Volume 29 | Number 3 Article 19

4-1-1951

Unincorporated Associations -- Capacity to Sue and Be Sued

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The court's denial of the requested equitable relief because a remedy existed at law is not objectionable in the principal case as a blind adherance to procedure which postpones adjudication on the merits. Rather, it is a question of fundamental power to hear and determine probate matters. The right to dispose of one's property by will is not an inherent or guaranteed one, but rather one granted by the legislature.[22] Nor is is an unrestricted right. The Clerk of the Superior Court is given exclusive original jurisdiction in probate matters under the statutes.[23] The court had no alternative but to dismiss the action and the suggested course of action, while unusual, represents no more than a liberal interpretation of the statutes to meet an unanticipated situation.

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Unincorporated Associations—Capacity to Sue and Be Sued

In a recent case[1] the Supreme Court of North Carolina held that under N. C. GEN. STAT. §1-97(6) (1943)[2] an unincorporated association could sue or be sued in its common name. Although the statute in question does not expressly authorize this departure from the common

[22] Wescott v. Bank, 227 N. C. 39, 40 S. E. 2d 461 (1946); Peace v. Edwards, 170 N. C. 64, 86 S. E. 807 (1915); Pullen v. Commissioners, 66 N. C. 361 (1872).
[23] N. C. GEN. STAT. §2-16 (1943); N. C. GEN. STAT. §28-1 (1943); N. C. GEN. STAT. §§31-12 to 31-27 (1943).

[1] Ionic Lodge No. 72 F.A. & A.M. v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Company, 232 N. C. 252, 59 S. E. 2d 829 (1950).

[2] "Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this state upon whom all processes and precepts may be served, and certify to the clerk of the superior court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts, and processes may be served upon the secretary of state of the state of North Carolina. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the secretary of state, if no process agent is appointed, shall be legal and binding on said association or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection shall be valid and may be collected out of any real or personal property belonging to the association or organization.

"Any such unincorporated association or organization, now performing any of the acts for which it was formed, shall within thirty days from the ratification of this subsection, appoint an agent upon whom processes and precepts may be served, as provided in this subsection, and in the absence of such appointment, such processes and precepts may be served upon the secretary of state, as provided in this subsection. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization."

law,[3] the court felt that when construed with N. C. GEN. STAT. §39-24 (1943)[4] and N. C. GEN. STAT. §39-25 (1943)[5] this was a sufficient expression of the legislative intent to change the common law rule.[6] However, upon rehearing of the same case the court reversed itself,[7] stating that N. C. GEN. STAT. §1-70 (1943)[8] precluded the former interpretation of N. C. GEN. STAT. §1-97(6) (1943) and that the common law rule still prevailed except as modified by N. C. GEN. STAT. §1-70 (1943). This decision does not settle the question as to whether N. C. GEN. STAT. §1-97(6) (1943) authorizes suit *against* an unincorporated association in its common name, since the only question before the court in the present case was whether an unincorporated association could sue.

If it were held that N. C. GEN. STAT. §1-97(6) (1943) authorizes suit against all unincorporated associations, but that only certain unincorporated associations could in turn *sue*, there might be a question as to the constitutionality of the statute. This question has not been presented to the North Carolina court, but in view of the fact that the substantive rights of these associations are not affected and they still retain their common law right of action through the members, it would

[3] At common law an unincorporated association could not sue or be sued in the association name on the theory that it was not a legal entity. Tucker v. Eatough, 186 N. C. 505, 120 S. E. 57 (1923), Note, 10 N. C. L. REV. 313 (1932).

[4] "Voluntary organizations and associations of individuals organized for charitable, fraternal, religious, or patriotic purposes, when organized for the purposes which are not prohibited by law, are hereby authorized and empowered to acquire real estate and to hold the same in their common or corporate names: Provided, that voluntary organizations and associations of individuals, within the meaning of this article, shall not include associations, partnerships or copartnerships which are organized to engage in any business, trade or profession."

[5] "Where real estate has been or may be hereafter conveyed to such orzanizations or associations in their common or corporate name the said title shall vest in said organizations, and may be conveyed by said organization in its common name, when such conveyance is authorized by resolution of the body duly constituted and held, by a deed signed by its chairman or president, and its secretary or treasurer, or such officer as is the custodian of its common seal with its official seal affixed, the said conveyance to be proven and probated in the same manner as provided by law for deeds by corporations, and conveyance thus made by such organizations, and associations shall convey good and fee simple title to said land."

[6] Ionic Lodge No. 72 F.A. & A.M. v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Company, 232 N. C. 252, 258, 59 S. E. 2d 829, 833 (1950). The position the court took was advocated by a recent note, 25 N. C. L. REV. 319 (1947).

[7] Ionic Lodge No. 72 F.A. & A.M. v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Company, 232 N. C. 648, 62 S. E. 2d 73 (1950).

