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Attorneys Exempt from Filing Certificate of Partnership

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ance used as a means of transportation on land propelled by a motor.¹³ A horse-drawn vehicle is excluded; although a trolley car or railroad train may be classified as motor vehicles the requirement that the vehicle must have been operated upon the highways of the state, excludes their being considered as such.¹⁴ Except for the fact that this last condition was intended to exclude trolley cars and railroad trains, it seems to serve no valid purpose in alleviating the evil sought to be corrected. Suppose the accident takes place on a private street as distinguished from a public highway, the evil which existed where a public highway is concerned exists here, yet by express provision the amendment is inapplicable.

After all the conditions above set forth have been complied with testimony as to the facts of the accident are admitted but testimony as to a conversation with the deceased is still incompetent.¹⁵ The statute somewhat alleviates the situation but its limitations are unduly narrowed by the wording of the Act. If the courts interpret the statute in the light of the evil sought to be prevented and give a liberal construction to its limitations the Act is a definite step forward. If, on the other hand, the Act is to be strictly construed, many evils sought to be prevented will not be eliminated.

BENJAMIN LIEBOV.

ATTORNEYS EXEMPT FROM FILING CERTIFICATE OF PARTNERSHIP.—The state, by virtue of its police power, may regulate its internal affairs for the protection and promotion of the general welfare.¹ Exercising this regulatory power the New York Legislature enacted in 1939 a mandatory direction requiring all persons conducting business as partners to file with the county clerk a certificate containing the name of the partnership and the names and addresses of all the partners.² The purpose of this statute was for the general conve-

¹³ BLACK, LAW DICTIONARY (3d ed. 1933) 1801 ("VEHICLE. Any carriage, conveyance, or other artificial contrivance used, or capable of being used, as a means of transportation on land;—not ordinarily including locomotives, cars, and street cars which run and are operated only over and upon permanent track or fixed way, unless the context of the ordinance or statute in question clearly indicates an intention to the contrary").

¹⁴ *Ibid.*

¹⁵ The statute expressly provides that "this provision shall not be construed as permitting testimony as to conversations with the deceased".

¹ *Halter v. State of Nebraska*, 205 U. S. 34, 27 Sup. Ct. 419 (1907).

² N. Y. PENAL LAW § 440-b: "1. No person shall hereafter carry on or conduct or transact business in this state as partners under a partnership agreement unless such persons shall file in the office of the clerk of the county or counties in which the partnership business shall be conducted or transacted, a certificate setting forth the name under which such business is, or is to be, conducted or transacted, the true or real full names of all the persons conducting

nience of third parties who contracted with the firm and then sought to enforce such contractual obligation incurred by the partnership under the firm name. That name, when used in executing a contract, is intended to bind the partnership and its members;³ and it is necessary when suing on such contract that all the partners be made parties defendant.⁴ Difficulty would arise where only the firm name had been used and the names of the partners were not disclosed, except that of the partner who was acting as agent for the partnership. The task is equally as onerous in actions based on tort where the plaintiff seeks to hold the partners jointly liable.⁵ The difficulty existed whether a fictitious name was used or an incomplete designation by true name. The task of the one seeking relief has been alleviated by the passage of the statute requiring *all* partnerships to record the name of the firm and the names of all the individual partners.⁶ Prior to the enactment of that statute, there existed an act which required only the filing of assumed names.⁷

Partnerships are classified into two divisions, trading or commercial partnerships and nontrading or noncommercial partnerships. In the case of a commercial or trading partnership (one engaged in a business of buying and selling for profit), each partner acts as a general agent with implied authority to make contracts and incur obligations which will bind all the partners, if within the scope of the partnership business.⁸ In the case of a noncommercial or nontrading partnership (engaged in business other than buying and selling for profit), however, the doctrine of general agency and implied liability does not apply, and a partner does not generally possess power to act for and bind the firm and the other partners.⁹ A partner in a nontrading partnership has no authority to execute a note in the firm name which is binding on the other partners.¹⁰ So a partner in the practice of medicine or surgery,¹¹ or law,¹² is not a member of a commercial partnership, and has not the implied authority of a general agent.

or transacting such partnership, with the residence and business addresses of such persons, and the age of any who may be infants. Such certificate shall be executed and duly acknowledged by all persons entering into such partnership agreement.⁷

³ 1 ROWLEY, MODERN LAW OF PARTNERSHIP (1912) 281.

⁴ N. Y. PART. LAW § 26.

⁵ Hyde v. Lesser, 93 App. Div. 320, 87 N. Y. Supp. 878 (1st Dept. 1904); Wood v. Proudman, 122 App. Div. 826, 107 N. Y. Supp. 757 (1st Dept. 1907); Maxwell v. Martin, 130 App. Div. 80, 114 N. Y. Supp. 349 (1st Dept. 1909).

⁶ N. Y. PENAL LAW § 440-b.

⁷ N. Y. PENAL LAW § 440.

⁸ 47 C. J. (1929) § 291.

⁹ Pease v. Cole, 53 Conn. 53, 22 Atl. 681 (1885); American Bonding Co. v. Fults, 157 Mo. A. 553, 138 S. W. 689 (1911); Ann Arbor First Nat. Bank v. Farson, 226 N. Y. 218, 123 N. E. 490 (1919); Snively v. Matheson, 12 Wash. 88, 40 Pac. 628 (1895).

