

## UNINCORPORATED ASSOCIATIONS AS PARTIES TO ACTIONS

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The cases are remarkably in accord that, in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name. Like unanimity substantially obtains in the reason assigned for the general rule. The following excerpts are cited as typical:

"Since a partnership is not a person, either natural or artificial, it cannot sue as a party plaintiff in the firm name." *Lister v. Vowell* (1898) 122 Ala. 264, 267, 25 So. 564, 565.

"As we have said, the plaintiffs have undertaken to make three unincorporated labor unions parties defendant. That is an impossibility. There is no such entity known to the law as an unincorporated association, and consequently it cannot be made a party defendant." *Pickett v. Walsh* (1906) 192 Mass. 572, 589, 78 N. E. 753, 760.

"A voluntary association, being only a collection of individuals, could not, at common law, sue or be sued by its associated name. . . ." *Lewelling v. Woodworkers Underwriters* (1919) 140 Ark. 124, 128, 215 S. W. 258, 259.

"There is no principle better settled than that an unincorporated association cannot, in absence of a statute authorizing it, be sued in its society or company name, but all the members must be made parties, since such bodies have, in the absence of statute, no legal entity distinct from their members." *Baskins v. United Mine Workers* (1921) 150 Ark. 398, 401, 234 S. W. 464, 465.<sup>1</sup>

<sup>1</sup>In addition to the cases quoted from, other representative cases are: *Grand Int'l. Bro. Loco. Engineers v. Green* (1921) 206 Ala. 196, 89 So. 435; *Barbour v. Albany Lodge* (1884) 73 Ga. 474; *Hanley v. Elm Grove Mut. Tel. Co.* (1911) 150 Iowa, 198, 129 N. W. 807; *Soper v. Clay City Lumber Co.* (1899) 21 Ky. L. 933, 53 S. W. 267; *Kimball v. Lower Columbia Fire Assoc.* (1913) 67 Or. 249, 135 Pac. 877; *Metropolitan St. v. Adams Express Co.* (1910) 145 Mo. App. 371, 130 S. W. 101; *Payne v. Livingston* (1923, Tex. Civ. App.) 253 S. W. 701; *Maisch v. Order of Americus* (1909) 223 Pa. 199, 72 Atl. 528; *Wharton v. Warner* (1913) 75 Wash. 470, 135 Pac. 235; Dicey, *Parties to Actions* (2d Am. ed. 1886) 169, 285; Wrightington, *Unincorporated Associations* (2d ed. 1923) 136, 425; 22 Enc. Pl. & Pr. 230, 242; 4 Cyc. 313; 5 C. J. 1365, 1369; 3 Ann. Cas. 699, note.

An enabling statute expressly authorizing suits in the common name has been said "to constitute the association an entity, at least for the purposes of the litigation." *Bro. of Ry. Trainmen v. Cook* (1920, Tex. Civ. App.) 221 S. W. 1049. But see Start, C. J., in *Dimond v. Minn. Sav. Bank* (1897) 70 Minn. 298, 300, 73 N. W. 182.

It is not to be overlooked that there are some cases in which the reason for the general rule is placed on the ground of lack of certainty of the parties litigant. *Reid & Co. v. McLeod* (1852) 20 Ala. 576; *Blackwell v. Reid & Co.* (1866) 41 Miss. 102; *Holland v. Butler* (1839, Ind.) 5 Blackf. 255; *Cady v. Smith* (1882) 12 Neb. 628, 12 N. W. 95; and see 1 Chitty, *Pleading*, \*256; *Bentley v. Smith* (1805, N. Y.) 3 Caines, 170; cf. *Armstrong v. Robinson* (1833, Md.) 5 Gill & J. 412.

In the famous case of *United Mine Workers v. Coronado Coal Co.*,<sup>2</sup> although there was no statute expressly authorizing suits against unincorporated labor unions in their union names, the United States Supreme Court found authority therefor by implication from the fact that state and Federal statutes have been enacted touching labor unions in various respects. The court found "affirmative legal recognition of their existence" by these general statutory provisions. Their "existence" being thus "recognized" they are suable in their association names.<sup>3</sup>

In reading the foregoing assignments-of-reason for the general rule and the method of approach of the Supreme Court in the Coronado case, one naturally raises questions like these: (1) If an unincorporated association is only a collection of individuals, if it is not a legal entity separate and distinct from its members, why can *it* not sue and be sued? Is not *it*, they? (2) By what provocation is the question considered whether an unincorporated association is or is not a legal entity? (3) Why is not an unincorporated association a "legal entity" in these cases? (4) How is it material whether or not statutes "recognize" the "existence" of the unincorporated association in these cases?

Before attempting to answer these questions specifically, it is worth while to point out a common law corollary to the general rule stated above. That is to the effect that *all* the members in their several names must appear as parties, plaintiff or defendant, as the case may be. A non-joinder is cause for abatement.<sup>4</sup>

In early times perhaps this corollary worked no serious harm. Firms or associations were small in membership, and their creditors or other plaintiffs had reasonable opportunity to know or ascertain an entire membership, even their Christian and ancestral names, without resort to initials, if necessary. In modern times, however, its hardship has become more serious. In the Coronado case the defendant association

<sup>2</sup> (1921) 259 U. S. 344, 42 Sup. Ct. 570.

<sup>3</sup> In this method of approach the Supreme Court followed the highest courts of Great Britain in the *Taff Vale* case [1901, H. L.] A. C. 426. The position taken by the court has been characterized as "startling, in view of precedent." NOTES (1923) 5 ILL. L. QUART. 126, and as a "radical change in common law procedure." Magill, *The Suability of Labor Unions* (1922) 1 N. C. L. REV. 81, 85.

<sup>4</sup> *O'Connell v. Lamb* (1895) 63 Ill. App. 652; *Wrightington, op. cit. supra* note 1, secs. 23, 70; 1 Rowley, *Modern Law of Partnership* (1916) secs. 495, 496; 1 Chitty, *op. cit. supra* note 1, \*12, \*42; and see *Moore v. Stemmons* (1906) 119 Mo. App. 362, 95 S. W. 313; *Donovan v. Danielson* (1923, Mass.) 138 N. E. 811. For the rule in tort cases see Dicey, *op. cit. supra* note 1, Rules 101, 119.

In many states statutes provide in effect that "joint" obligations generally are "joint and several" and in many states obligations of partners are made "joint and several." Rowley, *loc. cit. supra*.

Whether either class of statutes applies to unincorporated associations not for profit—where the members are not partners—is matter of statutory construction. It has been asserted that the individual members of such association are "jointly and severally liable as principals" on contracts to which they assent. 7 A. L. R. 222, note. But see 1 Williston, *Contracts* (1920) 607.

represented approximately 450,000 persons. What an economic loss of time, labor and printing paper to require the nomination of each member by his Christian and ancestral name before the plaintiff can have his cause heard in a common law court! If plaintiff's cause of action is in tort, however, the corollary rule is not controlling. He may sue one, some, probably, or all for each one's own tort. If, however, the plaintiff's claim soars to \$600,000 or more, for example, as it did in the Coronado case, it will stand him in hand, as a practical matter, to join as many responsible defendants as possible to assure satisfaction of his execution. If all the associates are responsible on one basis or another for the wrong to the plaintiff and if it were accomplished while endeavoring to further their association purposes, their wrongful action may be said to be an "association wrong" and their responsibility an "association responsibility." Since they have assumed an association name it applies to them in the given wrongful action and responsibility. Why must plaintiff be put to loss of time and labor and other expense in naming all by their several names as an alternative to proceeding against a lesser number with his chances for satisfaction of his execution diminished *pro tanto*?

If only a part of the associates are responsible to the plaintiff obviously there is no "association responsibility." Plaintiff's claim, then, is against so many individuals; their several names are their only names *pro hac vice* and plaintiff must proceed accordingly.<sup>5</sup>

If the plaintiff adopts the alternative of proceeding against only a portion of the associates further loss may be realized when he seeks to have execution against their shares of the "association property." The statement is made in the Coronado case that, "To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy *on his share* of the strike fund, would be to leave them remediless."<sup>6</sup> This is readily enough appreciated, and makes the matter no worse than it is by assuming that each member has a several interest in the strike fund which can be levied upon. If the unincorporated

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<sup>5</sup> Of course it might happen that all the associates would physically engage in, or otherwise become responsible for, a tortious act against a plaintiff but without the common purpose of furthering their associate enterprise. They might, for example, join with the community in a riot. If so, again there would be no "association wrong." They would be joint tort-feasors only, with no common name applicable to them in the given situation.

In a case where the plaintiff's cause of action sounds in contract and in the given jurisdiction the obligation is "joint and several" by statute, the corollary rule does not control any more than in the tort cases. But the same practical considerations require that as many responsible associates as possible be joined to assure collection of the judgment. If plaintiff claims on an "association contract," i. e., on one by which all the associates are responsible, why should he be put to the expense of nominating all of them in their several names in order to have all of them defendants, when the given transaction is one for which the associates have assumed a common name by which they are to be designated?

