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Nonprofit Unincorporated Associations

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HUMAN BEINGS TEND TO FORM GROUPS for cooperative purposes; this tendency seems to be instinctive. Many anthropologists and sociologists and political philosophers speak of homo sapiens as a "social animal" that normally hunts and lives in groups or "packs."[1] Some speak of these tendencies as "shared commitment" for the achievement of shared ends or purposes, which in turn involves a need for rules to hold the group together (e.g., its "legal principles").[2] Organization of groups usually is informal, loose and "unincorporated" at first, and then increasingly formal, tight, and corporate as the society becomes more sophisticated.

Western civilization has been (and is) characterized by voluntary associations of people, from the earliest warrior bands and "churches" to towns and universities and guilds, etc.[3] Corporations, as vehicles for such associations, did not exist until relatively recently, and associations were (and very many still are) unincorporated.[4] Unincorporated associations as a form of organization have been losing ground to the corporation, but are far from obsolete.[5]

Definitions

Nonprofit is a word of complex nature requiring a lengthy analysis for definition.[5a] It requires full scale discussion in order to make clear what it means. In general, "nonprofit organizations are those that are not intended to, and do not, produce monetary gain for their members or managers, except as reasonable salaries paid for services as employees, actually rendered to the organizations."[5b]

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[1] L. L. FULLER, *Two Principles of Human Association*, in VOLUNTARY ASSOCIATIONS (Pennock and Chapman, eds. 1969).

[2] *Id.* Fuller suggests a series of eight "laws" governing the interrelations of the two aspects ("principles") of human "associations".

[3] J. W. CHAPMAN, *Voluntary Association and the Political Theory of Pluralism*, in VOLUNTARY ASSOCIATIONS 87 (Pennock and Chapman, eds. 1969).

[4] *See generally*, MCNEILL, THE RISE OF THE WEST: A HISTORY OF THE HUMAN COMMUNITY (1963); TREVOR-ROPER, THE RISE OF CHRISTIAN EUROPE (1965).

[5] *See*, 1 OLECK, MODERN CORPORATION LAW, chs. 1, 2, 4 (supp. 1965); WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS 285 (1923); FLEXNER & BAILEY, FUNDS AND FOUNDATIONS (1952); Wynn, *Charitable Organizations*, 92 TRUSTS & ESTATES 762-6 (1953); RICE, FREEDOM OF ASSOCIATION (1962); FORD, UNINCORPORATED NON-PROFIT ASSOCIATIONS: THEIR PROPERTY AND THEIR LIABILITY (1959); LLOYD, UNINCORPORATED ASSOCIATIONS (1938); JOSLING AND LIONEL, LAW OF CLUBS (1964); R. NEEDHAME, ED., PRIVATE CLUBS—LEGAL AND BUSINESS PROBLEMS (1969).

[5a] *See*, OLECK, NON-PROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS, ch. 1 (2d ed. 1965).

[5b] Oleck, *Non-Profit Types, Uses, and Abuses*, 1970, 19 CLEVE. ST. L. REV. 207, 211 (1970), citing cases.

Nonprofit organizations may be truly charitable (as an orphan asylum) or merely not intended for distribution of profits as dividends to investors (as a golf club). The term *sodality* has been suggested as a replacement for the term "nonprofit, unincorporated association."[5c]

Association is a word of vague meaning that indicates a group of persons who have joined together for a certain object or purposes.[6] It resembles a partnership, but must be distinguished from partnership.

A *partnership* is an association of two or more persons to carry on as co-owners a "business for profit."[7] If an organization's purpose is not profit-making, the organization is not a partnership.[8] The typical unincorporated non-profit organization such as informally organized sports clubs,[9] or civic societies,[10] political committees,[11] religious communes,[12] fraternal orders,[13] and patriotic societies,[14] are *not* partnerships.

Labor unions, generally speaking, are not partnerships, and neither are trade associations, because they are not intended to obtain profits for the organization *as an organization,* even though they are intended to obtain profits for their members.[15] The same is true of associations of organizations for maintaining a service used by the members.[16]

[5c] CONARD, KNAUSS, & SIEGEL, ENTERPRISE ORGANIZATION: CASES ON EMPLOYMENT, AGENCY, PARTNERSHIPS, CORPORATIONS 5 (1972).

[6] BLACK'S LAW DICTIONARY, 156 (4th ed. 1951). *And see,* FORD UNINCORPORATED NON-PROFIT ASSOCIATIONS 50-147 (1959); WEBSTER, LAW OF ASSOCIATIONS, ch. 1 (1971).

[7] UNIFORM PARTNERSHIP ACT, § 6 (1); CRANE, PARTNERSHIP 524-48 (2d ed. 1952).

[8] UNIFORM PARTNERSHIP ACT (6 U. L. A. 1969) § 6, official comment; and *see,* Note, *Unincorporated Associations in New England,* 37 BOSTON U. L. REV. 336 (1957).

[9] Florio v. State *ex. rel.* Epperson, 119 S. 2d 305, 80 A. L. R. 2d 1117 (Fla. App. 1960); held not able to be treated as a partnership for lawsuit purposes.

[10] Cousin v. Taylor, 115 Ore. 472, 239 P. 96 (1925), group to try to obtain better telephone rates for users.

[11] Hale v. Hirsch, 205 A. D. 308, 199 N. Y. S. 514 (1923); Fennel v. Hauser, 141 Ore. 71, 14 P. 2d 998 (1932). *But cf.,* a commission appointed by governor to support a state entry at an exposition, Robbins Co. v. Cook, 42 S. D. 136, N. W. 445, 7 A. L. R. 218 (1919). And, political committee members held liable for purchase by chairman, Vader v. Ballou, 151 Wis. 577, 139 N. W. 413, 7 A. L. R. 216 (1913). *See* Annots., 61 A. L. R. 241 (1929) and 126 A. L. R. 114 (1940).

[12] Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044 (1903); *but cf.* Thurmond v. Cedar Spring Baptist Church, 110 Ga. 816, 36 S. E. 221 (1900); Forsberg v. Zehm, 150 Va. 756, 143 S. E. 284 (1928); Comment, 15 VA. L. REV. 98 (1928).

[13] Security-First Nat'l Bank v. Cooper, 62 Calif. App. 2d 653, 145 P. 2d 722 (1943); State v. Sunbeam Rebekah Lodge, 169 Ore. 253, 127 P. 2d 726 (1942).

[14] Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919 (1900).

[15] *Labor unions*: Mooney v. Bartenders' Union Local No. 284, 302 P. 2d 866 (Cal. App. 1956), *rev'd on other grounds,* 48 Cal. 2d 841, 313 P. 2d 857 (1957); People v. Herbert, 162 Misc. 817, 295 N.Y.S. 251 (1937); *but cf.* State v. Ritholz, 257 Minn. 201, 100 N. W. 2d 722 (1960); *and cf.* Teamsters Local 516 v. Santa Fe Packing, 300 P. 2d 660 (Okla. 1956). *Trade associations*: Blair v. Southern Clay Mfg. Co., 173 Tenn. 571, 121 S. W. 2d 570 (1938); Marshalltown Mutual Plate Glass Ins. Ass'n v. Bendlage, 195 Iowa 1200, 193 N. W. 448 (1922).

[16] *E.g.,* a common sewage system, Kittrell v. Angelo, 170 Ark. 982, 282 S. W. 363 (1926).

Joint venture members are not partners, if the venture is one not aimed at profit for the *group* as such.[17] A joint venture is a business enterprise undertaken by several persons as a single ("one-shot") project for profit,[18] even if the project may take years to complete. And, similarly, promoters of a corporation are not "partners" because their profits are to be obtained through the corporation rather than directly from their joint action.[19]

Cooperatives, charitable trusts, professional associations, condominiums, and other special types of organizations may be incorporated or unincorporated.

Of course the fact that a nonprofit organization makes money in some of its activities does not mean that the organization must be treated as a business for profit. Thus, a nonprofit organization may make money by selling beer, but devote the money to the organization's ultimate purpose, in which case the "unrelated business activity" is to be treated as a business operation (e.g., is taxable, for example), but the organization's overall nonprofit status continues.[20]

Nonprofit Associations, In General

Statutory provisions for unincorporated associations are fragmentary and inadequate in almost all of the states. In most cases they consist of short sections scattered through the state's code. Thus, there usually is a provision for agricultural associations in one place, one for firemen's associations in another, one for fraternal associations in still another part of the state's code, and so on.

Incomplete and sketchy provisions of this kind are found in the statutes of such states as California, Delaware, Florida, Illinois, New York and Ohio. In some states there are hardly any provisions for unincorporated associations.

New Jersey's statute for *Unincorporated Organizations*[21] is an example of a relatively integrated provision. It consists of a few short sections, and deals with lawsuits involving such organizations. Its primary purpose is to allow lawsuits to be brought by or against an unincorporated association in its recognized name, if it has one. It allows service of legal process on the president or other officer, agent or person in charge of its business, and execution of judgment against its assets. But it also allows suit and judgment against any members who are personally liable, if the organization does not

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[17] Sappenfield v. Mead, 338 Ill. App. 236, 87 N. E. 2d 220 (1949), property owners joined together to enforce zoning rules.

[18] BLACK'S LAW DICTIONARY 73 (4th ed. 1951).

[19] McEachin v. Kingman, 64 Ga. App. 104, 12 S. E. 2d 212 (1940); Schuster v. Largman, 308 Pa. 520, 162 A. 305 (1932); *but cf.* Hagan v Asa G. Candler, Inc., 189 Ga. 250, 5 S. E. 2d 739, 126 A. L. R. 108 (1939).

[20] Curtin v. Albion Brown's Post 590—Am. Legion, 74 Ill. App. 144, 219 N. E. 2d 386 (1966); Bromberg, *Tax Influences on Law of Business Associations,* 16 BAYLOR L. REV. 327 (1964).

[21] N. J. STAT. ANNO., tit. 2A, c. 64 (1952).

satisfy a judgment against it, or even without suit against the association as an organization.[22]

The New Jersey statute, at its end, expressly exempts from its application, in regard to lawsuits of equitable nature, charitable and fraternal organizations.[23] This is not explained.

The New Jersey statutes also contain a small volume, in the set, dealing with various *special types* of organizations and certain of their problems.[24] This however, mixes corporate and unincorporated matters in confusing style.

California's bulky statutes contain bits and pieces about unincorporated associations, scattered through volumes and chapters and sections dealing with corporations, probate, finance, military matters, etc.[25]

New York's short statute on unincorporated associations, like New Jersey's consists mainly of a few provisions concerning lawsuit procedures by or against associations, service of process, and the like.[26]

Statutes of most states, such as they are, usually are much like those of California, New Jersey, or New York.

It is easy to see, from the examples of these statutes, how undesirable the unincorporated form of organization usually is to its members. Use of this form of organization today usually results from sheer ignorance of the possible degree of personal liability of its members.

Either natural persons or corporations may be members of unincorporated associations.[27] The most familiar type of association of corporations is the trade association.

Modern associations usually are organized on roughly the following basis:

1. Articles of Association. This is an agreement (contract) among the original members, to which new members also agree. It sets up the general plan of organization, the purposes to be accomplished, and the method of operation.