¹⁰ Eastlick v. Hayward Lumber & Investment Co., 33 Ariz. 242, 263 Pac. 936 (1928).

¹¹ Crosthwait v. Ross, 1 Humph. 23 (Tenn. 1839).

¹² Worster v. Forbush, 171 Mass. 423, 50 N. E. 936 (1898).

The statute, requiring the filing of certificates of partnership, imposed this prerequisite on persons carrying on a business as partners without qualifications as to the type of copartnership. The question presented itself as to whether this statute applied to nontrading partnerships or to partners who are engaged in the practice of a profession. Upon being confronted with a similar problem under a fictitious name statute, a Michigan court held that a partnership of attorneys, engaged exclusively in the practice of their profession, was not exempt from the provisions of the statute on the ground that the practice of law is a "profession", and not a "business" within the meaning of the Act.¹³ The court said: "Nothing in the act suggests its limitation to those capitalized copartnerships organized for trade, manufacturing, or commerce, to the exemption of that numerous class of nontrading partnerships in occupation or employment, the capital of which consists chiefly of especial skill, experience, and learning in a particular calling * * *. That the act does not, by express language or by implication, except attorneys from provisions, is clear."¹⁴ If any doubt existed as to what partnerships were intended to be included under the New York filing statute, it was cleared up by the subsequent passage by the legislature of an amendment which excepted partnerships of attorneys from filing.¹⁵ From this may be inferred the legislative intent that both trading and nontrading partnerships file, the only exception being nontrading partnerships of attorneys, and that by special provision. The legislature probably was of the opinion that attorneys are subject to sufficient scrutiny when they are made to comply with the standard of qualification as set by the courts, with its auxiliary board of examiners, which has the duty of examination and determination and that further regulation as to attorneys as partners would put an undue burden on them. The legislature may, for the same reason, grant such exemption to physicians and accountants. It is for the legislature, not for the courts, to say whether there should be any exceptions to the provisions of such statute.¹⁶

Under common law a partnership was not restricted in its right to do business within a state.¹⁷ Since the transaction of business through partnerships is a rather popular practice the various states have found it necessary to enact regulatory statutes for the protection of the public. In exercising their police power to safeguard the public interests through imposing conditions on the right to engage in a business as partners, the states did not require compliance with conditions having no reasonable relation to that objective. Many states required that only partnerships having fictitious names should file so

¹³ *Slovan v. Bender*, 189 Mich. 258, 155 N. W. 581 (1915).

¹⁴ *Ibid.*

¹⁵ N. Y. PENAL LAW § 440-b, subd. 6 (subd. 6 as first set out was added by L. 1940, c. 512, in effect April 15, 1940 and it has no reference to the following subdivision which is also numbered subd. 6).

¹⁶ *Slovan v. Bender*, 189 Mich. 258, 155 N. W. 581 (1915).

¹⁷ *State v. U. S. Exp. Co.*, 81 Minn. 87, 83 N. W. 465 (1900).

that the public may have ready means of information as to the personal or financial responsibility behind the fictitious name.¹⁸ Some state statutes provide that a partnership may not maintain an action on a contract if it has not complied with the filing statute.¹⁹ These statutes do not apply to tort actions.²⁰ In some states there exist statutes requiring that only trading partnerships shall record.²¹ The New York Legislature has exercised the widest power in requiring *all* partnerships to file with the county clerk a certificate setting forth the partnership name and the names and addresses of all the individual partners.²²

The legislature evidently found that the "fictitious name filing statute" did not render sufficient protection to persons dealing with partnerships since many partnerships have true names which are incomplete designations. By requiring all partnerships to file an opportunity is given to a person, contracting with the partnership, to determine exactly with whom he is dealing. If one desires to bring an *ex delicto* action against a trading or nontrading partnership, he may sue the partners jointly or severally.²³ The filing statute protects this choice given the plaintiff by making it rather simple to determine who the partners are if the plaintiff wants to sue the partners jointly. The statute is not unconstitutional as forbidding the transaction of business.²⁴ It merely requires filing and provides a proper penalty for any violation thereof. Although not a creature of the state, as is a corporation, a partnership has become subject to much state regulation in recent years in an effort to prevent any evils which may arise when two or more persons associate for the purpose of transacting business.

CATHERINE GREENFIELD.

THE SELECTIVE SERVICE AND TRAINING ACT OF 1940.—Congress, exercising the power vested in it by the Federal Constitution,¹ recently passed the first peacetime statute conscripting the nation's

¹⁸ 45 A. L. R. 203 (1926).

¹⁹ *Melcher v. Beeler*, 48 Colo. 233, 110 Pac. 181 (1910); *Ryder-Gouger Co. v. Garretson*, 53 Wash. 71, 101 Pac. 498 (1909); *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596 (1910).

²⁰ *Melcher v. Beeler*, 48 Colo. 233, 110 Pac. 181 (1910).

²¹ 2 ROWLEY, MODERN LAW OF PARTNERSHIP (1912) 1237.

²² N. Y. PENAL LAW § 440-b.

²³ N. Y. PART. LAW § 26.

²⁴ *Kusnetzky v. Security Ins. Co.*, 313 Mo. 143, 281 S. W. 47 (1926).

¹ U. S. CONST. Art. I, § 8 ("The Congress shall have the power . . . to declare war . . . to raise and support armies, . . . to make rules for the government and regulation of the land and naval forces; . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers").