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SOME PROBLEMS PRESENTED BY UNINCORPORATED ASSOCIATIONS IN CIVIL PROCEDURE*

BY NOLEN L. BRUNSON**

I. *Introduction*

This article is addressed to certain problems in civil procedure presented by unincorporated associations. The specific problems considered are: (1) proper parties plaintiff or defendant, (2) jurisdiction over the association from the standpoint of conflict of laws, (3) the proper place of trial, venue, (4) proper service of process, and (5) execution of a judgment against the association. Each of these problems is treated as the section headings hereinafter will indicate. In each section the chronological order is, first, the common law rule, second, the equity rule, third, the effect of the fusion of law and equity, and finally, the effect of modern statutes and the cases interpreting these statutes. For reasons of convenience, only in personam actions are considered.

No special treatment is given to any particular type of association except the labor union, and then only in the section on parties to actions. Decisions in this field seem to preview decisions in other fields. For the most part, all types of associations are considered, and in the absence of special legislation, all associations will fall into the general rules outlined. A common example of such special legislation is the fraternal benefit association.¹ However, these have not been treated separately because the statutes generally require certain acts to be done before any business can be transacted. The same is generally true of joint stock companies, business trusts,² and exchanges.³ This article is limited to the types of associations which are not required to comply with such requirements. Some common examples are labor unions, churches, and lodges.

This is not a philosophical discussion of the nature of the asso-

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1. As for suability of fraternal benefit associations issuing policies of insurance, see Anno. 88 A.L.R. 164.

2. For special treatment of the suability of the Massachusetts Trust, see Anno. 31 A.L.R. 851, 46 A.L.R. 158, 58 A.L.R. 526, 71 A.L.R. 898.

3. For special treatment on actions by or against exchanges, see Anno. 94 A.L.R. 851, 141 A.L.R. 789.

ciation; neither is it a discussion of the rights of the members of the association between themselves, nor even of the substantive laws relating to liability of members for acts of the association. Assuming that all of the members are liable in the sense that the obligation incurred was an associational obligation, the questions explored relate to the methods which can be used to enforce these substantive rights.

In the federal courts if the suit is to enforce a substantive federal right, which presumably means a federal question, Rule 17 (b) (1) of the Federal Rules of Civil Procedure gives the association the capacity to sue or to be sued in the common name. If, however, the suit is not on a federal question, Rule 17 (b), *supra*, lays down the principle that state law governs. Therefore, discussion of these problems in the federal courts is omitted.

II. *Unincorporated Associations as Parties to Actions*

It was very early settled at common law that an unincorporated association could not sue nor be sued in its common name.⁴ The reason usually given was that it is not a separate and distinct entity apart from its members. This rule obtained too, in suits in equity.⁵ In cases where the plaintiffs or defendants were members of an unincorporated association, the only remedy at law was to join all members as plaintiffs or defendants. The members were regarded as joint obligors or obligees.

However, in a suit in equity, although there could be no suit in the common name, the rule was also early developed that when the persons interested in a suit are numerous, or the attempt to unite them in one suit would be impracticable, or exceedingly inconvenient, the court would allow a bill to be brought by or against some of the group on behalf of themselves and all others similarly situated, taking care that there should be due representation of all substantial interests.⁶ This became known as the class suit, and was justified by the doctrine of virtual representation. As said by Story:

The second class of cases, constituting an exception to the

4. *Grossman v. Granville Club*, 28 S.J. 513 (1884); *Bloom v. National Federation*, 35 T.L.R. 50 (1918); *London Association for the Protection of Trade v. Greenlands*, A.C. 15 (1916); *In re Pruitt*, 113 L.T. 136 (1915). See *Lloyd, Actions Instituted by or Against Unincorporated Bodies*, 12 MOD. L. REV. 408 (1949); 9 CAN. B. REV. 223 (1931).

5. *Maguire v. Reough*, 238 Mass. 98, 130 N.E. 270 (1920); *Canfield v. Besinger*, 5 Sch. Reg. 17 (Penn. Comm. Pl. 1937).

6. *Lloyd v. Loaring*, 6 Ves. 773, 31 Eng. Rep. 1302 (1802); *Fells v. Read*, 3 Ves. 70, 30 Eng. Rep. 899 (1800).

general rule, and already alluded to, is, where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole.⁷

In this country, there has been an almost universal acceptance of these rules. In actions at law an unincorporated association cannot sue or be sued in its association or common name.⁸ The reason has

7. STORY, EQUITY PLEADING § 107 (7th ed. 1865).

8. The following authorities expressly so hold, or recognize the existence of the rule:

Alabama: *Ex parte Hill*, 165 Ala. 365, 51 So. 787 (1910); *Grand International Brotherhood of Locomotive Engineers v. Green*, 206 Ala. 196, 89 So. 435 (1921).