In a few states, where statutes exist as to this matter, they direct merely that articles of association shall provide:

a. That the death or departure of a member shall not work a dissolution of the association.

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[22] *Id.*

[23] *Id.*, § 64-6.

[24] N. J. STAT. ANNO., tits. 15-16, Corps. & Ass'ns. Not For Profit (1939).

[25] *See*, ANN. CALIF. CODE, Gen. Index (West 1969).

[26] N. Y. GEN. ASS'NS L., and N. Y. CONSOL. LAWS. ch. 29 (McKinney, supp. 1971-72).

[27] *See*, 4 OLECK, MODERN CORPORATION LAW § 1795 (1965 supp. ed); WEBSTER, LAW OF ASSOCIATIONS (1971) which deals with trade associations in detail.

b. That the board of directors or trustees shall consist of (3) (5) members, who shall have the sole management of association affairs.

c. Any other management of association affairs not inconsistent with law.[28]

2. Constitution. This is the basic internal law of the organization, equivalent to a national or a state constitution. Sometimes it is implicit in the articles of association.

3. Bylaws. This is the detailed set of internal laws covering internal procedures and regulations. It is equivalent to the specific statutes of a state, as contrasted with the general provisions of a constitution. Sometimes the bylaws are in the constitution or even in the articles of association.

4. Management is carried on by an elected board of directors or trustees, who often are also the officers of the association.

5. Membership is evidenced by certificates of membership (or membership cards), which sometimes are transferable.

6. Continuity of existence in the event of the death, resignation or expulsion of any member usually is provided by the articles of association.

7. Property-holding power is vested in the board of directors or trustees.

8. Income tax exemption applies to the organization if its activities as a whole are not for the profit of its members.[29]

Because a nonprofit association is neither a partnership nor a corporation, it has a very indefinite character. Except insofar as statutes in a few states provided, it was not viewed as a legal entity in the past, and still is not in some respects, while it *is* in others. It suffers constant difficulties in acquiring, holding, and passing title to property, in making contracts, and in bringing or defending legal actions.

In recent years, governmental authorities have applied regulatory administration to many unincorporated as well as incorporated group activities. As a result, few advantages remain to the modern association. It is a desirable form of organization only for very special purposes.

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[28] *E.g.*, N. Y. GEN. ASS'NS L., Art. 1 (McKinney 1942). *See* Chaffee, *The Internal Affairs of Associations,* 43 HARV. L. REV. 993, 1022 (1930); Douglas, *The Right of Association,* 63 COLUMBIA L. REV. 1361 (1963).

[29] Consumer-Farmer Milk Coop., Inc. v. Commissioner, 186 F. 2d 68 (2d Cir. 1950); Parker v. Commissioner, 365 F. 2d 792, 796 (8th Cir. 1966); RABKIN & JOHNSON, FEDERAL INCOME, GIFT & ESTATE TAXATION § 2.10-2.12 (rev. to date). *See,* Lake Forest Inc. v. Commissioner, 36 T. C. 510, 538 (1961). For examples, *see infra,* cases cited at note 66a.

What Organizations Should Use Association Form?

Small local organizations, such as the following types, are the kinds of organizations that best can use unincorporated association form:

1. *Local clubs.* Social and sport groups of a local or neighborhood character often find the formalities of incorporation undesirable. But it should be understood by them that informal oral agreements of association are full of uncertainties. Formal articles of association (e.g., a constitution and bylaws) are the minimum provisions to avoid both misunderstanding and possible full personal liability.

2. *Local societies.* Musical, literary, or religious societies may take the unincorporated association form, subject to the dangers pointed out in item 1, above.

3. *Fraternal benefit societies.* These must use written articles of association. Their activities that have the character of insurance or indemnity are strictly subject to regulation by state insurance and public welfare statutes and authorities.

4. *Political clubs and committees.* These should use written articles of association. They are subject in all states to special statutes. They are usually required to have the approval of county or state party headquarters if their activities or names are party-organizational. *Propaganda organizations* may *have to* employ unincorporated form, as in the case of the organization to favor liberal homosexual laws, which was refused a chapter of incorporation because its purpose was (as yet) illegal.[29a]

5. *Labor unions.* This is by far the most important group of unincorporated associations. Labor unions, particularly, often find it preferable not to incorporate.

The vagueness of organizational liability is here an advantage. Activities of these associations sometimes fall in a liability twilight zone, and the association form further obscures both personal liability and that of the group. Such legislation as the Taft-Hartley Act (Labor Management Act of 1947) failed to clarify this uncertainty. The effect of viewing associations as *entities* is discussed below and in the section on Lawsuits By or Against an Association. *Requiring* incorporation would make the lines of liability very clear. There was an abortive attempt of this kind in 1944 in Colorado (*American Federation of Labor v. Reilly*),[30] but it failed to have effect.

In recent years the courts have shown a tendency to fasten liability on both the organization and all persons concerned in wrongs done by labor unions. Thus some courts have used the concept of *conspiracy* of this purpose, when planned picketing violence was charged by an injured person.[31] And some courts have held a union

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[29a] Gay Activists Alliance v. Lomenzo, 320 N.Y.S. 2d 994 (N. Y. Sup. Ct. 1971).

[30] American Fed'n. of Labor v. Reilly, 113 Colo. 90, 155 P. 2d 145, 160 A.L.R. 873 (1944).

not liable for an assault by its pickets,[32] while other courts have held that the union is liable, even as a "corporate" entity.[33] Some courts have viewed only labor unions as "corporate" entities in such cases.[34] Some people have urged that all nonprofit organizations be viewed as legal entities in such cases.[35] For lawsuit purposes, today, statutory permission to sue or be sued in a common name is usual.[36] But treatment of a trade association or fraternal order as *not* a legal entity has a long history,[37] with contribution being ordered as to members who authorize or ratify assumptions of obligations or debts.[38]

6. *Charitable Trusts* (unincorporated *foundations*). These are a special category of nonprofit organization, being an "organization" principally in the sense that they usually consist of a board of trustees, and have a small staff of officers. They have become numerous in recent years. But incorporation does not eliminate the trust aspects of charitable corporation assets, such as the *cy pres* doctrine, etc., discussed below.

According to the Patman Committee investigation report in 1962, wherein the author served as Consultant to the Congressional Committee, foundations (incorporated and unincorporated) increased to 45,124 tax-exempt foundations in 1960 as against 12,295 in 1952.[39] Congressman Patman charged that many foundations were used as tax-free cloaks for private business operation.[40] Others, including the author, had made the same charge as to various "charities" earlier.[41] For such a purpose, the unincorporated charitable trust form has some advantages over incorporation.[42]

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[31] Wallick v. International Union of Elec. R. & M. W., 90 Ohio L. Abs. 584 (C. P. 1962).

[32] Benoit v. Amalgamated Local 229 U.E.R.M.W., 150 Conn. 266, 188 A. 2d 499 (1963).

[33] United Brotherhood of Carpenters & Joiners of America v. Humphreys, 203 Va. 781, 127 S. E. 2d 98 (1962), *cert. denied*, 371 U.S. 962 (1963). *Entity view*: Miazga v. International Union of Operating Engr's, 2 Ohio St. 2d 49, 205 N. E. 2d 884 (1965); Boozer v. UAW; Local 457, 279 N. E. 2d 428 (Ill. App. 1972).

[34] Marshall v. International Longshoremen's & W.U.L.G, D. 1, 57 Cal. 2d 781, 22 Cal. Rptr. 211, 371 P. 2d 987 (1962) (especially court's footnote # 1); and *see*, Daniels v. Sanitarium Ass'n, Inc., 30 Cal. Rptr. 828, 381 P. 2d 652 (1963); Noted, 37 CALIF. L. REV. 130 (1964); 10 WAYNE L. REV. 444 (1964).

[35] Oleck, *Non-Profit Associations as Legal Entities*, 13 CLEVE-MAR. L. REV. 350 (1964); and *see* Daniels v. Sanitarium Ass'n, Inc., 30 Cal. Rptr. 828, 381 P. 2d 652 (1963); Titus v. Tacoma Smelterman's Union Local # 25, 62 Wash. 2d 461, 383 P.2d 504, 510 (1963).

[36] FED. R. CIV. P. 17 (b); N. Y. CIVIL PRACTICE LAW & RULES, § 1025 (McKinney 1963); Sturges, *Unincorporated Asociations as Parties to Actions*, 33 YALE L. J. 383 (1933).

[37] *Trade Association*: Cousin v. Taylor, 115 Ore. 472, 239 P. 96, 41 A.L.R. 750 (1925). *Fraternal order*: Meriwether v. Atkin, 137 Mo. App. 32, 119 S. W. 36 (1909).

[38] Azzolini v. Order of Sons of Italy, 119 Conn. 681, 179A. 201 (1935).

[39] HOUSE, SELECT COMMITTEE ON SMALL BUSINESS. TAX-EXEMPT FOUNDATIONS AND CHARITABLE TRUSTS: THEIR IMPACT ON OUR ECONOMY; chairman's report (1962).

[40] *Id. See*, Krasnowiecki & Brodsky, *Comment on the Patman Report*, 112 U. PA. L. REV. 190 (1963); Good Will Home Ass'n. v. Erwin, 266 A.2d 218 (Me. Sup. Jud. Ct. 1970).

[41] Oleck, *Foundations Used as Business Devices*, 9 CLEVE.-MAR. L. REV. 339 (1960). Of course other types of organizations also may cloak business purposes behind a mantle of charity or education, or etc., such as the "boys *home*" that ran a school that charged $2800 tuition fee. Good Will Home Ass'n v. Erwin, 266 A. 2d 218 (Me. Sup. Jud. Ct. 1970); this "purpose" being held to be *ultra vires*.

[42] *Id. See* Wallace, *How to Save Money by Giving It Away*, 47 MARQUETTE L. REV. 1 (1963); Comment, *Charitable Trusts and Inducements to Violate the Law*, 20 WASH.

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It is to be doubted that the "self-dealing" prohibitions of the Tax Reform Act of 1969 will completely cure this. Such a unit often is set up with endowment consisting of stock of business corporations controlled by the founder. Control is fastened onto the corporations by the *deed of trust*[43] that conveys their stock, and it provides (for the founder) gift-tax benefits (deductions), income and other tax avoidance, perpetuation of control, fine public relations, low cost research and product development, competitive advantage over companies that pay full taxes, ready source of capital, and thus far not much real governmental regulation. Just how the new self-dealing restrictions of the Tax Reform Act of 1969 will affect such devices is yet to be seen.[44]

Foundations still often are spoken of (among legal cognoscenti) as "business devices," "straw men" for tax advantage use, and as "venture capital" devices.[45] Congressional investigations of them, in 1961-2 (Patman Committee) and 1969-70 (Mills Committee), made a lot of headlines but so far only a few uncertain, though hoped-for, reforms.[46] In late 1969, with President Nixon threatening a veto, the Congress had to soft-pedal or drop most of the really vital tax reforms sternly promised not long before that time,[47]—not that some of our statesmen needed much urging to do so.