<sup>6</sup> *Supra* note 2, at p. 389, 42 Sup. Ct. at p. 576. (italics mine.)

labor union is deemed a "business" enterprise wherefore the incidents of "tenancy in partnership" attach, undoubtedly, by the rules of partnership law, each member does have an interest, more or less valuable, in the common fund which his creditors may get in one way or another. The Minnesota Court has emphatically declared, however, that labor unions are not business associations for profit.<sup>7</sup> Whatever may be the proper classification of labor unions, there is the non-business class of unincorporated associations in which the associates are not partners, where the incidents of "tenancy in partnership" cannot be said to obtain, and where, it would appear, the members have no several interest in the common fund which creditors of the individual member can secure. The incidents of ownership of such common property may be referred to perhaps as "tenancy in non-partnership associations." In absence of express provision to the contrary, the associate is under disability to sell or transfer his interest in the common property.<sup>8</sup> Upon withdrawal from membership his interest is extinguished, by beneficial survivorship to the remaining associates.<sup>9</sup> Upon death his interest is likewise extinguished.<sup>10</sup> Also on dissolution, the then living members take the whole, after creditors are satisfied, probably, to the exclusion of former members or their heirs.<sup>11</sup> The proprietary interest of the associate, while such, is the right that the common property be used

<sup>7</sup> *St. Paul Typothetae v. Bookbinders' Union* (1905) 94 Minn. 351, 102 N. W. 725—strictly a question of statutory construction, however, *Cf. Fitzpatrick v. Int'l. Typo. Union* (1921) 149 Minn. 401, 184 N. W. 17; *Diamond Block Coal Co. v. United Mine Workers* (1920) 188 Ky. 477, 487, 222 S. W. 1079, 1084; *Pacific Typesetting Co. v. Int'l. Typo. Union* (1923, Wash.) 216 Pac. 358; *Herald v. Glendale Lodge* (1920) 46 Calif. App. 325, 189 Pac. 329, and Vann, J., in *Ostrom v. Greene* (1900) 161 N. Y. 353, 360, 55 N. E. 919, 921.

<sup>8</sup> *Branagan v. Buckman* (1910, Spec. T.) 67 Misc. 242, 122 N. Y. Supp. 610; *Detroit Light Guard Band v. First Mich. Indep. Inf. Band* (1903) 96 N. W. 934, 134 Mich. 598; see also *Moore v. Hillsdale City Tel. Co.* (1912) 171 Mich. 388, 137 N. W. 241; *McFadden v. Murphy* (1889) 149 Mass. 341, 21 N. E. 868; *O'Neill v. Delaney* (1909, Sup. Ct. S. T.) 158 N. Y. Supp. 665. If the constitution-by-law-agreement provides therefor, the member has the power to alienate subject thereto. *Nashua Sav. Bank v. Abbott* (1902) 181 Mass. 531, 63 N. E. 1058; *Belton v. Hatch* (1888) 109 N. Y. 593, 17 N. E. 225.

<sup>9</sup> *Burt v. Oneida Community* (1893) 137 N. Y. 346, 33 N. E. 307; *Clark v. Brown* (1908, Tex. Civ. App.) 108 S. W. 421; *Local Union v. Barrett* (1896) 19 R. I. 663, 36 Atl. 5; *Curtiss v. Hoyt* (1848) 19 Conn. 154; *Mo. Bottlers' Assoc. v. Fennerty* (1899) 81 Mo. App. 525 (expelled for cause); *Lawson v. Hewel* (1897) 118 Calif. 613, 50 Pac. 763; see *McLaughlin v. Wall* (1909) 81 Kan. 206, 105 Pac. 33.

<sup>10</sup> *Goesele v. Bimler* (1852, U. S.) 14 How. 589; *Everitt v. Duss* (1913, C. C. A. 3d) 206 Fed. 590; see also *Mason v. Atlanta Fire Co.* (1883) 70 Ga. 604.

<sup>11</sup> *Sommers v. Reynolds* (1894) 103 Mich. 307, 61 N. W. 501; and see *Schiller Commandery No. 1 v. Jaennichen* (1898) 116 Mich. 129, 74 N. W. 458; *cf. Walters v. Pittsburgh & Lake Angeline Iron Co.* (1918) 201 Mich. 379, 167 N. W. 834. See also *Parks v. Knickerbocker Trust Co.* (1910, 1st Dept.) 137 App. Div. 719, 122 N. Y. Supp. 521; *Everitt v. Duss* (1912, W. D. Pa.) 197 Fed. 401.

consistently with the purposes of the association.<sup>12</sup> With the member's interest of such nature in this class of associations it is hard to see what his creditor can procure as "his share" of the common fund. In a common law court, if he proceeds against less than all of the associates and if he establishes other than an "association responsibility," it would seem that he is remediless as to the association funds.<sup>13</sup>

The Court of Chancery early took into account the foregoing considerations, especially the hardships caused by the corollary to our general rule, and invented so-called representative actions.<sup>14</sup> In causes properly cognizable by the Chancellor a few members are made parties plaintiff or defendant as representative of all. The representatives are deemed to represent the association, that is, all the associates, and the decree or judgment which determines their rights, concludes all as respects the common interest.<sup>15</sup>

With modern codes and their provision for one "civil action" it may be hoped, and to some degree expected, according to recent authorities, that this heretofore exclusively equitable procedure will be chosen for any case involving unincorporated associations of substantial membership.<sup>16</sup>

<sup>12</sup> *Myrick v. Holmes* (1921) 151 Ga. 437, 107 S. E. 324; *Kalbitzer v. Goodhue* (1903) 52 W. Va. 435, 44 S. E. 264; *Clark v. Brown*, *supra* note 9. If this right plus the conditional right to share in the property if he is a living member at final dissolution can be said to be an "interest," it is virtually worthless to his creditor.

<sup>13</sup> See *Driscoll v. Hoyt* (1858, Mass.) 11 Gray, 404.

<sup>14</sup> *Bromley v. Williams* (1863, Ch.) 32 Beav. 177; Story, *Equity Pleading* (9th ed. 1866) sec. 97. *Ibid.* sec. 107: "In cases of this sort the persons interested are commonly numerous, and any attempt to unite them all would be, even if practicable, exceedingly inconvenient, and would subject the proceedings to the danger of perpetual abatements, and other impediments, arising from intermediate deaths, or other accidents, or changes of interest."

<sup>15</sup> *Fitzpatrick v. Rutter* (1896) 160 Ill. 282 43 N. E. 392; *Bushong v. Taylor* (1884) 82 Mo. 660; *Hartford Life Ins. Co. v. Ibs* (1915) 237 U. S. 662, 35 Sup. Ct. 692. See also *Oster v. Brotherhood of Loco. F. & E.* (1921) 271 Pa. 419, 114 Atl. 377. Cf. *Am. Steel Co. v. Wire Drawers' Union* (1898, C. C. N. D. Ohio, E. D.) 90 Fed. 598; *Spaulding v. Evenson* (1906, C. C. E. D. Wash.) 149 Fed. 913.

<sup>16</sup> "One object of the code in abolishing the distinction between actions at law and suits in equity, and prescribing the same method of procedure for the prosecution of both, evidently was to simplify judicial proceedings, and facilitate the administration of justice; and, to accomplish that end, its provisions, and proceedings under them, should receive that liberal construction which it is expressly required shall be given them. To restrain the application of section 5008, to actions of a purely equitable nature, would, we think, be at variance with its language, and the general spirit and purpose of the code." *Platt v. Colvin* (1893) 50 Ohio St. 703, 711, 36 N. E. 735, 738 (representative plaintiffs). Accord: *Branson v. I. W. W.* (1908) 30 Nev. 270, 95 Pac. 354 (representative defendants). Decision on this point is expressly reserved in *Baskins v. United Mine Workers* (1921) 150 Ark. 398, 234 S. W. 464.

In *Liederkrans Singing Soc. v. Germania T.-V.* (1894) 163 Pa. 265, 268, 29

But while the general rule stands with its corollary, and though its hardships and inconveniences remain unmitigated by Code provisions, still perhaps a change should be resisted. A rule of law may be so uniformly pronounced, that despite its logical imperfection and actual inconvenience, it is better to leave it undisturbed than to upset the *status quo*. This consideration demands attention if our daily affairs have become adjusted to the enormity. Has the general rule under consideration any such pervading effect? It is believed not, in the light of its application by the courts. Although it is very uniformly recited that suits in the common name *cannot* be maintained—even that it is an impossibility—this is only extravagance of expression. And so the Massachusetts Court in *Pickett v. Walsh*, quoted from at the outset, to the effect that it is an “impossibility” to sue unincorporated labor unions in their common name, remarks in a subsequent portion of the opinion: “A trade union was made a party defendant in *Vegelahn v. Guntner*, 167 Mass. 92, and the anomaly seems to have escaped attention.”<sup>17</sup> What is this “impossibility” which can be done if done unconsciously? Likewise, it is at times asserted that the defect goes to the “jurisdiction” of the court:<sup>18</sup> “There must be a suable party before the court. A suable party is essential to jurisdiction whether by compulsory writ or voluntary submission.” This was provoked by a special appearance to move to quash summons and pleading in abatement because the union was named defendant in the union name. In most cases where such language is used the question of suability has been seasonably raised, or the case rests on more serious grounds.<sup>19</sup> By most of the authorities, the designation of an unincorporated association as a party litigant in its common name, is deemed to be only a formal procedural defect. If not taken as a matter of abatement,

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Atl. 918, 919, this position is taken: “It is necessary that the suit should be brought on behalf of all the parties in interest, but this may as well be done, in substance, by using the general name which describes them all, as by the phrase, ‘in behalf of themselves and all others interested,’” there being no plea in abatement. And see *Branson v. I. W. W.*, *supra*; *St. Germain v. Bakery Workers’ Union* (1917) 97 Wash. 282, 166 Pac. 665.

