PARTNERSHIPS, LIMITED: Corporations and limited partnerships may both use the word "limited" or its abbreviation at the end of the names under which they transact business.

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Honorable Russell Maloney
Corporation Supervisor
Office of the Secretary of State
of Missouri
Jefferson City, Missouri

Dear Mr. Maloney:

Your letter of March 9, to General Taylor, requesting this Department to furnish your office with an opinion respecting the legality of the use of the word "limited" as a part of a fictitious name, by a limited partnership, or whether the use of the word "limited" is exclusive to corporations, has been received and assigned to the writer to preapre the opinion.

Your letter states:

> "The question has been submitted to this department as to whether or not we should permit the registration of a fictitious name ending with the abbreviation of the word 'limited.'
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> "It is contended by applicant that as a limited partnership they are entitled to designate the partnership in such manner, and that the word 'limited' is not confined to the use of corporations as is not the word 'company'.
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> "We have refused the application because in our judgment the word 'limited' is for the exclusive use of a corporation even though it is not commonly used in this country."

47 C.J., Section 1008, page 1273, defines a "limited" partnership as follows:

> "The term 'limited partnership' is a term sometimes used to designate joint adventures and partnerships limited only in respect of the nature and scope of the business to be carried on, and more loosely, to characterize business associations formed under statutes permitting the organization of partnership associations, the liability of whose members is limited to the amount contributed to their capital. A more accurate usage of the term confines it to the form of business association composed of one or more general partners and one or more special partners, the latter not being personally liable for the partnership debts."

Chapter 34, R.S. Mo. 1939, contains the statutory laws of Missouri on such partnerships under the title "Partnerships, Limited." This chapter is composed of Sections 5564 to 5576, both inclusive. Section 5564 of said chapter is as follows:

> "Two or more persons may form a limited partnership, which shall consist of one or more persons of full age, called general partners, and also one or more persons of full age, who contributed in actual cash payments a specified sum as capital to the common stock, called special partners, for the transaction within this state of any lawful business, except insurance and banking, upon the terms and subject to the conditions and liabilities prescribed in this chapter."

Section 5569 of said Chapter is in part as follows:

> "The business of such partnership shall be conducted under a firm name in which the name or names of some or all of the general partners only shall be inserted without the addition of the word 'company,' or any equivalent term, * * * "

Section 5570 is in part as follows:

> "* * * The special partners shall not be liable for the debts of the partnership beyond the fund contributed by them respectively to the capital of the partnership."

Section 5576 of said chapter is as follows:

> "Any partnership formed under this chapter shall keep in a conspicuous place at each of its places of business a plain and legible sign, giving the name and style of the firm, together with the names of all of the members of such partnership, designating which are general and which are special partners, and failure to obey this requirement shall make the special partners liable as general partners."

This subject is very clearly treated in 47 C. J. page 1290. The text there states:

> " * * * However, many of the statutes expressly forbid the use of the word 'Company' or any other general or equivalent term in the firm name. Such a provision is obviously intended for the benefit of the public, and under it the use of a suffix, like 'and Company,' in the firm name is in direct violation of its requirements. * * * "

Indeed, it would seem that the only purpose the Legislature had in enacting legislation at all on the subject was for the protection of the public. Article 3, Chapter 140, R. S. Mo. 1939, constitutes the law of this State on the use and registration of fictitious names. That part of Section 15467 of said Article 3, Chapter 140, setting out what shall be contained in the statement to be permitted to register a fictitious name under which to transact business, is very similar in the language used to some of the language used in Section 5565, and Section 5576 of said Chapter 34 on "Partnerships, Limited." These statutes in the "fictitious names" article also appear very clearly to have the express intention in mind to protect the public.

With respect to the right to use a fictitious name,

45 C. J., page 376, states this rule:

> " * * * Without abandoning his real name, a person may, in the absence of statutory prohibition, adopt any name, style, or signature, wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue or be sued, * * * * ."

Our St. Louis Court of Appeals in the case of Sheridan et al, vs. Nation, 159 Mo. App. 27, l.c. 43, on the same point says:

> "* * * It is entirely settled, both by the elementary writers and adjudicated cases, that in the absence of fraud, a person may do business and execute contracts in any name he or she has chosen to assume and has a perfect right to sue and be sued in such name. * * * "

The Kansas City Court of Appeals in the case of Ditzell et al., vs. Shoecraft, 219 Mo. App. 436, l.c. 446, approving the same principle of law, said:

> "It has been held that the right to do business is inherent in every person and partnership and in the absence of fraud, any name may be used. (Palmer v. Leivy (Mo. App.) 205 S.W. 244.) The powers of the Legislature are narrowly confined. It has power to regulate but not to prohibit business. * * * "