In the 1930's there were about 240 foundations in this country (6 in Ohio, 58 in New York, etc.).[48] Then, the *Foundation Directory Edition* 3 (1967) said there were 6,803 in 1966 (463 in Ohio, 1,822 in New York) as of 1965 figures. It also said there were 18,000, but that 10,000 were "very small" (i.e., assets less than $200,000 or making grants less than $10,000 per year). But in 1969 the I.R.S. official list of tax-free foundations *registered* with it, numbered 30,262.[49] This latter list showed 1,493 registered in Ohio, while the *Foundation Directory* said 463 (a disparity of 1,030).

(Continued from preceding page)

& LEE L. REV. 85 (1963); Lusk, *The Uncertain Future of Charitable Trusts*, 15 ALA. L. REV. 390 (1963).

[43] *See, In re* Scholler, 403 Pa. 97, 169 A.2d 554 (1961).

[44] *See*, Eliasberg, *New Law Threatens Private Foundations: An Analysis of the New Restrictions*, 32 J. TAXATION (3) 156 (Mar. 1970), for a "management" ("tax advantages desired") view of the new statute.

[45] *See*, 1 OLECK, MODERN CORPORATION LAW, 533 (supp. 1965) and vol. 2 at 632 and vol. 3 at 520. As to "straw men," used by oil companies as conduits for holding mineral rights and using depletion allowances for total tax evasion, see Lang, *"Charity" Saves Oilmen Tax Millions*, Plain Dealer, Nov. 24, 1969 at 1. [*e.g.*, one foundation in 1967-8 handled almost $3 million and gave $25 (yes, $25, total) as its charitable distributions.].

[46] *Id., House Ways & Means Progress Report*, 10 FOUNDATION NEWS (4) 139 (July-Aug. 1969).

[47] Cleveland Plain Dealer, Sept. 5, 1969 at 1.

[48] FOUNDATION DIRECTORY (1st ed. 1939). As to the history of foundations, see WEAVER, U.S. FOUNDATIONS, esp. 14-16 (1967).

[49] New York Times, Jan. 9, 1969, at 28, col. 8. The list book can be had for $6.50 from the Govt. Printing Office.

The Foundation Library Center's 1967 *Foundation Directory* said foundations then owned $19.6 billion in assets. But in early 1969 the New York attorney-general's investigation *in New York alone,* found an "alarming rate" of cases of foundation funds diverted to personal uses, and ⅓ of the 13,500 foundations that had registered there owned $25 billion in that state; and the investigation had not yet ended.[50] He said that in New York alone the number of foundations was increasing at about 100 per month. The 1972 edition of the *Foundation Directory* set the total assets figure at $25.2 billion, and described 5454 foundations but said that there are over 20,000 others which make grants of less than $25,000 per year. It added that foundations only account for about 9 percent of the nation's total annual private philanthropy, though they are generally thought to be much more significant than that. About 70 percent of the foundations were founded after 1950, according to the *Directory*; which fact does not seem to be consistent with the numbers and dates set forth in earlier editions of the book.

A "deed of trust" setting up a foundation endowed with business corporation stock may evade the basic principle of corporation statutes and law, that control shall not be taken away from the board of directors. The legal phrase often used is that "the board of directors shall not be sterilized."

Supine submission by the corporations' respective boards of directors, of course, warrants (but rarely results in) *quo warranto* action by the Secretary of State or Attorney General. How effective the new rules against "self-dealing," in the Tax Reform Act of 1969, will be in curbing these abuses is yet to be seen. As long as perpetual life and tiny taxation of only net investment income hold true for foundations (as they do) the temptation towards (and ease of) abuses probably will continue. The new rules, placing a 20% limit on business stock ownership, ignore the facts that 20 percent may suffice for control and that "partnerships" aimed at avoiding the rule are an obvious route for evasion, for example.

Statutory provisions for charitable trusts are brief and incomplete in most states. The Ohio statute[51] is typical. It provides for methods of incorporation, and has had brief provisions as to officers and management. In practical effect it adds nothing regarding unincorporated charitable trusts. What is said hereinabove about nonprofit associations generally applies also to unincorporated charitable trusts, with the added difficulties (as concerns its "organization" aspects) that result from the impact of the law of trusts.

Six types of trusts generally are regarded as charitable: relief of poverty, aid to education, aid to religion, health promotion, community benefit, and aid to government.

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[50] New York Times, Jan. 18, 1969, at 1, col. 1.

[51] OHIO REV. CODE § 1719 (Page 1953).

Mere benevolence, such as a trust for division of a fund among a group of school children, is not an "educational purpose," as the children might use the money for other than educational purposes. Thus it is not a charitable trust.[52] If the trustee had been directed to buy books for the children, on the other hand, that would have been a charitable trust.

A trust for the benefit of a small group such as relatives (or employees) of the settlor, even for an educational purpose, in some states is not a valid *charitable* trust because it lacks the required true trust concept of public spirit.[53] Likewise, the American and Canadian Internal Revenue Services may refuse tax exemptions for a trust that benefits only employees of the settlor.

Cy pres doctrine: usually the trust will not fail even if that particular purpose becomes impossible to achieve. The court will order use of the fund for a similar charitable purpose. This is on the theory that the settlor would have wanted his intention carried out "as nearly as possible," if his main motive was charitable.[54]

If the purpose of the settlor is very specific, and is not fundamentally an expression of a general charitable intent, failure of that purpose means failure of that trust. In such case the *cy pres* doctrine ordinarily will not be applied.[55]

Association Property

Only a human being, or a group of humans recognized as a legal entity, can hold title to property, unless specific statutes provide otherwise. Early common law established that rule, and it still applies. When title to property is conveyed to a group having an artificial name, the conveyance to that name is meaningless unless the group is a legal entity (such as a corporation)—except as special statutes may validate such a transfer.

Therefore, when property is conveyed to an informally associated group, the courts ordinarily view the conveyance as a transfer to the individual persons who comprise the group.[56] What this means is

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[52] Shenandoah Valley Nat'l. Bank v. Taylor, 192 Va. 135, 63 S.E.2d 786 (1951).

[53] *In re* Compton (1945) Ch. 1923. Not valid for employees: Pennsylvania Bar Ass'n. Endowment v. Robbins, 10 Pa. D. & C. 2d 637 (C. P. Dauph. 1955); Valid: *In re* Barbieri, 8 Misc. 2d 753, 167 N.Y.S. 2d 962 (1957); Boxer v. Boston Symphony, 339 Mass. 369, 159 N.E.2d 336 (1959). The trustee, even if corporate, is not really the owner. Lefkowitz v. Cornell Univ., 62 Misc. 2d 95, 308 N.Y.S. 2d 85 (1970). Policy, rather than "magic words" is the test. Trustees of Dartmouth College v. City of Quincy, 258 N.E.2d 745 (Mass. Sup. Jud. Ct. 1970).

[54] Thatcher v. St. Louis, 335 Mo. 1130, 76 S.W.2d 677 (1934); *In re* Byrd's Will, 62 Misc. 2d 232, 308 N.Y.S. 2d 97, 101 (1970); Haywood House v. Trustees of Donations and Bequests, 27 Conn. Sup. 176, 233 A.2d 5 (1967); and *see,* Brookes, *Foundations and Their Tax Problems,* 41 TAXES 742 (1963).

[55] Industrial Nat'l. Bank v. Drysdale, 83 R.I. 172, 114 A.2d 191 (1955); Industrial Nat'l. Bank of R.I. v. Guiteras, 267 A.2d 706, 711 (R.I. Sup. Ct. 1970). *But,* the Doctrine of Approximation may apply. Daggett v. Children's Center, 28 Conn. Super. 468, 266 A.2d 72 (1970).

[56] Normandy Consol. School Dist. v. Harral, 315 Mo. 602, 286 S.W. 86 (1926).

that each person has become a part-owner. Title can now be conveyed only with his consent, and subject to the legal rights of his family, heirs and creditors.[57] A clumsier method of holding title to property is hard to imagine.

Although the Uniform Partnership Act, which has been widely adopted, permits the transfer of title *to* a business partnership as an entity, it does not permit transfer *from* the partnership as an entity, except with the consent of each partner.[58] And in some states a transfer of title to an unincorporated association is absolutely void.[59]

A partial cure for this impossible situation is the designation, by the association members, of trustees to take hold, and convey title on their behalf.[60] But this solution is made undesirable by another rule of law—the *rule against perpetuities*. This rule forbids title to be tied up (*e.g.*, in trust) by the wishes of the transferor for a period longer than that measured by *"two lives in being"* (*i.e.*, the lifetime of the longer-lived of two designated persons).

This rule makes an exception for *charitable* trusts—an exception that may not apply if the association is merely "nonprofit" and not actually "charitable" in purpose. Thus, trusts for fraternal associations have been held to be invalid under this rule,[61] and in other cases have been held to be valid.[62]

Solution of this puzzle now is provided in some states by statutes affecting specially designated types of religious societies and other highly charitable associations. These statutes permit taking title in the group name.[63] All the states make a general provision to this effect for profit-making associations (partnerships).[64] A similar general provision for nonprofit associations would simplify the problem. As it is, many associations prefer to incorporate simply to gain this advantage. In New York, for example, incorporation is encour-

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[57] Apostolic Holiness Union v. Knudson, 21 Idaho 589, 123 P. 473 (1912). Many states have statutes defining "corporations" as including associations for jurisdictional, tax, and other purposes, but these statutes apply primarily to business organizations. *See,* U.M.W. v. Coronado Coal Co., 259 U.S. 344, 27 A.L.R. 762 (1922) unincorporated union held liable, in union name, to treble damages under Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1-7, 15 note (1963) and STEVENS, CORPORATIONS § 7 (2d ed. 1949); Bankers Trust Co. v. Knec, 222 Iowa 988, 263 N.W. 549 (1935). Corporations can be members of associations: 4 OLECK, MODERN CORPORATION LAW § 1795 (supp. 1965).

[58] UNIFORM PARTNERSHIP ACT §§ 8 (3) (4), 10 (2).

[59] State v. Sunbeam Rebekah Lodge No. 180, 169 Ore. 253, 127 P.2d 726 (1942).

[60] Venus Lodge No. 62, F.A.&M. v. Acme Benevolent Ass'n., Inc., 231 N.C. 522; 58 S.E.2d 109, 15 A.L.R. 2d 1446, 1451 (1950).

[61] *In re* Rathbone, 170 Misc. 1030, 11 N.Y.S. 2d 506 (1939) (fraternal order).

[62] Bancroft v. Cook, 264 Mass. 343, 162 N.E. 691 (1928) (college fraternity). Trusts to a church for masses are usually upheld. O'Brien, *Seventy Years of Bequests for Masses in New York Courts,* 23 FORDHAM L. REV. 147 (1954); Curran, *Trusts for Masses,* 7 NOTRE DAME LAW. 42 (1931). *See also,* SCOTT, TRUSTS 298 (3d ed. 1940) (cases).

[63] *See,* Brown, v. Father Divine, 163 Misc. 796, 298 N.Y.S. 642 (1937).