<sup>17</sup> 192 Mass. at p. 590, 78 N. E. at p. 761. Like anomalies are common. See for example: *Barr v. Essex Trades’ Council* (1894) 53 N. J. Eq. 101, 30 Atl. 881; *So. Ry. v. Machinists’ Union* (1901, C. C. W. D. Tenn.) 111 Fed. 49, 58, note.

<sup>18</sup> *Grand Bro. of Eng. v. Green* (1921) 206 Ala. 196, 198, 89 So. 435, 436.

<sup>19</sup> For example, the Kentucky Court in *Soper v. Clay City Lumber Co.*, *supra* note 1, declares: “The appellee, not being a corporation, it had no existence in fact and in law as would enable the plaintiff to sue it in the name of Clay City Lumber Company . . . . Such a judgment is void.” The judgment here was by default, taken after service had on a former agent of a dead man who had done business in Kentucky under the above name. Obviously the court was without jurisdiction to render the personal judgment, but not necessarily for the reason assigned. But see *Paine’s Chapel v. Aberdeen Realty Co.* (1919) 120 Miss. 12, 81 So. 650.

it is waived forever.<sup>20</sup> But as to the precise nature of that defect, as to its specification for the pleader, there is remarkable lack of uniformity, as indicated in the note.<sup>21</sup>

<sup>20</sup> *Agr. Ext. Club v. Hirsch & Son* (1919) 39 Calif. App. 433, 179 Pac. 430; *Herald v. Glendale Lodge*, *supra* note 6; *Dorsey v. Lawrence & Co.* (1808, Ky.) Hardin, 508; *Moore v. Martin & Hoyt Co.* (1900) 124 Ala. 291, 27 So. 252; *Johnson & Co. v. Smith* (1841, Iowa) 1 Morris, 105; *Pate v. Bacon & Co.* (1818, Va.) 6 Munf. 219; *Barnes & Co. v. Chicago Typo. Union* (1908) 232 Ill. 402, 83 N. E. 932; *Krug Furn. Co. v. Berlin Union* (1903) 5 Ont. L. 463; *Cady v. Smith*, *supra* note 1; *Deems v. Albany & Canal Line* (1878, C. C. S. D. N. Y.) 7 Fed. Cas. No. 3736; *Mitchell & Bro. v. Railton* (1891) 45 Mo. App. 273; *Iron Moulders' Union v. Allis-Chalmers Co.* (1908, C. C. A. 7th) 166 Fed. 45; *Rogers v. Verlander* (1888) 30 W. Va. 619, 5 S. E. 847; *Morgridge v. Stoeffler* (1905) 14 N. D. 430, 104 N. W. 1112; (1921) 20 MICH. L. REV. 245; cases *infra* note 21. See also *Crawley v. Am. Society of Equity* (1913) 153 Wis. 13, 139 N. W. 734; *Branson v. I. W. W.*, *supra* note 16.

Within the rules of the conflict of laws the question is one of "procedure." *Saunders v. Adams Express Co.* (1904) 71 N. J. L. 270, 57 Atl. 899. Cf. *Ruth v. Lowery & Upton* (1880) 10 Neb. 260, 4 N. W. 977.

In the following cases, however, the objection was deemed not waived at time raised: At the trial: *Hughes v. Walker, Carter & Co.* (1835, Ind.) 4 Blackf. 50; *Barbour v. Albany Lodge* (1884) 73 Ga. 474; *Weisz v. Davey* (1890) 28 Neb. 566, 44 N. W. 470. See also *McConnell v. Apollo Sav. Bank* (1892) 146 Pa. 79, 23 Atl. 347; objection first made on appeal: *Proprietors of the Mex. Mill v. Yellow Jacket Min. Co.* (1868) 4 Nev. 40, distinguished in *Branson v. I. W. W.*, *supra* note 16. And see *Simpson v. Grand Int. Bro. of Loco. Engineers* (1919) 83 W. Va. 355, 98 S. E. 580.

Some cases also indicate that the defect is not subject to amendment. *Hajeck v. Bohemian-Slavonian Benev. Soc.* (1896) 66 Mo. App. 568; *Barbour v. Albany Lodge*, *supra* note 1. *Contra: Morgridge v. Stoeffler*, *supra*, at p. 432, 104 N. W. at p. 1113, "The partnership name furnished the means of identifying the plaintiffs, and it cannot therefore be said that the firm name was the same as no name;" *Kleinert v. Knoop* (1907) 147 Mich. 387, 110 N. W. 941; see also *Loewenberg v. Gilliam & Lyon* (1904) 72 Ark. 314, 79 S. W. 1064.

Where the complaint is dismissed of course judgment must be for "dismissal of the complaint," and not judgment for defendant "who has no legal existence." *Hajeck v. Bohemian Benev. Soc.*, *supra*; but is, of course, "without prejudice." *Fox v. Blue Grass Grocery* (1901) 22 Ky. L. 1695, 60 S. W. 414.

In case of default judgment the defect is reversible error. *Simmons v. Tütche Bros.* (1894) 102 Ala. 317, 14 So. 786; cf. *Seymour v. Thomas Harrow Co.* (1887) 81 Ala. 250, 1 So. 45; *Burden v. Cross* (1870) 33 Tex. 685; *Day v. Cushman, Eaton & Co.* (1838) 2 Ill. 475; *Dunham v. Shindler* (1889) 17 Or. 256, 20 Pac. 326.

<sup>21</sup> The defect has been treated as:

1. No legal capacity to sue: *Union Wine Co. v. Green* (1909, Spec. T.) 62 Misc. 551, 115 N. Y. Supp. 921; *Grolier Soc. v. Foster* (1922) 110 Kan. 306, 203 Pac. 920; *Agr. Ext. Club v. Hirsch & Son*, *supra* note 20; *Pollock v. Dunning* (1876) 54 Ind. 115; *Franklin Union v. People* (1906) 220 Ill. 355, 77 N. E. 176. See also *Barnes & Co. v. Chicago Typo. Union*, *supra* note 20; *Brookmire & Co. v. Rosa* (1892) 34 Neb. 227, 51 N. W. 840.

2. Misnomer: See *Porter v. Cresson* (1823, Pa.) 10 Serg. & R. 257; cf. *Seely v. Schenck & Denise* (1806, N. J. Sup. Ct.) 1 Penn. 75.

3. Nonjoinder of parties in interest: *Burden v. Cross*, *supra* note 20; *Hays v.*

The chief irritant, or factor promoting this confusion, however, appears to be the idea that an unincorporated association is not a "person," not a "legal entity separate from its members." With this we may revert to the question proposed at the beginning of this article: By what provocation is the question considered whether or not an unincorporated association is a legal entity in these cases?

A single individual, without renouncing his ancestral and christian name, may adopt an additional name and therein incur and enjoy legal relations.<sup>22</sup> The courts concern themselves in identifying him, the human being, with the legal relation in question. They approach the problem in that manner. Such single individual, also, can sue<sup>23</sup> and can be sued in such assumed name. "The replication to a plea of misnomer, that a party is as well known by one name as another, is good."<sup>24</sup> It is considered that he is sufficiently named, it being the name which he and third persons have used to designate him. That such name is not fairly susceptible of being that of a person, but rather is "artificial," appears to make no difference.<sup>25</sup>

If a number of individuals associate or come together and co-operate in a common purpose, and take unto themselves an association name *pro hac vice*, what is its significance? If plaintiff sells goods to the authorized agent of the associates, but extends credit to the association name, he is deemed by the courts to have given credit to "the individuals, whom, upon inquiry, should be found to stand behind it."<sup>26</sup>

*Lanier* (1833, Ind.) 3 Blackf. 321; *Cf. Armstrong v. R. & T. Robinson* (1833, Md.) 5 Gill. & J. 412 and *Blackwell v. Reed*, *supra* note 1.

4. Lack of certainty of parties: See cases *supra* note 1, especially *Blackwell v. Reed*. See also *Moore v. Martin & Hoyt Co.*, *supra* note 20.