Our Supreme Court was considering and discussing the fictitious name statutes in the case of Kusnetsky vs. Insurance Company, 313 Mo. 143. The Court, l.c. 152, said:

> "It is earnestly argued by counsel for appellants here that the statute is intended to <u>prevent</u> fraud. Exactly. The particular fraud in contemplation undoubtedly was the deception of persons dealing with any institution trading under a name other than the actual name of the owners. * * * "

Section 15467, R.S. Mo. 1939, does not preclude one from beginning a business of any sort under a fictitious name. It does provide that within five (5) days after engaging in or beginning such business he shall then register the fictitious name with the Secretary of State. There is no discretionary power given to the Secretary of State, nor are any discretionary duties placed upon him in any of the sections of said Article 3, respecting the registration of fictitious names. That the Legislature did not contemplate or intend that the Secretary of State should take any part in the selection of a fictitious name under which one would begin or carry on a business venture is self-evident, otherwise it would have been provided that one could not begin a business under a fictitious name without first having registered the name with the Secretary of State and obtained his approval of the name. On the other hand, the applicant for the registration of such business name is left free and unhampered to adopt any name he wishes to use for the purpose. He is only required to register the name within the period of five (5) days after engaging in such business. He must then only comply with the terms of said Section 15467, and produce the evidence that he has paid the registration fee, as prescribed by the following section, 15468. It then becomes the ministerial duty of the Secretary of State to register such fictitious name.

40 C. J. 1210 gives a definition of "ministerial duty" as follows:

> "A ministerial duty has been variously defined as a duty in which nothing is left to discretion; * * * ."

The same volume on the same page under foot-note 83 (b) quoting a South Carolina case which clarifies the text definition above, says:

> "A ministerial duty arises when an individual has such a legal interest in its performance that neglect of performance of such duty becomes a wrong to such individual. Morton v. Comptroller-Gen., 38 S.C. L. 430, 473."

46 C. J. 1032, in discussing the distinction between express and implied powers of public officers under the title of "officers" states the rule of such distinction as follows:

> " * * * But no powers will be implied other than those which are necessary for

> the effective exercise and discharge of the powers and duties expressly conferred and imposed, and where the mode of performance of ministerial duties is prescribed, no further power is implied."

The fictitious name statutes are mandatory and penal as far as the applicant for registering a fictitious name is concerned. It is compulsory that within five (5) days after beginning business he must register any fictitious name under which he is operating. If, for any time, after the elapse of five (5) days, he should conduct his business under a fictitious name without having registered the same with the Secretary of State, he would be, under the terms of Section 15469, guilty of a misdemeanor, and subject to a fine, or imprisonment, or both.

38 C. J. gives a very appropriate definition of "mandatory" as it may be applied to the terms of the statutes under consideration, page 956, where the text reads:

> " * * * As an adjective (usually spelled mandatory), containing a command; imperative; peremptory; preceptive."

59 C.J., page 1110, in defining "penal statutes" uses this text:

> " * * * In common use, however, this sense has been enlarged to include under the term 'penal statutes' all statutes which command or prohibit certain acts, and establish penalties for their violation, * * * ."

The same volume of the same work, pages 1127 and 1128, gives as examples of "penal statutes";

> " * * * those which operate in restraint of * * * the exercise of any trade or occupation, or the conduct of business. * * * "

Such mandatory and penal statutes must be strictly construed against the State, and liberally construed in favor of the individual, such as the applicant here, in the registration of a fictitious name. A case where this rule of strict construction was applied by our Supreme Court, was in the case of State ex rel. Spriggs vs. Robinson et al.,

State Board of Health, 253 Mo. 271. That was a case where the relator's license to practice medicine had been revoked. Of the statute being construed, under which the revocation of such license was effected, l.c. 284, 285, the Court said:

> " * * * If remedial, it must be liberally construed in behalf of both respondents and appellant, while if it be a penal law, it must be strictly construed against the respondents, as the representatives of the State, and liberally construed in favor of appellant. (State v. Balch, 178 Mo. 392; State v. Koock, 202 Mo. l.c. 235; State v. McMahon, 234 Mo. l.c. 614.)
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> "This rule is announced in 2 Lewis's Sutherland's Statutory Construction (2 Ed.), section 531.
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> "' Among penal laws which must be strictly construed, those most obviously included are all such acts as in terms impose a fine or corporal punishment under sentence in State prosecutions, or forfeitures to the State as a punitory consequence of violating laws made for preservation of the peace and good order of society. But these are not the only penal laws which have to be so construed. There are to be included under that denomination also all acts which . . . take away or impair any privilege or right.'"