[64] UNIFORM PARTNERSHIP ACT §§ 8(3), 8(4), 10(2).

aged by a statute that permits an incorporated association to take title to association property merely by incorporating.[65]

Tax Exemption: Insofar as property is used within the state for the truly charitable purposes of an association, it is free in most states from property taxes, inheritance and gift taxes.[66] Tax exemption is a subject that requires separate treatment, and it cannot be treated here.[66a]

Such property as association records is subject to ordinary governmental regulation and supervision, including investigation. But the Constitutional guaranties against unreasonable searches and seizures, which apply to natural persons, do not protect association propery. The unincorporated association is not a "person" in this sense.[67]

Such property as an automobile must be registered in the name of an individual, not of the association. This, again, is because the association is not a legal "person" for this purpose, unless a specific statute so provides.[68]

Such property as a name or its goodwill usually is protected by general statutes against unfair appropriation by third persons.[69]

Lawsuits by or Against an Association

At common law, not being a legal entity, an association can sue or be sued only in a representative capacity.[70] That is, a trustee or director must act on behalf of the association. He personally is named as a party, though only in a representative sense.

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[65] N. Y. NOT-FOR-PROFIT CORP. L. § 402, 403, 1405 (McKinney 1970).

[66] MacGregor v. Commissioner, 327 Mass. 484, 99 N.E.2d 468 (1950 inheritance and gift taxes).

[66a] *See,* for example: Non-profit organization's apartment house gets no property tax exemption where tenants pay rent. Friendship Manor Corp. v. Tax Comm'n., 487 P.2d 1272 (Utah 1971); Leased-out parts of a building of a charity organization may get no tax exemption. Milton Hospital & Convalescent Home v. Board of Assessors, 271 N.E.2d 745 (Mass. S. Ct. 1971); No state tax exemption for fraternal order. *In re* Estate of Allen, 94 Cal. Rptr. 648 (App. 1971); Nor for sports club. State Bd. of Tax Comm'rs. v. Fort Wayne Sport Club, Inc., 258 N.E. 2d 874 (Ind. App. 1970); Nor for veteran's association. *In re* Application of Am. Legion, 20 Ohio St. 2d 121, 254 N.E.2d 21 (1969). Nor for an old peoples "home" that charged a big entry fee ($9,000 to $20,500). Willow v. Munson, 43 Ill. 2d 203, 251 N.E.2d 249 (1969). Not for a university restaurant. Ohio Northern Univ. v. Tax Comm'rs. 21 Ohio App. 2d 113, 255 N.E. 2d 297 (1970). As to charitable operation as the test of tax exemption right (as against social and other functions) *see,* Sahara Grotto & Styx, Inc. v. State Bd. of Tax Comm'rs. 261 N.E. 2d 873 (Ind. App. 1970); *In re* application of Dana W. Morey Foundation, 21 Ohio App. 2d 230, 256 N.E. 2d 232 (1970). The following articles may prove helpful: Note, *Tax-Exempt Status of Public Interest Law Firms,* 45 S. CAL. L. REV. 228 (1972); Graves, *When Will Political Activities of Unions and Associations Cost Them Their Exemption?* J. TAXATION 254 (1971); Fleming, *Charitable Trusts Under the Tax Reform Act,* 48 TAXES 757 (1970).

[67] United States v. White, 322 U.S. 694 (1944).

[68] Hanley v. American Ry Express Co., 244 Mass. 248, 138 N.E. 323 (1923).

[69] Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737 (1929).

[70] *See,* Sturges, *Unincorporated Associations as Parties to Actions,* 33 YALE L. J. 383 (1924).

But by 1922 the United States Supreme Court had ruled that, even in the absence of statutes, an unincorporated association (there, a labor union) could be sued as an entity, in its own name, for its agents' torts.[71] This rule was codified in the Federal Rules of Civil Procedure.[72] It later was restated, as to labor unions, by the Labor Management Relations Act, to make damages payable only by the Association, not against a member.[73] But then the State of Oregon first reaffirmed the common law rule as its rule and then made it not the rule for unions.[74] And in 1960 a federal court upheld a suit against a trustee of a union welfare fund which, under Pennsylvania law, could be sued as a "foreign corporation or similar entity."[75]

Then, in 1962, in the case of *Marshall v. ILWU,* the Supreme Court ruled that a member could sue an unincorporated association (labor union) as an entity, for torts committed by members.[76] And in 1965 Ohio adopted the "legal entity" view of nonprofit organizations.[77] The difficulties of the old view of unincorporated associations have about worn out the patience of the courts.[78] In 1972, for example, Illinois ruled that unincorporated associations may be treated as corporations for lawsuit purposes.[78a]

Today, many states specifically authorize legal action to be brought in the association name, or against the association itself.[79] Statutes permitting legal action in the association's own name now are found in California, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, South Carolina, Virginia, Washington, and several

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[71] U.M.W. v. Coronado Coal Co., 259 U.S. 344 (1922).

[72] FED. R. CIR. P. 17 (b).

[73] 29 U.S.C. § 185 (b) (1947).

[74] Benz v. Companio Naviera Hidalgo, S.A., 233 F.2d 62, 68 (9th Cir. 1956), *aff'd.* 353 U.S. 138 (1957); Note, 43 A.B.A.J. 638 (1957). *But,* said that labor unions will be viewed as entities for everything in Browner v. Sanders, 244 Ore. 302, 417 P.2d 1009, 1012 (1966).

[75] Parlovscak v. Lewis, 274 F.2d 523 (3d Cir. 1960).

[76] Marshall v. ILWU Local 6, Dist. 1, 57 Cal. 2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962); Note, 50 CALIF. L. REV. 909 (1962); Note, 1963 DUKE L. J. 197. This decision was limited to labor unions by the court. *See also,* Daniels v. Sanitarium Ass'n., Inc., 30 Cal. Rptr. 828, 381 P.2d 652 (1963), Note, 10 WAYNE L. REV. 444 (1964).

[77] Miazga v. International Union of Oper. Engrs., 2 Ohio St. 2d 49, 205 N.E. 2d 884 (1965); *cf.* United Bhd. of Carpenters & Joiners of Amer. v. Humphreys, 203 Va. 781, 127 S.E.2d 98 (1962), *cert. denied* 371 U.S. 962 (1963).

[78] Kingsley v. Amalgamated Meat Cutters, Local 530, 323 Ill. App. 353, 55 N.E.2d 554 (1944); Curtis v. Albion-Brown's Post 590 Am. Legion, 74 Ill. App. 2d 144, 219 N.E. 2d 386, 389 (1966). *See* Note, *Hazards of Enforcing Claims Against Unincorporated Associations in Florida,* 17 U. FLA. L. REV. 211 (1964).

[78a] Boozer v. U.A.W., Local 457, 279 N.E.2d 428 (Ill. App. 1972).

[79] *E.g.,* PENNA. R. CIV. P., rules 2152, 1253, 15 U.S.C.A. §§1-7 (labor unions in anti-trust cases); 29 U.S.C.A. §§ 151-161 (labor unions generally); N. J. STAT. ANNO., tit. 2A, c.64; N. Y. CIVIL PRACTICE L. & RULES § 1025 (McKinney 1963); OKLA. STAT. ANNOT. tit. 12 §§ 182; OHIO REV. CODE, §§ 1745.01, 1745.02 (Page 1955) (execution may be only against association assets); *but,* Lyons v. American Legion Post, 172 Ohio St. 331, 175 N.E.2d 733 (1961) also permitted execution against members; Marsh v. General Grievance Committee, 1 Ohio St. 2d 165, 205 N.E.2d 571, 573 (1965). *But* criminal liability may not apply to an association for the acts of an individual: Ridgeport v. Fraternal Order of Eagles, 97 Ohio App. 245, 56 Ohio Op. 33, 125 N.E.2d 202 (1954).

other states.[80] But in Massachusetts (and Illinois until 1972 apparently) for example, an unincorporated labor union apparently is not a legal entity according to some decisions. No court judgment can be issued for it or against it, in its own name. Such a judgment may be entered only for or against its members, except a mere declaratory judgment.[81]

In some states, such as New York and Ohio, action naming either the association or its representative is permitted.[82] In Indiana, New York and Pennsylvania, suit may be brought in the name of an officer, as well, though Indiana does not allow the suit against the association as such.[83]

The local courts usually assume jurisdiction over unincorporated associations whenever a branch of the association (such as a union local) carries on activities within the state. In New Jersey, New York, Pennsylvania and many other states, the tests of "doing business" that apply to any foreign (out-of-state) corporation are applied also to foreign associations. The presence and representative activity of local agents is the basic test of local court jurisdiction over foreign organizations.[84]

Under the present Federal Labor Management Law, labor dispute suits may be carried on in the federal courts in the organization name of a labor association, which is considered a legal entity.[85]

The Bankruptcy Act permits a nonprofit association, like a nonprofit corporation, to go into voluntary bankruptcy proceedings as an entity. At the same time, it generally forbids involuntary proceedings to be brought against either, except when some material part of the organization's activities are profit-making. The problem of insolvency procedures is a large and complex one. For a proper understanding special works should be consulted.[86]

It is uncertain how far an association properly may go into protecting the personal rights of its members by legal action. In some cases, however, the boundaries are clear. For example, a professional society clearly may bring suit to stop unauthorized practice of the profession by unlicensed persons or organizations. In so doing, the

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[80] *See,* Fredstrom v. Giroux Post No. 11 of Am. Legion, 94 F.Supp. 983, (W.D. Mich. 1951).

[81] Bakery & Confectionery Workers Union v. Hall Baking Co., 320 Mass. 286, 69 N.E. 2d 111, 167 A.L.R. 986; Murley v. Painters Local 14, 273 N.E.2d 538 (Ill. App. 1971). *But see contra,* note 121, *infra.*

[82] *See,* Martin v. Curran, 303 N.Y. 276, 101 N.E.2d 683 (1951); Stefania v. McNiff, 49 Misc. 2d 480, 267 N.Y.S. 2d 854, 857 (1966); Marsh v. General Grievance Committee, 1 Ohio St.2d 165, 205 N.E.2d 571 (1965) (suit against a committee); Miazga v. International Union of Operating Eng'rs., 2 Ohio St.2d 49, 205 N.E.2d 884, 886 (1965).

[83] *See,* note 34 and note 37, *supra;* Slusser v. Romine, 102 Ind. App. 25, 200 N.E. 731 (1936).

[84] *See,* Quinn v. Pershing, 367 Pa. 426, 80 A.2d 712 (1951); and 29 U.S.C. § 185(c) (1947) (labor unions).

[85] *See,* note 73 *supra.*

[86] *See,* for a short study, OLECK, DEBTOR-CREDITOR LAW (1959 supp. ed.).

society is acting properly in protection of the personal interests of its members.[87] On the other hand, when the acts of the unlicensed persons are criminal, public policy requires that public authorities (not private organizations) act to protect the rights of individuals.[88] The same is true in non-criminal regulatory matters which affect substantial numbers of people, as in regulation of public places of assembly or of the purity of food offered for sale.[89]

In any event, an unincorporated association has the general right to act on behalf of its members as a friend or advisor of the court (*amicus curiae*). But it is up to the court to decide whether or not it will listen.[90] Labor laws give to unions the specific right to act on behalf of their members in securing for them better working conditions or redress of denials of their rights as workers.

Co-principal doctrine: In a business partnership the negligence of a partner or employee is imputed to all the partners, including a partner injured thereby.[91] Thus, a partner injured by concurrent negligence of a third person and his co-partner has no action against the third person, because the contributory negligence of his co-partner is charged to the injured partner.[92] In effect he sues himself.