5. That Christian and ancestral names must appear on record: *Livingston v. Harvey* (1858) 10 Ind. 218; *Day v. Cushman, Eaton & Co.*, *supra* note 20.

In some cases, no name is given to the defect to guide the pleader for time had passed to take advantage of a "formal defect," while in other cases the court indifferently treats it as any one of several. See *Herald v. Glendale Lodge*, *supra* note 6.

<sup>22</sup>L. R. A. 1915 D, 983, note. N. I. L. sec. 18.

<sup>23</sup>*Roberts v. Mosier* (1913) 35 Okla. 691, 132 Pac. 678 (elaborately reviewing the problem); *Sheridan v. Nation* (1900) 159 Mo. 27, 59 S. W. 972; *Clark v. Clark* (1878) 29 Kan. 522; *Baumeister & Co. v. Markham* (1897) 101 Ky. 122, 39 S. W. 844, 41 S. W. 816; *Cooper v. Burr* (1865, N. Y. Sup. Ct.) 45 Barb. 9; see also *Bank of Havana v. Magee* (1859) 20 N. Y. 355.

<sup>24</sup>*Lucas v. Farrington* (1858) 21 Ill. 31 (headnote); *Selman & Co. v. Shackelford* (1855) 17 Ga. 615; *Miller v. George* (1889) 30 S. C. 526, 9 S. E. 659; *Conway v. Hays* (1844, Ind.) 7 Blackf. 159. And see *Linch v. Hooke* (1704, K. B.) 1 Salk 7.

<sup>25</sup>*Charles v. Valdosta Foundry & Mach. Co.* (1908) 4 Ga. App. 733, 62 S. E. 493; *Bremen Fdry. Works v. McLendon* (1917) 19 Ga. App. 650, 91 S. E. 1049; 29 Cyc. 270, *cf.* 15 Enc. Pl. & Pr. 929. See also *Stange v. Price* (1921) 191 Ky. 734, 231 S. W. 532.

<sup>26</sup>*Davison v. Holden* (1887) 55 Conn. 103, 112, 10 Atl. 515, 516. Accord: *Ridgely v. Dobson* (1842, Pa.) 3 Watts & S. 118. ". . . and this for the public



The courts have approached the problem in that manner. It would seem to be a fair and expedient construction of the transaction. Like conclusion is reached regarding a bill of sale, or chattel mortgage to the association name. "The Arkansas Machinery & Supply Co. is not a corporation, but it is the business name of a firm of partners . . . . Such a conveyance to a firm is just as effectual as if the name of each partner had been set out in the mortgage."<sup>27</sup> In case of a mortgage of real estate to the association name, the rule appears to be, at least for states having the "lien theory" so called, that it is of like effect as the note of which it is "mere security, although in the form of a conditional conveyance," namely a mortgage to the associates.<sup>28</sup> Real estate leases to an association *eo nomine* are also sustained as being such in favor of the members.<sup>29</sup> Where deeds of land are attempted to be executed to an unincorporated association in its association name, the decisions are in some confusion. In a few cases the deed is said to be void for want of "a competent grantee."<sup>30</sup> By another class of

convenience, because it would be very troublesome, to say the least, to insert the names of a whole company in every entry in books, in bills, and on other mercantile negotiations." *Seely v. Schenck & Denise*, *supra* note 21. The same method of approach obtains with simple contracts generally: *Ackermann v. Ackermann Schuetzen Verein* (1900, Tex. Civ. App.) 60 S. W. 366, 368 ". . . a right accruing to such an organization in its company name inures to the benefit of its members;" *Camden, G. & W. Ry. v. Guarantors of Pa.* (1896) 59 N. J. L. 328, 35 Atl. 796. A negotiable promissory note payable to "Vernon Advertising and Manufacturing Company," a partnership name, is not payable to bearer under sec. 9, N. I. L. as a note payable to a "fictitious or non-existing person, or when the name of the payee does not purport to be the name of any person." *Write Away Pen Co. v. Buckner* (1915) 188 Mo. App. 259, 265, 175 S. W. 81, 84.

<sup>27</sup> *Hendren v. Wing* (1895) 60 Ark. 561, 562, 31 S. W. 149; *Kellogg v. Olson* (1885) 34 Minn. 103, 24 N. W. 364; and see *Slaughter v. Doe ex dem. Swift, Murphy & Co.* (1880) 67 Ala. 494. But in Massachusetts an automobile is an outlaw upon the public highways, if registered only in the name of an unincorporated labor union, because it is not registered "by the owner thereof"—this because such union "has no separate existence in law—unlike a corporation which is a legal person quite apart from its stockholders." *Hanley v. Am. Ry. Express Co.* (1923, Mass.) 138 N. E. 323, 324. Compare the reference of Rugg, C. J., of the same court, to *Pickett v. Walsh* (1906) 192 Mass. 572, 78 N. E. 753, in *Long v. Co-op. League of Am.* (1923) 140 N. E. 811, 812. See also *People v. Brander* (1910) 244 Ill. 26, 91 N. E. 59.

<sup>28</sup> *Chicago Lumber Co. v. Ashworth* (1881) 26 Kan. 212; *Slaughter v. Doe ex dem. Swift, Murphy & Co.*, *supra* note 27.

<sup>29</sup> *Evans v. Curtis* (1826, N. P.) 2 Carr. & P. 296; *Reding v. Anderson* (1887) 72 Iowa, 498, 34 N. W. 300; *Edwards v. Old Settlers' Assoc.* (1914, Tex. Civ. App.) 166 S. W. 423. See also *Piper v. Taylor* (1922, N. D.) 188 N. W. 171.

<sup>30</sup> Because of want of a "competent grantee" it is held in the following cases that the legal title at least is still in the grantor. *Harriman v. Southam* (1861) 16 Ind. 190; *Miller Lumber Co. v. Oliver* (1896) 65 Mo. App. 435; *Douthitt v. Stinson* (1876) 63 Mo. 268; and see *Tidd v. Rines* (1879) 26 Minn. 201; cf. *Kellogg v. Olson*, *supra* note 27; *East Haddam Church v. East Haddam Society* (1877) 44 Conn. 259. These cases pronounce the formula that since the associa-

cases the deed is sustained in favor of the members where the firm or association name contains the name of at least one of the members although only his ancestral name.<sup>31</sup> Others take the more cautious position that legal title vests only in the individual so named, suggesting that there will be equitable rights in the other members respecting the property.<sup>32</sup>

On the other hand, in *Byam v. Bickford*<sup>33</sup> the Massachusetts court goes the full way in holding that a deed of land to "the South Chelmsford Hall Associates," an association of definite membership, operated to vest the property in those "who were properly described by this title."<sup>34</sup> It

tion is unincorporated the requirements for a deed are not satisfied, namely, that there must be a competent grantor and grantee. That the Missouri court, however, in *Douthitt v. Stimson*, *supra*, the only one of the cases that purports to give the problem careful consideration, used the formula only as a way to state its conclusion that the grantee was not designated or described with adequate certainty, is clearly evident from the opinion and the earlier Missouri case, *Arthur v. Weston & Strode* (1856) 22 Mo. 378, on which it relies.

The early New York cases, *Jackson v. Cory* (1811, N. Y. Sup. Ct.) 8 Johns. 385, and *Hornbeck v. Westbrook* (1812, N. Y. Sup. Ct.) 9 Johns. 73, which are frequently cited, cannot be relied on to support the foregoing formula as a reason in itself. In the former case the deed was to "the people of the county of Otsego," and in the latter "to the inhabitants of the town of Rochester." Both communities were unincorporated. Both deeds were held void. While the first case talks of "capacity" of the grantee as well as uncertainty in designation or description thereof, the latter case is quite explicit that want of certainty of grantee is the reason for the decision. And see *Greene v. Dennis* (1826) 6 Conn. 292, 301. These cases may be sound enough where the grantee named is the population of a geographical area, the group being an indefinite and unascertained number. That the problem is one of designation or description of the grantees with sufficient certainty, rather than a question whether the grantee has "capacity" or is a "competent grantee" as the issue arises in cases of felons, aliens, idiots or like persons under disability, should be obvious. See Sheppard, *Touchstone*, \*236; cf. Comyn's Digest, Capacity, B, 1. These cases will be referred to later. For the extent to which the two foregoing New York cases have been carried in New York, see *Schein v. Erasmus Realty Co.* (1920, 2d Dept.) 194 App. Div. 38, 184 N. Y. Supp. 840. *German Land Assoc. v. Scholler* (1865) 10 Minn. 331, properly interpreted, likewise rests on uncertainty in the beneficiary; see *Society of the Most Precious Blood v. Moll* (1892) 51 Minn. 277, 281, 53 N. W. 648, 649.

<sup>31</sup> *Sherry v. Gilmore* (1883) 58 Wis. 324, 332, 17 N. W. 252, 255. "A firm name is always held sufficient to designate the true name of all the persons composing the firm;" and see *Hoffman v. Porter* (1824, C. C. 4th) 2 Brock. 156; *Menage v. Burke* (1890) 43 Minn. 211, 45 N. W. 155.

