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SUABILITY OF UNINCORPORATED ASSOCIATIONS IN INDIANA

KENNETH SHOCKLEY*

The ability to sue an unincorporated association *qua* association has, for the last century or more, been a more or less vexing problem in the courts of this country. The common law rule that an unincorporated association could not exist as a legal entity has been adopted by most courts in the absence of statute.¹ Nevertheless, the courts have consistently avoided the rule where its application would produce unfair and unjust results.² Equity in order to mitigate the harshness of the common law rule, permitted class or representative suits.³

An unincorporated association usually is a body of persons acting together, without a charter, but in the manner of incorporated bodies, for the prosecution of some common enterprise.⁴ Although, neither a partnership nor a corporation, the unincorporated association partakes somewhat of the nature of both. In its organization the unincorporated association resembles a partnership in that it is a voluntary association of individuals organized without a charter for

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¹ Grand Int'l Bro. Loco. Eng. v. Green, 206 Ala. 196, 89 So. 435 (1912); Karges Furniture Co. v. Almagamated Woodworkers' Local Union No. 131, 165 Ind. 421, 75 N. E. 877 (1905); Hanley v. Elm Grove Mutual Tel. Co., 150 Iowa 198, 192 N. W. 807 (1911); Sturges, *Unincorporated Associations as Parties to Actions* (1923) 35 Yale L. J. 383.

² Taff Vale R. Co. v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 426, 1 B. R. C. 832; United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 27 A. L. R. 762 (1922). Many decisions declare that the rule is one of form rather than substance. If it is not taken as a matter of abatement it is waived. Beatty & Richie v. Kurtz, 2 Peters 566 (U. S. 1829); Iron Moulders' Union No. 125 v. Allis Chalmers Co., 166 Fed. 45 (C. C. A. 7th, 1908); Franklin Union v. People, 220 Ill. 355, 77 N. E. 176 (1906); Barnes & Co. v. Chicago Typo Union, 232 Ill. 402, 83 N. E. 932 (1908). *Contra*: Proprietors of the Mex. Mill v. Yellow Jacket Mining Co., 4 Nev. 40 (1868).

³ In equity, regardless of statutes permitting representative actions, a suit may be brought against an association having a large membership by serving as defendants a few natural persons, sufficient to represent and protect the interests of the entire membership. Steel & Wire Co. v. Wire Drawers' & Die Makers' Union, 90 Fed. 598 (C. C. Ohio, 1898); Hartford Life Ins. Co. v. Ibs, 237 U. S. 662 (1915); Fitzpatrick v. Rutter, 160 Ill. 282, 43 N. E. 392 (1896).

⁴ Hecht v. Malley, 265 U. S. 144, 157 (1923).

a common enterprise and without authority to issue stock. Likewise the right of membership is not transferrable by the individual member, except with the consent of the association.⁵ In its operation, the unincorporated association more closely resembles a legal corporation in that it usually operates through a board of trustees or a group of officers who are elected by a vote of the members. These officers, as a general rule, have complete control and can exercise their discretionary power, within the limitations of the by-laws of the association, without any interference from the members between the stated meetings of the association. It is this mode of operation that gives rise to the question so often before the courts of whether the association is not a legal entity that can sue and be sued through these trustees or officers the same as a corporation may be brought into court by service upon such officers as have been designated to receive service of summons.

Although there is still great diversity of opinion, the trend in most courts is to treat the unincorporated association as an entity for the purpose of suing or being sued, and to permit it to come in or be brought into court by service upon its officers. Statutes have directed this result in order to redress wrongs for which recovery otherwise would be impossible.⁶ In determining whether an association is an entity, a court of the forum will look to the state which created it, and where statutes are involved, the courts must look to the legislative intent to determine whether or not an association constitutes a legal entity.⁷ In Indiana, the question has not been ruled on frequently, for unless the issue was directly presented the court has refrained from expressing an opinion. Originally the decisions adhered strictly to the common law rule; but gradually the rule has been abandoned and reliance has been placed entirely upon the statutes. In the earliest recorded case, *Vattier, Assignee, v. Roberts*,⁸ an action was brought on promissory notes, payable to an agent of the Aurora Association for internal improvements, given in payment of the purchase price of real property belonging to the association, and the conveyance

⁵ *Branagan v. Buckman*, 67 Misc. 242, 122 N. Y. Supp. 610 (Sup. Ct. 1910).