This doctrine has been carried over to most non-profit unincorporated associations.[93] It applies clearly to small organizations but is of doubtful validity to large, well organized unincorporated associations.[94] In an injury to an initiate, however, a large group (Temple of the Mystic Shrine) was held liable.[95] In labor organizations the doctrine has been sought to be invoked in recent years, but the *Marshall* case is the rule today, and it contradicts the old rule.

Entity doctrine: Most recently many courts have ruled that a non-profit unincorporated association is a legal entity equivalent to a corporation in this respect; and this seems to be the emerging general rule.[96]

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[87] State Bar of Oklahoma v. Retail Credit Ass'n., 170 Okla. 246, 37 P.2d 954 (1934); Latson v. Eaton, 341 P.2d 247, 248 (Sup. Ct. Okla. 1959).

[88] New Hampshire Bd. of Registration in Optometry v. Scott Jewelry Co., 90 N.H. 368, 9 A.2d 513 (1939).

[89] Western Pa. Restaurant Assn. v. Pittsburgh, 366 Pa. 374; 77 A.2d 616 (1951); and RESTATEMENT OF TORTS § 710 (guidelines); and *see*, Waite v. Holmes, 133 Mont. 512, 327 P.2d 399, 403, 404 (1958).

[90] *See*, Bernstein, *Volunteer Amici Curiae in Civil Rights Cases*, 1 N.Y.L.S. STUD. L. REV. 95 (1952); and, hospital association as *amicus curiae* in a hospital—public interest problem; Matthews v. Ingleside Hospital, Inc., 254 N.E.2d 923 (Ohio C.P. 1969).

[91] Annot. 14 A.L.R. 2d 473 (1950).

[92] Buckley v. Chadwick, 45 Cal.2d 183, 288 P.2d 12 (1955).

[93] DeVillars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950).

[94] Crane, *Liability of Unincorporated Association for Tortious Injury to a Member*, 16 VAND. L. REV. 319 (1963).

[95] Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

[96] Miazga v. International Union of Operating Eng'rs., 2 Ohio App.2d 153, 196 N.E. 2d 324 (1964); Marshall v. I.L.W.U. 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962); Inglis v. Operating Eng'rs. Local 12, 18 Cal. Rptr. 187, *aff'd.* 23 Cal. Rptr. 403, 373 P.2d 467 (1962); International Union of Operating Eng'rs. Local 12 v. Fair

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Association Agents' and Members' Powers and Liabilities

Members of unincorporated associations may be viewed as members of a multi-member partnership, when considered in the broadest sense, and then each is liable for the acts of the other done in the course and scope of the "partnership."[97] But non-profit associations, mainly because they do not "seek profit," are not partnerships.[98]

An unincorporated association, whether it be a fraternal organization or a labor union, like any ordinary partnership, has no legal entity or existence apart from its members. In legal effect each member becomes both a principal and an agent as to all other members for the actions of the group itself; accordingly as a principal he has no cause of action against a co-principal (the group) for the wrongful conduct of their common agent.[99] Thus, courts appear to have followed the general rule of non-liability of the unincorporated association in an action for negligence by one of its members. Typically the cases have involved fraternal organizations or beneficial associations.[100]

The general rule as to associations was arrived at by applying to other forms of voluntary, unincorporated associations the rules of law developed in the field of business partnerships. Under traditional legal concepts the partnership is regarded as an aggregate of individuals with each partner acting as agent for all other partners in the transaction of partnership business, and the agents of the partnership acting as agents for all of the partners. When these concepts are transferred bodily to other forms of voluntary associations such as fraternal organizations, clubs and labor unions, which act normally through elected officers and in which the individual members have little or no authority in the day-to-day operations of the association's affairs, reality is apt to be sacrificed to theoretical formalism. The courts, in recognition of this fact, have from case to case gradually

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Employment Practices Comm'n., 81 Cal. Rptr. 47, 52 (Ct. App. 1969); Illinois *see,* note 81, *supra;* Oleck, *Non-Profit Associations as Legal Entities,* 13 CLEV.-MAR. L. REV. 350 (1964); Note, *Developments in the Law: Judicial Control of Actions of Private Associations,* 76 HARV. L. REV. 983 (1963); and *see,* Knight and Searle v. Dove (1964) 2 ALL ENG. REV. 307; Note, 80 LAW Q. REV. 326 (1964).

[97] Annot. 14 A.L.R. 2d 473. And *see generally* CONARD & KNAUSS, BUSINESS ORGANIZATION CASES AND MATERIALS 368 *et passim* (3rd ed., 1965); CRANE & BROMBERG ON PARTNERSHIP, § 24 (1968); Crane, *Liability of Unincorporated Association for Tortious Injury,* 16 VAND. L. REV. 319 (1963); CONARD, KNAUSS & SIEGEL, ENTERPRISE ORGANIZATION (cases) (4th ed. 1972).

[98] CRANE & BROMBERG ON PARTNERSHIP, § 13 (1968), citing UNIFORM PARTNERSHIP ACT § 6(1).

[99] Marshall v. I.L.W.U., 57 Cal. Rptr. 211, 371 P.2d 978 (1962).

[100] Carr v. Northern Pac. Beneficial Ass'n., 128 Wash. 40, 221 P. 979 (1924) (negligent selection of physicians and negligent hospital care furnished); Koogler v. Koogler, 127 Ohio St. 57, 186 N.E. 725 (1933) (negligent maintenance of fire escape); Roschmann v. Sanborn, 315 Pa. 188, 172 A.657 (1934) (negligent operation of a bus); DeVillars v. Hessler, 363 Pa. 498, 70 A.2d 333, 14 A.L.R. 2d 470 (1950) (negligent operation of a steam table); Mastrini v. Nuova Loggia Monte Grappa, 1 Pa. D. & C. 2d 245 (1954) (negligent maintenance of lodge floor); Duplis v. Rutland Aerie, No. 1001, Fraternal Order of Eagles, 118 Vt. 438, 111 A.2d 727 (1955) (negligent maintenance of stairway).

evolved new theories in approaching the problems of such associations, and there is now a respectable body of judicial decision, especially in the field of labor-union law, which recognizes the existence of unincorporated labor unions as separate entities for a variety of purposes, and which recognizes as well that the individual members of such unions are not in any true sense principals of the officers of the union or of its agents and employees so as to be bound personally by their acts under the strict application of the doctrine of "respondeat superior."[101]

Like a corporation, which is an artificial entity, an association can act only through agents or representatives. The amount of authority delegated to an agent must be determined by the executive board or the trustees, pursuant to the powers granted by the members.

The agent can bind the association only to the extent to which he is authorized to act.[102] But the general rules of principal and agent (agency law) also apply. The apparent (seeming) authority of an agent may bar the association from later denying that he actually had such authority. But if an agent clearly exceeds his authority, the members are not liable, if they have not negligently or fraudulently permitted third persons to be misled. Persons dealing with an agent have a duty to make reasonable inquiry, and to demand reasonable proof of the actual scope of his authority.[103]

The acts of the association's agents may either be authorized in advance or ratified or adopted afterwards. In both cases the members of the association assume liability.[104]

An uncertain implied authority inheres in some types of agency. Thus, an agent who is authorized to buy something for a certain price has implied power either to pay cash or to give association notes or other paper in payment, unless the authorization is specific on these points. In certain types of associations, such as social clubs, it is generally held that an agent can bind only the funds of the association, such as dues and contributions. The personal liability of members of such associations cannot be involved by the agent, at least in routine matters. This is because it is generally understood that most such associations are very limited in their purposes and operations.[105]

But if the facts and circumstances give to the agent the apparent power to commit the members personally, they may actually be bound by his actions. For example, if a club's agent leases a clubhouse in the name of the club, some cases have held that this binds the members. Ordinarily, of course, club members expect and consent

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[101] Marshall v. I.L.W.U., 57 Cal. Rptr. 211, 371 P.2d 987 (1962).
[102] Humphrys v. Republican Cent. Campaign Comm., 320 Pa. 353, 182 A. 366 (1936).
[103] *See,* Haldeman v. Addison, 221 Iowa 218, 265 N.W. 358 (1936).
[104] *See,* Empire City Job Print, Inc. v. Harbord, 244 App. Div. 6, 277 N.Y.S. 795 (1935).
[105] *See generally,* CRANE & BROMBERG, *supra* note 98.

to no such extent of liability. But if the lessor has reasonable cause to believe they did so consent, he may enforce his rights against them personally as well as against the association.[106]

In most cases, the liability of members of an association is determined by the general principles of agency law. Little significant legislation exists on this precise point (except for labor unions, which are treated in the next section). In one case a member of a trade association was held to be not liable for the salary of the editor of the association's journal, because the member was inactive.[107] But in another (old) case, the members of a college alumni group were held liable for the costs of a yearbook, because they had chosen one member to publish it.[108]

In most associations, the directors also are the officers of the association, and thus are its principal agents. A large association may also have many employees, some of whom may have the status of agents.

An association is liable, as a principal, for the negligence or other wrongful acts of an agent, when these acts are committed by him during, and within the scope of, his authorized duties. What is and what is not "in the course and scope of his employment" is a question of fact in each case.[109]

Labor Union Agents' and Members' Powers and Liabilities

Today there is a substantial body of law governing agents and transactions in the trade union (labor union). But even this body of law is so vague and conflicting that it is a very uncertain guide. Unions today are non-profit in purpose, insofar as profit of the *membership as a group is concerned.* It is true that the purpose of a union is to obtain profits for its members in terms of higher wages and other benefits. A labor union thus in a sense combines non-profit and profit purposes. But the same can be said of almost any non-profit organization. Its purpose almost always is to obtain *benefits* for its members—and often in terms of pecuniarily valuable advantages.

Labor unions, however, have one great advantage in this respect. Statutes require employers to recognize and bargain with unions and forbid them from directly discouraging their employees from joining unions. Very few statutes, at present, require unions to use only gentle means in dealing with employers.

The power of modern unions, and the public's fear of their power, is illustrated by the fact that they are expressly forbidden, by statute,

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[106] *See,* Korstad v. Williams, 80 Wash. 452, 141 P. 881 (1914).

[107] Stone v. Guth, 232 Mo. App. 217, 102 S.W.2d 738 (1937).

[108] Wilcox v. Arnold, 162 Mass. 577, 39 N.E. 414 (1895).

[109] *See generally* CRANE & BROMBERG, *supra,* note 96; PROSSER, TORTS, § 80 (4th ed. 1971); Note, *Liability of Members and Officers of Non-Profit Associations for Contracts and Torts,* 42 CALIF. L. REV. 812 (1954); and, Note, *Enforcing a Contractual Claim Against an Unincorporated Association in Wisconsin,* 1960 WIS. L. REV. 444.

from contributing to political campaigns.[110] Yet this does not restrict freedom of political opinions, as exercised in discussions in labor journals published by unions.[111] And the devices for evasion of this rule, while interesting, do not belong in this work.