<sup>32</sup> *Arthur v. Weston & Strode*, *supra* note 30, at p. 380: ". . . parties may be described with various degrees of certainty;" *Gossett v. Kent* (1858) 19 Ark. 602; see also *Percifull v. Platt* (1880) 36 Ark. 456; *Beaman v. Whitney* (1841) 20 Me. 413.

<sup>33</sup> (1885) 140 Mass. 31, 2 N. E. 687.

<sup>34</sup> Accord: *Apostolic Holiness Union v. Knudson* (1912) 21 Idaho, 589, 123 Pac. 473; *Powers v. Robinson & Co.* (1890) 90 Ala. 225, 8 So. 10; *Sherry v. Gilmore*, *supra* note 31; 1 Tiffany, *Real Property* (2d ed. 1920) sec. 196. By the Uniform Partnership Act, sec. 8, (3) and (4), provision is made for conveyances to the firm name.

is quite evident in those cases where the question has been carefully considered that such courts have been trying to resolve the doubt, remembering our registration statutes and their purposes, whether the association name designates and describes the members with sufficient certainty.<sup>35</sup>

Cases involving testamentary dispositions to an unincorporated association by its name similarly represent a variety of holdings. It has been held that since the association is unincorporated "it has not capacity to take" and that the gift cannot be held to vest in the members who stand behind their associate name because it would defeat the testator's intention that the gift should be enjoyed in "perpetual succession."<sup>36</sup> Aside from New York, the tendency is quite evident, however, to sustain these gifts, especially in case of bequests.<sup>37</sup> In New York the formula is recited that since the association is unincorporated "it has no capacity to take."<sup>38</sup>

As to the proper effect to be given to these various formal transactions one feels favorably inclined toward the position of the Irish Exchequer in *La Touche v. Whaley*.<sup>39</sup> The case is this: By deed defendant assigned a judgment to "Right Honorable David La Touche & Company," with covenants. Declaration in Covenant thereon by

<sup>35</sup> For an able and careful consideration of the problem see *Arthur v. Weston & Strobe*, *supra* note 30.

<sup>36</sup> *Greene v. Dennis*, *supra* note 30, at p. 301 (devise); *Trustees of the Phila. Baptist Assoc. v. Hart's Ex'rs.* (1819, U. S.) 4 Wheat. 1 (bequest). These cases involved non-partnership associations and would seem to overlook or unconsciously decide against what were referred to as "incidents of tenancy in non-partnership associations" earlier in this article. The continued succession resultant from such ownership would seem to be quite as effective as "corporate" ownership to afford "continued succession."

<sup>37</sup> In *Guild v. Allen* (1907) 28 R. I. 430, 67 Atl. 855, a legacy to an unincorporated missionary society by its association name is good. "That is, in legal effect, a gift to the individuals calling themselves by that name." *Ibid.* at p. 435, 67 Atl. at p. 857. Accord: *Estate of Ticknor* (1864) 13 Mich. 44, 57 (an able opinion by Campbell, J.): "We have found no satisfactory authority which shows why an association, capable of clear identification, is not as capable of receiving a simple pecuniary bequest for lawful purposes, as a partnership of purchasing a stock of goods." And see *Hartman v. Pendleton* (1920) 96 Or. 503, 186 Pac. 572.

In absence of special controlling policy, such as violation of the rule against perpetuities (see *Lounsbury v. Trustees of Square Lake Assoc.* [1912] 170 Mich. 645, 137 N. W. 513), or mortmain (see 1 Schouler, *Wills* [6th ed. 1923] sec. 35), it is difficult to see how the problem in cases of devises and bequests differs from transactions *inter vivos*, (except possibly a gift to a partnership where continued succession does not obtain, by the agreement and the purpose of the gift as intended by the testator would be defeated), namely, whether the association name designates a definite group of individuals with sufficient certainty either by nomination or description.

<sup>38</sup> *Owens v. Missionary Society* (1856) 14 N. Y. 380. The cases are collected in 40 Cyc. 1052.

<sup>39</sup> (1832) Haynes & Jones, 43.

plaintiff, John David La Touche, surviving partner of the above named firm. Demurrer: Plaintiff's name not put in the indenture. Held: Demurrer overruled:<sup>40</sup> "Certum est quod certum reddi potest. This is not a case in which individuals are neither named nor described; but one in which though not named they are sufficiently described . . . . Here the covenant is not with David La Touche alone, but with him and his partners. They, it is true, are not set forth *nominatim*, but they are described as partners in trade with him. And we hold here, that persons may be made parties to a deed, by such a description as will enable them to be accurately ascertained by averment."

Whatever may be hoped for in the development of the rule with respect to deeds of land and testamentary dispositions, it is significant to notice that in the foregoing transactions the courts have generally concerned themselves with the question whether or not the association name is a certain designation, by nomination or description, of the associates. If the association name refers to the members in such cases, why should it so uniformly signalize a non-existing legal entity when that name is sought to be placed upon the records as a party litigant? If the association name nominates or describes *the associates* whether with more or less certainty in the case of a contract, deed, and testamentary disposition, why does it connote a non-existing "legal person" in these actions-cases?

With the foregoing analogies for premises, logic would bring us to the conclusion that the association name is merely an additional name assumed by each and all of the members as their own *pro hac vice* and that such name should be treated in the case of a number of individuals the same as an additional name taken on by a single individual.

But, again, "a page of history is worth a volume of logic," it is believed, in ascertaining the basis and real reason of the general rule under consideration. It is orthodox in our common law that "corporate rights" lie in grant from the King. To pretend to be a corporation without privilege is cause for *Quo Warranto*.<sup>41</sup> The troublesome problem to the King's courts has been to determine what constitutes usurping "corporate rights." Lord Eldon, in referring to *Rex v. Webb*,<sup>42</sup> remarks: ". . . it would have been fortunate, if the court had then looked at this as a distinct question, and had been good enough

<sup>40</sup> To like effect see: *Maugham v. Sharpe* (1864) 17 C. B. (N. S.) 443; *Moller & Moller v. Lambert* (1810, C. P.) 2 Camp. 548. But see *Brazilay v. Loewenthal* (1909, 1st Dept.) 134 App. Div. 502, 119 N. Y. Supp. 612 *re* specialty contracts; cf. *NOTES* (1923) 23 COL. L. REV. 663.

<sup>41</sup> See 3 Holdsworth, *History English Law* (3d ed. 1923) 476. This tradition was vitalized by the Bubble Act, (1719) 6 Geo. I, c. 18 touching ". . . all acting or pretending to act as a corporate body or bodies." This was repealed by (1825) 6 Geo. IV, c. 91. See also *Duvergier v. Fellows* (1828, C. P.) 5 Bing. 248, at p. 267; 1 Angell and Ames, *Private Corporations* (10th ed. 1875) ch. 2.

<sup>42</sup> (1811, K. B.) 14 East, 406.

to declare 'this is not acting as a corporation, because to act as a corporation you must do so and so.'"<sup>43</sup>

It is quite clear however, that several individuals by associating together for business or other common purposes, and taking an association name were not guilty of an illegal assumption of "corporate rights."<sup>44</sup> To pass the question of privilege of the group to carry on business in the common name, we find that when the group came to the King's court "as such," or sought to put the association name upon the records as a party litigant, that was deemed to be acting as a corporation and the associates not being "incorporated," the courts refused to accord them the power so to sue or the liability to be sued in such manner and form. In 1802 we have Lord Eldon's opinion as follows:<sup>45</sup>

"It is the absolute duty of Courts of Justice not to permit persons, not incorporated, to affect to treat themselves as a corporation upon the Records . . . . I desire my ground to be understood distinctly. I do not think, the court ought to permit persons, who can only sue as partners, to sue in a corporate character; and that is the effect of this bill."

A similar position is taken in other cases:

"This is a number of persons taking to themselves a fictitious name, and by that name, protruding themselves into a court of justice . . . . But by this assumed name, they cannot appear in a court of justice. They can neither sue nor be sued by it. This is a privilege appertaining to corporate bodies only . . . . To sue and be sued, in their corporate name, is one of the great privileges granted to corporate bodies. It can only be authorized by the supreme power of the State."<sup>46</sup>

"It is too plain for any argument that they [two unincorporated labor unions in their union name] cannot be so sued. The right to sue and be sued is a corporate franchise. . . ."<sup>47</sup>

<sup>43</sup> *Kinder v. Taylor* (1825) 3 L. J. Ch. 68.

<sup>44</sup> Tindal, C. J., in *Harrison v. Heathorn* (1843, C. P.) 6 Man. & G. 81, 128, and *Garrard v. Hardey* (1843, C. P.) 5 Man. & G. 471, 481; Turner, L. J., in *In the Matter of the Mexican & So. Am. Co.* (1859, Ch.) 4 De Gex & J. 544, 555; Kirkpatrick, C. J., in *Seely v. Schenck & Denise*, *supra* note 21; Dwight, *Legality of Trusts* (1888) 3 POL. SCI. QUART. 592.