Arkansas: *Lewelling v. Manufacturers Wood-Workers Underwriters*, 140 Ark. 124, 215 S.W. 259 (1919); *Baskin v. United Mine Workers of America*, 150 Ark. 398, 234 S.W. 464 (1921).

California: *Herald v. Glendale Lodge*, 46 Cal. App. 325, 189 Pac. 329 (1920).

Florida: *Richardson v. C. W. Smith & Co.*, 21 Fla. 336 (1885); *Johnson v. Albritton*, Cir. Judge, 101 Fla. 1285, 134 So. 563 (1931).

Georgia: *Barbour v. Albany Lodge*, 73 Ga. 474 (1884); *Caine v. Armenia Lodge*, 12 Ga. App. 251, 77 S.E. 184 (1913); *O'Jay Spread Co. v. Hick*, 185 Ga. 507, 195 S.E. 564 (1938); *Smith v. International Ladies Garment Workers Union*, 58 Ga. App. 26, 197 S.E. 349 (1938).

Illinois: *Cahill v. Plumbers Gas & Steam Fitters Local*, 238 Ill. App. 123, (1925); *O'Connell v. Lamb*, 63 Ill. App. 652 (1895).

Indiana: *Hughes v. Walker, Carter & Co.*, 4 Blackf. 50 (Ind. 1935); *Pollock v. Dunning*, 54 Ind. 115 (1876); *Mackenzie v. School Trustees*, 72 Ind. 189 (1880); *Karges Furniture Co. v. Amalgamated Woodworkers' Union*, 165 Ind. 421, 75 N.E. 877, 2 L.R.A. (N.S.) 788 (1905); *Farmers Mutual v. Reser*, 43 Ind. App. 738, 88 N.E. 349 (1909); *Colt v. Hicks*, 97 Ind. App. 177, 179 N.E. 335 (1932).

Iowa: *Nightingale v. Barney*, 4 G. Greenl. 106 (Iowa 1853); *McConnell v. Gardner*, Morris 272 (Iowa 1844); *Westbrook v. Griffin*, 132 Iowa 185, 109 N.W. 608 (1906); *Marshall-Town Mutual Plate Glass Ass'n v. Bendlage*, 195 Iowa 1200, 193 N.W. 448 (1922); *Hadley v. Elm Grove Mutual Telephone Co.*, 150 Iowa 198, 129 N.W. 807 (1901); *Presbyterian Church of Paralta, Lynn County v. Johnson*, 213 Iowa 48, 238 N.W. 456 (1931); *Wilson v. Air-line Coal Co.*, 215 Iowa 855, 246 N.W. 753 (1933); *Lamm v. Stoen*, 226 Iowa 662, 284 N.W. 465, 121 A.L.R. 627 (1939); *United Packing House Workers of America v. Boynton*, 240 Iowa 212, 35 N.W. 2d 881 (1949).

Louisiana: REVISED CIVIL CODE OF 1870, Art. 446; *Soller v. Mouton*, 3 La. Ann. 541 (1848).

Maine: *McGreary v. Chandler*, 58 Me. 537 (1870).

Maryland: *Mears v. Moulton*, 30 Md. 142 (1868).

Massachusetts: *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753 (1906); *New England States Sangelbund v. Fidelia Musicians & Educational Society*, 218 Mass. 174, 105 N.E. 629 (1914); *Denovan v. Danielson*, 244 Mass. 432, 138 N.E. 811 (1923); *Tyler v. Boot & Shoe Workers*, 285 Mass. 54, 188 N.E. 509 (1933); *Malloy v. Carrol*, 287 Mass. 376, 191 N.E. 661 (1934).

Michigan: *Detroit Schuetzenbund v. Detroit Agitation Verein*, 44 Mich. 313, 6 N.W. 675 (1880); *Jenkinson v. Wysner*, 125 Mich. 89, 83 N.W. 1012 (1900).

Minnesota: *St. Paul's Typothetae v. St. Paul's Bookbinders Union*, 94 Minn. 351, 102 N.W. 725 (1905).

Mississippi: *Vardo v. Whitney*, 166 Miss. 663, 147 So. 479 (1933).