Agents of a union may bind the union only on the express authorization of the members.[112] Many cases have held that the employer acts at his peril if he acts merely on the implied or apparent authority of union representatives.[113] This is unlike the general law of agency, and clearly tends to contribute to the corruption of the labor movement. If the unions can freely disown unpalatable arrangements based on agreements not specifically authorized by the members, it is actually an advantage (in the short view) to be careless about the character of union representatives. A partial remedy for this difficulty was attempted by the 1947 Federal Act in making consent or ratification not controlling.[114]

Distinctly the leading case on modern views of the labor union as an association (*e.g.*, an *entity* rather than a loose partnership) is the 1962 *Marshall* case, which has been cited several times hereinabove.[115] Even before that, the federal courts had said that an unincorporated labor union could be sued as an entity in federal courts.[116] The Supreme Court also said:[117]

> Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union. The union's existence in fact, and for some purposes in law, is as perpetual as that of any corporation, not being dependent upon the life of any member . . . "The actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question. At the same time, the members are not subject to either criminal or civil liability for the acts of the union or its officers as such *unless it is shown that they personally authorized or participated in the particular acts . . .*"[118]

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[110] 18 U.S.C. § 610 (1948).

[111] United States v. C.I.O., 335 U.S. 106 (1948).

[112] W. A. Snow Iron Works, Inc. v. Chadwick, 227 Mass. 382, 116 N.E. 801 (1917); Boylston Housing Corp. v. O'Toole, 321 Mass. 74, 538 N.E. 2d 288, 299 (1947).

[113] *See,* United Bhd. of Carpenters v. U.S., 330 U.S. 395 (1947) (esp. the dissent). *But,* "authorization" or "ratification" are not controlling under the Labor Management Relations Act, 29 U.S.C. § 152(13) (1947).

[114] *See,* Humphrys v. Republican Cent. Campaign Comm., 320 Pa. 353, 182 A. 366 (1936). And for a case on difficulty of proof of deliberate wrongs, *see* Hill v. Eagle Glass & Mfg. Co., 219 F. 719 (4th Cir. 1915).

[115] 57 Cal. 2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962), and *see, supra* notes 101, 99, and 96.

[116] UMW v. Coronado Coal Co., 259 U.S. 344 (1922).

[117] United States v. White, 322 U.S. 694, 701, 702, (1944).

[118] *Id.* at 702, 1253.

The labor union then was labeled "a separate legal entity," similar to a corporation; and described as *sui generis* and no longer comparable to voluntary fraternal orders or partnerships.[119] The conclusion in the *Marshall* case was that an injured member could sue the union for damages and not be defeated by the old concept that he was suing his "partners" and thus himself.

Contracts: A representative cannot bind the union as an entity in some states. He can bind only the current membership, which changes constantly.[120] In Massachusetts (according to some decisions) and New York, on the other hand, the union is viewed as a legal entity for this purpose.[121] In either case, the membership and the agents change quite often, creating a very foggy agency situation, though *procedural* statutes usually permit suits.

In a state such as Mississippi the union's contract is a "third party beneficiary contract." The union members are the beneficiaries. The beneficiaries can enforce the agreement against the parties, but the parties rarely have any enforcement powers other than those specifically stated in the contract.[122] Usually such contracts are strictly enforced by the courts against the employer, but not so strictly against the individual employee.

A more logical view is that of the federal courts, adopted by such states as Missouri and Nebraska, that a labor contract is a direct contract between each employee and the employer.[123] In this view the union representatives are merely agents for the individual employees. Only under this theory can an employer logically obtain specific performance of the contract. Otherwise, an employee always can defy his own union, if necessary. All the union can do to force him to honor his agreement is to expel him. If he is not afraid to seek other kinds of work, this threat is futile.[124]

In the internal affairs of a union, too, problems arise which ultimately plague even the friendly employer and the public. Jurisdictional disputes between rival factions or between rival agents cause many uncalled-for labor troubles. Reorganizations or secessions within unions often result in the destruction of contracts duly entered into by union agents. Then the agreements of an agent become subject to the internal provisions of a union constitution or bylaws.

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[119] *Id.*, citing Chavez v. Sargent, 52 Cal.2d 162, 193, 339 P.2d 801, 820 (1959).

[120] Wilson v. Airline Coal Co., 215 Iowa 855, 246 N.W. 753 (1933).

[121] Donovan v. Travers, 285 Mass. 167, 188 N.E. 705 (1934); Ribner v. Rasco, Butter & Egg Co., 135 Misc. 616, 238 N.Y.S. 132 (1929). *But see, supra* note 81, *contra.*

[122] McCoy v. St. Joseph B. Ry., 229 Mo.App. 506, 77 S.W.2d 175 (1934); Yazoo & M.V.R.R. v. Sideboard, 161 Miss. 4, 133 S. 699 (1931); Burns v. Washington Savings, 251 Miss. 789, 171 So.2d 322, 325 (1965).

[123] *See*, note 55 *supra;* McCoy v. St. Joseph B. Ry., 229 Mo.App. 506, 77 S.W.2d 175 (1934); Rentschler v. Missouri P.R.R., 126 Nebr. 493, 253 N.W. 694 (1934); Sandobal v. Armour & Co., 429 F.2d 249, 252 (8th Cir. 1970).

[124] Associated Master Plumbers v. Warnock & Zahrndt, Inc., 236 A.D. 882, 260 N.Y.S. 573 (1932).

Disaffiliation of a local from the parent body, a common event in recent years, for example, creates knotty problems as to disposition of union funds.[125]

Exemption from Collective Bargaining: In some states non-profit organizations, such as hospitals, are (or have been) exempt from obligation to bargain collectively with labor unions.[126] This exemption was, in part, a result of the nature of hospital operation in the past.[127]

In most private non-profit operations, labor relations are controlled by the National Labor Relations Act,[128] but in some states hospitals are specifically exempted.[129] This subject is treated below.

Injuries to Members: Remedies against the union for injuries done to members by other members' negligence used to be quite limited, largely because of the amorphous legal nature of non-profit associations.[130] The newer view of unions, as legal entities, has gone far towards curing the unfair old view.[131]

If the union representatives act intentionally, in causing harm to members, the union clearly is liable.[132] The same is true where a special duty of representation is owed to the particular member.[133] Such a duty often is a question of discretion on the part of union officers; and the courts prefer not to interfere unless abuse of a fiduciary duty is shown.[134] And if business judgment is involved, the discretionary aspect usually bars court interference.[135]

All in all, the state of union responsibility vis-a-vis members is still unclear. For example, it was held that a union did not violate N.L.R.B. rules by fining strike-breaker members; the contract theory being viewed as governing the case.[136]

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[125] Svete, *Disposition of Local's Funds Upon Disaffiliation*, 12 CLEV.-MAR L. REV. 539 (1963).

[126] *See*, N. Y. LABOR L. ART. 20, § 715, (McKinney 1965); Hebrew Home and Hosp. for Chronic Sick, Inc. v. Davis, 38 Misc.2d 173, 235, N.Y.S.2d 318 (1962).

[127] *See*, Billington, *Hospitals, Unions, and Strikes*, 18 CLEV.-MAR. L. REV. 70 (1969).

[128] 29 U.S.C. § 141 *et seq.*

[129] *Id.* § 152(2), *See*, Peters v. Poor Sisters, 267 N.E.2d 558 (Ind. App. 1971), and other citations, at note 144 *infra*.

[130] *See*, Marshall v. I.L.W.U., 57 Cal.2d 781, 22 Cal Rptr. 211, 371 P.2d 987 (1962) and the old view as *illustrated by* Marchitto v. Central R.R. of N.J., 9 N.J. 456, 88 A.2d 851 (1956); *overruled* Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825, 831 (1961); *see*, Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941); Goins v. Missouri Pac. Sys. Fed. of Maint. of Way Emp. U., 272 F.2d 458, 460 (8th Cir. 1960).

[131] Marshall v. I.L.W.U., 57 Cal. 2d 781, 22 Cal. Rptr. 211, 37 P.2d 987 (1962).

[132] International Ass'n. of Machinists v. Gonzales, 356 U.S. 617 (1958).

[133] Fray v. Amalgamated Meat Cutters, 9 Wis.2d 631, 101 N.W.2d 782 (1960). *But*, no special duty was owed in Marshall v. I.L.W.U., 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

[134] Neider v. J. G. Van Holten & Son, Inc., 41 Wis.2d 602, 165 N.W.2d 113, 115 (1969); Cheese v. Afram Bros. Co., 32 Wis.2d 320, 145 N.W.2d 716, 720 (1966); Foltz v. Harding Glass Co., 263 F.Supp. 959 (W.D. Ark. 1967).

[135] Finnegan v. Pa. R.R., 76 N.J. Super. 71, 183 A.2d 779 (1962).

[136] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 182 (1967).

Whether or not one agrees with the precise provisions of such statutes as the Taft-Hartley Act, or the Norris-LaGuardia Anti-Injunction Act, it is clear that carefully drawn, specific legislation still is necessary. The modern labor union is only partly a non-profit organization in the sense of an eleemosynary or charitable association. To lump it indiscriminately with such organizations is simply unrealistic. It is "big business" in itself (more aptly, "big labor"). Its social importance demands special treatment and special legislation.

Associations Exemption from Collective Bargaining

The exemption of some nonprofit organizations, such as hospitals, from the duty to engage in collective bargaining with labor unions, has led to some difficulties.[136a]

American national policy is to encourage workers to organize and work together, in labor unions, in order to improve their conditions.[137] The duty of employers to bargain with unions, however, is purely statutory.[138] This was held to apply to nonprofit hospitals, the nature of most of their operations being profitable "trade" indeed.[139] But in 1947 Congress exempted charitable hospitals from this duty, almost casually.[140] Then, in 1951, a Utah case said that the Taft-Hartley amendments to the Act reopened the matter and gave the states the power to control the question.[141] Utah ruled that hospital employees could use collective bargaining.[142]

A number of states enacted laws barring labor union negotiations in hospitals, while other states permitted such protection of employees.[143] Thus Colorado, Connecticut and Massachuetts exempt charitable hospitals from collective bargaining, while Michigan, Minnesota, New Jersey, and New York and some other states require hospitals to bargain with employee unions.[144] Utah, ironically, then amended its statute, to exclude charitable hospitals.[145] Ohio's courts have held that hospitals need not bargain collectively.[146]

[136a] 29 U.S.C. § 141 *et seq.* (1947).

[136b] 18 U.S.C. § 3692 (1964), 29 U.S.C. §§ 101-115 (1964).

[136c] *See,* Billington, *Hospitals, Unions and Strikes,* 18 CLEV-MAR. L. REV. 70 (1969); LaVerne, *Toward Equal Protection for the Non-Profit Employee,* 5 SUFFOLK L. REV. 365 (1971).

[137] 29 U.S.C. §§ 152 *et passim.*

[138] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

[139] NLRB v. Central Dispensary & Emergency Hosp., 145 F.2d 852 (D.C. Cir. 1944), *cert. denied,* 324 U.S. 847 (1945).

[140] National Labor Rel. Act, 29 U.S.C.A. § 152(2); and *see,* Legislative History of the Labor-Management Act of 1947, at 1464 (1948).

[141] Utah Labor Relations Bd. v. Utah Valley Hosp., 120 Utah 463, 235 P.2d 520 (1951).

[142] *Id.*

[143] Billington, *supra* note 136c, sets forth the statutes of the various states and the decisions of the courts.

[144] *Id.;* Indiana joined this group with the decision in Peters v. Poor Sisters of St. Francis Seraph, 267 N.E.2d 558 (Ind. App. 1971).

[145] UTAH CODE ANN. §§ 34-1-1 to 15 (1966).

