used, and it appeared that it was the intention that the property should pass to an incorporated institution, it being expressly provided by the act incorporating Georgetown College that no misnomer thereof should defeat or annul any donation, etc., thereto. *Speer v. Colbert*, 200 US 130, 141, 50 L Ed 403, 26 S Ct 201.

Ark. "Convent of the Sisters of Mercy at Ft. Smith, known as St. Anne's Convent" referred to "Sisters of Mercy of the Female Academy of Ft. Smith." *McDonald v. Shaw*, 81 Ark 235, 98 SW 952.

Cal. Fact that in will corporate legatee is described by ordinary rather than official or true name will not defeat legacy. In re *Brehm's Estate*, 116 Cal App 206, 2 P2d 402.

Ill. To sustain a devise to a corporation it has been held sufficient if the words used show that the testator could only mean a particular corporation, though the name be entirely mistaken. *Sykes v. People*, 132 Ill 32, 47, 23 NE 391.

Ky. A devise over to the "Home Christian Missionary Society, of which Benj. L. Smith of Cincinnati, Ohio, is corresponding secretary" was not uncertain as to the devisee because the society was misnamed therein, its true name being "American Christian Missionary Society." *American Christian Mission Society v. Tate*, 198 Ky 621, 250 SW 483.

Me. Preachers' Aid Society v. Rich, 45 Me 552.

Md. Home for Incurables of Baltimore City v. Bruff, 160 Md 156, 163 A 403; *Vansant v. Roberts*, 3 Md 119.

Misnomer of corporation will not defeat, devise or bequest to it, provided that the identity of corporation is otherwise sufficiently certain. *Inasmuch Gospel Mission v. Mercantile Trust Co. of Baltimore*, 184 Md 231, 40 A2d 506.

"The Vestry of the Parish of the Ascension of Carroll County" was held entitled to a devise made to "The Vestry of Ascension Church, Ascension Parish, in Westminster, in Carroll County, Md." *Doan v. Vestry of Parish of Ascension, Carroll County*, 103 Md 662, 64 A 314.

Mass. *Minot v. Boston Asylum*, 7 Metc 416; *First Parish in Sutton v. Cole*, 3 Pick 232.

Mo. *St. Louis Hospital Ass'n v. Williams*, 19 Mo 609.

N.H. In re *Morrison Estate*, 106 NH 388, 211 A2d 904.

N.Y. *New York Inst. v. How*, 10 NY 84; *House of Good Shepherd v. Rector, etc., of Church of Good Shepherd*, 207 App Div 129, 201 NYS 798; *Kernochan v. Farmers' Loan & Trust Co.*, 187 App Div 668, 175 NYS 831; In re *Johnson's Estate*, 148 Misc 218, 265 NYS 395; In re *Burger's Estate*, 123 Misc 308, 205 NYS 220.

"Sisters of the Poor of St. Francis" was entitled to the proceeds of a devise directed to be paid over to "the trustees of St. Francis Hospital in the city of New York," there being no corporation name "St. Francis Hospital" in such city. *Johnson v. Hughes*, 187 NY 446, 80 NE 373.

A corporation may be designated by its corporate name, by the name by which it is usually or popularly called and known, by a name by which it was known and called by the testator, or by any other name or description by which it can be distin-

viation merely means a corporation and is not an essential part of the name.²⁹ The omission, addition, or misdescription of a geographical phrase has been regarded as unimportant.³⁰ It is not a material misnomer to identify a part of the corporate name by an appropriate

guished from every other corporation. *Lefevre v. Lefevre*, 59 NY 434.

"Church of the Lady of the Lake, Cooperstown, N.Y." was entitled to devise to "St. Mary Roman Catholic Church of Cooperstown, N.Y." In re *Foley's Estate*, 27 Misc 77, 58 NYS 201.

N.C. *Ryan v. Martin*, 91 NC 464.

Ohio. *Kovar v. Kortan*, 3 Ohio Misc 63, 209 NE2d 762.

Pa. In re *Washington & Lee University's Appeal*, 111 Pa 572, 3 A 664; In re *Newell's Appeal*, 24 Pa 197.

Tenn. *Durell v. Martin*, 172 Tenn 97, 110 SW2d 316.

Vt. *Button v. American Tract Society*, 23 Vt 336.

Va. "Richmond Home for Ladies" was entitled to a bequest made to "the Trustees of the Presbyterian Home for Old Ladies situated in Richmond, Va." *Jordan's Adm'r v. Richmond Home for Ladies*, 106 Va 710, 56 SE 730.

²⁹ Ark. *Central Supply Co. v. Wren*, 198 Ark 1090, 133 SW2d 632.

Cal. *Indian Refining Co., Inc. v. Royal Oil Co., Inc.*, 102 Cal App 710, 283 P 856.

Fla. *Gables Racing Ass'n v. Persky*, 116 Fla 77, 156 So 392.

La. *R.B. Tyler Co. v. Merrill Engineering Co.*, 181 La 191, 159 So 319; *Placid Oil Co. v. A.M. Dupont Corp.*, 148 So 2d 166 (La App).

Validity of corporation contract was not affected by the accidental omission of the abbreviation "Inc.,"

from the name in the signing of the contract. *National Oil Works, Inc. v. Korn Bros.*, 164 La 800, 114 So 659.

It is matter of common knowledge that corporations frequently do not use the words "incorporated" or "limited," which form part of its corporate name. *Merchandise Reporting Co., Inc. v. Weiss & Goldring*, 168 So 336 (La App).

Mich. *Bill-Gel Co. v. Thoma*, 345 Mich 698, 77 NW2d 89.

R.I. "Inc." is recognized as an abbreviation for "Incorporated," and, therefore, the use of such abbreviation in the signature of a corporation to a bond given to dissolve an attachment was held immaterial. *Andrews v. Belilove*, 49 RI 446, 143 A 857.

Statutory requirements governing words indicating corporateness, see § 2418.

³⁰ Mo. A mistake in describing a defendant corporation as Cinder Block Company of St. Louis, instead of Cinder Block Company of Kansas City, Mo., its true name, is not material where no prejudice results. *Blades v. Cinder Block Co. of St. Louis*, 10 SW2d 319 (Mo App).

W. Va. The fact that the "Home Brewing Company of Grafton" was designated as the "Home Brewing Company" by the claimant of a mechanic's lien in taking the steps necessary to the perfecting and enforcing of such lien, was not fatal to his right to the lien. *Grafton Grocery Co. v. Home Brewing Co. of Grafton*, 60 W Va 281, 54 SE 349.

abbreviation,³¹ such as "Ry." for "Railway,"³² "Co." for "Company,"³³ or "Mfg." for "Manufacturing."³⁴ A mistake in using the word "Company" for "Corporation,"³⁵ or "Corporation" for "Company,"³⁶ or "Company" for "Inc.,"³⁷ is not a material misnomer of the corporation.

The same principles have been applied to special legislative enactments concerning corporations, such as special acts of incorporation,³⁸ special grants of power,³⁹ and property assess-

³¹ Cal. Use by corporation of abbreviation of its name is not ground for forfeiture of its charter. *People v. Bogart*, 45 Cal 73.

Mo. The fact that in both petition and return of service a portion of the names were indicated by appropriate abbreviations makes no difference, since they do not differ essentially from words but are, like them, merely signs of thought. *Porter v. Missouri Pac. R. Co.*, 219 Mo App 19, 267 SW 964.

W. Va. *Stout v. Baltimore & O.R. Co.*, 64 W Va 502, 63 SE 317 (use of initials of the corporation).

³² Mo. *Porter v. Missouri Pac. R. Co.*, 219 Mo App 19, 267 SW 964.

³³ Mass. Trust receipt identifying corporation as "Co." rather than "Company" was sufficient notice of the trust and the change to be insignificant. *Sales Finance Corp. v. McDermott Appliance Co.*, 340 Mass 493, 166 NE2d 119.

Mo. *Porter v. Missouri Pac. R. Co.*, 219 Mo App 19, 267 SW 964.

³⁴ Ga. *Robinson v. Reward Ceramic Color Mfg., Inc.*, 120 Ga App 380, 170 SE2d 724.

Ill. *Seiberling v. Miller*, 207 Ill 443, 69 NE 800.

³⁵ U.S. *Frederick v. Motors Mortg. Corp.*, 1 F2d 437.

³⁶ W. Va. *Varney & Evans v. Hutchinson Lumber & Manufacturing Co.*, 64 W Va 417, 63 SE 203.

³⁷ Mass. An automobile insurance policy is not voided by the fact that the name of the vendor is stated therein to be the "Wilys-Overl and Company" whereas its correct name is the "Wilys-Overland, Inc." *Simpionbato v. Royal Ins. Co., Ltd.*, 253 Mass 606, 149 NE 666.

³⁸ Del. An act was effective to reincorporate the "Washington Fire Company of the City of Wilmington" although it erroneously used the name "Washington Steam Fire Engine & Hook & Ladder Company No. 7 of the City of Wilmington, Delaware," where it was clear that the legislature intended to refer to such corporation. *Washington Fire Co. No. 7 v. Yates*, 13 Del Ch 32, 115 A 365.

Minn. *Cotton v. Mississippi & R. River Boom Co.*, 22 Minn 372.

Mo. A corporation, designated "St. Vincent College" in the title of the incorporating act, and "President and Faculty of St. Vincent's College" in the body thereof, is entitled to a tax exemption running in favor of "St. Vincent College." *St. Vincent's College v. Schaefer*, 104 Mo 261, 16 SW 395.

Wis. *Attorney General v. Chicago & N.W. Ry. Co.*, 35 Wis 425.

³⁹ N.M. A statute authorizing "the Board of Regents of the University of New Mexico" instead of "the Regents of the University of New

ments.⁴⁰

§§ 2445-2450 [Reserved]

§ 2451 Change of name—In general.

A corporation may change its original name but its right to do so is not absolute.¹ A corporation has no right or power without statutory or other legal authorization to abandon its name and adopt a new or different name.² This does not mean that a corporation cannot con-

Mexico" to issue bonds, held not to render bonds invalid. *State v. Regents of University of New Mexico*, 32 NM 428, 258 P 591.

⁴⁰ Cal. *People v. Sierra Buttes Quartz Min. Co.*, 39 Cal 511.

N.H. See *Souhegan Nail, Cotton & Woollen Factory v. McConihe*, 7 NH 309.