Missouri: *Newton County Farmers & Fruit Growers Exchange v. Kansas*

been variously attributed to the rule that there is no entity separate and distinct from the members,⁹ or that there is a lack of certainty of the parties,¹⁰ or that the parties have been misnamed,¹¹ or that

City Southern Ry. Co., 326 Mo. 617, 31 S.W. 2d 803 (1930); Road District No. 30 v. Jackson, 208 Mo. App. 194, 231 S.W. 1043 (1921); Ruggles v. I.A. B.S. & D. I. O., 331 Mo. 20, 52 S.W. 2d 860 (1932); Corbett v. Milk Wagon Drivers Union, 84 S.W. 2d 377 (Mo. App. 1935); Forrest City Mg. Co. v. International Ladies Garment Workers Union, 233 Mo. App. 935, 111 S.W. 2d 934 (1938); O'Rourke v. Kelly the Printer, 233 Mo. App. 91, 135 S.W. 1011 (1911); Bentley v. Hurlyey, 222 Mo. App. 51, 299 S.W. 604 (1927).

Montana: Vance v. McGinley, 39 Mont. 46, 101 Pac. 247 (1909).

Nevada: The Proprietors of Mexican Mill v. The Yellow Jacket Mining Co., 4 Nev. 40, (1868); Branson v. Industrial Workers, 30 Nev. 270, 95 Pac. 354 (1908).

New Hampshire: Danbury Cornet Band v. Bean, 54 N.H. 524 (1874).

New Jersey: Kline v. Knights of the Golden Eagle, 113 N.J. Eq. 513, 167 Atl. 758 (1933).

New York: Hanke v. Cigar Makers International Union, 27 Misc. 529, 58 N.Y.S. 412 (1899).

North Carolina: Tucker v. Eatough, 186 N.C. 515, 120 S.E. 57 (1923); Marshall v. Lovelace, Cam. & N. 217 (N.C. 1801).

Ohio: State v. Board of Underwriters, 40 Bull. 245 (Ohio 1898); Congregation of St. Augustine Roman Catholic Church v. Metropolitan Bank, 15 Ohio 520, 32 N.E. 2d 518 (1936).

Oregon: Kimball v. Lower Columbia Fire Relief Ass'n of Oregon, 67 Or. 249, 135 Pac. 877 (1913).

Pennsylvania: Manich v. Order of Americus, 223 Pa. 199, 72 Atl. 528 (1909); Wolf v. Limestone Council, 233 Pa. 357, 82 Atl. 499 (1912); Oster v. Brotherhood of Locomotive Firemen and Enginemen, 271 Pa. 419, 114 Atl. 377 (1921).

Rhode Island: Guild v. Allen, 29 R.I. 430, 67 Atl. 855 (1907).

Tennessee: Powers v. Journeymen Bricklayers Union, 130 Tenn. 643, 172 S.W. 284 (1914).

Texas: Methodist Episcopal Church South v. Clifton, 34 Tex. Civ. App. 248, 78 S.W. 732 (1904); Gribble v. Call, 123 S.W. 2d 711 (Tex. Civ. App. 1938).

Utah: Pearson v. Anderburg, 28 Utah 495, 80 Pac. 307 (1905).

Vermont: F. R. Patch Mfg. Co. v. Capeless, 79 Vt. 1, 63 Atl. 938 (1903).

Virginia: International Brotherhood v. Wood, 162 Va. 517, 175 S.E. 45 (1934).

Washington: St. Germain v. Bakery & Confectionry Union, 97 Wash. 282, 166 Pac. 664 (1917).

West Virginia: Simpson v. Grand Brotherhood, 83 W.Va. 355, 98 S.E. 580 (1919); West v. B. & O. Ry., 103 W.Va. 417, 137 S.E. 654 (1927); Milan v. Settle, 127 W.Va. 271, 32 S.E. 2d 269 (1944); State *ex rel* West Virginia State Lodge, Fraternal Order of Police v. City of Charleston, 133 W.Va. 403, 56 S.E. 2d 763 (1949).

Wisconsin: Crawley v. American Society of Equity, 153 Wis. 13, 139 N.W. 734 (1913).

See also the following authorities: Sturgis, *Unincorporated Associations as Parties to Actions*, 33 YALE L. J. 383 (1924); WRIGHTINGTON, *UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS* 425-444 (2d Ed. 1923); Anno. 27 A.L.R. 786, supplemented in 149 A.L.R. 510.

9. Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906); Lister v. Vowell, 122 Ala. 264, 25 So. 564 (1898); Lewelling v. Woodworkers Union, 140 Ark. 124, 215 S.W. 258 (1919); Baskin v. United Mine Workers, 150 Ark. 124, 215 S.W. 258 (1921).