<sup>45</sup> *Lloyd v. Loaring* (1802, Ch.) 6 Ves. 773, 777. Accord: *Pipe v. Bateman* (1855, Iowa) 1 Clarke, 369, followed in *Westbrook v. Griffin* (1906) 132 Iowa, 185, 109 N. W. 608; Willes, J., in *Hybart v. Parker* (1858) 4 C. B. (N. S.) 209, 212, quoted by Rogers, J., in *Roberts v. Anderson* (1915, C. C. A. 2d) 226 Fed. 7, 12; 1 Daniel, *Chancery Pleading and Practice* (8th ed. 1914) 56; Story, *Equity Pleading* (9th ed. 1866) sec. 497, note, quoted with approval in *Donovan v. Danielson* (1923, Mass.) 138 N. E. 811, 813; and see Dwight, *op. cit. supra* note 39, at p. 610, point (4) of his summary.

<sup>46</sup> *Seely v. Schenck & Denise*, *supra* note 21. Quoted with approval in *Richardson v. Smith & Co.* (1885) 21 Fla. 336, 341; see also *Crawley v. Am. Society of Equity* (1913) 152 Wis. 116, 139 N. W. 734; and Vann, J., in *Ostrom v. Greene*, *supra* note 7, at p. 361, 55 N. E. at p. 920.

<sup>47</sup> Hammond, J., (1898) *American Steel & Wire Co. v. Wire Drawers Union* (1898, C. C. N. D. Ohio, E. D.) 90 Fed. 598, 600. And see *Thurmond v.*

At an earlier day, then, the association name signaled a number of human beings, the members, "protruding themselves into a court of justice" in manner and form as officious intruders upon an existing tradition current in our common law dating from well toward the beginnings of our political institutions. We sanction that tradition to-day under the guise of the formula that an association, unincorporated, is not a "legal entity separate and distinct from its members."

The same historical doctrine of corporate franchises might be offered to explain the beginnings of the rule which is announced in those cases which declare that a deed or testamentary disposition to an unincorporated association in the association name is void for want of "capacity" in the unincorporated association. Such explanation would be true to history especially in the cases involving acquisition of property by unincorporated communities "as such."<sup>48</sup> The writer is reluctant however, to offer such explanation for the American cases on this subject. The two cases, *Jackson v. Corey* and *Hornbeck v. Westbrook* (referred to in note 30), which appear to be the foundation for the property rule in question, appear too clearly to approach the problem as one of uncertainty of designation or description of the grantee or beneficiary. Consideration of the "capacity" which is had in those cases is fairly clearly collateral. There is not sufficient evidence, in the opinion of the writer, to warrant the statement that the court was influenced in its decisions by the idea that to receive property in an association name was an exclusively corporate power and privilege requiring a sovereign grant.

On the evidence it seems most consistent to say that the formula that "an unincorporated association is not a legal entity separate from its members" has been employed by the courts only as a *method of statement* of the real reasons for their decisions. That in the actions cases the real reason for the decisions is the conclusion of the courts that to sue or be sued in the association name are exclusively "corporate" legal relations, which will not be accorded to the associates in the absence of grant from the sovereign. That in the property cases, so far as the formula is used, it is used to state the independent conclusion of those courts that dispositions of property to the association name do not satisfy the requisite of certainty of grantee or beneficiary.

Although this conclusion does not require one to go further and assert that the formula can be no more than a *method of stating a reason* existing independently of the formula, it seems well to do so. It must be noted that it is no sufficient reason in itself to say that an unincorporated association cannot sue or be sued in its association name, or that it cannot acquire property thereby because "it is not a

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*Cedar Spring Baptist Church* (1900) 110 Ga. 816, 36 S. E. 221. The question is not one of "right" to sue and be sued, but of the associate's power to sue and their liability to be sued; see Lord Shand in the *Taff Vale* case, *supra* note 3, at p. 441.

<sup>48</sup> See Holdsworth, *loc. cit. supra* note 41.

legal entity separate from its members," because "it is not an entity known to the law." To verify this requires consideration of two questions: (1) Is it sufficient to say that an unincorporated association is not a legal entity separate from its members simply because it is not incorporated? (2) Is it sufficient reason in itself to hold that unincorporated associations cannot sue or be sued or own property because they are not legal entities separate and distinct from the members? The first question must be answered in the negative. "Legal entity" is not an attribute applicable exclusively to corporations. If in a given case concerning an unincorporated association a court finds it to be a convenient way of stating its decision it may employ "legal entity." On such occasion it will declare that the association *is* a legal entity.<sup>49</sup> On another occasion, having come to a given decision on independent grounds, the court may declare, even as respects a corporation, that the association *is not* a "legal entity," or to use the orthodox terminology of corporation law: it "disregards the corporate entity."<sup>50</sup> The particular decision to be stated will, of course, determine the form of statement to be employed, and whether either one of these forms is employed rather than some third method will be determined by convenience and not by any *a priori* non-applicability of "legal entity" to unincorporated associations. In addition to the actual practice of courts of using "legal entity" on occasion with reference to unincorporated associations the conclusion that it is not exclusively "corporate" is made the more evident by considering the second question, namely, is it a sufficient reason in itself for the decisions that an unincorporated association cannot sue or be sued, or own property because it is not a "legal entity"? How does "legal entity" come into these cases at all? Apparently as follows: The court conceives of the suit in the common name as being by or against the "association" and not by or against the members, and a deed or testamentary disposition to the association name as being to the "association" and not to the members. This conception is natural, the appearance of "legal entity" in these cases is natural. It is consequent upon certain of our mental processes. We first perceive *the associates*, human beings, engaged in a common enterprise with a common purpose. Thereupon, in our consideration of them we reify them as a group, and we get "it," "the association as such." By this instinctive process "the association" becomes an entity, a thing separate and distinct from the associates. Before this process

<sup>49</sup> *Walker v. Wait* (1878) 50 Vt. 668; *State v. Krasher* (1908) 170 Ind. 43, 47, 83 N. E. 498, 500: ". . . in thus speaking the courts have referred to partnerships as legal entities *merely as a term of accommodation*, where there was under consideration some question as to the rights of partners *inter se*, or of the derivative rights of creditors growing out of the equities of the partners . . ." (italics mine.)

<sup>50</sup> See *First National Bank v. Trebein* (1898) 59 Ohio St. 316, 326, 52 N. E. 834, 837.

takes place we concern ourselves with a number of individuals, the associates. We observe that these individuals have assumed for themselves a common or association name by which to distinctly designate themselves in their associate activities. Starting with the premise that these associates can sue or be sued and can acquire property, the real issue in our cases would seem to be whether *they* can sue or be sued or acquire property in a particular manner and form, namely by the common name which they have assumed. To say that they cannot because an unincorporated association is not a legal entity indicates that the process of reification has taken place, that the individuals are no longer the immediate focus of observation, but instead, that the "association as such" is under consideration. This instinctive process leaves us with an "association," an entity separate and distinct from its members. But the formula which we have is that such an association is *not* a legal entity separate from its members, it is not an entity known to the law. This would seem to indicate that for some cause a second process has operated to destroy the original creation,—a process in the nature of things dependent upon the effect of the first—that there has been an abrogation of the entity heretofore created. Why? If for no independent reason, then for no reason at all, for quite obviously to do so because we do so is no reason for so doing. To repeat: If any court has decided that the associates cannot sue or be sued in their common name, or that they cannot receive property thereby without having come to the conclusion that such ought to be the decision on independent grounds, on grounds independent of the formula that an unincorporated association is not a legal entity separate from its members, there is no reason, no justification for the court for having made such decision. Such court has followed the natural bent of thinking of the associates as an entity, of thinking of the group "as such;" but it has brushed aside the creation. Why? The only answer in such case is: because it has.

If these observations are accepted there is some doubt as to exactly what the supreme court is looking for in the *Coronado* case in searching statutory provisions touching labor unions for "affirmative legal recognition of the existence" of unincorporated labor unions. Certainly statutory authority is not essential to give them the existence" of a "legal entity." As pointed out, that in itself is an idea to be acquired by the court by its own mental processes. Apparently emphasis is to be placed upon their "recognition" by statutory enactments wherefore the court can gather sufficient sovereign authorization for ascribing an exclusively corporate legal relation to the members, namely, liability to be sued in their association name.<sup>51</sup>

If then sovereign prerogative to grant "corporate" rights be the ulti-

<sup>51</sup> *Quaere*, if this doctrine is followed, may not partnerships, organized under the Uniform Partnership Act, sue and be sued in the firm name?



mate, independent and real reason for our general rule of non-suability, and the provocation for declaring that an unincorporated association is not a legal entity, when the associates appear as a party litigant in their association name, will our present social structure be wrecked by disregarding the tradition? To modernize the question, would it be too great usurpation by the courts of powers of the legislature? We have noted that the rule now hangs only on a pleading of abatement in most of the states. If the courts will establish individual immunity to stockholders just as if they were a *de jure* corporation although the members have substantially failed to perform the conditions for "incorporation"—this in the name of *de facto* corporations; if the courts will legislate the doctrine of no collateral attack applicable to many *ultra vires* transactions of corporations; if plaintiffs may sue in their association name, although unincorporated, when the defendant has contracted with them in that name, on the doctrine of "corporation by estoppel," estoppel to deny legal existence as a corporation, as obtains in many jurisdictions;<sup>52</sup>—if these doctrines have been made up out of whole cloth and cut from this traditional bolt by our courts, and legislatures allow them to stand, for the welfare and convenience of ourselves, it is submitted that the courts have been a little "fastidious,"<sup>53</sup> in the light of the inconvenience caused by it and its corollary, in continuing to impose the general rule which we have under consideration.