[Section 2451]

¹ U.S. Grand Lodge of benevolent fraternal corporation does not by allowing use of its name in incorporation of subordinate state lodges, forfeit right to anjoin unfair competition by use of same name by rival organization. *Grand Lodge I.B.P.O. Elks v. Grand Lodge I.B.P.O. Elks, Inc.*, 50 F2d 860, 864.

Ala. *Cadden v. Ladd*, 358 So 2d 437 (Ala).

D.C. *American Elementary Elec. Co. v. Normandy*, 46 App Cas 329.

Ga. Statute authorizing trustees of university to accept bequests, donations and grants of property for use of university, does not prohibit legislature from changing name of university. *State v. Regents of University System of Georgia*, 179 Ga 210, 175 SE 567.

Ill. *Pilsen Brewing Co. v. Wallace*, 291 Ill 59, 125 NE 714.

Ind. *Lindenberg v. M & L Builders & Brokers, Inc.*, 158 Ind App 311, 302 NE2d 816.

Miss. *North Mississippi Savings & Loan Ass'n v. Confederate States Savings & Loan Ass'n*, 250 Miss 463, 166 So 2d 119 (charter amendment changing corporate name and domicile adopted at stockholders' meeting).

N.Y. In re *Albany City Sav. Institution*, 116 Misc 561, 190 NYS 334, affd 200 App Div 848, 191 NYS 913.

² U.S. Fact that colored fraternal order has incorporated under name similar to that already used by white fraternal order, there being no competition between them, does not deprive it of right to protect name against unfair competition by rival colored organization appropriating same name. *Grand Lodge I.B.P.O. Elks v. Grand Lodge I.B.P.O. Elks, Inc.*, 50 F2d 860.

Ala. *Cadden v. Ladd*, 358 So 2d 437 (Ala).

D.C. *American Elementary Elec. Co. v. Normandy*, 46 App Cas 329.

Ill. *Pilsen Brewing Co. v. Wallace*, 291 Ill 59, 125 NE 714; *Sykes v. People*, 132 Ill 32, 23 NE 391; *Anzalone v. Durchslag*, 1 Ill App 3d 125, 273 NE2d 752.

Corporation has no right or power to change or alter name originally selected by it, without recourse to such formal proceedings as are pre-

n. 7.

U.S. In an action for service mark infringement, the factors pertaining to the relationship between the parties' advertising, channels of trade and classes of prospective purchasers supported a finding of the likelihood of consumer confusion since the parties advertised in the same publication and targeted the same classes of prospective purchasers in the same geographic areas. *Star Financial Services, Inc. v. Aastar Mortgage Corp.*, 89 F3d 5 (CA1 1996). For an expanded analysis of this case, see *Fletcher Corp Law Advisor* 1996—No. 9.

n. 9.

U.S. *Star Financial Services, Inc. v. Aastar Mortgage Corp.*, 89 F3d 5 (CA1 1996). For an expanded analysis of this case, see *Fletcher Corp Law Advisor* 1996—No. 9.

n. 11.

U.S. Trademark infringer deliberately and unjustifiably disobeyed injunction prohibiting it from sending out any forms using the infringing name, even though the infringer's employees testified that they did not intend to violate the injunction; the infringer sent notices that it was changing its name, and those notices mentioned the infringing name. *Star Financial Services, Inc. v. Aastar Mortgage Corp.*, 89 F3d 5 (CA1 1996). For an expanded analysis of this case, see *Fletcher Corp Law Advisor* 1996—No. 9.

§ 2442 Assumed or fictitious names.

n. 1.

Tex. *Bailey v. Vanacot Concrete Co.*, 894 SW2d 757 (Tex 1995).

§ 2444 Effect of misnomer.

n. 24.

Md. *Curtis G. Testerman Co. v. Buck*, 340 Md-569, 67 A2d 649 (1995).

§ 2459.50 Professional service corporations.

n. 1.

Ga. *Darugar v. Hodges*, 471 SE2d 33 (Ga App 1996) (owner contracted in individual capacity where registered trade name did not indicate professional corporation).

See, e.g., *Ariz Rev Stat Ann* § 10-2216(1); *Del Code Ann tit 8, § 617*; *NJ Rev Stat* § 14A:17-14.

Chapter 23

CORPORATE SEALS

Changes or additions within reprinted material appear in boldface

§ 2462 In general.

n. 5.

Changes have been made to the Connecticut statute:
Conn. Conn Gen Stat § 33-647(3).

§ 2463 Acquisition, adoption, change or alteration.

n. 2.

Changes have been made to the Connecticut statute:
Conn. Conn Gen Stat § 33-647(2).

§ 2466 Use of seal—In general.

n. 17.

Changes have been made to the Connecticut statute:
Conn. Conn Gen Stat § 33-647(2).

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³ See § 4526 et seq.

See also Cyc Fed Proc §§ 15.31, 15.52 (3rd Ed).

⁴ See Cyc Fed Proc § 15.32 (3rd Ed).

Method of attacking defects in process or service, see § 4458.

Lack of jurisdiction as defense in responsive pleadings, see § 4444.

⁵ See § 4555 et seq.

⁶ See Fed R Civ P 7(c).

See, e.g., Ohio R Civ P 7(C).

See also Cyc Fed Proc § 15.150 (3rd Ed).

⁷ See Fed R Civ P 12(b).

See also Cyc Fed Proc § 15.148 et seq. (3rd Ed).

⁸ Fed R Civ P 12(e).

Missouri. If more certainty be asked as to facts of incorporation which need not be pleaded, the motion is frivolous. Motion to make definite and certain by stating the "traversable acts" constituting plaintiff a corporation calls for evidence and is frivolous. *Chillicothe Sav. Ass'n v. Ruegger*, 60 Mo 218.

New York. *Rothschild v. Grand Trunk Ry. Co.*, 10 NYS 36, judgment aff'd 60 Hun 582, 14 NYS 807; *Harmon v. Vanderbilt Hotel Co.*, 79 Hun 392, 29 NYS 783.

See also Cyc Fed Proc § 15.265 et seq. (3rd Ed).

⁹ See Fed R Civ P 12(f).

United States. A whole answer will not be stricken out because matter of abatement (corporate existence) is pleaded with the merits and therefore is waived, even if the motion is to strike that part, it is not absolutely necessary to do so; it may stand as out of the case. *Oregonian*

Ry. Co., Ltd. v. Oregon Ry. & Nav. Co., 22 F 245.

Alabama. Plea nul tiel is properly stricken where amendment already made by defendant gives it correct name as affirmed by the plea. *Central Foundry Co. v. Laird*, 189 Ala 584, 66 So 571.

If the complaint does not describe it as a corporation nor the record show that fact, a plea of nul tiel corporation is properly stricken as irrelevant. *Ware v. St. Louis Bagging & Rope Co.*, 47 Ala 667.

Connecticut. *Mellwain v. Moser Farms Dairy, Inc.*, 40 Conn Supp 230, 488 A2d 102.

Georgia. An immaterial allegation as to the district where the cause of action arose may be stricken out where jurisdiction does not depend on it. *Southern Ry. Co. v. Wells*, 103 Ga 209, 29 SE 714.

Illinois. *Keokuk & Hamilton Bridge Co. v. Wetzel*, 228 Ill 253, 81 NE 864 (plea by defendant of nul tiel corporation properly stricken upon its motion for change of venue).

Indiana. *Wert v. Crawfordsville & A. Turnpike Co.*, 19 Ind 242.

Where existence is admitted by general denial, paragraphs denying it may be stricken out. *Price v. Grand Rapids & I. R. Co.*, 18 Ind 137.

New York. Denial of incorporation on information and belief may be stricken as sham when the motion shows the allegation in the complaint supported by evidence. *Commonwealth Bank v. Pryor*, 11 Abb Pr NS (NY) 227.

Oregon. *Oregon Cent. R. Co. v.*

Wait, 3 Or 91; *Oregon Cent. R. Co. v. Scoggin*, 3 Or 181.

Virginia. A complaint will not be stricken for lack of jurisdiction appearing on its face. *Guarantee Co. of North America v. First Nat. Bank*, 95 Va 480, 28 SE 909.

See also Cyc Fed Proc § 15.339 et seq. (3rd Ed).

¹⁰ Fed R Civ P 12(c).

Kentucky. Judgment on the pleadings should be given where the answer not only does not deny the cause of action, but fails to deny that it had been doing business under the name sued by. *Wilbite v. Convent of Good Shepherd*, 117 Ky 251, 78 SW 138.

See also Cyc Fed Proc § 15.216 et seq. (3rd Ed).

¹¹ New York. *National Bank of Metropolis v. Orcutt*, 48 Barb 256.

Nonincorporation not apparent on the face of the complaint cannot be raised by moving for judgment on the pleadings. *Jantzen v. Emanuel German Baptist Church*, 27 Okla 473, 112 P 1127.

¹² New York. *National Bank of Metropolis v. Orcutt*, 48 Barb 256 (affidavit on corporate existence not admissible on motion for judgment on pleadings).

The pleadings determine where the cause of action arose, when attacked by motion or demurrer, and affidavits on that issue are not receivable. *Delaware, L. & W. R. Co. v. New York, S. & W. R. Co.*, 12 Misc 230, 33 NYS 1081.

¹³ Fed R Civ P 12(b).

See also Cyc Fed Proc § 15.40 et seq. (3rd Ed).

B. COMPLAINTS

§ 4492. Naming and describing corporation.

As noted in a preceding section of this chapter,¹ the title of the action in the complaint must include the names of all the parties. Generally, unless a statute provides otherwise,² actions by or against corporations must be in the corporate name³ and not in the individual names of officers, shareholders, or trustees,⁴ whether it be a de jure or a de facto corporation.⁵ If there are two corporations, or individuals constituting distinct corporations, the complaint should name the corporation affected by the action.⁶ If two corporations are sued as one and the same, their identity must be alleged.⁷

The corporate name used in a complaint must be the true and correct name as fixed by the charter or articles of incorporation.⁸ If a corporate defendant is designated by an alias, such as by listing two names separated by "a/k/a", the two names must both describe what is in fact a single entity.⁹ If the two names

describe separate entities, the alias designation will not be effective in naming a party that does not have actual notice of the proceedings.¹⁰ Actions by and against corporations under assumed, fictitious or trade names are discussed elsewhere in this treatise.¹¹

Whether a suit by or against the party named in the pleadings is a corporate or an individual action may be determined by reference to the cause of action pleaded.¹² A reference in the body of the complaint, or elsewhere in the record, to the parties in the plural form may indicate that individuals and not the corporation were intended as the appropriate parties.¹³ When there has been an actual change of name, the facts should be set forth.¹⁴ The name of a successor corporation is used when the suit is by or against it.¹⁵ A misnomer is not a fatal defect in the pleadings and may be corrected by amendment.¹⁶

¹ See § 4484.

