

# Designation of Particular Insurance Agent Prohibited

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the *Abbott* case.<sup>24</sup> Under the present statute no application is admissible in evidence, to decide either an extrinsic or intrinsic question, if the application is not attached to the insurance policy. The amendment only provides for applications and makes no mention of any other writings such as is made in the previously enacted part of the section. Therefore, it follows that writings other than applications are admissible in evidence when it is necessary to decide an extrinsic question, even though they are not attached to the policy, particularly since both the majority and the dissenting opinions in the *Abbott* case<sup>25</sup> agreed on this point and it has not been disturbed by the Legislature.

The insurance corporations may see fit to contest Section 142 as being unconstitutional, on the ground that it interferes with their contract rights under the United States Constitution. The insurance business is *quasi*-public in character because of its vast effect on all classes of people and their property. Therefore, it is competent for the state by virtue of its police power to regulate and control both the business and the contracts.<sup>26</sup>

The principle underlying former Section 58, that the insurance policy should contain the entire contract, is a sound principle for the protection of the public and its extension by Section 142 to insurance policies other than for life is a further indication of the legislative intention to add more weight to the unbalanced bargaining power of the insured.

CATHERINE GREENFIELD.

#### DESIGNATION OF PARTICULAR INSURANCE AGENT PROHIBITED.

—The right to make contracts is protected by the "due process" clause of the Federal Constitution.<sup>1</sup> The courts have guarded few rights more zealously, being ever on the alert to prevent an undue invasion of this guarantee.<sup>2</sup> However, in the same breath, they have constantly reiterated their holding that the right is not absolute, that it must be restrained when the public welfare demands it,<sup>3</sup> and legislation to that effect will be upheld as constitutional.<sup>4</sup>

<sup>24</sup> 281 N. Y. 375, 25 N. E. (2d) 141 (1939).

<sup>25</sup> *Ibid.*

<sup>26</sup> CADY, *THE LAW OF INSURANCE* (3d ed. 1934) 79.

<sup>1</sup> U. S. CONST. AMEND. XIV, § 1; *Adkins, et al. v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394 (1923); *German Alliance Ins. Co. v. Barnes*, 189 Fed. 769 (C. C. Kan. 1933).

<sup>2</sup> *Chas. Wolff Packing Co. v. The Court of Industrial Relations of the State of Kansas*, 262 U. S. 522, 43 Sup. Ct. 630 (1923); *Liberty Warehouse Co. v. Burley Tobacco Growers Co-operative Ass'n*, 276 U. S. 71, 48 Sup. Ct. 291 (1928); *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., et al.*, 284 U. S. 151, 52 Sup. Ct. 69 (1931).

<sup>3</sup> *Advance Rumely Thresher Co., Inc. v. Jackson*, 287 U. S. 283, 53 Sup. Ct. 133 (1932).

<sup>4</sup> *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 57 Sup. Ct. 578 (1937).

Recently the New York Legislature amended the Penal Law, inserting a new section therein, whereby it is made the law of the state that: " \* \* \* no trustee, director, officer, agent or other employee of any bank, or banking institution, or of any insurance corporation or association, or of any other corporation or company engaged in the business of lending money on the security of real property shall require, as a condition precedent to loaning money upon the security of a mortgage upon real property, that the owner of the property to whom the money is to be loaned, negotiate any policy of insurance covering such real property through a particular insurance agent or broker or brokers".<sup>5</sup> It appears that the Legislature has undeniably restricted the right of the lending party to contract. Although the Insurance Law prohibits the granting of rebates by insurance companies or their agents,<sup>6</sup> it is apparent that the lender can, nevertheless, gain substantial benefit, even if only indirectly, from his exercise of the power to name the insurance broker through whom the prospective borrower is to procure his insurance.

Justification for this legislation is found in a long line of decisions dealing with similar restrictive statutes.<sup>7</sup> These cases would seem to indicate that, although the courts regard the right to contract as a liberty or property right,<sup>8</sup> it is, nonetheless, not to be considered as an absolute right, but a qualified one which is subject to reasonable restraint in the interest of the public welfare.<sup>9</sup> This restraint is accomplished by the use of the police power.<sup>10</sup> It becomes important to examine the concept of the police power to see if it is sufficiently broad to encompass the instant legislation. As was said by the court in *Panhandle Eastern Pipe Line Co. v. State Highway Commission*,<sup>11</sup> "The police power of a state while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the

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<sup>5</sup> N. Y. PENAL LAW § 442-a (L. 1940, c. 91).

<sup>6</sup> N. Y. INS. LAW § 188.

<sup>7</sup> *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383 (1898); *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1 (1901) (regulating the redemption of store orders issued for wages); *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, 33 Sup. Ct. 69 (1912) (regulating contracts for the sale of real estate); *Sturges & Burns Mfg. Co. v. Beauchamp*, 231 U. S. 320, 34 Sup. Ct. 60 (1913) (prohibiting child labor); *N. Y. Central R.R. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 (1917) (establishing a system of compulsory workmen's compensation); *Banting v. Oregon*, 243 U. S. 426 (1917) (prescribing hours of labor in certain occupations).

<sup>8</sup> *Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 253, 49 Sup. Ct. 314 (1929); *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 56 Sup. Ct. 513 (1936).