10. Reid & Co. v. McLeod, 20 Ala. 576 (1852); Blackwell v. Reid & Co., 41 Miss. 102 (1866); Holland v. Butler, 5 Blackf. 255 (Ind. 1839); Cady v. Smith, 12 Neb. 628, 12 N.W. 95 (1882).

11. Porter v. Cresson, 10 Serg. & R. 257 (Pa. 1823).

interested parties have not been joined,¹² or that the Christian and ancestral names are not on the record,¹³ or some writers have announced a more basic reason.¹⁴ But, whatever the reason, it is well settled that in the absence of a statute, all members of an unincorporated association must be joined as plaintiffs or as defendants in an action at law.¹⁵ In equity procedure, as stated above, the class suit has likewise won practically universal acceptance.¹⁶

Nevertheless, in some cases it has been held that the defect was not seasonably raised, and was therefore waived.¹⁷ In other cases,

12. *Burden v. Cross*, 33 Tex. 685 (1870); *Hays v. Lanier*, 3 Blackf. 322 (Ind. 1833).

13. *Livingston v. Harvey*, 10 Ind. 218 (1858); *Day v. Cushman, Eatmon & Co.*, 2 Ill. 475 (1838).

14. *Sturgis, Unincorporated Associations As Parties To Actions*, 33 YALE L. J. 383, 414 (1924); 37 ILL. L. REV. 70 (1943); *Dodd, Dogma And Practice Of Associations*, 42 HARV. L. REV. 977 (1929).

15. *Baskin v. United Mine Workers*, 150 Ark. 398, 234 S.W. 464 (1921); *DeQueen v. Park*, 146 Ark. 350, 225 S.W. 614 (1920); *Soller v. Mouton*, 3 La. Ann. 541 (1848); *Simpson v. Grand International Brotherhood*, 83 W.Va. 355, 98 S.E. 580 (1919); *O'Connell v. Lamb*, 63 Ill. App. 652, (1900); *Sturgis, Unincorporated Associations As Parties To Actions*, 33 YALE L. J. 383 (1924); *WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS* 426 (2d Ed. 1923).

16. *United Brotherhood of Maintenance, etc. v. Kennedy*, 13 Del. Ch. 106, 115 Atl. 587 (1922); *O'Connell v. Lamb*, 63 Ill. App. 652 (1895); *Cahill v. Plumbers Gas & Steam Fitters Union*, 238 Ill. App. 123 (1925); *Biller v. Eagan*, 290 Ill. App. 219, 8 N.E. 2d 205 (1937); *Western-United Dairy Co. v. Nash*, 293 Ill. App. 219, 12 N.E. 2d 47 (1937); *Carpenters' Union v. Citizen's Committee*, 333 Ill. App. 225, 164 N.E. 393 (1928); *Republican Central Committee v. Cook County*, 348 Ill. App. 189, 108 N.E. 2d 524 (1952); *Guilford v. Author*, 158 Ill. 600, 41 N.E. 1009 (1895); *Tate v. Ohio Co.*, 10 Ind. 174 (1858); *Sourse v. Marshall*, 23 Ind. 194 (1864); *Zuelly v. Casper*, 160 Ind. 460, 67 N.E. 103 (1903); *Fink v. Umsheid*, 40 Kan. 271, 19 Pac. 623 (1888); *Birmingham v. Gallagher*, 112 Mass. 179 (1873); *Snow v. Wheeler*, 113 Mass. 179 (1873); *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906); *New England Sanglebund v. Fidelia Musicians & Educational Society*, 218 Mass. 174, 105 N.E. 629 (1914); *Donovan v. Danielson*, 244 Mass. 432, 138 N.E. 811 (1923); *Rowzee v. Pierce*, 75 Miss. 807, 23 So. 307 (1898); *State ex rel Allai v. Thatch*, 361 Mo. 190, 234 S.W. 2d 1 (1950); *Egan v. Bonacum*, 38 Neb. 577, 57 N.W. 298 (1894); *Branson v. Industrial Workers of the World*, 30 Nev. 270, 95 Pac. 354 (1908); *Van Houten v. Pine*, 36 N.J. Eq. 133 (1882); *Anglo-Continentale Tr. M. v. Allgemeine*, 171 Misc. 714, 13 N.Y.S. 2d 397 (1939); *Liggett v. Ladd*, 17 Or. 89, 21 Pac. 133 (1888); *Liederkrantz Singing Society v. Germania Turn-Verein*, 163 Pa. St. 265, 29 Atl. 918 (1894); *Elliot v. Greer Presbyterian Church*, 181 S.C. 84, 186 S.E. 651 (1936); *Barns v. Fort*, 181 Tenn. 522, 181 S.W. 2d 881 (1944); *Pearson v. Anderburg*, 28 Utah 495, 80 Pac. 307 (1905); *St. Germain Bakery v. Bakery & Confectionry Union*, 97 Wash. 282, 166 Pac. 665 (1917); *Simpson v. Grand Brotherhood*, 83 W.Va. 355, 98 S.E. 580 (1919); *Milan v. Settle*, 127 W.Va. 271, 32 S.E. 2d 269 (1944).