² Georgia. Under statute authorizing the leasing of a state-owned railroad and enacting that the lessee should be a corporation named the W. & A. R. Co. with power to sue and be sued, that name should be used rather than the name of the corporation which became the lessee. Nashville, C. & St. L. Ry. Co. v. Edwards, 91 Ga 24, 16 SE 347.

New York. Leonardsville Bank v. Willard, 25 NY 574 (statute permitting bank to sue in name of its president); Columbia Bank v. Jackson, 24 NY St Rep 738, 4 NYS 433.

Statute did not reciprocally enable the bank to sue on the president's individual cause of action. Bank of Havana v. Magee, 20 NY 355.

Statute allowing the bringing of suit for an association in the president's name did not disable an incorporated association from suing in its

own name. New York Marble Iron Works v. Smith, 11 NY Sup Ct 362.

³ United States. Smith v. Stone, 202 F Supp 11.

Georgia. Kersey v. Grant, 177 Ga 501, 170 SE 501.

Generally, where name of either plaintiff or defendant in a petition is insufficient to show either a natural person, partnership or corporation, the suit is a nullity. South Cobb Builders Supply, Inc. v. Southern Concrete Products Co., 115 Ga App 779, 159 SE2d 121.

Indiana. Tomlinson v. Bricklayers' Union No. 1 of Indiana, 87 Ind 308.

Louisiana. Minton v. Del Corral, 132 La 730, 61 So 771; Interstate Trust & Banking Co. v. Lichtentag, 9 La App 68, 118 So 773.

Massachusetts. Smith v. Hurd, 12 Metc 371.

New York. Ogdensburgh Bank v. Van Rensselaer, 6 Hill 240.

Oregon. Dant & Russell v. Ostind, 148 Or 204, 35 P2d 668, 672.

Vermont. Handy Bros., Inc. v. Tucker, 126 Vt 280, 229 A2d 301.

Virginia. Porter v. Nekervis, 4 Rand 359.

Wisconsin. Button v. Hoffman, 61 Wis 20, 20 NW 667.

Naming of parties in shareholder derivative actions, see § 6004.

⁴ Georgia. Kersey v. Grant, 177 Ga 501, 170 SE 501.

Illinois. Marsh v. Astoria Lodge No. 112, I. O. O. F., 27 Ill 421.

Indiana. Smythe v. Scott, 124 Ind 183, 24 NE 685.

Where complaint named majority stockholder as defendant and did not name corporation, mistake was not mere misnomer. Bowling v. Holdeman, 413 NE2d 1010 (Ind App).

Suing in treasurer's name instead of the corporation's makes judgment erroneous but not void. Nicholson v. Stephens, 47 Ind 185.

Louisiana. A corporation may sue in its own name, without designating its president or any other officer in the complaint. New Orleans Terminal Co. v. Teller, 113 La 733, 37 So 624.

Maryland. A religious corporation should be sued by name and not by names of the persons who are its trustees constituting the corporation and described in the pleading as such. Tartar v. Gibbs, 24 Md 323.

New York. President of religious corporation cannot bring its suit in his own name. Lowenthal v. Wiseman, 56 Barb 490.

North Carolina. Brittain v. Newland, 19 NC 363.

Pennsylvania. The trustees

should not sue on subscriptions made for an object which the corporation represents after it comes into existence. Edinboro Academy v. Robinson, 37 Pa 210.

Naming of parties in shareholder derivative actions, see § 6004.

⁵ California. First Baptist Church of San Jose v. Branham, 90 Cal 22, 27 P 60.

Actions by and against de facto corporations, see § 3857.

⁶ Minnesota. Where a new company and an old one are distinct and both existing, the new one cannot be sued for the old one's doings, under an allegation, contrary to the fact, that they are identical. Titus v. Minnesota Min. Co., 8 Mich 183.

Pleading in actions by or against consolidated corporation, see § 7175.

⁷ Texas. White v. Pecos Land & Water Co., 18 Tex Civ App 634, 45 SW 207.

⁸ New Hampshire. In pleadings involving corporate party, it is better practice to describe the corporation by its correct name and also to allege the state by or under whose laws it was organized. Bourget v. New England Tel. & Tel. Co., 97 NH 193, 84 A2d 830.

Virginia. Frazier v. Virginia Military Institute, 81 Va 59.

Corporate names, see § 2437.

⁹ Georgia. Morgan v. GMC Trucks, 163 Ga App 206, 294 SE2d 350.

¹⁰ Georgia. Morgan v. GMC Trucks, 163 Ga App 206, 294 SE2d 350.

¹¹ See § 2443.

¹² United States. Rike v.

Floyd, 42 F 247 (holding suit by "trustees of" corporation constituting an individual action).

New York. Whether suit by one as president of a bank is to be regarded as one by an individual, or as one in the president's name by the bank according to the statute depends on whether averments of a corporate action and cause of action also appear. *Hallett v. Harrower*, 33 Barb 537.

Texas. Petition declaring on notes signed by president was sufficient to show that corporation was sued, and that judgment against it was good, though suit was brought against him as "president". *Dyer v. Sullivan*, 18 Tex 767.

¹³ Maryland. A prayer for process on a bill against the "president and directors," etc., does not make the corporation a party. *In re Blaney*, 2 Bland 99 (Md).

Massachusetts. Action is not in corporate name where writ describes plaintiffs by name as "Trustees of" named corporation, and refers to them in plural. *Bartlett v. Brickett*, 14 Allen 62.

¹⁴ See § 4493.

¹⁵ See § 4493.

¹⁶ See § 4494.

Amendment of pleadings to correct misnomer, see § 4568.

§ 4493. — Change of name.

As previously discussed elsewhere in this treatise,¹ a mere change in the name of a corporation involves no change in its rights or privileges and it may sue or be sued in its new name.² The change of name must or should be averred as a fact in order to relate the cause of action to the new name, and to identify the corporation with both names.³ Thus, for example, a complaint in an action on a contract may allege that it was made in the old name of the corporation.⁴ In no case should a new name be alleged if it has not yet been adopted or accepted.⁵

A successor corporation to a consolidation, merger, or acquisition which has the same name as its predecessor need only plead that it is the successor of the named corporation.⁶ If the new corporation has a different name from the old corporation, it should be related in interest and succession to the cause of action which ordinarily will require allegations in brief form of the old corporation's existence and the succession of the new corporation to its rights or liabilities.⁷

¹ See § 2456.

² Alabama. If a consolidation

bears the same name the suit proceeds under it; if a different name be chosen it proceeds under the new

name. *Birmingham Ry., Light & Power Co. v. Ensten*, 144 Ala 343, 39 So 74.

Georgia. Corporation was liable in its new corporate name on cause of action arising prior to change, where only its name and location of its principal office were legally changed by amendments and no corporate reorganization occurred. *American Bitumuls & Asphalt Co. v. Homer Leggett Const. Co., Inc.*, 119 Ga App 170, 166 SE2d 430.

Illinois. *Newlan v. Lombard University*, 62 Ill 195.

³ Alabama. Fact of name must be pleaded in action on note in old name. *Madison College v. Burke*, 6 Ala 494.

California. *Cumberland College v. Ish*, 22 Cal 641.

New York. *Hyatt v. McMahon*, 25 Barb 457 (receiver of new corporation suing on a note to it by its original name).

Texas. *Nelson v. Detroit & Security Trust Co.*, 56 SW2d 860 (Tex Com App).

No assignment or devolution of right upon the corporation should be alleged in pleading only a change of name. *Posey v. White House Lumber Co.*, 142 SW 931 (Tex Civ App).

Allegation that plaintiff is the same corporation as one by different name to which the bond in suit runs and that its name was changed as pleaded, is sufficient. *French, Finch*

& Co. v. Hicks, 82 SW 1034 (Tex Civ App).

⁴ California. *American Trust Co. v. Jones*, 130 Cal App 651, 20 P2d 345.

Missouri. *W.T. Rawleigh Co. v. Grigg*, 191 SW 1019 (Mo App).

Pennsylvania. *Northumberland County Bank v. Eyer*, 60 Pa 436.

⁵ Alabama. *Beene v. Cahawba & M. R. Co.*, 3 Ala 660.

⁶ Indiana. *Walker v. Shelbyville & R. Turnpike Co.*, 80 Ind 452.

New York. Succession should be pleaded with definiteness and certainty as to how it came about. *Kaulbach v. Knickerbocker Trust Co.*, 139 App Div 468, 124 NYS 286.

General averment of reorganization and change of name is enough. *Hyatt v. McMahon*, 25 Barb 457.

North Carolina. *Pinnix v. Lake Drummond Canal & Water Co.*, 132 NC 124, 43 SE 578 (requiring affirmative allegation by party relying on it).

See also § 7175.

⁷ Delaware. A successor in a mechanic's lien suit must show the change of name and all necessary facts to show succession. *Montello Brick Co. v. Pullman's Palace Car Co.*, 4 Penne 90, 54 A 687 (Del).

Georgia. *Water Lot Co. v. Bank of Brunswick*, 53 Ga 30.

See also § 7175.

§ 4494. — Misnomer.

As previously discussed in connection with corporate names,¹ a misnomer in a complaint that is not misleading or destructive as to the identity of the corporation may be treated

as immaterial if it is not seasonably objected to, or may be corrected by amendment.² A discussion of amendments to pleadings to correct misnomers is provided in a subsequent section of this chapter.³ A variety of mistakes or misnomers have been held not to be fatal to complaints in actions by or against corporations including misspelling of the name or use of wrong but similar words in the name;⁴ omission of the abbreviation "Inc.";⁵ use of words instead of initials in the name;⁶ omission or addition of words in the name;⁷ omission or addition of the place of incorporation or place of business in the name;⁸ omission or addition of words such as "president," or "trustees";⁹ transposition of words;¹⁰ and other slight differences in the name.¹¹

By answering to and defending under a misnomer, the misnomer is waived,¹² and the judgment cannot be attacked later on the basis of the error.¹³ In other words, when a corporation has failed to raise objections to a misnomer in either a motion or responsive pleading, a corporation is bound by a judgment against it.¹⁴ The various procedures for raising objections to pleadings in general¹⁵ and the raising of objections to misnomers by an answer responsive pleading in particular¹⁶ are discussed in other sections of this chapter.

