

## Statutory Liability of Partnership for Failure to File Certificate

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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.

lature enacted in 1939 an express command that all persons, conducting business as partners, set forth, among other particulars, the true names and addresses of all persons constituting the partnership.<sup>5</sup> Bearing in mind the peculiar status of an infant in the business world, it is interesting to note that the statute affords the additional protection against unknowingly dealing with infants by requiring that "the age of any who may be infants" be expressly stated.<sup>6</sup> Today it is an absolute requisite that persons carrying on as partners file their certificate of "doing business" under Section 440-b of the New York Penal Law or be guilty of a crime.<sup>7</sup>

What is the position of a partnership failing to comply with this penal provision? Let us take an analogous example in the corporation law. Suppose *A*, *B*, *C* and *D* decide to carry on as a corporation. In ignorance of our corporation law they fail to comply, and make no colorable attempt to comply with our laws, thus failing to achieve a *de facto* existence. Now if *A* acts for the supposed corporation the relationship between him and the third party raises a difficult problem. Was *A* an agent without a principal? Was *A* binding the others by his contract? The corporation law has introduced a fiction as to this phase of the law.<sup>8</sup>

Similarly, what shall be the status of *A*, *B*, *C*, who enter into a partnership agreement and fail to comply with the new statutory requirement? "The failure to comply with the provisions of this section shall in no way affect the rights of third persons, nor shall this section be deemed or construed so as to limit the liability of partners under the provisions of the partnership law."<sup>9</sup> Here we have an express legislative declaration as to the status of individuals who

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<sup>5</sup> N. Y. PENAL LAW § 440b (*Conducting business as partners*. 1—No persons shall hereafter carry on or conduct or transact business in this state as partners under a partnership agreement unless such person 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 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 the persons entering into such partnership agreement).

<sup>6</sup> *Ibid.*

<sup>7</sup> N. Y. PENAL LAW § 440b (5) (Persons conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this section or who shall make a false statement of a material nature, shall be guilty of a misdemeanor).

<sup>8</sup> "Parties assuming to act in a corporate capacity without a legal organization as a corporate body, are liable as partners to those with whom they contract." *Fuller v. Rowe*, 57 N. Y. 23, 26 (1874).

<sup>9</sup> N. Y. PENAL LAW § 440b (4) as amended by L. 1940, c. 51 (The failure to comply with the provisions of this section shall in no way affect the rights of third persons, nor shall this section be deemed or construed so as to limit the liability of partners under the provisions of the partnership law, nor shall it apply to a limited partnership or to a private banker duly authorized by the superintendent of banks to engage in business pursuant to the provisions of the banking law).

fail to comply with the statute. *A, B and C* are liable as partners. No doubt the failure to file is a crime and a business so conducted is being illegally conducted. Does the above subdivision of the enactment by implication lead us to the conclusion that a suit by the partnership would at all times be frustrated by reason of its illegal existence? Although penal statutes, as a fundamental rule, must be strictly construed,<sup>10</sup> the legislative intent, when clearly established, becomes a substantial part of the statute as though expressly inserted therein.<sup>11</sup> The courts have not as yet been called upon to construe the legislative intent. But some light as to possible future judicial thought is cast by adjudications under a similar statute which makes it a crime to carry on as partners under the name of one not interested in the partnership, or use the description "& Co." when no actual partner is represented.<sup>12</sup> Courts have held that this "was a measure intended to be in the interests of the commercial community and had its foundation in public policy. It simply made it a misdemeanor to do what was therein specified and *that is all*".<sup>13</sup> And if third parties were not actually deceived by such illegality it was a matter of state concern only.<sup>14</sup> Thus, in *Vandergrift v. Bertron*,<sup>15</sup> plaintiff who was alone interested in a business but carried on as "Vandergrift and Co." was permitted a recovery over the defendant's claim that such practice was illegal in view of the penal law, on the ground that the contract was executed and defendant was not misled by the false designation. Where, however, an administratrix assumed to transfer the right and privilege of using a firm name which had been used by her intestate, it was a defense to an action to recover the subject matter therefor that the use of such firm name by decedent was illegal.<sup>16</sup> Here by statute the subject matter of the sale was illegal.

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<sup>10</sup> *People ex rel. Commissions of Public Charities and Correction v. Cullen*, 159 N. Y. 629, 47 N. E. 894 (1897).

<sup>11</sup> The mischief designed to be remedied may be considered by the courts in the interpretation of a statute. *Hawkins v. Hawkins*, 193 N. Y. 409, 86 N. E. 468 (1908); see Note (1931) 70 A. L. R. 5.

<sup>12</sup> N. Y. PENAL LAW § 924 (*Fictitious copartnership names*. A person who transacts business, using the name, as partner, of one not interested with him as partner, or using the designation "and company", or "& Co." when no actual partner is represented thereby, is guilty of a misdemeanor. But this section does not apply to any case where it is specially prescribed by statute that a partnership name may be continued in use by a successor, survivor, or other person).

<sup>13</sup> *Sinnott v. German-American Bank*, 164 N. Y. 386, 391, 58 N. E. 286, 287 (1900).

<sup>14</sup> "To violate this statute, the designation 'and company' or '& Co.' must be used in the transaction of some business. The purpose of the statute was obviously to protect persons giving credit to the fictitious firm on the faith of the fictitious designation. It could have no other purpose." *Gay v. Seibold*, 97 N. Y. 472, 476 (1884).

<sup>15</sup> 83 App. Div. 548, 82 N. Y. Supp. 153 (4th Dept. 1903).

<sup>16</sup> *Jenner v. Shope*, 205 N. Y. 66, 8 N. E. 325 (1912).

From a practical viewpoint Section 440-b of the New York Penal Law was intended to make the constituency of a partnership an "open book". Thus, if parties should enter into executory obligations, in reliance upon the fact that before performance the entire partnership can be investigated by a reference to its certificate, a failure to file under such circumstances should relieve the third party from his obligation. For one has a right to assume that the people he is dealing with are conducting their business legally. But where there has been no reliance upon the fact that such a certificate has been filed it is safe to say that it is a matter of state concern only.

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