<sup>9</sup> *St. Louis R. R. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419 (1899).

<sup>10</sup> *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1 (1901).

<sup>11</sup> 294 U. S. 613, 622, 55 Sup. Ct. 563 (1935).

governmental power of self protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury."

It should be noted that the Constitution does not speak of freedom of contract. It speaks of the liberty of contract and prohibits the deprivation of that liberty without due process of law.<sup>12</sup> This liberty is subject to such restraint as best subserves the general welfare of the people.<sup>13</sup> Regulation thus adopted and which is reasonable in regard to the subject restrained is due process as that term is interpreted by the courts.<sup>14</sup> However, freedom is the general rule and restraint the exception.<sup>15</sup> The exercise of legislative authority to abridge it can only be justified by exceptional circumstances.<sup>16</sup> The attitude of the courts was summarized in *Chicago, B. & Q. R. R. v. McGuire*,<sup>17</sup> wherein it was said: "\* \* \* Freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulation and prohibitions imposed in the interest of the community."

An examination of the statute itself discloses its most significant aspect, *viz.*, that its prohibition applies only to the business of "\* \* \* any bank or banking institution, or of any insurance corporation or association, or of any other corporation \* \* \*".<sup>18</sup> The statute evidently does not purport to regulate individual lenders. They would seem to have been excluded by implication. Perhaps an explanation for this restriction on the scope of the statute is to be found in the New York Constitution where the Legislature reserves to itself the right to repeal, alter, or amend any corporate charter.<sup>19</sup> On this ground alone the constitutionality of the enactment can probably be well defended.

It is submitted that the police power reserved to the states is sufficiently broad to make this statute applicable to individual as well as corporate borrowers. The courts cannot set it aside on the ground that it is unnecessary, for what makes for the general welfare is a

<sup>12</sup> U. S. CONST. AMEND. XIV, § 1.

<sup>13</sup> See note 9, *supra*.

<sup>14</sup> See note 4, *supra*.

<sup>15</sup> *Adkins, et al. v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394 (1923).

<sup>16</sup> *Chas. Wolff Packing Co. v. The Court of Industrial Relations of the State of Kansas*, 262 U. S. 522, 43 Sup. Ct. 630 (1923).

<sup>17</sup> *Chicago, B. & Q. R. R. v. McGuire*, 219 U. S. 549, 567, 31 Sup. Ct. 259 (1911).

<sup>18</sup> N. Y. PENAL LAW § 442-a (L. 1940, c. 91).

<sup>19</sup> N. Y. CONST. AMEND. X, § 1; *N. Y. Central R. R. v. Williams*, 199 N. Y. 108, 92 N. E. 404 (1910) (a corporate charter may be amended by a general act which does not specifically refer to such charter).

matter of legislative judgment and the judicial review is limited to power and excludes policy.<sup>20</sup>

ALEXANDER VITALE.

**STATUTORY LIABILITY OF PARTNERSHIP FOR FAILURE TO FILE CERTIFICATE.**—A partnership is an association of two or more persons to carry on as co-owners a business for profit.<sup>1</sup> The word person includes individuals, partnerships, corporations, and other associations.<sup>2</sup> Thus it becomes apparent that the articles of partnership may bring together any number of persons to carry on in the commercial community. With the law established that an action against a partnership is an action against a group of individuals, rather than an entity, it becomes the very difficult task of a third party seeking relief to ascertain the two or more persons constituting the partnership.<sup>3</sup> To alleviate this task the legislature has enacted that persons conducting businesses under an assumed name shall file in the office of the county clerk a certificate setting forth the real name or names of the persons conducting said business.<sup>4</sup> The step was taken to protect third parties dealing with fictitious or assumed named businesses. The statute clearly includes partnerships carrying on under assumed names, but a firm name may be a true but incomplete designation. For example, "Smith & Jones" may be the firm name of a partnership consisting of Smith, Jones and Brown, the latter's name not appearing in the firm designation. In view of the fact that Brown's financial resources make him a desirable party defendant, a plaintiff in order to ascertain his relationship to the firm may have to wander deep into his action before learning that the firm "Smith & Jones" consisted of three partners. To overcome this needless hardship the New York Legis-

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<sup>20</sup> German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612 (1914).

<sup>1</sup> N. Y. PART. LAW § 10.

<sup>2</sup> N. Y. PART. LAW § 2. The word "person" as defined by this section does not give corporations the *right* to enter into partnerships either with other corporations or with individuals. Op. Atty. Gen. 230 (1935), "A partnership and a corporation are incongruous." Malory v. Hanaur Oil Works, 86 Tenn. 598, 8 S. W. 396, 399 (1888).

<sup>3</sup> In actions based on contracts made with a partnership, all partners should be made parties defendants. Alaska Banking and Safe Deposit Co. v. Van Wyck, 146 App. Div. 5, 130 N. Y. Supp. 563 (1st Dept. 1911). Of course, a failure to join an active partner is by no means fatal. Where for any cause a partner has not been joined as defendant, the plaintiff may maintain a separate action upon the same demand against such omitted partner. See N. Y. Civ. PRAC. ACT § 1201.

In actions based on tort the same holds true. 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).

<sup>4</sup> N. Y. PENAL LAW § 440.