There is a distinction between mere misnomers and cases of mistaken identity. In a misnomer the plaintiff has designated the correct party, but incorrectly stated the defendant's name. On the other hand, a case of mistaken identity involves naming the wrong party.¹⁷ The rules applicable to misnomers that treat the mistake as immaterial do not apply to mistaken identity, such as where an individual is served with process when the intended defendant was a corporation.¹⁸ Any substantial deviation from the name is error.¹⁹

¹ See §§ 2447, 2448.

² *Georgia. Atlanta Title & Trust Co. v. Allied Mortg. Co.*, 64 Ga App 38, 12 SE2d 147.

Illinois. Where complaint mistakenly names corporation with name confusingly similar to name of

intended party, correction must be made before expiration of statute of limitations period. Spears v. Ferro Corp., 89 Ill App 3d 1036, 412 NE2d 690.

Kansas. Rockey v. Runft, 191 Kan 117, 379 P2d 284.

Mississippi. Collins v. General Elec. Co., 123 So 2d 609 (Miss).

New Hampshire. Bourget v. New England Tel. & Tel. Co., 97 NH 193, 84 A2d 830.

New Jersey. Motor Credit Corp. v. Ray Guy's Trailer Court, Inc., 6 NJ Super 563, 70 A2d 102.

New York. An amendment of the complaint will be permitted if the intended but misnamed defendant corporation was fairly apprised that it was the party the action was intended to affect and if the intended but misnamed defendant corporation would not be prejudiced. Simpson v. Kenston Warehousing Corp., 154 AD2d 526, 546 NYS2d 148 (1989).

Ohio. Stauffer v. Isaly Dairy Co., 4 Ohio App 2d 15, 211 NE2d 72. See also § 2448.

³ See § 4566.

⁴ *Texas. West v. Johnson*, 129 SW2d 811 (Tex Civ App) (use of "Association" instead of "Corporation" in name).

⁵ *Arkansas. Central Supply Co. v. Wren*, 198 Ark 1090, 133 SW2d 632.

Georgia. South Cobb Builders Supply, Inc. v. Southern Concrete Products Co., 116 Ga App 779, 169 SE2d 121 (omission of abbreviation "Inc." in attached statement of account); *Atlanta Title & Trust Co. v. Allied Mortg. Co.*, 64 Ga App 38, 12 SE2d 147 (use of "Company" instead of "Companies, Inc." not fatal).

Kansas. Rockey v. Runft, 191 Kan 117, 379 P2d 285 (use of "Incorporated" instead of "Inc." immaterial).

Louisiana. Where foreign cor-

poration was required to show capacity to sue by producing certificate of qualification issued by secretary of state, presentation by Panamanian corporation of certificate which listed term "S.A." following corporate name rather than "Inc., under which name suit was brought, was insufficient. Diesel Engineering, S.A. v. Environmental Aids Corp., 393 So 2d 932 (La App).

New York. Where a corporate entity is served under an incorrect name—summons and complaint misnamed defendant as "St. Mary's Hospital of Syracuse" rather than accurate name of "St. Mary's Hospital of Syracuse, Inc."—the court may permit the plaintiff to correct the mistake if the defendant was fairly apprised that it was the intended party. Pinto v. House, 79 AD2d 361, 436 NYS2d 733.

Texas. In criminal prosecution for theft of corporate property, allegation of ownership by "Jetronics," when proper name was "Jetronics, Inc.," was not so misleading as to void conviction, particularly since there was adequate evidence that stolen property was owned by Jetronics, Inc. Boyette v. State, 632 SW2d 916 (Tex App).

⁶ *Kansas. Rockey v. Runft*, 191 Kan 117, 379 P2d 285.

⁷ *United States. Frederick v. Motors Mortg. Corp.*, 1 F2d 437.

Alabama. Alabama Conference M.E. Church South v. Price, 42 Ala 39.

Delaware. Culver v. Philadelphia, B. & W. R. Co., 7 Boyce 76, 102 A 980 (omitting prefix "The" in pleading corporate name as immate-

rial); *Lapham v. Philadelphia, B. & W. R. Co.*, 4 Penne 421, 56 A 366 (addition or omission of "The" before name).

Mississippi. Gillespie v. Planters' Oil Mill & Manufacturing Co., 76 Miss 406, 24 So 900.

New York. Grossman v. Loeber Hair Co., 156 NYS 1012.

Ohio. State v. Bell Tel. Co., 36 Ohio St 296, 38 Am Rep 583.

Texas. Western Bank & Trust Co. v. Ogden, 42 Tex Civ App 465, 93 SW 1102 (addition of definite article "the" as not fatal); *Texas & N.O. R. Co. v. Barber*, 31 Tex Civ App 84, 71 SW 393.

California. Tropical Inv. Co. v. Brown, 45 Cal App 205, 187 P 133 (variance as to state incorporation not fatal).

Kansas. Pape v. Capitol Bank, 20 Kan 440 (holding addition of name of city where located immaterial).

Louisiana. Canal Bank v. Fisher, 19 La 365 (omission of place); *Mechanics' & Traders' Bank v. Prescott*, 12 La 444.

Maryland. Thatcher v. West River Nat. Bank, 19 Mich 196 (holding omission of name of state at end of name of bank immaterial).

Missouri. International Ins. Co. of New York v. Davenport, 57 Mo 289 (holding omission or addition of words "city and state of" before "New York" in corporate name immaterial); *Bank of Commerce v. Mudd*, 32 Mo 218; *Blades v. Cinder Block Co. of St. Louis*, 10 SW2d 319 (Mo App) (omission in addition of location); *Schaefer v. Phoenix Brewery Co.*, 4 Mo App 115 (misnomer by

mere omission of name of town as immaterial).

Louisiana. Canal Bank v. Fisher, 19 La 365; *Mechanics' & Traders' Bank v. Prescott*, 12 La 444.

New Hampshire. Burnham v. Savings Bank, 5 NH 446 (name running "President and Trustees of," as fatally variant).

Pennsylvania. A variance by leaving off the words "President of," in the contract is not fatal if identity with plaintiff is shown. Hendel v. Berks & D. Turnpike Road, 16 Serg & R 92 (Pa).

Virginia. Culpeper Agr. & Mfg. Society v. Digges, 6 Rand 165, 18 Am Dec 708 (holding addition in contract of words prefixed, "President and Managers of," to corporate name not a variance).

Iowa. Knatt v. Dubuque & S.C. Ry. Co., 84 Iowa 462, 51 NW 57 (holding misnaming defendant by transposing words in its name mere clerical error and not misleading).

New Hampshire. Misarrangement of words and syllables leaving substance certain is immaterial unless pleaded in abatement. Burnham v. Savings Bank, 5 NH 446.

Arkansas. Meek v. United States Rubber Tire Co., 244 Ark 359, 425 SW2d 323.

Indiana. Sayers v. First Nat. Bank, 89 Ind 230.

New York. Bank of Utica v. Smalley, 2 Cow 770, affd 8 Cow 398.

Texas. American Spiritualist Ass'n v. City of Dallas, 366 SW2d 97 (Tex Civ App) (Spiritualistic rather than Spiritualist).

¹² See § 2448.

Raising objections to misnomer in answer, see § 4545.

¹³ *Colorado. Burlington & Missouri River R. Co. in Nebraska v. Burch*, 17 Colo App 491, 69 P 6 (mish-naming defendant as not material where it defended suit by wrong name on the merits).

Texas. See J.C. Wooldridge Lumber Co. v. Moss, 100 SW2d 736 (Tex Civ App).

¹⁴ *Texas. Adams v. Consolidated Underwriters*, 124 SW2d 840 (Tex).

¹⁵ See § 4491.

¹⁶ See § 4545.

¹⁷ *Georgia. Designation of defendant as "Quality Trucks, Inc. a/*

k/a Quality GMC Trucks, Inc." did not sufficiently name Quality GMC Trucks, Inc. as a party defendant where it was a distinct and separate entity from Quality Trucks, Inc., not merely an alias used by the same party. *Morgan v. GMC Trucks*, 163 Ga App 206, 294 SE2d 350.

¹⁸ *Illinois. See Leonard v. City of Streator*, 113 Ill App 3d 404, 447 NE2d 499.

¹⁹ *Indiana. Glass v. Tipton, T. & B. Turnpike Co.*, 32 Ind 376 (suit to enjoin corporation).

Texas. Southern Pac. Co. v. Burns, 23 SW 288 (Tex Civ App) (holding Southern Pac. R. Co. not same as Southern Pac. Co.).

§ 4494.50. — Assumed, fictitious and trade names.

A full discussion of actions by or against corporations under an assumed, fictitious or trade name is provided elsewhere in this treatise.¹

¹ See § 2443.

§ 4495. Capacity to sue or defend.

At common law, a complaint by a corporation was required to allege that it was an action by its attorney.¹ Now, under practice rules in federal courts, it is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity.² When a party desires to raise an issue as to the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue must do so by specific negative averment, which must include such supporting particulars as are peculiarly within the pleader's knowledge.³ Similar rules governing the capacity to sue or be sued apply to proceedings in state courts.⁴ So, the complaint

XII. PLEADINGS

A. IN GENERAL

§ 4486 Cross-claims and counterclaims.

n. 8.

U.S. In action by selling shareholders for breach of stock-purchase agreement, purchaser of stock did not provide a legitimate excuse for its delay in filing a counterclaim for indemnification pursuant to the agreement, therefore, the district court did not abuse its discretion in denying the purchaser's motion to file the counterclaim. *Carroll v. Acme-Cleveland Corp.*, 955 F2d 1107 (CA7 1992).

§ 4488 Verification—Necessity.

n. 1.

Ind. *Keil Chemical Co. v. Common Council of Hammond*, 612 NE2d 209 (Ind App 1993) (verification of petition for writ of certiorari by general manager of division of corporation insufficient); *Gary Community Mental Health Center, Inc. v. Indiana Dept. of Public Welfare*, 496 NE2d 1341 (Ind App).

§ 4489 — Authority to verify.

n. 1.

Ind. *Indiana Dept. of Public Welfare v. Chair Lance Services, Inc.*, 423 NE2d 1373 (Ind 1988); *Keil Chemical Co. v. Common Council of Hammond*, 612 NE2d 209 (Ind App 1993) (verification of petition for writ of certiorari by general manager of division of corporation insufficient).

n. 3.