However, conceding that the general rule may, in net result, give only cause for pleading in abatement if violated, and has no more

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<sup>52</sup> See NOTE (1922) 7 MINN. L. REV. 42. Cf. *Heaston v. Cincin. & F. W. R. R.* (1861) 16 Ind. 275.

<sup>53</sup> *Johnson & Co. v. Smith*, *supra* note 20. And see Wannamaker, J., in *Fowler v. Cleveland* (1919) 100 Ohio St. 158, 159, 126 N. E. 72.

Most cases which treat the suability question as one of certainty of parties (see *supra* note 1) would appear to be consistent with the method of approach of the courts in cases involving contracts, deeds, etc. They generally rely on Chitty who says that for "C. D. and Company" to appear as a party litigant is uncertainty. Whether he means by this that a "non-joinder" of parties is indicated is not clear. Most of the cases resting on the ground of certainty are in such form.

The growth of modern statutes authorizing suits in the common name would seem to indicate that certainty was not a serious problem in these cases. If rules of service, proof of cause, judgment and execution are ascertained there would seem to be no special necessity for further certainty. Cf. *Karges Co. v. Amalgamated Woodworkers' Union* (1905) 165 Ind. 421, 423, 75 N. E. 877, 878.

The foregoing rules would also doubtless apply to statutes authorizing suits against unincorporated associations by their association name, these statutes generally providing for service upon any associate. See for examples: Ala. Code, 1907, sec. 2506; Calif. C. C. P. 9115, sec. 388; Colo. Rev. Sts. 1908, sec. 14; Idaho, 2 Comp. Laws, 1919, sec. 6656; Mont. Rev. Code, 1921, sec. 9089; Minn. Gen. Sts. 1913, sec. 7689; Neb. Comp. Sts. 1923, sec. 8537; N. Y. C. C. P. 1876, sec. 1919; Md. Code, 1911, Art. 23, sec. 301; Vt. Gen. Laws, 1917, sec. 5720; Mich. Comp. Laws, 1915, secs. 12, 363; similar provisions exist in other states.

serious basis than above suggested, are there serious problems concerning service of process, proof of plaintiff's case, rendition of judgment, or of execution thereon, that render it impracticable to abandon the rule without statutory provisions for these matters? It may be admitted that these problems present more serious difficulties.

As respects service of process, however, the general statement will probably not be contested that "due process" is satisfied if defendants are given reasonable notice and opportunity to defend. Personal notice is not necessary.<sup>54</sup> A common law rule is to be noted, however, to the effect that all "joint" contractors or partners must have been duly served before plaintiff could take any judgment. If one of such defendants were non-resident, plaintiff was apparently helpless unless out-lawry proceedings were had. Whether such proceedings were available in civil action is doubtful.<sup>55</sup> To obviate such failure of justice, "joint debtor" statutes have been passed in one form or another in most states. These statutes generally authorize service of process on any one of the "joint" debtors or partners. The judgment appears to be valid, within the doctrine of *Pennoyer v. Neff*,<sup>56</sup> at least to bind the "joint" property within the state.<sup>57</sup> The judgment is apparently invalid to impose any individual responsibility upon the non-resident debtor or partner not duly served within the state nor voluntarily appearing.<sup>58</sup> These statutes are quite uniformly restricted, however, to defendants "jointly indebted on a contract." In such statutes only does there appear to be any statutory assistance in our problem of service. These rules are instructive, however.

In states where statutes prescribing such service do not obtain, and in cases where they are not applicable, how shall service be made? The Chancellor made a rule for himself in the case of representative actions, based on the idea of reasonable notice, to the effect that service upon the representatives in the suit would be sufficient to authorize a decree

<sup>54</sup> See 35 L. R. A. (N. S.) 292, note, and NOTES (1906) 20 HARV. L. REV. 58.

<sup>55</sup> *Blessing v. McLinden* (1911) 81 N. J. L. 379, 79 Atl. 347; *Nathanson v. Spitz* (1895) 19 R. I. 70, 31 Atl. 690.

<sup>56</sup> (1877) 95 U. S. 714.

<sup>57</sup> See *Sugg v. Thornton* (1889) 132 U. S. 524, 10 Sup. Ct. 163; *Esteve Bros. & Co. v. Harrell* (1921, C. C. A. 5th) 272 Fed. 382; Freeman's note, 44 Am. Dec. 570. See also Scott, *Jurisdiction over Non-Residents Doing Business Within a State* (1919) 32 HARV. L. REV. 871.

<sup>58</sup> *Moredock v. Kirby* (1902, C. C. W. D. Ky.) 118 Fed. 180; *Caldwell v. Armour* (1899, Del.) 1 Pennewill, 545, 43 Atl. 517; *Cabanne v. Graf* (1902) 87 Minn. 510, 92 N. W. 461; and see *Flexner v. Farson* (1919) 248 U. S. 289, 39 Sup. Ct. 97; Freeman, (1873) sec. 120 a. See also 43 L. R. A. (N. S.) 540, note, reviewing decisions on these statutes, and *Hall v. Lanning* (1875) 91 U. S. 160. Whether judgment shall be entered in form against all the defendants including those non-resident, or only against those who are duly served within the state and those who voluntarily appear, seems to be only a question of formal compliance with the particular statute.

binding all the associates respecting the common property.<sup>59</sup> And again, in a proceeding in a common law court, without statutory assistance, service upon the principal officer of the association has been held adequate.<sup>60</sup> Such conclusion would seem to carry out fairly the requirement of reasonable notice in light of the examples already noted. It is workable. It should be sufficient to authorize judgment effective in the first instance against the common fund. It is consistent with the policy of the "joint debtor" statutes referred to above, as well as that reflected in the statutory provisions of the most of the states which authorize suits against the associates in their common name.

This conclusion will raise the question whether the basis of individual responsibility of the associates is changed. If plaintiff, by using their common name, names each and all of the associates, is proof of his cause of action altered in case of partnership associations? The jural liabilities of partners are imposed by law. They are imposed because they, by their contract, become co-entrepreneurs.<sup>61</sup> The powers of co-partner A are co-extensive with what is the common and usual practice of entrepreneurs generally in prosecuting that particular kind of business in which the firm is engaged. His powers need not be referred to authority from his associates as principals before a partnership transaction can be established. If plaintiff proves that co-partner A's transaction with him was accomplished by A in behalf of the association as distinguished from being on his (A's) own personal account, and is a transaction within the common practice of such business as stated above, plaintiff's right against all the associates is established. There is an "association responsibility." (This is subject, of course, to the qualification that plaintiff did not know of any agreed limitation on A's powers contained in the partnership agreement.) If this is true where plaintiff sues all the partners by their several names, it is hard to see how this basis of responsibility would be changed by suing all the associates in their common name which is applicable to them for the given transaction.

In the case of non-partnership associations, on the other hand, the jural liabilities of the associates are determined by the rules of agency

<sup>59</sup> See cases *supra*, note 14.

<sup>60</sup> *Slaughter v. Baptist Society* (1912, Tex. Civ. App.) 150 S. W. 224. See also *Fitzpatrick v. Rutter*, *supra* note 14. And in the *Coronado* case, 259 U. S. at p. 392, 42 Sup. Ct. at p. 577, Taft, C. J., states: ". . . we conclude that the International Union, the District No. 21, and the 27 local unions were properly made parties defendant here and *properly served by process on their principal officers.*" (italics mine.)

<sup>61</sup> It will be conceded that a more orthodox statement of the partnership relation is that it involves the mutual relation of principal and agent, that each partner is the agent for the co-partners in the ordinary purposes of the trade. As Justice Gray points out, however, in *Meehan v. Valentine* (1892) 145 U. S. 611, 12 Sup. Ct. 972, this is only a statement of the consequence of the relation and not the reason for the legal relations of partners.

law. Each associate must consent within those rules before a transaction is binding upon that one.<sup>62</sup> All of the associates must consent within those rules before an "association transaction" can be consummated.<sup>63</sup> This is plaintiff's case when the associates are named in their several names. Is it changed by using the common or association name? If suit is brought against the associates by their association name, which names all of the associates, is it not to establish an "association responsibility" and will not plaintiff therefore have to prove the responsibility of *all* on the basis of agency law as a condition of using the common name? The New York courts have answered this question in the affirmative under the New York statute.<sup>64</sup> The plaintiff cannot employ the statutory method unless there is proof of responsibility of *all* the members. "It is essential to a right of recovery in such a case that the cause of action was one for which an action might be maintained against the 30,000 members of the United Association."<sup>65</sup> This would seem to be the proper construction of an action in such form in absence of statute, understanding "members" to mean those who were associated at the time the cause of action accrued.<sup>66</sup> If this is

<sup>62</sup> *Ash v. Guie* (1881) 97 Pa. 493.