Webster's International Dictionary, page 2098, defines the word "register" as used in said Sections 15466 and 15467 in definition 1:

> "To record formally and exactly, as for future use or service; to enroll, to enter precisely in a list or the like.
>
> "2a. To secure or make an official entry of in a register; as, to register a will, a deed, a mortgage."

It would appear, under the above quoted authorities, that an applicant for registering a fictitious name for a "limited" partnership, there being nothing in our statutes prohibiting it, or giving the State the right to refuse its

use, would have the lawful right to use the word "limited", or its abbreviation as the last word in such fictitious name.

At least one of our States, the State of Pennsylvanis, by a statute enacted many years ago, Section 5, Laws of Penna., 1874, page 272, required the word "limited" to be the last word in the name of every partnership association formed under their "Limited Partnership Statute." The provisions of the Pennsylvania statute have been somewhat changed and strengthened in that regard in later years. Sections 265 and 266, Title 59, pages 2655, 2656, Purdon's Penna. Statutes, 1936 Compact Edition, require the words "limited liability" to appear after the name of every partner in a "limited" partnership whose names appear in its signs or upon its stationery.

It is very probable that the appearance of the word "limited" in Section 7 of the Corporation Act of 1943, page 418, has caused the position to be taken that the word "limited" is exclusive to corporations, and that it may not be used by a "limited" partnership in its selection for registration and use of a fictitious name in its business. It is not believed that such a position is justified under the law. Section 7 of the new Corporation Act of 1943, page 418, states:

> "The corporate name:
>
> "(a) Shall contain the word 'corporation,' 'company,' 'incorporated,' or 'limited,' or shall end with an abbreviation of one of said words."

It is not seen that the use of the word "limited" could serve any possible office of identity of a corporation as such, or its name. Certainly, there is nothing in any part of this Act making the use of the word "limited" exclusive to corporations. Said Section, as quoted, requires the use of one of the words therein expressed in quotations. There could be no controversy that the use of the word "corporation," "company" or "incorporated," would fully and appropriately identify any organization as a corporation. That statute says that only one of the words, including "limited," shall be used, or the abbreviation of either of them at the end of the corporate name. But, suppose all of the other words, one only of which is permitted to be used, are eliminated, and only the word "limited" is used, such word would fail completely to identify the organization as a "corporation," whereas either of the others would do so. The word "limited" is not defined by said section, or elsewhere, in said Act. It would thus stand out as entirely meaningless in identifying the corporation as such, or in performing any other intelligible function.

Under our State Constitution, Section 7, Article 12, all corporations are "limited" in the extent and character of their businesses which they propose to operate. But neither by the Constitution nor by any statute are they given the exclusive right to use the word "limited."

The enactment of the "limited" partnership statutes and the fictitious names statutes of this State was and is a proper exercise, by the Legislatures which enacted them, of the police powers of the State for the prevention of fraud against the public. Here, if the word "limited" or its abbreviation, is used as the last word of a "limited" partnership, operating under a fictitious name, it would seem to be complying with both the spirit and the letter of both the "limited" partnership statutes and the "fictitious" name statutes to inform the public of the very nature of the partnership, so that the public, fully informed of the fact that it would be transacting business with a partnership, the names of some of the members of which are of "limited" financial responsibility and liability in the partnership's business, may protect itself.

To give Section 7, Laws 1943, page 418, as quoted, containing the word "limited" such construction as would confine its use to corporations only, and to exclude its use by "limited" partnerships, would have the effect of giving a corporation, without authority of law, a privilege over individuals, in violation of Section 3, Article XI of the new Constitution of Missouri, which is as follows:

> "The exercise of the police owner of the state shall never be * * * * * construed to permit corporations to infringe the equal rights of individuals, or the general well-being of the state."

Section 5, Article XII of the Constitution of 1875, recently repealed by the approval of the new Constitution of this State, was in almost the same language as our new Section 3, supra. The Supreme Court in the case of State vs. Railroad, 242 Mo. 339, had the meaning of this Section of said Article before it, and l.c. 355, said:

> " * * * It was merely a constitutional declaration that the police power shall not be <u>construed</u> so as to exalt the rights of corporations above those of natural citizens or so as to disturb the general well-being of the State."

CONCLUSION.

Considering the above authorities, it is the opinion of this department that the use of the word "limited" or its abbreviation, as the last word of its corporate designation is not the exclusive privilege of corporations alone, but that it may be used in like manner by "limited partnerships" at the last of a fictitious name selected and registered by such partnership in the conduct of its business affairs.

Respectfully submitted,

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APPROVED:

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