Ind. *Keil Chemical Co. v. Common Council of Hammond*, 612 NE2d 209 (Ind App 1993) (verification of petition for writ of certiorari by general manager of division of corporation insufficient).

§ 4491 Objections and defenses to pleadings.

n. 7.

U.S. *Coan v. Bell Atlantic Systems Leasing International, Inc.*, 819 F Supp 929 (D Conn 1990) (dismissing securities law claims on grounds that sale/leaseback arrangements not constituting "security").

B. COMPLAINTS

§ 4492 Naming and describing corporation.

n. 2.

Mass. *Minot v. Curtis*, 7 Mass 441.
Mich. *Ferry v. Cincinnati Underwriters*, 111 Mich 261, 69 NW 483;
Walrath v. Campbell, 28 Mich 111.

N.H. *Society for Propagating the Gospel v. Young*, 2 NH 310.

W. Va. *Marmet Co. v. Archibald*, 37 W Va 778, 17 SE 299.

Wis. *Woodrough & Hanchett Co. v. Witte*, 89 Wis 537, 62 NW 518.

n. 3.

U.S. Where it is not shown that there are other corporations of the same name, special proof of the identity of a corporation bringing suit on a written instrument with a corporation of the same name to whom the instrument was executed is not required. *Campbell & Zell Co. v. American Surety Co.*, 129 F 491.

Ala. *Western Ry. of America v. McCall*, 89 Ala 375, 7 So 650.

Cal. It is a rule as old, perhaps, as the earliest laws forming or authorizing the formation of corporations, that a corporation must sue and be sued by its corporate name. *Curtis v. Murry*, 26 Cal 633, 634.

La. *Mioton v. Del Corral*, 132 La 730, 61 So 771; *Interstate Trust & Banking Co. v. Lichtentag*, 9 La App 68, 118 So 773; *Placid Oil Co. v. A.M. Dupont Corp.*, 148 So 2d 166 (La App).

A corporation may sue in its own name without naming its president or any other of its officers in the petition. *Southern Sawmill Co. v. Ducate*, 120 La 1052, 46 So 20; *New Orleans Term. Co. v. Teller*, 113 La 733, 37 So 624.

Mo. *H.W. Underhill Const. Co. v. Nilson*, 3 SW2d 399 (Mo App).

N.J. *Saunders v. Adams Exp. Co.*, 71 NJL 270, 67 A 899.

N.Y. *Mail & Express Co. v. Parker Axles, Inc.*, 204 App Div 327, 198 NYS 20.

Okla. *Oklahoma Operating Co. v. Shipley*, 171 Okla 484, 43 P2d 445.

Or. *Dant & Russell v. Ostlund*, 148 Or 204, 35 P2d 668, 672.

S.C. *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 SC 237, 399 SE2d 779 (1990); *Griffin v. Capital Cash*, 310 SC 288, 423 SE2d 143 (SC App 1992).

W. Va. *Varney & Evans v. Hutchinson Lumber & Manufacturing Co.*, 64 W Va 417, 63 SE 203; *Grafton Grocery Co. v. Home Brewing Co. of Grafton*, 60 W Va 281, 54 SE 349; *First Nat. Bank of Ceredo v. Huntington Distilling Co.*, 41 W Va 530, 23 SE 792; *Krall Piano Co. v. Kent*, 39 W Va 294, 19 SE 409.

n. 8.

Delete cross reference and substitute:

Corporate names, see § 2414 et seq.

n. 11.

Delete cross reference and substitute:

See § 4494.50.

§ 4493 — Change of name.

n. 2.

U.S. Under Iowa law, recording of contractual lien given by corporation is constructive notice of its contents to all the world and binding upon all who deal with corporation after it has changed its name. *Ginsberg v. Lindel*, 107 F2d 721.

Cal. *American Trust Co. v. Jones*, 130 Cal App 651, 20 P2d 348.

Fla. Sealcell Corp. v. Barry, 112 Fla 342, 150 So 634; Stewart v. Preston, 80 Fla 473, 86 So 348.

Ga. A corporation is suable in the new corporate name, although the alleged cause of action may have arisen before the change. Porter v. State Grand Lodge No. 7, 146 Ga 13, 90 SE 281.

Ill. Where change of name of corporation occurred before commencement of suit against it, such action should have been commenced by or prosecuted against corporation under its new name. Ernest Freeman & Co. v. Robert G. Regan Co., 332 Ill App 637, 76 NE2d 514.

Ind. Rosenthal v. Madison & L. Plankroad Co., 10 Ind 358; Lindenberg v. M & L Builders & Brokers, Inc., 158 Ind App 311, 302 NE2d 816.

A corporation will, on appeal, be held to have had the right to sue in its new name on a debt owing to it under its old name, especially when no question in regard to the evidence, showing the identity of the two corporations, is presented. Philapy v. Aukerman-Bright Lumber Co., 56 Ind App 266, 105 NE 161.

Iowa. Trustees of Northwestern College v. Schuyler, 37 Iowa 577.

Ginsberg v. Lindel, 107 F2d 721.

Mo. Dean v. La Moite Lead Co., 59 Mo 523; W.T. Rawleigh Co. v. Grigg, 191 SW 1019 (Mo App).

Neb. W.T. Rawleigh Medical Co. v. Bunning, 104 Neb 179, 176 NW 85.

A corporation could not recover against the guarantor in a continuing contract of guaranty, executed to it in its original name, on debts contracted by the one whose account was guaranteed, after a change in the corporate name. Crane Co. v. Specht, 39 Neb 123, 57 NW 1015.

N.J. Delsware & Atlantic R. Co. v. Quick, 23 NJL 321.

N.Y. Corporation's change of name does not release surety on bond given by it. Worth Corp. v. Metropolitan Cas. Ins. Co., 142 Misc 734, 255 NYS 470.

Okla. A corporation is entitled to maintain a suit in such name upon a bond entered into by it as obligee after the change in name but under its old name. Detroit Automatic Scale Co. v. Taylor, 67 Okla 121, 169 P 908.

S.D. The fact that a renewal fire insurance policy is issued and addressed to a corporation, after it has changed its corporate name, in its original name does not preclude the corporation, it having retained the policy, from suing thereon. Peever Mercantile Co. v. State Mut. Fire Ass'n of Canton, 23 SD 1, 119 NW 1008.

Tex. Where the name of a corporation was changed by charter amendment it may sue on a note under its later name though the note was assigned to it under its former name, the change of name being alleged, and also that plaintiff is the legal owner and holder of the note. Tipton v. Board of Pensions of Presbyterian Church, 82 SW2d 1044 (Tex Civ App).

Vt. Where a corporation changes its name after making a contract and is sued under both names, a refusal to dismiss as to the company under its earlier name is proper, there having been no change in the corporation's identity. Keefe v. Fraternal Protective Ins. Co., 107 Vt 99, 176 A 305.

Va. A change of name pursuant to contract and under a resolution of the board of directors ratified by the stockholders does not ipso facto change the identity of the corporation so as to prevent an obligation

incurred by it under its original name from being enforced against it in its new name. Wright-Cassier Tobacco Co. v. A. Roen & Co., 105 Va 327, 54 SE 309.

u. 3.

Cal. A change in a name does not affect the identity of a corporation, although it may have the effect of requiring additional averments in the pleading for the purpose of showing identity. Mutual Building & Loan Ass'n of Long Beach v. Corum, 220 Cal 282, 36 P2d 509.

Mo. W.T. Rawleigh Co. v. Grigg, 191 SW 1019 (Mo App).

u. 4.

Ala. Ready v. City of Tuscaloosa, 6 Ala 327.

After note 5 add:

A change in the name of a corporation while litigation is pending does not defeat the suit or prevent the court from granting appropriate relief,^{5.50} since a court may permit amendments to correct misnomers of a corporation in the pleadings.^{5.60}

^{5.50} U.S. Under New York statute, failure to notify secretary of state of change of name terminated corporation's authority to do business but this did not affect any action pending at the time. Fawick Corp. v. Alfa Export Corp., 135 F.Supp 108.

Ala. Where, after a change in its corporate name, a corporation is sued in its old name, which was the one under which it entered into the contract in suit, the court may, upon plaintiff's motion, made when the case is called for trial, and proof in support of such motion of a legal change in the name, order that the cause proceed against the defendant in its new or changed name. North Birmingham Lumber Co. v. Sims & White, 137 Ala 595, 48 So 84.

Ga. Where action has been begun by a corporation, and thereafter its corporate name is changed, it may amend its petition and pray that the suit may continue under the amended name. Atlantic Coast Line R. Co. v. Waycross Elec. Light & Power Co., 123 Ga 613, 51 SE 621.

Ind. State Exch. Bank v. Paul, 58 Ind App 487, 108 NE 532.

Mich. Where a corporate mortgagee of real property changed its corporate name by amendment of its articles without making any other change whatsoever, the fact that the mortgagee was foreclosed in the name as changed rather than by the corporation in its original name, held, not to affect the validity of the sale on foreclosure, although there was never any assignment of the mortgage by operation of law or otherwise upon change of the corporate name. Union Guardian Trust Co. v. Kowalsky, 267 Mich 110, 255 NW 171.

N.Y. Corporate defendant did not have power to change its name during pendency of action so as to compel plaintiff to enter judgment against a corporation with a name of defendant's choice and then re-establish itself under the old name, and defendant's motion to substitute its new name would be denied at juncture in case in which plaintiff was entitled to judgment.

ment. *Standard Packaging Corp. v. American Travelers Club, Inc.*, 42 Misc 2d 445, 248 NYS2d 625.

Va. *Welfley v. Shenandoah, L., L., M.&M. Co.*, 83 Va 768, 3 SE 376.
See § 4556.

§ 4494 — Misnomer.

Change first paragraph of section to read:

The legal effect of the misnomer of a corporation in a pleading is the same as that of the misnomer of an individual.¹ If the identity of the corporation is reasonably clear, a misnomer in a complaint that is not misleading or destructive as to the identity of the corporation may be treated as immaterial.² A misnomer in the pleading may be corrected by amendment, which is fully discussed in a subsequent section of this chapter.³ A variety of mistakes or misnomers have been held not to be fatal to complaints in actions by or against corporations including misspelling of the name or use of wrong but similar words in the name;⁴ omission of the abbreviation "Inc.";⁵ use of words instead of initials in the name;⁶ omission or addition of words in the name;⁷ omission or addition of the place of incorporation or place of business in the name;⁸ omission or addition of words such as "president," or "trustees";⁹ transposition of words;¹⁰ and other slight differences in the name.¹¹

The test in determining the materiality of the misnomer is whether the corporation was or could have been misled.^{11.10} If the corporation was not misled and was duly served with process, a judgment will bind it whether or not it appears.^{11.20} A mistake in naming the corporation in the summons would undoubtedly be fatal where it resulted in service upon the wrong corporation.^{11.30} Misnomer of a corporation in the return of service does not invalidate the return nor defeat the service.^{11.40}

¹ Cal. *Nishet v. Clio Min. Co.*, 2 Cal App 436, 83 P 1077.