⁶ See Warren, CORPORATE ADVANTAGES WITHOUT INCORPORATION.

⁷ *Hall v. Essner*, 208 Ind. 99, 193 N. E. 86 (1934).

⁸ 2 Blackf. 255 (Ind. 1829).

was signed by the agent, as agent for the association. The defense was that the agent had no authority to make such a conveyance. The court, in sustaining this defense, said:

"The company was not a corporation, and the members could not bind themselves by the special denomination of 'The Aurora Association,' to execute a conveyance; *a fortiori*, an agent could not so bind them. The obligation, to have been valid against the association, should have been executed by all the individual members, either personally or by their agent."

By this decision, the court refused to recognize the existence of an unincorporated association as a legal entity, capable of making a conveyance in its associate name, and regarded it instead as merely a group of individuals. This position was re-affirmed in *Hays v. Lanier*.⁹ In an action by Stapp, Lanier and Company on a promissory note payable to the firm, suit was brought in the firm name without any declaration as to who the members of the firm were. The court said:

"There is no principle more certainly and satisfactorily settled than that in all actions the writ and declaration must both set forth, accurately, the christian and surname of each plaintiff and each defendant, unless the party is a corporation, known to the law by an artificial name, and is authorized to sue and be sued in such corporate name. This rule of law and practice is sustained by reason, justice, and the highest authorities. In the case now before us, the defendant in error was not a corporation known to the law by the artificial name of Stapp, Lanier and Company; they are natural persons, and must sue in their individual names."

These decisions adhered closely to the common law rule, and, by implication, denied the power to bring an unincorporated association into court by service on its officers, and directly required that in such suits all members be named as individual defendants. For over forty years, this rule remained the law in Indiana.¹⁰

In 1881, the Legislature passed a statute¹¹ which provided that where there is a common interest or where the parties are so numerous as to make it impractical to get them all in court, then one or more may sue or defend for

⁹ 3 Blackf. 321 (Ind. 1833).

¹⁰ *Hughes v. Walker, Carter & Co.*, 4 Blackf. 50 (Ind. 1835); *Barrackman v. J. M. Worthington & Co.*, 5 Blackf. 213 (Ind. 1839); *Livingston v. Harvey*, 10 Ind. 218 (1858); *The Adams Express Co. v. Hill*, 43 Ind. 157 (1873); *Pollock v. Dunning*, 54 Ind. 115 (1876).

¹¹ BURNS IND. STAT. (1933) § 2-220.

the benefit of all. But the courts seemingly did not consider this statute in their subsequent decisions, for as late as 1905 in the case of *Karges Furniture Co. v. Amalgamated Iron Workers Union*,¹² the court said:

"On the other hand, in the absence of an enabling statute defining the rights and liabilities of the members, societies, associations, partnerships, and other bodies, combined under their own rule, for their own private benefit, and without any express sanction of law, are not, in the collective capacity and name, recognized from their members; hence no power to sue or be sued in the company name. Such unincorporated associations, so far as their rights and liabilities are concerned, are rated as partnerships, and to enforce a right either for or against them, as in partnerships, the names of all of the individual members must be set forth, either as plaintiffs or defendants."

This decision seems to change the status of members from that of individuals with a common interest to that of partners, and thus the association was not recognized as an entity and the names of all of the members must be set forth in the proceedings. This rule was followed in *Farmers' Mutual v. Reser, Executrix*.¹³ However, in that case the court held that since the articles of association provided for an executive committee who could sue or defend on behalf of the association, this was sufficient to take the case out of the general rule and permit a suit by or against the committee. The court indicated that the common law rule would be followed unless the articles of association authorized representative actions. In that case, if the articles were not contrary to public policy, the court would recognize and enforce the provisions in order to expedite the suit.