<sup>63</sup> Unquestionably those members, less than all, who do authorize the transaction are themselves personally responsible.

<sup>64</sup> *McCabe v. Goodfellow* (1892) 133 N. Y. 89, 30 N. E. 728.

<sup>65</sup> *Schouten v. Alpine* (1915) 215 N. Y. 225, 232, 109 N. E. 244, 246; accord: *Coney v. Brennan* (1917, Spec. T.) 167 N. Y. Supp. 903.

<sup>66</sup> If a member dies or voluntarily withdraws from the defendant association after plaintiff's cause of action has accrued against the associates but before proceedings commenced, question will arise whether plaintiff can proceed against the associates in their association name. There has been a change in the associates. In such case however, the withdrawing member still remains responsible both as respects his share, whatever it is, in the common property and as respects his private purse (assuming death does not extinguish his duty as a "joint" debtor). He, or his representative, is still responsible to plaintiff on an "association responsibility," and it seems that the association name should still include him for the purposes of this litigation. The question of service of process should not make for a different result in such case. Under the "joint debtor" statutes, presumably if one joint debtor agreed with his co-debtors that he should be responsible alone, with no acquiescence by the creditor, it would hardly be argued that service on any one according to the statute would not be sufficient although it would be if such bargain had not taken place between the debtors. It is recognized however, that in cases where there has been a dissolution of a partnership that there is some conflict of authority whether one partner can receive service for all after dissolution. It is submitted that there should be no such difficulty where the judgment goes upon an "association responsibility" against only the common fund in the first instance and against the members' private purses only in supplementary proceedings after return of execution unsatisfied. The foregoing observations should apply to associations whether of the non-partnership class or partnership class, and whether, by the membership agreement, the associate purposes are to be carried on regardless of changes

the purpose and effect of the suit against the common name and such is the proof requirement for plaintiff's cause of action, it seems obvious that no change is made in proof of plaintiff's cause of action facilitating his establishing an "association responsibility" at any sacrifice of protection to the associates. In this connection it is to be further remembered, however, that plaintiff need not do more than satisfy the rules of the law of agency applicable in such cases. He may have recourse to the constitution-agreement of the members, their by-laws, their resolutions, and in general to the objective standards of agency which we label "scope of authority" and "incidental purposes" of an association of any particular type in question.<sup>67</sup> As to what they are as respects any particular association this article is not concerned. Let it be noted only that there is no striking innovation suggested, in

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in membership, or whether they are to terminate upon death or withdrawal of a member.

If a new member has been admitted into the defendant association, that is into the membership agreement of the association, subsequently to accrual of plaintiff's cause of action, it would seem expedient and sufficient to cause suggestion of his non-responsibility to be made upon the record, and his contribution to the common property reserved in the judgment. Let him be treated as a non-member *pro hac vice*.

If the firm name is being used as plaintiff on a claim in favor of the association, and such claim against the defendant accrued before the death or withdrawal of an associate plaintiff, certainly the association name can be used in case of a non-partnership association where the interest of such member passes by beneficial survivorship to the remaining members. The association name will properly designate all parties in interest in the "association claim" against defendant. If the association is a partnership from which the member withdraws and there is no "dissolution" by the withdrawal it would seem that the association name would still be proper to designate the proper parties in interest on the partnership claim against defendant if the withdrawing member still retains his interest in the claim as between himself and his former co-partners and as between himself and the defendant. If he has sold his interest to his former co-partners it is likewise hard to see why the association name does not properly designate all parties in interest on the "association claim" against defendant. If the partner's withdrawal effects a "dissolution" of the firm, obviously there is little advantage in using the association name for the surviving partner can sue in his own name in that capacity.

If a new member has been added to the plaintiff association, that is, admitted into the membership agreement of the plaintiff associates obviously, in either class of associations, the association name properly designates the proper parties in interest on an "association claim" against the defendant.

<sup>67</sup> See *McCabe v. Goodfellow*, *supra* note 59. "There are cases, doubtless, in which the act done is so clearly in furtherance of the objects for which the association was organized that all will be presumptively bound by it. When such is not the case, consent or ratification must be proved," *Sizer v. Daniels* (1873, N. Y. Sup. Ct.) 66 Barb. 426, 433.

If plaintiff must prove the responsibility of all the members, but one is non-resident, can the plaintiff use the common name? There would seem to be no greater objection in allowing it as matter of form, than in cases under the "joint debtor" statutes where the name of the non-resident may go into the judgment record in form.

allowing suit to be maintained against the common name, with service upon a principal officer, and judgment binding in the first instance upon the common property.

A last question arises, namely, have we changed the extent of responsibility of the associates? It is submitted that we have not, and that their ultimate responsibility is unlimited, and whether plaintiff shall employ the method of suing the defendants in their common name should be at his election. Statutes authorizing suits against the common name with service as above stated and providing for judgment in such cases against the "joint property" have been construed as not limiting ultimate responsibility.<sup>68</sup> Upon return of execution against the common property unsatisfied, supplementary proceedings (a "new action" presumably in case of those who were non-resident members) should be available against any or all of the *sui juris* members subject to process for the deficiency. Herein will the member have his day in court as to his individual responsibility. The doctrine of "corporation by estoppel" has not been extended to take away their responsibility, by the better considered authorities,<sup>69</sup> nor can the present doctrine of *de facto* corporations be said to be applicable, nor is it believed that it is desirable to extend that doctrine in this direction, at least not until we are ready to hold that the responsibility of partners and principals generally are to be limited.

In conclusion:

1. It is believed that the power to sue or the liability to be sued by their association name was denied to associates of unincorporated

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<sup>68</sup> Judgment against the common name does not authorize execution against the members individually; *Wyman, Moses & Co. v. Stewart* (1868) 42 Ala. 163; *McCoy v. Watson* (1874) 51 Ala. 466; 2 *Bates, Partnership* (1888) sec. 1064. But the members' responsibility, otherwise than as respects liability to suit in their common name, are said to remain unchanged: see *Huth v. Humboldt & Stamm* (1891) 61 Conn. 227, 23 Atl. 1084; *Mayhew & Isbell Co. v. Valley Wells Assoc.* (1919, Tex. Civ. App.) 216 S. W. 225. The members may still be sued in their individual names: *Littleton v. Wells & McComas Council* (1904) 98 Md. 453, 56 Atl. 798; *Haralson v. Campbell* (1879) 63 Ala. 278; and the two forms of action may be joined: *Detroit Light Guard Band v. First Mich. Ind. Inf. Band* (1903) 134 Mich. 598, 96 N. W. 934. If there is sufficient service on each associate within the state, or he voluntarily appears, in absence of express statutory restriction, it would seem that execution might issue against the member's private purse on the single judgment. *Stout v. Baker* (1884) 32 Kan. 113. Statutory provision for service on any associate and judgment against the common name with execution thereon to issue against the associates' private purse as well as against the common fund has been held to be "due process." *Appeal of Baylor* (1913) 93 S. C. 414, 77 S. E. 59. See also *Patch Mfg. Co. v. Capeless* (1906) 79 Vt. 1, 63 Atl. 938. That supplementary proceedings may be had after return on the judgment unsatisfied from the common fund seems clear. *Cox v. Harris* (1872) 48 Ala. 538; *Ruth v. Lowrey* 10 Neb. 260; and see *Anderson v. Wilson* (1909) 142 Iowa, 158, 120 N. W. 677; *Hawkins v. Lasley* (1883) 40 Ohio St. 37; *Patch Mfg. Co. v. Capeless, supra*.

<sup>69</sup> NOTES (1922) 7 MINN. L. REV. 42, 44.

associations by the courts for the reason that they considered such attempts a usurpation of corporate franchises, which must lie in grant from the sovereign.

2. That the formula of the present day cases that unincorporated associations cannot sue or be sued because they are not legal entities separate from their members is but a *method of statement* employed to give effect to this real reason. That so far as present day courts are not moved to their decision in accord with the general rule on this or some other independent ground there is no reason or justification for the decision—that it is no reason in itself why the associates cannot sue or be sued in their association name to say that an unincorporated association is not a legal entity separate from its members.

3. That the present status of the general rule is that of a technical matter of form in our procedure, and that it is cause of unnecessary inconvenience.

4. That it can well be abolished by the courts of their own motion and suits allowed to be brought in the association name.

5. That service of process upon a principal officer should be sufficient to authorize judgment and execution thereon in the first instance against the common property, with supplementary proceedings thereafter (or a new action in case of the non-resident members), against any members individually who are *sui juris* and subject to service of process for any deficiency upon such execution.