Ga. *Robinson v. Reward Ceramic Color Mfg., Inc.*, 120 Ga App 380, 170 SE2d 724.

^{11.10} Del. *Atkinson v. North American Smelting Co.*, 245 A2d 436 (Del).
Ga. *Robinson v. Reward Ceramic Color Mfg., Inc.*, 120 Ga App 380, 170 SE2d 724.

Minn. *Hovelson v. U.S. Swim & Fitness, Inc.*, 450 NW2d 137 (Minn App 1990) (misnomer having no effect on jurisdiction).

Mo. *Martin v. Signal Dodge, Inc.*, 444 SW2d 29 (Mo App); *Blades v. Cinder Block Co. of St. Louis*, 10 SW2d 319 (Mo App).

Va. Amendment to the proper name of the corporation was permitted where the process was issued in the trade name, which was formerly an independent corporation but absorbed by the real defendant, as the officer served was the officer of the present company and also of the former corporation and the party substituted here a real relation of interest to the original party and nobody was misled or prejudiced, *Jacobson v. Southern Biscuit Co., Inc.*, 198 Va 813, 97 SE2d 1.

^{11.20} Ala. A default judgment against a corporation will not be set aside on appeal because of a shortening of the corporate name in the summons, where the name was properly stated in the complaint and in the sheriff's return. *Tennessee River Nav. Co. v. Hodges*, 202 Ala 15, 79 So 300.

La. *Boudreaux v. Allstate Finance Corp.*, 217 So 2d 439 (La App).
Mich. *Simon v. Patrons' Mut. Fire Ins. Co. of Michigan*, 228 Mich 508, 199 NW 810.

Minn. *Hovelson v. U.S. Swim & Fitness, Inc.*, 450 NW2d 137 (Minn App 1990) (misnomer having no effect on jurisdiction).

Fact that a corporation claimed in garnishment proceedings as sometimes referred to as "Company" and at others as "Bank" is immaterial, service of papers being had on the right corporation, and no one being prejudiced. *Hancock-Nelson M. Co. v. Midwest Food Packers*, 182 Minn 426, 234 NW 696.

Miss. Where a writ of garnishment was served on the cashier of a bank, although the similar name of a defunct bank was used in the writ, the cashier was or should have been apprised thereby that the bank of which he was an officer was summoned and required to answer the writ, and if such bank failed to appear at the return term, it waived its right to object to the misnomer and was bound by the default judgment taken although such judgment was not entered against it in its true name. *Campbell & Campbell v. Pickens Bank*, 134 Miss 559, 89 So 378.

Mo. *Martin v. Signal Dodge, Inc.*, 444 SW2d 29 (Mo App).

Where an action for damages for personal injuries was in reality against the Cinder Block Company of Kansas City, Mo., and that corporation was duly served but defaulted, and its property was seized on execution, it could not successfully maintain a third-party claim on the ground that the original proceedings were against the Cinder Block Company of St. Louis, for such mistake in the description of its situs was not of a substantial nature. *Blades v. Cinder Block Co. of St. Louis*, 10 SW2d 319 (Mo App).

Tex. When corporation intended to be sued is sued and served by wrong corporate name, and such corporation fails to appear and plead such misnomer in abatement, and suffers judgment to be obtained, it is bound by such judgment and in all future litigation it may be connected with such suit by proper averments. *Adams v. Consolidated Underwriters*, 138 Tex 26, 124 SW2d 840.

Corporation was properly a party to action and it was under duty to plead a misnomer in abatement and its failure to so plead constituted waiver of right to abate. *Astro Sign Co. v. Sullivan*, 518 SW2d 420 (Tex Civ App).

^{11.30} U.S. Misnomer or mistake in naming corporation in summons is fatally defective where service is not duly made on intended corporation.

and it had no notice of suit. *Thompson v. Liberty Mut. Ins. Co. of Boston, Mass.*, 390 F2d 24.

Ala. *Tennessee River Nav. Co. v. Hodges*, 202 Ala 15, 79 So 300.

Ariz. Erroneous designation of defendant's corporate name did not render service of process ineffective where the name designated was sufficiently similar to true name of defendant to distinguish the corporation sued from other corporations. *Guzman v. Montgomery Ward & Co.*, 9 Ariz App 186, 450 P2d 427.

Del. Corporate defendant received proper notice notwithstanding error in its name, where word "Company" in correct name was shortened to "Co." and "Inc." was added at end of name. *Atkinson v. North American Smelting Co.*, 245 A2d 436 (Del).

Iowa. *Hickman v. Hygrade Packing Co.*, 185 NW2d 801 (Iowa).

La. *Boudreaux v. Allstate Finance Corp.*, 217 So 2d 439 (La App).

Mich. *Simon v. Patrons' Mut. Fire Ins. Co. of Michigan*, 228 Mich 508, 199 NW 810.

Minn. *Hovelson v. U.S. Swim & Fitness, Inc.*, 450 NW2d 137 (Minn App 1990) (misnomer having no effect on jurisdiction).

Mo. *State v. Walner*, 348 Mo 852, 156 SW2d 664.

Where suit is brought against one railway company and service is made upon another, the question is not one of misnomer but of service upon the proper party. *Little Rock Trust Co. v. Southern Missouri & A.R. Co.*, 195 Mo 689, 93 SW 944.

Neb. A decree foreclosing a tax lien is not void by reason of the fact that the corporation defendant was summoned as "The Globe Investment Company" when its real name was "Globe Investment Company," the variance being so slight as to leave no doubt as to the identity of the corporation. *Clifford v. Thun*, 74 Neb 831, 104 NW 1052.

N.Y. *Nolan v. Ohio Medical Products*, 75 Misc 2d 620, 348 NYS2d 497. Service on "Metcalf & Eddy Engineers" did not describe a corporation and a misnomer did not exist which could be corrected as a "Metcalf & Eddy, Inc." did exist or at least neither the existence of the partnership and the corporation was contradicted. *Schwab Bros. Trucking, Inc. v. Monroe County Water Authority*, 32 Misc 2d 675, 223 NYS2d 3.

N.C. *Gordon v. Pintsch Gas Co.*, 178 NC 435, 100 SE 878.

Okla. *Citizens' Nat. Bank v. Wiswell*, 88 Okla 194, 212 P 583.

Tex. *Johnson v. Coca-Cola Co.*, 727 SW2d 756 (Tex App).

Where there are two separate and distinct corporations and the wrong corporation is sued through mistaken identity, as distinguished from a mere misnomer, no judgment can rightfully be rendered against it. *Stessel v. Bekins Van & Storage Co.*, 461 SW2d 434 (Tex Civ App); *Barnes v. Continental Trailways, Inc.*, 472 SW2d 606 (Tex Civ App).

Wis. Service was not invalid where defendant actually served was erroneously referred to as association rather than corporation. *Hoesley v. La Crosse VFW Chapter*, 46 Wis 2d 601, 175 NW2d 214.

11.40 See § 4446.

n. 2.

Delete cross reference "See also § 2448."

U.S. *Grooms v. Greyhound Corp.*, 287 F2d 95; *Frederick v. Motors Mortg. Corp.*, 1 F2d 437.

Ala. The plea of misnomer, as to the name of the defendant corporation, "Southern Railway Company," and "The Southern Railway Company," is both too frivolous and too technical to be noticed. *Southern R. Co. v. Hayes*, 183 Ala 465, 62 So 874.

Corporate defendant was in fact a party to first action even though its name was incorrect in complaint, so that its plea in abatement to second action on ground of pendency of first action involving "same party" and same cause of action should have been sustained. *Redstone Land Development Co. v. Boatwright*, 44 Ala App 363, 209 So 2d 221.

Ariz. *Guzman v. Montgomery Ward & Co.*, 9 Ariz App 186, 450 P2d 427.

Ark. Slight elaboration of plaintiff's exact corporate name was immaterial where no separate party was actually involved. *Meek v. United States Rubber Tire Co.*, 244 Ark 359, 425 SW2d 323.

Cal. *Indian Refining Co., Inc. v. Royal Oil Co., Inc.*, 102 Cal App 710, 283 P 856.

La. *R.B. Tyler Co. v. Merrill Engineering Co.*, 181 La 191, 159 So 319.

Where a statute provides that corporations must sue or be sued in their authorized name, a slight alteration in the name is not important if the identity of the corporation is shown and the defendant has not been misled thereby. *Newman, Grace & Holloway Architects, Inc. v. Tillery*, 454 So 2d 140 (La App).

It is no defense to action by hospital suing as "Charity Hospital of Louisiana;" that its true name is "Charity Hospital of New Orleans," *Charity Hospital of Louisiana v. Axford*, 14 La App 535, 131 So 770.

Minn. *Hovelson v. U.S. Swim & Fitness, Inc.*, 450 NW2d 137 (Minn App 1990) (misnomer having no effect on jurisdiction).

Mo. General rule is that mere misnomer of a corporate defendant in words and syllables is immaterial, provided there is no substantial mistake so as to indicate a different entity, it is duly served with process and it could not have been or was not misled. *Martin v. Signal Dodge, Inc.*, 444 SW2d 29 (Mo App).

S.C. *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 SC 237, 399 SE2d 779 (1990); *Griffin v. Capital Cash*, 310 SC 288, 423 SE2d 143 (SC App 1992).

Tex. Alteration of name of corporation sued, in an attachment bond and affidavit after the same had been filed, from "The Kemp-Leader, Inc." to "The Leader, Inc.," did not vitiate them, the record showing that the two names applied to the same corporation and were used interchangeably by the parties. *Elder Mfg. Co. v. The Leader*, 25 SW2d 274 (Tex Civ App).

Prefixing the word "The" to the name of a corporation defendant does not change such name in a manner that can mislead, and the misnomer will not be noticed by the courts. *Western Bank & Trust Co. v. Ogden*, 42 Tex Civ App 465, 93 SW 1102.