17. *Ada Street Methodist Episcopal Church v. Garney*, 66 Ill. 132 (1872); *Franklin Union No. 4 v. People*, 220 Ill. 355, 77 N.E. 176 (1906); *Barnes v. Chicago Typographical Union*, 232 Ill. 402, 83 N.E. 932 (1908); *United Packing House v. Boynton*, 240 Iowa 212, 35 N.W. 2d 881 (1949); *Dorsey v. Lawrence & Co.*, Hardin 517 (Ky. 1808); *United Mine Workers v. Dorsey*, 159 Ky. 605, 167 S.W. 891 (1914); *McGreary v. Chandler*, 58 Me. 537 (1870);

it has been held that the defect is not waivable, and a judgment rendered against the association is void.¹⁸ Other courts have found enough elements of estoppel to justify a disregard of the defect of parties and to enter a judgment as if the association were incorporated.¹⁹ The estoppel is generally a holding out to the general public that the association is a corporation, or possessed of corporate powers. Thus, in a subsequent suit, the court will not allow the association to set up the lack of corporate existence.

On the other hand, in suits in equity, the practice has been to continue the previous procedure of allowing suits by a member or members for the benefit of all, even in the absence of statutes so providing.²⁰

In some states statutes have been enacted changing these rules in various ways. The first one to be considered logically, and the first to appear chronologically, is the statutory class action. The form of the statute has generally assumed two distinct types, though a difference of substance is doubtful. The first one, and by far the more popular, is almost a verbatim statement of the equity rule, and is as follows:²¹

When the question is one of a common or general interest to many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Many states have adopted this type of statute, and usually in the same language.²²

Alco Finance Co. v. Moran, 178 Okla. 575, 63 P. 2d 747 (1937). See also Sturgis, *Unincorporated Associations As Parties To Actions*, 33 YALE L. J. 383, 389, note 30 (1924).

18. *Methodist Church v. Clifton*, 34 Tex. Civ. App. 248, 78 S.W. 732 (1900); WRIGHTINGTON, *UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS* 425 (2nd Ed. 1924); Sturgis, *Unincorporated Associations As Parties To Actions*, 33 YALE L. J. 383 (1924). See *Soper v. Clay City Lumber Co.*, 21 Ky. L. Rep. 1236, 53 S.W. 267 (1899).

19. 7 MINN. L. REV. 42, 44 (1922).

20. See note 16 *supra*.

21. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-205.

22. CODE OF ALABAMA, 1940, § 7-128; ARKANSAS STATUTES OF 1947, § 27-809; CALIFORNIA CODE OF CIVIL PROCEDURE, § 383; COLORADO CODE OF CIVIL PROCEDURE, 1921, § 12; GENERAL STATUTES OF CONNECTICUT, 1949, § 7827; FLORIDA STATUTES ANNOTATED, § 63.14, now Equity Rule 14; GEORGIA CODE, 1933, § 37-1002; GENERAL STATUTES OF KANSAS, 1949, § 60-413; KENTUCKY CIVIL CODE OF PRACTICE, § 25; MINNESOTA STATUTES ANNOTATED, § 540.02; REVISED CODES OF MONTANA, 1947, § 93-2821; REVISED STATUTES OF NEBRASKA, 1943, § 25-319; NEVADA COMPILED LAWS (Hillyer 1929) § 8558; NEW MEXICO STATUTES OF 1941, § 19-601; NEW YORK CIVIL PRACTICE ACT, § 195; NORTH CAROLINA GENERAL STATUTES, § 1-70; NORTH DAKOTA REVISED CODE OF 1943, § 28-0208; PAGE'S OHIO GENERAL CODE ANNOTATED, 1938, § 11257; OKLA-