[146] Building Serv. and Maintenance Union v. St. Luke's Hosp., 11 Ohio Misc. 218, 227 N.E.2d 265 (C. P. Cuyahoga County, 1967).

Of course, the rising costs of hospital care have been attributed in large part to costs of workers' services, which is quite unfair.[147] If anything, it is the physicians and the drug and supply people who, between them, have been drawing great wealth from their hospital connections. New York settled the debate, there, in 1967, by statute amendment granting bargaining rights to employees of charitable hospitals.[148] This would be the simplest and most reasonable way for all states to end the cruelty of exploitation of hospital service workers.

Organizing the Association

In practice many unincorporated associations just "sort of grow" into going organizations, out of informal (often, social) meetings of their members. This is very human, but not very wise.

The members ought to meet, more or less formally, and discuss purposes, plans, and proposals. Then the persons concerned should reduce their agreement to written form.

The agreement is the *Articles of Association*, or sometimes, the *Constitution*, or the *Charter*. These may contain rules for internal management procedures, or the body of internal rules may be stated in a separate document; in either case the rules are the *By-laws*.

Forms of articles, constitutions and bylaws should be understood to be merely guides. The provisions of the articles for each association must be tailored to its purposes, personnel, funds, facilities, and the agreed plan of operation. When the articles are duly signed and adopted, the association comes into existence.

In some states, articles of association must be filed with the secretary of state and with the clerk of the county in which the association's principal office is located. In a few states a certificate stating the name of the organization, its office, and its officers is required instead. Use of an assumed (group) name also may require filing, in the nature of licensing, with penalties for failure to file.[148a]

Managing the Association

Internal management of an unincorporated association must be carried on as provided by the articles of association. In most states where statutes cover the subject, the management must be in the hands of a board of directors or trustees consisting of at least three (or five) persons.[149]

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147 *See*, G. Kirstein, *Why Hospitals Exploit Labor*, 189 THE NATION 3 (July 4, 1959). D. Kochery & G. Strauss, *The Non-Profit Hospital and the Union*, 9 BUFF. L. REV. 255 (1960); E. Weissman, *Non-Profit Hospitals and Labor Unions*, 8 CLEV.-MAR. L. REV. 482 (1959).

148 N. Y. LABOR L., Art. 20 §§ 700-717 (McKinney 1967).

148a N. Y. GEN. BUS. L. § 130 (McKinney 1968).

149 149 N. Y. GEN. ASS'NS. L., Art. 1 (McKinney 1942).

The rights of members of the association (other than mere social relations) often are viewed as property rights. Interference with such rights mainly is treated much as is many improper interference with any property rights, by the issuance of injunctions or damage awards by the courts.[150] (See the next section, below).

The courts ordinarily will not interfere in the purely internal affairs of an association, except to prevent fraud or to protect property and civil rights.[151] If, for example, a member is expelled, he must exhaust all the remedies provided by the association's rules before the courts will aid him, unless these remedies obviously are futile.[152] And then the courts will move only if he can show some illegality in the action against him. If he can show unfair or improper treatment, the courts can and will grant damages or even order his reinstatement.[153] When membership is valuable or necessary to him, or is tinged with public stature or purpose as in a professional or trade association, the courts will scrutinize an exclusion or expulsion with particular care.[154]

Membership in a private association, society, or club, or (to some extent) in a labor union, is open only to those the members choose to admit. And membership is not transferable unless the association's rule so provide. This right of choosing associates is called *delectus personae*. But restrictions must be reasonable.[155]

The managers of an association (the directors or trustees) are fiduciaries. They stand to the members almost in the position of full trustees. But among members there is no such fiduciary relationship except in special circumstances.[156]

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[150] *See,* Elfer v. Marine Engr. Ben. Ass'n., 179 La. 383, 154 S. 32 (1934).

[151] *See, as to civil rights*: Quimby v. School Dist. No. 21 of Pinal County, 10 Ariz. App. 69, 455 P.2d 1019, 1022 (1969) (dicta that discrimination in a voluntary non-profit association, as to membership, will be subject to a judicial review in order to safeguard constitutional rights). *As to labor unions, see,* Krause v. Sander, 66 Misc. 601, 122 N.Y.S. 54 (1910) (union member expelled). *And see,* (*inherent* right, not merely property right, of political association member who was expelled, and question of share of value of club house use) Berrien v. Pollitzer, 83 U.S. App. D.C. 23, 165 F.2d 21 (1947).

[152] Jennings v. Jennings, 56 Ohio L. Abs. 258, 91 N.E.2d 899 (1949); Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67, 72 (2d Cir. 1966) (union member could not be expelled for failure to take a loyalty oath; the property basis was rejected and the proceeding was based on tort).

[153] Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67, 72 (2d Cir. 1966); Van Daele v. Vinci, 282 N.E.2d 728 (Ill. 1972); McCune v. Wilson, 237 S.2d 169, 173 (Fla. 1970).

[154] Pinsker v. Pacific Coast Soc. of Orthodontists, 81 Cal. Rptr. 623, 460 P.2d 495 (1969) *and see, supra* note 151; Van Daele v. Vinci, 282 N.E.2d 728 (Ill. 1972) (association of grocers); Commonwealth v. Beiler, 168 Pa. Super. 469, 79 A.2d 134 (1951) (religious association); courts seldom will interfere in doctrinal or procedural disputes; Dragelvich v. Rajsich, 263 N.E.2d 778 (Ohio App. 1970); Serbian Orthodox Church v. Kelemen, 21 Ohio St. 2d 154 (1970).

[155] *See,* Johnston v. Winn, 105 S.W.2d 398, 400 (Tex. Civ. App. 1937) (definition of *delectus personae*). *See also,* Page v. Edmonds, 187 U.S. 596 (1903) (transfer of stock exchange membership). *But,* concerning unions *see* Ryan v. Simmons, 18 N. Y. L. W. 2305 (Sup. Ct. 1950) (restriction to family members is illegal) and PENNA. LAB. REL. ACT (1937) § 3(f), 43 Penna. Stat. § 211.3(f) (restrictions of race or religion are illegal).

[156] Boston B.B. Club v. Brooklyn B.B. Club, 37 Misc. 521, 75 N.Y.S. 1076 (1902).

Submission to the constitution and direction of a parent body or authority often is found in such subsidiaries as fraternal lodges, unions, and religious associations.

The *cy pres* rule of the law of trusts applies to nonprofit organizations. A trust fund always must be devoted as nearly as (cy pres) is possible to the trust purpose specified by the founder. If, for example, property is given to a religious association to benefit that association's faith, it may not be used for a different faith. If the association dissolves, the courts will order the property used for other, *closely similar* purposes, unless specific provision for such an eventuality was made by the founder.[157]

Exclusion and Expulsion of Members

(See the text above, at notes 150-156).

Denial of membership to would-be members, and expulsion of existing members, are basically civil rights (constitutional law) problems.[158] These matters are only incidentally questions of nonprofit association law, and the principles applicable are generally the same for unincorporated as for incorporated organizations. These often are problems of racial or religious discrimination and of the privilege to exercise the ordinary rights of citizenship, such as the right to vote, free speech, freedom of petition, right to resort to the courts, equal protection of laws in many respects, employment right, etc.

Basically, a private organization may limit its membership (exercise *delectus personae*—choice of the person),[159] unless the organization is affected by a strong *public interest*.[160] A "strong public interest" may be said to be present, for example, in the constituency of a professional society[161] or a trade association.[162] The exceptions and limitations are affected by such questions as when the 14th and 15th Amendments to the Constitution involve "state action" as against

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[157] Note, *Cy Pres Doctrine and Anonymous Donors,* 6 STAN. L. REV. 729-734 (1954); Sheridan, *The Cy Pres Doctrine,* 32 CAN. B. R. 599-623 (1954); Note, *Cy Pres Doctrine,* 5 BAYLOR L. REV. 205-210 (1953). *See,* Bell v. Carthage College, 243 N.E. 2d 23 (Ill. App. 1968) (applies to college that moves to another state); *but cf.,* City of Patterson v. Patterson Gen. Hosp., 250 A.2d 427 (Super. Ct. 1969), *aff'd.* 251 A.2d 131 (N.J. 1969) (taxpayer cannot stop relocation of a hospital).

[158] Pasley, *Exclusion and Expulsion From Non-Profit Organizations—The Civil Rights Aspect,* 14 CLEV.-MAR. L. REV. 203 (1965); Chafee, *The Internal Affairs of Associations Not-For-Profit,* 43 HARV. L. REV. 993 (1930); Holland, *Clubs and the Race Relations Act of* 1968, 122 NEW L. J. 258 (1972); Holden, *Judicial Control of Voluntary Associations,* 4 N.Z.U.L. REV. 343 (1971); Note, *Discrimination in Private* Social Clubs, 1970 DUKE L. J. 1181.

[159] *Supra,* note 155.

[160] Madden v. Queens County Jockey Club, Inc., 296 N. Y. 249, 72 N.E.2d 697 (1947); Cline v. Insurance Exch. of Texas, 140 Tex. 175, 166 S.W.2d 677 (1943); Pinsker v. Pacific Coast Soc. of Orthodontists, 81 Cal. Rptr. 623, 460 P.2d 495 (1969); McCune v. Wilson, 237 S.2d 169, 173 (Fla. 1970); Van Daele v. Vinci, 282 N.E. 2d 728 (Ill. 1972).

[161] Pinsker v. Pacific Coast Soc. of Orthodontists, 81 Cal. Rptr. 623, 460 P.2d 495 (1969).

[162] Grempler v. Multiple Listing Bureau, 266 A.2d 1 (Md. App. 1970); Van Daele v. Vinci, 282 N.E.2d 728 (Ill. 1972).

private action.[163] Thus leases of public premises to organizations, and economic aid, and public licensing may inject "state action."[164]

The Civil Rights Act of 1964[165] particularly applies to clubs and organizations according to one view, and particularly does not apply according to another view.[166] Private school discrimination or segregation based on race is illegal,[167] and so is social fraternity or sorority discrimination especially at public (state) institutions,[168] welfare organizations,[169] or a political "club" that is used as a mere device for exclusion.[170] But in June 1972 the United States Supreme Court held that a private club may exclude Negroes from its restaurant, on the theory that the granting of a liquor license is not such "state action" as violates the constitution, and in August, 1972 the Pennsylvania Supreme Court held otherwise.[171]

Where exclusion or expulsion involves the right to earn a living or other economic interests, today such action usually is viewed as improper. This is by case law decisions in some respects,[172] and more effectively by statutes forbidding racial discrimination by labor unions.[173] So, too, the right to belong to a professional society is upheld when it affects the right to practice one's profession and earn a living.[174]

Amendments of Articles, Constitution, or By-laws

Articles of association always should set forth precise procedures, including the number of votes necessary, for the amendment of the articles, the constitution, or the bylaws of the association. Or each document may contain provisions for its own amendment. Changes must, of course, be consistent with the law. The requirement of a two-thirds vote is customary.

Notice provisions are important. At least ten days' notice of a meeting should be required, and *notice* should be defined to include purpose as well as time and place.

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[163] Civil Rights Cases, 109 U.S. 3 (1883); Comment, *A Statement Against State Action,* 37 S. CAL. L. REV. 463 (1964).