Not until *Colt v. Hicks*¹⁴ did the court recognize that the statute of 1881 applied to suits against unincorporated associations. In that case the surviving widow and beneficiary of a member of the International Union of Steam Operating Engineers sued members and representatives of that union for death benefits. The complaint alleged that there were thousands of members of the association residing in every state in the United States and in foreign coun-

¹² 165 Ind. 421 (1905).

¹³ 43 Ind. App. 634 (1908).

¹⁴ 97 Ind. App. 177, 179 N. E. 335 (1933).

tries, and that it would be impracticable and impossible to join all of them as parties defendant, and that the appellants were made defendants to represent and act for all members of the association. Demurrers by the defendants for lack of jurisdiction and for defect of parties were overruled by the trial judge, and upon appeal the Indiana Appellate Court held that the appearance by the defendants was sufficient for jurisdiction, and the failure to point out specific parties such as local unions, local joint executive boards, and state and national officers as proper parties, was fatal to the demurrer. The court, holding that the suit came under the statute, said:

"At common law an unincorporated association cannot be sued in its society or company name, but it is necessary that all members be made parties to the action, since such bodies in the absence of statutes, have no legal entity distinct from that of their members. . . . Equity recognizing the fact that in many instances this rule was harsh and would defeat the enforcement of legal and equitable rights, adopted the equitable doctrine of parties by representation, and, in the enactment of our Code, the Legislature evidently intended to and did incorporate in it that equitable doctrine. This section of the code is a reenactment of a rule which has prevailed in equity and is to receive a construction which will make it identical with the pre-existing doctrine."

In its decision the court quotes with approval the language of Chief Justice Taft in *United Mine Workers v. Coronado Coal Co.*,¹⁵ as follows:

". . . equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued (citing authorities); and thus has had its influence upon the law side of litigation, so that out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported, in which no question has been raised as to the right to treat them in their closely united action and functions as artificial persons capable of being sued or being sued."

The court then went on to say that to require persons to sue every member would be in effect to leave them remediless.

¹⁵ 259 U. S. 344 (1922).

In Indiana this rule has superseded the earlier common law doctrine. Thus, in *Slusser v. Romine*¹⁶ in an action by the appellee against the appellants as members of and as representing the members of the Order of Owls, an unincorporated voluntary association, the court cited the decision in *Hicks v. Colt* and held that under the rule as laid down in that case the appellee could recover. Later in *Muncie Building Trades Council v. Umbarger*,¹⁷ the court again followed the statute and held that individual members being too numerous to name and serve, service on a representative group was sufficient to bring the unincorporated association into court, and a decision rendered against it was binding on all of its members.

Unincorporated associations may hold property and make conveyances, with limitation in this state. Generally, in the absence of a statute, an unincorporated association, having no legal existence independent of the members who compose it, is incapable, as an organization, of taking or holding either real or personal property in its associate name, and a conveyance to an unincorporated association passes title to no one.¹⁸ In *Popovitch v. Yugoslav National Home Society, Inc.*,¹⁹ the court was faced with a case arising from the sale by the Serbian Beneficial Society of real estate to the Yugoslav National Home Society, Inc. A majority of the members of the former organization in a regular meeting voted to sell the property and the conveyance was signed by a majority of the members and their wives. The action was brought by a dissenting member to have the deed set aside. The court held that although a majority vote of the association "is controlling as to internal questions relative to the government of such society, . . . a majority vote of its members could lawfully decide on the transfer of its property. However, to effectuate a valid transfer of the legal title to the transferee, it would necessitate the execution of a deed of conveyance by a grantor having a legal existence or by a grantor who is recognized by law as having authority to execute a deed of convey-

¹⁶ 102 Ind. App. 24, 200 N. E. 731 (1935).

¹⁷ 215 Ind. 13, 17 N. E. (2d) 828 (1938).

¹⁸ *Harriman v. Southern*, 16 Ind. 190 (1861); *Miller Lumber Co. v. Oliver*, 65 Mo. App. 435 (1896); *Douthitt v. Stimson*, 63 Mo. 286 (1876). *But see Sturges, supra* note 1, at 391.