[8] ". . . Any and/or all unincorporated, beneficial organizations, fraternal benefit orders, associations and/or societies, or voluntary fraternal beneficial organizations, orders, associations and/or societies issuing certificates and/or policies of insurance, foreign or domestic, now or hereafter doing business in this state, shall have the power to sue and/or be sued in the name commonly known and/or used by them in the conduct of their business to the same extent as any other legal entity established by law, and without naming any of the individual members composing it: Provided, however, this section shall apply only in actions concerning such certificates and/or policies of insurance."

seem that the states are within their authority in enacting such a statute.[9]

The principal case does make it clear that the capacity of unincorporated associations to sue and be sued must rest on a specific legislative enactment. Since the final decision in the principal case, the North Carolina General Assembly has enacted an amendment[10] to N. C. GEN. STAT. §39-24 (1943) which allows unincorporated associations holding real estate under that section to sue and be sued in their common names in actions concerning real estate so held. The effect of this amendment is to overrule the principal case, but it still leaves the majority of unincorporated associations without a simple method of litigating their rights.

The inconvenience, brought about by the application of the common law doctrine under modern business conditions has led to much legislation, altering more or less, the common law procedure.[11] Some statutes provide for suits against associations (or partnerships) in the name of the associations with service of process on the officers or other associates. Judgments under such statutes bind the association property, but the individual property of those members who have not been personally served is not bound.[12] These statutes usually provide for execution on the association property before proceeding against the individual property of the members.[13] Their validity appears unquestionable.[14]

A few states, however, have statutes which though somewhat similar, provide for judgments binding individually even those members not personally served.[15] The validity of these statutes is doubtful. Under the authority of two United States Supreme Court decisions[16] it would seem to be a violation of the Due Process Clause of the Fourteenth Amendment as to any person not a resident of the forum state; but

[9] See 160 U. S. 389, 393 (1895) where the court said, "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligation be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

[10] N. C. Sess. Laws 1951 c. 86.

[11] The various state acts are classified and discussed in detail in WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 542 *et seq* (1929).

[12] TEX. REV. CIV. STAT. ANN. art. 6133-8 (1949).

[13] TEX. REV. CIV. STAT. ANN. art. 6137 (1949): "Every member who is personally served is individually liable for any amount of judgment not satisfied by levy on association property."

[14] Sugg v. Thornton, 132 U. S. 524 (1889); Jardine v. Superior Court in and for Los Angeles County, 213 Cal. 301, 2 P. 2d 756 (1931); United States Heater Co. v. Iron Moulders Union, 129 Mich. 354, 88 N. W. 889 (1902).

[15] S. C. CODE ANN. §§7796-7798 (1942); VT. PUB. LAWS §5720 (1933).

[16] D'Arcy v. Ketchum, 11 How. 165 (U. S. 1851); Pennoyer v. Neff, 95 U. S. 714 (1877).

in a case in which residence of parties was not mentioned, the South Carolina Supreme Court held that such a judgment was valid.[17]

The several states are not in accord as to whether these enabling statutes apply to ordinary partnerships. Some of the statutes expressly exclude their application to common law partnerships,[18] and other states have reached the same result by judicial decision.[19] Still others treat a partnership like any other association and allow suits in the common name.[20]

A few of the state statutes have been held not to extend to non-profit associations.[21] It would seem that the need for allowing suits in the common name against associations such as labor unions and fraternal organizations, would be as great, or greater, than the need as to business organizations. Some states take this view and extend their statutes to cover any unincorporated association, whether organized for profit or not.[22]

In view of the great need for a simple method of suit by and against the many unincorporated associations that exist today,[23] it is suggested that the legislature enact a specific statute allowing suits by and against such associations in their common names. The following statute is respectfully submitted:

> All unincorporated associations or orders, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated: Provided, however, this section shall not apply to ordinary partnerships as defined in G. S. 59-1[24] and G. S. 59-36.[25]

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[17] *Ex parte* Baylor, 93 S. C. 414, 77 S. E. 59 (1913). Professor Warren in his treatise, CORPORATE ADVANTAGES WITHOUT INCORPORATION at p. 554 expresses the opinion that the decision in *Ex parte* Baylor would not have been sustained by the Supreme Court of the United States if the case had been carried to that Court.

[18] DEL. REV. CODE §4676 (1935).

[19] Texas Land & Cattle Co. v. Molina, 258 S. W. 216 (Tex. Civ. App. 1924).

[20] CAL. CIV. CODE §388 (1941), Craig v. San Fernando Furn. Co., 89 Cal. App. 167, 264 Pac. 784 (1928) (applies to partnerships).

[21] Realty Trust Co. v. First Baptist Church of Haskell, 46 S. W. 2d 1009 (Tex. Civ. App. 1932).

[22] Deeney v. Hotel and Apartment Clerks' Union, 57 Cal. App. 2d 1023, 134 P. 2d 328 (1943); Herald v. Glendale Lodge, 46 Cal. App. 325, 189 Pac. 329 (1920).

[23] And to avoid further piecemeal legislation exemplified by the latest North Carolina statute on the problem. See note 10 *supra*.

[24] UNIFORM LIMITED PARTNERSHIP ACT §1.

[25] UNIFORM PARTNERSHIP ACT §6.