A petition against the "Underwriters' Fire Association of Dallas" is not vitiated by the designation of the defendant as the "Underwriters' Fire Association at Dallas." *Underwriters' Fire Ass'n of Dallas, Tex. v. Henry*, 79 SW 1072 (Tex Civ App).

W. Va. Varney & Evans v. Hutchinson Lumber & Manufacturing Co., 64 W Va 417, 63 SE 203.

Change second paragraph of section to read:

A misnomer of the corporation in a pleading must be raised by timely objection in accordance with the practice rules of the particular jurisdiction.^{11.50} By answering to, and defending under, a misnomer, the misnomer is waived,¹² and the judgment cannot be attacked later on the basis of the error.¹³ In other words, when a corporation has failed to raise objections to a misnomer in either a motion or responsive pleading, a corporation is bound by a judgment against it.¹⁴ A mere mistake in naming a corporation in a pleading generally will not be subject to a motion to dismiss,^{14.50} or demurrer.^{14.60} The various procedures for raising objections to pleadings in general¹⁵ and the raising of objections to misnomers by an answer responsive pleading in particular¹⁶ are discussed in other sections of this chapter.

^{11.50} Ga. Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga App 380, 170 SE2d 724.

Ky. In Kentucky objection that defendant is not sued in its correct corporate name should be presented by answer or affidavit in the nature of a plea in abatement, setting forth the misnomer and disclosing defendant's true name. Carnation Co. v. Devore, 252 SW2d 860 (Ky.).

Mich. Simon v. Patrons' Mut. Fire Ins. Co. of Michigan, 228 Mich 508, 199 NW 810, citing this treatise.

Mo. Martin v. Signal Dodge, Inc., 444 SW2d 29 (Mo App).

N.C. Gordon v. Pintsch Gas Co., 178 NC 435, 100 SE 878.

S.C. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 308 SC 237, 399 SE2d 779 (1990).

Tex. In absence of anything to contrary, court must assume that defendant corporation was sued in its corporate name as stated in plaintiff's petition. Trustees of Motley Independent School Dist. v. Steck Co., 116 SW2d 434 (Tex Civ App).

^{14.50} U.S. Frederick v. Motors Mortg. Corp., 1 F2d 437.

Iowa. Motion to dismiss on ground that plaintiff sued wrong party should not have been sustained where petition pleaded that defendant was doing business as an individual but contract exhibit attached to the petition indicated that defendant was a corporation, although the pleading may have been vulnerable to a motion to strike or for more specific statement. Nesper Sign & Neon Co. v. Nugent, 168 NW2d 805 (Iowa).

Ky. Carnation Co. v. Devore, 252 SW2d 860 (Ky.).

^{14.60} See § 4560.

n. 12.

Delete cross reference "See § 2448."

U.S. Baltimore & P.R. Co. v. Fifth Baptist Church, 137 US 568, 34 L Ed 784, 11 S Ct 185; Bute Refrigerating Co. v. Gillett, 31 F 809.

Colo. Union Pacific, Denver & Gulf Ry. Co. v. Perkins, 7 Colo App 184, 42 P 1047.

Del. Prefixing the article "The" to the name of the corporation defendant is a misnomer to which a plea in abatement will lie. Lapham v. Philadelphia, B & W.R. Co., 4 Penn 421, 56 A 366 (Del).

Fla. RHPC, Inc. v. Gardner, 533 So 2d 312 (Fla App 1988) (misnomer as not preventing appearance to defend in action).

Ga. Temperature Control, Inc. v. Diversified Engineering, Inc., 120 Ga App 522, 171 SE2d 373; Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga App 380, 170 SE2d 724.

Ill. Charles Friend & Co. v. Goldsmith & Seidel Co., 307 Ill 45, 138 NE 185.

A corporation, sued and summoned by, and appearing and answering to the merits under other than its correct name, cannot make the fact that it did not appear in the record under its true name, until after limitations had run, the basis of a plea of limitations as a defense to the action. Pennsylvania Co. v. Sloan, 125 Ill 72, 17 NE 37.

Iowa. Wilson v. Baker, 52 Iowa 423, 3 NW 481.

Kan. School Dist. v. Griver, 8 Kan 224.

Ky. In order that a corporation make a plea in abatement good, it must give its true name so that plaintiff may correct the error by amendment. Wilhite v. Convent of Good Shepherd, 117 Ky 251, 78 SW 138.

Md. Coulter v. Western Theological Seminary, 29 Md 69.

Mass. Medway Cotton Manufactory v. Adams, 10 Mass 360; Gilbert v. Nantucket Bank, 5 Mass 97.

Mich. Simons v. Patrons' Mut. Fire Ins. Co. of Michigan, 228 Mich 508, 199 NW 810.

Miss. Gillespie v. Planters Oil-Mill Mfg. Co., 76 Miss 408, 24 So 900.

Mo. Objection by misnamed corporate defendant should be raised before issue is joined and before trial, verdict or judgment, and failure to promptly raise objection as to such misnomer results in waiver of the objection. Martin v. Signal Dodge, Inc., 444 SW2d 29 (Mo App).

Neb. Grand Lodge O.U.W. v. Barts, 64 Neb 800, 90 NW 901.

N.H. Wheeler v. Contoosook Mills Corp., 77 NH 551, 94 A 265; Brunham v. Strafford County Sav. Bank, 5 NH 446.

N.M. El Capitan Land & Cattle Co. of New Mexico v. Lees, 13 NM 407, 86 P 924.

N.Y. Whittlesey v. Frantr, 74 NY 456.

N.C. Gordon v. Pintsch Gas Co., 178 NC 435, 100 SE 878.

Ohio. State v. Bell Tel. Co., 36 Ohio St 296; Gilligan v. Prudential Life Ins. Co., 70 Ohio L Abst 225, 127 NE2d 883.

Pa. Northumberland County Bank v. Eyer, 60 Pa 436.

Tex. Dacca, Inc. v. Commonwealth Land Title Ins., Co., 822 SW2d 360 (Tex App 1992) (company not becoming a party to suit naming its president as defendant by filing general denial).

Motion for summary judgment was properly granted where wrong corporation was sued. Barnes v. Continental Trailways, Inc., 472 SW2d 606 (Tex Civ App).

Where corporation, sued on contract, appears and defends without filing plea in abatement because word "Company," was omitted from its signature to contract, it waives defect. *Houston Press Co. v. Bawden Bros.*, 51 SW2d 438 (Tex Civ App).

Va. *Leckie v. Seal*, 161 Va 215, 170 SE 844.

W. Va. *Kingman Mills v. Furner*, 89 W Va 511, 109 SE 600; *Board of Education of Walton Dist., Roane County v. Board of Trustees, Walton Lodge No. 132, I.O.O.F.*, 78 W Va 445, 88 SE 1099; *Duty v. Chesapeake & O. Ry. Co.*, 70 W Va 14, 73 SE 331; *First Nat. Bank of Ceredo v. Huntington Distilling Co.*, 41 W Va 530, 23 SE 792.

n. 13.

Ga. *Robinson v. Reward Ceramic Color Mfg., Inc.*, 120 Ga App 380, 170 SE2d 724 (defect cured by verdict and judgment).

Kan. Failure of a corporation to plead a misnomer by plea in abatement or otherwise, or to disclose its true name, is a waiver of such misnomer, and a judgment rendered in the name under which the corporation is sued will be as valid as if rendered against it in its true name. *American Surety Co. of New York v. Maryland Cas. Co.*, 97 Kan 275, 155 P 59.

Ky. Misnomer of defendant corporation may not be pleaded after cause has been referred, after defendant makes default, or after judgment. *Carnation Co. v. Devore*, 252 SW2d 860 (Ky).

La. *Newman, Grace & Holloway Architects, Inc. v. Tillery*, 454 So 2d 140 (La App).

Md. *Sindorf v. Jacron Sales Co., Inc.*, 27 Md App 53, 341 A2d 856.

Mich. *Simon v. Patrons' Mut. Fire Ins. Co. of Michigan*, 228 Mich 508, 199 NW 810.

Mo. *Martin v. Signal Dodge, Inc.*, 444 SW2d 29 (Mo App).

Neb. *Grand Lodge, A.O.U.W. v. Bartes*, 64 Neb 800, 90 NW 901.

N.H. *Wheeler v. Contoosook Mills Corp.*, 77 NH 551, 94 A 265.

N.Y. Under a statute providing that a mistake in the naming of a corporation in a suit or proceeding by or against it shall be pleaded in abatement, and, if not so pleaded, shall be deemed to have been waived, a corporate defendant waives a mistake in its name as well when it defaults as when it appears and answers but does not plead as provided. *Whittlesey v. Frantz*, 74 NY 456.

S.C. *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 SC 237, 399 SE2d 779 (1990).

Tex. *Northwest Sign Co. v. Jack H. Brown & Co., Inc.*, 680 SW2d 809 (Tex).

n. 14.

La. Although the name of the corporation filing a suit may differ slightly from its name in a signed judgment in its favor, that is no ground to say a judgment has been rendered in favor of a corporation not a party to the suit. *Newman, Grace & Holloway Architects, Inc. v. Tillery*, 454 So 2d 140 (La App).

Tex. *Northwest Sign Co. v. Jack H. Brown & Co., Inc.*, 680 SW2d 809 (Tex); *Adams v. Consolidated Underwriters*, 124 SW2d 840 (Tex).

Bold text in this paragraph is new.

There is a distinction between mere misnomers and cases of mistaken identity. In a misnomer the plaintiff has designated the correct party, but incorrectly stated the defendant's name. On the other hand, a case of mistaken identity involves naming the wrong party.¹⁷ The rules applicable to misnomers that treat the mistake as immaterial do not apply to mistaken identity, such as where an individual is served with process when the intended defendant was a corporation.¹⁸ Any substantial deviation from the name is error.¹⁹ The ultimate test of whether an error in naming parties is a misnomer or a material change in parties is most equitably the understanding and intent of the parties.²⁰

²⁰Neb. *Pittman v. Foote Equipment Co.*, 1 Neb App 105, 487 NW2d 584 (1992).

n. 17.

Neb. *Pittman v. Foote Equipment Co.*, 1 Neb App 105, 487 NW2d 584 (1992).

Tex. *Daca, Inc. v. Commonwealth Land Title Ins., Co.*, 822 SW2d 360 (Tex App 1992) (misnomer-of-rule not acting to substitute correct defendant for incorrect one).

n. 18.

Tex. *Daca, Inc. v. Commonwealth Land Title Ins., Co.*, 822 SW2d 360 (Tex App 1992) (company suing insurer for breach of obligation to defend not a party in suit naming president of company as defendant).