The other form of statute is embodied in Rule 23 (a) of the Federal Rules of Civil Procedure, in which no substantial change was made from the first type quoted above, even though it states with greater particularity instances in which class suits may be maintained—differences not relevant here. The federal rule has also been adopted in some states.²³

It is readily seen that this statutory class suit would be available in an action against an unincorporated association if the type of relief demanded were an equitable one; that is, an injunction, specific performance or reformation of an instrument, because those were traditionally equitable remedies, and the class suit was traditionally allowed in equity. However, with the adoption of a statutory class action, and the attempt to fuse law and equity, both substantively and procedurally, the question has arisen whether the statutory class action applies to an action at law. The problem is, do these statutes apply only to a suit in equity or of traditionally equitable nature, or may they apply in an action at law?

As could well be expected, the courts which have passed on this question have reached varying results. Some courts have held that the statutory class suit does apply to an action at law,²⁴ some have hinted that it does not,²⁵ and some have specifically reserved the point.²⁶ In some states, there is reason to believe that the court will hold that the class action does not apply to actions at law, although

HOMA STATUTES ANNOTATED, 1937, § 12-233; OREGON COMPILED LAWS ANNOTATED, 1940, § 9-106; PENNSYLVANIA RULES OF CIVIL PROCEDURE No. 2230; SOUTH DAKOTA CODE, 1939, § 33.0410; REVISED CODE OF WASHINGTON, 1950, § 4.08,070; WISCONSIN STATUTES, 1951, § 260-12; WYOMING COMPILED STATUTES, 1945, § 3-616.

23. ARIZONA CODE ANNOTATED, 1939, § 21-524; COLORADO RULES OF CIVIL PROCEDURE, No. 23; DELAWARE CHANCERY COURT RULE No. 23; IOWA RULES OF CIVIL PROCEDURE No. 42; VERNON'S ANNOTATED MISSOURI STATUTES, § 507.070; NEW MEXICO STATUTES OF 1941, § 19-101(23); VERNON'S TEXAS RULES OF CIVIL PROCEDURE (1948 Supp.), Rule 42; UTAH RULES OF CIVIL PROCEDURE No. 23 (a).

24. *Platt v. Colvin*, 50 Ohio St. 703, 36 N.E. 735 (1893); *Branson v. Industrial Workers of the World*, 30 Nev. 270, 95 Pac. 354 (1908); *Baker v. Ducker*, 79 Cal. 365, 372, 21 Pac. 764, 765 (1889); *Florence v. Helms*, 136 Cal. 613, 69 Pac. 429 (1902); *Colt v. Hicks*, 97 Ind. App. 177, 179 N.E. 335 (1932); *Jackson v. International Union*, 307 Ky. 485, 211 S.W. 2d 138 (1948); *Anglo-Continental Tr. M. v. Allgemeine*, 171 Misc. 714, 13 N.Y.S. 2d 397 (1939); but see *Cavanaugh v. Hutchenson*, 140 Misc. 178, 250 N.Y.S. 127, *aff'd* 236 App. Div. 794, 259 N.Y.S. 967 (1931); *Blonde v. Stern*, 73 N.D. 272, 14 N.W. 2d 249 (1944).

25. *Cahill v. Plumbers Gas & Steam Fitters Union*, *supra*, note 5; *State Provision Co. v. Oregon Ry. & Navigation Co.*, 20 Or. 563, 26 Pac. 838 (1891).

26. *Baskin v. United Mine Workers*, 150 Ark. 398, 234 S.W. 464 (1921).

there is no present holding to that effect.²⁷ Others seem to lead to the opposite conclusion, either by implication, or by express wording in the statute.²⁸

In those states which have held or which would probably hold that the class suit does not apply to an action at law, there could possibly be an argument made that there is no adequate remedy at law when the parties are so numerous that it is impracticable to bring them all before the court, and thus a suit could be brought in equity. That is, the mere fact that the members are numerous would be sufficient to render the remedy at law inadequate and allow a suit in equity. However, one court has rejected this argument, presumably on the theory that the inadequacy of the remedy at law must be in the remedy given, *i. e.*, a money judgment, rather than procedure used in the trial of a law case.²⁹

The next type of statute is one in which an attempt was made to deal with the problem on a higher level. The text of such a statute is as follows:³⁰

When two or more persons, associated in any business, transact such business under a common name, . . . the associates may be sued by such common name

Two things should be noted about this statute, which has been adopted in some states.³¹ The first is that it only authorizes suits against the association, not suits by it.³² If the association is suing,

27. See District No. 21, *U.M.W. v. Bourland*, 169 Ark. 796, 277 S.W. 546 (1925). See also, for example, CODE OF GEORGIA, 1933, § 37-1003, in the chapter entitled "Parties To Equitable Proceedings". Also, see DELAWARE CHANCERY RULE 23, whereas there is no analogous rule for the Superior Court. It would seem that in states where there has not been even a codification of the equitable principle, the practice must still be governed by older equitable principles, and such practice will not obtain in actions at law. Such states are Massachusetts, Illinois, Maine, Mississippi, New Hampshire, Rhode Island, Vermont, Virginia, and West Virginia.