¹⁹ 106 Ind. App. 195, 18 N. E. (2d) 948 (1938).

ance."²⁰ As the association did not follow the manner set forth by the statute for the transfer of its property,²¹ neither the Society "nor the members who signed the deed had any authority in law to make a valid conveyance of the real estate in question."²²

Several recent cases have been decided where the unincorporated association has been made a party litigant without any mention or comment on the fact by the court.²³ Thus it appears that an unincorporated association may sue or be sued in its associate character as a matter of course in Indiana. This result is reached on the authority of statutes which reenacted the equitable doctrine of suits by representation, and which expressly permits associations to hold and convey real estate within limitation, rather than upon any recognition of the association as a legal entity, entitled to own property and sue or be sued in its own right, by the filing of complaint by or the service of summons on its officers.

Most states have been slow to abandon the common law rule or even to relax farther than the statutes require. The decisions, however, represent a wide divergence of opinions. For example, in *Craig v. San Fernando Furniture Co.*²⁴ the court said:

"Where a group of people are conducting a business under a common name, the law recognizes that group in its entity as a legal entity, and whether the group of persons sees fit to avail themselves of the provisions of the law and form a corporation, or whether they see fit to conduct that business under a common name without incorporating, the legal entity still exists and is designated by the common name adopted or used."

On the contrary in New York, the court in *Bower v. Crimmins*²⁵ took the view that:

"If it was a corporation, an assignment properly drawn and executed in its own name by the president, and bearing the seal of the corporation, would be presumptively authorized.

²⁰ *Popovich v. Yugoslav Nat. Home Soc.*, 106 Ind. App. 195, 203, 18 N. E. (2d) 948, 952 (1939).

²¹ BURNS IND STAT. (1933) § 25-1515.

²² *Supra* note 20, at 204.

²³ *Roth v. Local Union No. 1460 of Retail Clerks Union*, 24 N. E. (2d) 280 (Ind. 1939); *Local Union No. 26, Nat. Bros. of Operative Potters v. Kokomo*, 211 Ind. 72, 5 N. E. (2d) 624 (1937).

²⁴ 89 Calif. App. 167, 264 Pac. 784 (1928).

No such presumption arises in the case of an unincorporated association, nor is such an association presumed to have a seal. Such an association is not regarded as a legal entity, and it necessarily follows that the club or association, as such, cannot appoint or have an agent. The members may appoint an agent; but in such a case he is the agent of the members as individuals. They are joint principals. Such an association is not a partnership, and to render a member liable as a principal on contracts made by the persons or committees who manage and assume to act for the association, it must be shown that they are expressly or impliedly authorized to represent and bind him."

The object for which the association was formed seems all important in determining whether the association will be treated as a legal entity. Courts favor unincorporated associations which are not engaged in business enterprises, objects of which do not contemplate profit and loss, but which are organized for moral, social, benevolent, literary, scientific, political, or other like purposes, or for the purpose of recreation or amusement. It is generally held that such associations are not partnerships, and that the members are not partners, either as between the members and third persons dealing with them or the association. Thus, a Workman's Union, the objects of which are the elevation of the craft and the raising of the standards of skill and wages for the members thereof has been held not to be a partnership.²⁵ Where, however, the association is organized for commercial purposes, and operated for pecuniary profit, it is usually treated as a partnership, and the rights and liabilities incident to that relationship attach to its members.²⁷

The foregoing discussion indicates, however, that as a general rule and in the absence of applicable statutes to the contrary, an association is not a legal entity separate from the persons who compose it; but where statutes permit suits by representation and the holding of property in the common name, the rigor of the common law rule will be avoided without recognizing the association as a legal entity.

²⁵ 121 N. Y. Supp. 648, 650 (Sup. Ct. 1910).

²⁶ *Rhode v. United States*, 34 App. D. C. 249; *St. Paul Typothetae v. Bookbinders' Union No. 37*, 94 Minn. 351, 102 N. W. 725 (1905).

²⁷ *Chastain v. Baxter*, 139 Kan. 381, 31 P. (2d) 21 (1934); *Burks v. Weast*, 67 Calif. App. 745, 228 Pac. 541 (1924).