§ 4494.50 — Assumed, fictitious and trade names.

Change section to read:

A suit by or against a corporation generally may be brought under the name in which it transacts business, including an assumed or fictitious name.¹ If a corporation is sued under the name it does business, process is sufficient to bring it within the jurisdiction of the court.² The right to sue under an assumed or fictitious name may be conditioned on compliance with statutory requirements on filing the name with the state.³ A judgment obtained against a corporation in its assumed or trade name may be enforced against it in its legal name.⁴

¹U.S. *Davis v. Tex-O-Kan Flour Mills Co.*, 186 F2d 50 (applying Texas law).

Ga. American Exp. Travel Related Services Co., Inc. v. Bertye, 202 Ga App 358, 414 SE2d 499 (1991); Moon Motor-Car Co. v. Savannah Motor-Car Co., 41 Ga App 231, 182 SE 611.

A corporation conducting business in a trade name may sue or be sued in that trade name, and this rule applies to non-profit corporations. John L. Hutcheson Memorial Tri-County Hospital v. Oliver, 120 Ga App 547, 171 SE2d 649.

It is proper to bring suit on account against a corporate defendant and allege that the name shown on the attached statement of account is a trade or business name used by defendant named in the petition, and fact that attached statement omitted abbreviation "Inc." did not render petition subject to demurrer as designating a different defendant. South Cobb Builders Supply, Inc. v. Southern Concrete Products Co., 116 Ga App 779, 159 SE2d 121.

A corporation may sue in its corporate name on a contract made by it in its trade or colloquial name. McClain v. Georgian Co., 17 Ga App 649, 87 SE 1090.

Ida. Where corporation sues under assumed name and defendant raises lack of capacity to sue, defendant will prevail unless corporate plaintiff is given opportunity to amend complaint. W.L. Scott, Inc. v. Madras Aerotech, Inc., 653 Idaho 791, 653 P2d 791.

Iowa. When a corporate defendant does business under a trade or assumed name and notice of the action is addressed to that very name, defendant will not be heard to say on special appearance that such name is not its name. Thune v. Hoka Cheese Co., 260 Iowa 347, 149 NW2d 176; Hickman v. Hygrade Packing Co., 185 NW2d 801 (Iowa).

Ky. Upon proof that named corporate monastery of sisters was doing business as a named hospital, as designated in caption of complaint and summons, service of process upon administrator of the hospital in action brought in county where she served as such administrator would meet requirements of civil rule that service shall be made upon a corporation by serving an officer or managing agent thereof, or the chief agent in the county wherein the action is brought. Griffith v. St. Walburg Monastery, 427 SW2d 802 (Ky).

La. Ready Portion Meat Co. v. Michael's A Catering Experience, 542 So 2d 207 (La App 1989).

A statute providing that a person who does business under a trade name shall sue in his or her own name to enforce a right created by, or arising out of, the doing of such business is equally applicable to a corporation that does business under a trade name. Mas Nursing Inc. v. Burke, 523 So 2d 909 (La App 1988).

In absence of statutory prohibition, corporation which has validly contracted in an assumed name may sue in that name to enforce the contract. Hy-Grade Investment Corp. v. Robillard, 198 So 2d 558 (La App).

Mich. In Ferry v. Cincinnati Underwriters, 111 Mich 261, 89 NW 483, it was held that two insurance companies which, acting together, issued a certain policy of insurance under a single assumed name, following which their separate corporate names were set out, might be garnished under such assumed name by a creditor of the insured.

N.Y. Mail & Express Co. v. Parker Axles, Inc., 204 App Div 327, 198 NYS 20.

A corporation may, very likely, so adopt a name, in the transaction of its business, as to be made liable in its true name upon transactions in its assumed name; but it must then be sued by its true name. McGary v. People, 45 NY 153.

It must be alleged and demonstrated that the corporation sued or suing was really intended by the parties to be the corporate entity described in the contract or instrument by another than its legal name. Mail & Express Co. v. Parker Axles, Inc., 204 App Div 327, 198 NYS 20.

N.C. Tyson v. Leggs Products, Inc., 84 NC App 1, 351 SE2d 834.

Okla. Oklahoma Operating Co. v. Shipley, 171 Okla 484, 43 P2d 445.

S.C. Where a corporation has acquired a name by usage, an adjudication against it by the name so acquired is valid and binding. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 SC 237, 399 SE2d 779 (1990).

If a corporation is sued under the name it transacts business, service is sufficient to bring it before a court. Griffin v. Capital Cash, 310 SC 288, 423 SE2d 143 (SC App 1992).

Tex. Davis v. Tex-O-Kan Flour Mills Co., 186 F2d 50.

When a division's name is also an assumed name of the corporation, the corporation may sue and be sued in the assumed name. Matsushita Elec. Corp. of America v. McAllen Copy Data, Inc., 815 SW2d 850 (Tex App 1991).

Corporation may sue or be sued either in proper names or trade names as assumed. Employees Loan Co. v. Templeton, 109 SW2d 774 (Tex Civ App).

Wash. Where plaintiff corporation identified itself in its complaint by pleading both its true corporate name and its assumed name under which it transacted business, it came within exemption under Washington assumed-name statute and was not obligated to file assumed-name certificate as a condition precedent to maintaining the action. Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc., 71 Wash 679, 430 P2d 600.

Statutory authority to conduct business under assumed or fictitious business names, see § 2442.

²N.C. A corporation is adequately served with sufficient legal process under its assumed name and the trial court has proper jurisdiction if there is a lack of confusion concerning the identity of the intended defendant or the defendant is not misled or prejudiced. Tyson v. Leggs Products, Inc., 84 NC App 1, 351 SE2d 834.

S.C. Griffin v. Capital Cash, 310 SC 288, 423 SE2d 143 (SC App 1992).

A court will allow amendment to a default judgment to substitute a corporation's name for its trade name merely to correct a clerical mistake where service and notice was otherwise proper and the judgment debtor had not registered the trade name, had not come forth to correct the misnomer until after judgment, and had not otherwise been prejudiced by it. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 SC 237, 399 SE2d 779 (1990).

³Colo. Where an action brought by a corporation, doing business under an assumed name, is dismissed for the sole reason that it has failed

to comply with the statutory provisions requiring the filing of a certificate to authorize the doing of business under an assumed name, and where the corporation after such dismissal complied with the statute, it can maintain a new suit upon the same transaction against a plea of res judicata. *Admiral Corp. v. Trio Television Sales*, 138 Colo 157, 330 P2d 1106.

Mont. Shareholders in a corporation that has not complied with the fictitious name statute may be barred from maintaining an action under such name. *Stott v. Fox*, 246 Mont 301, 805 P2d 1305 (1990).

A corporation which was acting under an assumed name without registration did not have access to the state courts. *Marketing Specialists, Inc. v. Service Marketing of Montana, Inc.*, 693 P2d 540 (Mont).

Pa. The failure to register the fictitious name does not impair or effect the validity of any contract to which the corporation is a party, but does preclude instituting an action or gaining recovery by the noncomplying corporation until the requirements for registration are met. *W.F. Meyers Co., Inc. v. Stoddard*, 363 Pa Super 481, 526 A2d 446.

Tex. If a party fails to file an assumed name certificate he cannot maintain a suit in a Texas court under that name. *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 SW2d 595 (Tex App 1994).

Statutory regulations governing assumed or fictitious business names, see § 2442.

⁴**Ga.** *American Exp. Travel Related Services Co., Inc. v. Berlye*, 202 Ga App 358, 414 SE2d 499 (1991).

Ky. On a cause of action for personal injuries arising against a corporation while operating under a fictitious name, a judgment was obtained against it in such name and enforced against it in its true corporate name. *Central Consumers Co. v. Ralston*, 202 Ky 94, 259 SW 67.

S.C. A default judgment entered against a defendant in the name under which a business is being operated may be amended by changing the name of the defendant to the name of the corporation that operates the business. *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 SC 237, 399 SE2d 779 (1990).

Tex. *Employees Loan Co. v. Templeton*, 109 SW2d 774 (Tex Civ App).

§ 4495 Capacity to sue or defend.

n. 4.

Mo. *Gilmore v. Bi-State Development Agency*, 836 SW2d 193 (Mo App 1996).

See, e.g., Ohio R Civ P 9(A); Tenn R Civ P 9.01; Wis Stat § 802.03.

§ 4513 Cause of action—In general.

n. 2.

U.S. *Wade v. Hopper*, 993 F2d 1246 (CA7 1993) (52-page rambling complaint embodying every element of poor pleading insufficient to state cause of action under RICO statute).

n. 4.

Mo. A petition is not insufficient merely because of the lack of definiteness or an informality in the statement of an essential fact. *State ex rel. Malone v. Mummert*, 889 SW2d 822 (Mo 1994).

n. 6.

La. Challenged pleadings should be accorded every reasonable interpretation in favor of maintaining their legal sufficiency, thus giving the litigant an opportunity to present evidence. *Korson v. Independence Mall I, Ltd.*, 593 So 2d 981 (La App 1992).

Mo. When determining whether a petition sets forth sufficient facts to support a claim, courts liberally construe the allegations, and impliedly include reasonable inferences fairly deducible from the facts stated. *State ex rel. Malone v. Mummert*, 889 SW2d 822 (Mo 1994).

Bold text in this paragraph is new.

Pleading requirements for particular actions by or against corporations, such as those relating to subscriptions to stock,⁷ directors, officers and agents,⁸ mortgage foreclosures,⁹ mandamus proceedings,¹⁰ proceedings in quo warranto,¹¹ anti-trust suits,¹² dissolution or forfeiture proceedings,¹³ receivership suits,¹⁴ piercing the corporate veil,^{14.50} are considered elsewhere in this treatise.¹⁵

^{14.50} See § 41.28.

§ 4519 Contracts and instruments.

n. 1.

La. *Korson v. Independence Mall I, Ltd.*, 593 So 2d 981 (La App 1992) (petition for breach of lease agreement failing to establish contractual privity with defendant).

§ 4525 Prayer for relief.

Bold text in this paragraph is new.

Generally, the only requirement is that the complaint provide a short and plain statement of the claim showing that the pleader is entitled to relief.¹ In other words, unless the pleading rules in the particular jurisdiction provide otherwise, every final judgment must grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his or her pleadings.^{1.50} Relief against a corporation may be prayed for in the alternative.² The same rules are followed in the federal courts.³