28. *Grover v. Marcott*, 192 Ind. 552, 136 N.E. 81 (1922). It would seem that in those jurisdictions which have adopted the federal rules, class suits should be allowed in an action at law. Such states are noted in note 20 *supra*. In addition, those states which provide that there is but one civil action should have sufficient manifestation of legislative intent to allow the procedure in an action at law. Some statutes expressly provide that the rule of procedure governs actions at law as well as suits in equity.

29. *Maguire v. Reough*, 238 Mass. 98, 130 N.E. 270 (1920).

30. CALIFORNIA CODE OF CIVIL PROCEDURE, § 388.

31. REVISED CODE OF DELAWARE, 1935, § 4676; IDAHO CODE, § 5-323; REVISED CODE OF MONTANA, 1947, § 93-2827; NEVADA COMPILED LAWS, (Hillyer 192) § 8564; OKLAHOMA STATUTES ANNOTATED, 1937, § 12-182; UTAH RULES OF CIVIL PROCEDURE, Rule 17 (d); SOUTH DAKOTA CODE, 1939, § 33.08.

32. *Holden v. Mensinger*, 175 Cal. 300, 165 Pac. 950 (1917); *Ginsberg Tile Co. v. Farrone*, 99 Cal. App. 381, 278 Pac. 866 (1929); *Case v. Kadota Fig Ass'n of Producers*, 207 P. 2d 86 (Cal. App. 1949); *modified* 35 Cal. App. 2d 256, 220 P. 2d 912 (1950); *The Proprietors of the Mexican Mill v. The Yellow Jacket Mining Co.*, 4 Nev. 40 (1868).

it must join all members or use a class suit.³³ The second thing to be noticed is that it requires that there be a transaction of business. The term "transact business" has at least two possible meanings, only one of which is relevant here. It could mean the standard by which the courts determine the "presence" of a corporation or other entity for the purpose of jurisdiction. This concept is very wide, and includes many more things than commercial transactions. There is another use of the term in which it is restricted to commercial business, such as a trade or business in that sense. The problem is, which meaning is intended here?

The courts which have passed upon this question have varied from state to state and even reflect different trends in the same state. First, there is the interpretation in which the ordinary and approved usage of the word indicates, a regular, continuous and permanent employment or enterprise for the main and governing purpose of profit.³⁴ But there are also cases which adhere to the more liberal view, that the term is intended to embrace everything about which anyone can be employed; it is not intended necessarily to imply a profit motive, but is intended to cover any purpose, or any act to carry out that purpose.³⁵ Thus counsel may argue in each case the interpretation which he thinks the court should adopt.

Another statute which, though not worded the same way, seems to require the same two elements is in force in Louisiana.³⁶ By the wording of the statute, the association may be sued in the common name upon any obligation which was entered into on behalf of its members. Some statutes have been passed which attempt to rectify the defect in this statute which prevents the association from suing in the common name, but they seem unsatisfactory.³⁷ The phrase "for the benefit of the members" has received a restrictive interpretation in one case in which the court held that this statute could not be used by a member in mandamus proceedings to compel reinstatement, because it was not on an obligation "incurred for the benefit

33. *Von Schmidt v. Huntington*, 1 Cal. 55 (1850); *Jellen v. O'Brien*, 89 Cal. App. 505, 264 Pac. 1115 (1928).

34. *Swift v. San Francisco Stock & Exch. Bd.*, 67 Cal. 567, 8 Pac. 94 (1885); *Warman Steel Casting Company v. Redondo Beach Chamber of Commerce*, 34 Cal. App. 37, 166 Pac. 856 (1917); *St. Paul's Typothetae v. St. Paul Bookbinders Union No. 37*, 94 Minn. 351, 102 N.W. 725, 3 Ann. Cas. 695 (1905).