[164] *Refer* to discussion and cases in Pasley article *supra,* note 158 at 206-212.

[165] Pub. L. 88-352, 78 Stat. 243, *esp.* § 201(e) of the Act.

[166] Castle Hill Beach Club, Inc. v. Arbury, 2 N.Y.2d 596, 142 N.E.2d 186 (1957) (does apply); Tillman v. Wheaten-Haven Recreation Ass'n., Inc., 451 F.2d 1211 (D.C. Md. 1972) (does not apply).

[167] Brown v. Board of Education, 347 U.S. 483 (1954); *and see,* statutes such as N. Y. EXEC. L. § 296(4) (McKinney 1972); N. Y. STAT. ANN., § 18:25-5(1).

[168] Comment, 8 U.C.L.A. L. REV. 168 (1961).

[169] Statom v. Board Comm'rs of Prince George's County, 233 Md. 57, 195 A.2d 41 (1963).

[170] Pasley, *supra,* note 158, at 225.

[171] Moose Lodge No. 107 v. Irvis, 40 U.S.L.W. 4715,—U.S.—,92 S.Ct. 1965 (1972). The August decision held that a Moose Lodge *must* serve blacks if it allows *any* nonmembers to use its facilities. Matter of Moose Lodge 107 of Harrisburg, Penna., Supr. Ct. unanimous opinion, reported in N. Y. Times, p. 40 (Aug. 2, 1972).

[172] Pasley, *supra,* note 158 at 227, citing cases; and cases cited *supra* notes 153, 154.

[173] CIVIL RIGHTS ACT OF 1964, Pub. L. 88-352, 78 Stat. 241 (Title 7); *see* Note, 78 HARV. L. REV. 684 (1965); N. Y. CIVIL RIGHTS LAW § 43 (McKinney 1948).

[174] Falcone v. Middlesex County Med. Soc., 34 N.J. 582, 170 A.2d 791 (1961); Annot. 89 A.L.R.2d 964 (1963).

The statutory provisions, in the various states, for amendments of corporate articles and by-laws are good guides for similar action in unincorporated associations.[175]

Foreign Associations

If an association wishes to carry on activities in a state other than where its home office is located, it is a *foreign* organization in that other state. [176] Operation in another state usually involves filing in the other state and *qualifying* for license to do business there.[177]

Most state statutes provide that a foreign association must register if it undertakes more than occasional, isolated transactions, unless its activities can be classified as "interstate commerce."[178] Interstate commerce is exempt from state regulation.

Registration usually consists of the filing of a certificate with the the secretary of state, designating him as the agent for the service of legal process against the association. This certificate usually must be signed by the president, vice-president, or secretary and the signature must be notarized. The certificate usually must set forth:

1. The names and places of residence of its officers and trustees.
2. Its principal place of operation.
3. The address of its office within the state.

Failure to file usually is punished by denying the association the right to use the local courts to enforce its contracts in the state.[179]

Dissolution

Statutory procedures for dissolution of corporations are good guides for dissolution formalities of unincorporated associations.[180]

Dissolution of an association should be provided for in its articles of association. The procedure usually is to dissolve upon at least a two-thirds vote, or by consent of all the members. Some articles provide that no dissolution may be voted so long as seven members vote

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[175] *E.g.*, N. Y. NOT-FOR-PROFIT CORP. L., Art. 8, §§ 801 *et seq.* (McKinney 1970); OHIO REV. CODE § 1702.38 (at 1955).

[176] *See*, BLACK'S LAW DICTIONARY, 775 (4th ed. 1951).

[177] *See*, for rules and fees in all states and Canadian provinces, statutes regarding filing as a foreign corporation, 1 H. OLECK, MODERN CORPORATION LAW, §§ 107-166 (1958, with 1965 supp.). *See esp.*, N. Y. NOT-FOR-PROFIT CORP. L., Art. 13 §§ 1301 *et seq.* (McKinney 1970); OHIO REV. CODE, §§ 1703.01 *et seq.* (1955).

[178] *Id.*

[179] N. Y. NOT-FOR-PROFIT CORP. L., Art. 13, *esp.* § 1313 (McKinney 1970); OHIO REV. CODE § 1703.02 (1955); *but see*, Selama-Dindings Plantations v. Durham, 216 F.Supp. 104 (S. D. Ohio 1963) (as to members' right to sue); Local Trademarks, Inc. v. Derrow Motor Sales, 120 Ohio App. 103, 201 N.E.2d 222 (1963) (as to what is interstate commerce).

[180] *See*, for samples of forms from various states, 5 H. OLECK, MODERN CORPORATION LAW, Forms 1079, 1080, 1085-1095, *et passim* (1960 with 1965 supp.); and *esp.* OHIO REV. CODE §§ 1702.47-1702.52 (1970); *see In re Dissolution*, Cleveland Savings Soc., 90 Ohio Abs. 3, 183 N.E.2d 234 (1962); *In re* Dissolution of Springfield Savings Soc., 12 Ohio Misc. 51, 230 N.E.2d 139 (1965); N. Y. NOT-FOR-PROFIT CORP. L., Arts. 10 (non-judicial dissolution), 11 (judicial dissolution). (McKinney 1970).

to continue. The other members then have little choice except to resign, unless fraud can be shown.

Dissolution of an association by court action, for fraud or for other good cause, always, is possible.[181]

After all association debts have been paid a dissolved *"merely nonprofit"* association's property is divided proportionately among the members. When a *"charitable"* association holds property in trust and the achievement of purpose becomes impossible, the courts will assign that property to some other trustee to carry on the purpose of the donor, under the *cy pres* rule described above.[182]

Recently the idea of using unincorporated association form for the purpose of winding up a dissolved charitable corporation (*e.g., a foundation*) has been developed. The late Harold T. Clark of Cleveland, a noted expert in foundation organization and management, used this method in winding up the famous Leonard C. Hanna, Jr. Fund, a large foundation.

After the *incorporated* foundation was dissolved, a Trust Agreement was made by the corporate officers, setting up the *unincorporated* Leonard C. Hanna, Jr. Final Fund. Remaining, unexpended assets were given to the Final Fund, under this trust, for completion of distribution. A bank was made trustee for depositary and distribution purposes. The directors of the corporation were named to control distribution of the final assets by the bank (trustee). This Agreement was filed with the Secretary of State of Ohio as part of the record of the dissolution of the incorporated (and dissolved) foundation.[183]

Combination of both incorporated and unincorporated association forms, to serve various purposes (such as orderly dissolution and winding up of a nonprofit corporation) thus is seen to be useful.

Combination of both nonprofit and profit-making associations and/or corporations now apparently is readily possible under such statutes as the 1970 New York Not-For-Profit Corporation Law.[184] Thus the use of classes of membership, some of corporate and some of unincorporated associations, and others, are specifically authorized.[185] This refers to ongoing operation as well as to dissolution of corporations or associations.

"Mixed" Unincorporated-Corporate Organizations

Cooperatives, and to some extent *Professional "Corporations"* and *Trusts,* incorporated or unincorporated, present a special problem that

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[181] *See,* N. Y. NOT-FOR-PROFIT CORP. L., Art. 11 (McKinney 1970).

[182] *See,* text *supra,* note 157.

[183] This technique was first explained in personal conversations between Mr. Clark, its innovator, and the writer in 1964.

[184] N. Y. NOT-FOR-PROFIT CORP. L. *esp.* § 601 (McKinney 1970).

[185] *Id.,* under the Ohio statute, if the article or by-laws so provide, corporations, whether profit or non-profit, or partnerships, may be members of non-profit organizations; OHIO REV. CODE, § 1702.13 (E) (1955).

resembles the reverse of the liability-fixing question discussed in the earlier parts of this paper.

A *trust,* for example, can be liable *as an entity* for wrongs done by its employees. But beneficiaries and/or trustees may be *personally liable* for wrongs done *by the trust;* and such liability depends mainly on the extent of *control* of (or, *right* to control) the trust organization. This is only obliquely a matter of the law of unincorporated nonprofit associations. In effect, a *corporate* organization (and, of course, an *unincorporated* one) can involve personal liability that closely resembles that of a partnership.[186]

Professional corporations (or, *associations*) of physicians or lawyers, are corporations almost solely for tax and pension purposes. For most other purposes they are treated as partnerships (*e.g.,* for ethics or personal liability purposes).[187]

Real Estate Cooperatives and *Condominiums* can involve substantial risks of personal liability for members, which is proportionate to the amount of *control* of (or, *right* to control) common areas, whether the formal organization is based on corporate, trust, association, or individual-title-plus-cross-easement (or undivided interest in common areas).[188] *Farm cooperatives* usually involve little personal liability for members, under most state statutory systems.[189]

Conclusion: Points to Remember in Counsel Work for Unincorporated Associations

An attorney handling the formation and/or operation of an unincorporated nonprofit association should bear in mind the following guiding principles:

Always use articles of association. Do not rely on oral agreements.

Tailor your articles to your purposes and plans.

Use corporate form, if possible. It is better for all but a few kinds of organizations.

Check your state laws to see whether or not the association as such can take title to property. If it cannot, appoint trustees to hold title for the association.

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[186] Application of partnership law to an unincorporated partnership; McDonald v. McDonald, 53 Wis.2d 371, 192 N.W.2d 903 (1972); *and see,* as to trusts, Annot., 156 A.L.R. 22-231 (1945); Jones, *Business Trusts in Florida—Liability of Shareholders,* 14 FLA. L. REV. 1 (1961); G. BOGERT, TRUSTS (4th ed. 1963); A SCOTT, TRUSTS (3d ed. 1967).

[187] B. EATON, *Professional Corporations and Associations* in BENDER, BUSINESS ORGANIZATIONS vol's. 17, 17A, 17B (current ed.); K. STRONG, PROFESSIONAL CORPORATIONS (1971); Note, *The Illinois Professional Association Act,* 57 N. W. L. REV. 334 (1962).

[188] PACKEL, LAW OF COOPERATIVES (4th ed. 1970); Comment, *Community Apartments,* 50 CALIF. L. REV. 299 (1962); Note, *Condominiums—Member of Unincorporated Association May Sue Association for Negligent Maintenance of Common Areas,* 40 FORDHAM L. REV. 627 (1972).

[189] E. ROY, COLLECTIVE BARGAINING IN AGRICULTURE (1970); White, *The Farmer and His Cooperative,* 7 KANS. L. REV. 334 (1959).

Obey licensing and registration laws.

Check your state laws as to whether the association can sue or be sued in its own name. If it cannot, designate an officer for this purpose and protect him with a bond.

Remember that bankruptcy and insolvency laws make special provisions for nonprofit organizations.

Remember that the law of "principal and agent" governs acts of association representatives; and beware of "implied" or "apparent" authority.

Labor unions are subject to special laws. And these laws change often. Check the latest statutes before you act.

Provide carefully for internal management, meetings, members' rights, admission, and expulsion.

Provide exact procedures for amendment of the charter, constitution, and bylaws.

Register as a foreign association if you carry on any real activity in another state.

Provide exact procedures for dissolution votes and for distribution of property after payment of debts.

Consider the use of unincorporated association form for effectuating the winding-up process in dissolving a non-profit organization.

Consider the use of combinations of incorporated and unincorporated operation.