35. *Camm v. Justice's Court*, 35 Cal. App. 293, 170 Pac. 409 (1917); *Herald v. Glendale Lodge*, 46 Cal. App. 325, 189 Pac. 329 (1920); *Jardine v. Superior Court*, 82 Cal. Dec. 188, 2 P. 2d 756 (1931). See 5 So. CAL. L. REV. 421 (1932).

36. LOUISIANA REVISED STATUTES OF 1950, § 13:3471 (22).

37. LOUISIANA REVISED STATUTES OF 1950, § 9:3051. See McMahon, *Parties Litigant In Louisiana*, 10 TULANE L. REV. 489, 505, (1936). See also 3 LOY. L. REV. 80 (1946).

of the members."³⁸ This interpretation seems to restrict the phrase to contract actions alone or at least, it is a stricter term than the phrase "transacting business." In Louisiana the situation is not aided in this particular by the lack of a common law or equity background, since resort cannot be had to the equitable class suit. Due to the historical background of the state, legislation is theoretically the only source of law,³⁹ and there is no statutory class suit.⁴⁰ Therefore, some other means will have to be used, possibly an assignment, or a similar arrangement. However, recourse could be had to the federal courts if the requisite jurisdictional requirements could be met, and the class suit would then be available. Nevertheless, there seems to be hope that the situation will soon be rectified.⁴¹

There are several statutes in force in other states, which, though retaining the requirement of a transaction of business, are somewhat broader than the preceding statutes because they allow suits both by and against the association in the common name. Such a statute⁴² is as follows:

Any unincorporated association, consisting of 7 or more members having a recognized name, may sue or be sued in any court of this state

This chapter, in so far as it relates to actions of an equitable nature against unincorporated organizations or associations, shall

38. State *ex rel* Doane v. General Longshore Workers, etc., 61 So. 2d 747 (La. App. 1952).

39. LOUISIANA REVISED CIVIL CODE OF 1870, Art. 1.

40. In a recent case, *Levy v. Bonfouca Hunting Club*, La., 67 So. 2d 96 (1953), the court admitted that there was no statutory authority for the appointment of a receiver for a voluntary association. But, the court went on to say that there was no law prohibiting it either, and that being so, the court could "*in the exercise of their inherent equitable power* (emphasis added, somewhat amazing language in view of the historical background of the Louisiana court), *make such appointment where the exigencies of the case require it*." Why could not the court "in the exercise of its inherent equitable power", allow a class suit (a traditionally equitable principle), if the "exigencies of the case" require it? In the cited case, the "exigencies" consisted of the fact that the members of the association were very numerous, and it was impossible, rather than impracticable, to bring them all before the court, their whereabouts being unknown. It seems therefore, that if the court wanted to import the class suit from English Equity principles, it could do so. See also *Executive Committee of French Opera Trade Ball v. Tarrant*, 164 La. 83, 113 So. 174, 53 A.L.R. 1233 (1927).

41. At the present time, the Louisiana State Law Institute is preparing a comprehensive revision of the LOUISIANA CODE OF PRACTICE. At the present time, there are no proposed texts available, but proposed texts dealing with service of process and venue, which are available, deal specifically with unincorporated associations, thus raising the presumption that when the texts on "Parties To Actions" becomes available, the unincorporated association will be remembered.

42. Blank.

43. NEW JERSEY STATUTES ANNOTATED, § 2A:64-1.

not apply to a fraternal, charitable or other organization not organized for pecuniary profit.

Presumably what is meant in the last quoted paragraph is to negative the application of the first paragraph to non-commercial organizations as a general proposition.⁴⁴ However, it seems possible that a suit for a money judgment could be brought against a non-commercial organization because the statute only excepts actions of an equitable nature.

Another statute⁴⁵ of the same type provides:

Any company or association of persons formed for the purpose of (1) carrying on any trade or business, (2) holding any specie of property, or (3) representing an employee in collective bargaining with employers, and not incorporated, may sue and be sued by such usual name

Of course, this statute could cover non-commercial associations if they came under subdivisions (2) or (3), but under subdivision (1), non-commercial associations would seem to be excluded by the use of the term "carrying on any trade or business."

One final statute within this group provides that any unincorporated voluntary association which is formed in the state or conducts or transacts business there, or which maintains an office or place of business in the state, can sue or be sued in the common name if composed of 5 or more members and known by some distinguishing name.⁴⁶ Apparently it could be argued that if the association were formed in the state, there is no requirement for the transaction of business. At any rate, it undoubtedly applies to commercial associations, and possibly, not positively, to non-commercial ones.

A principle which runs through all of the preceding statutes is that there must be a transaction of business. Whether this means commercial business or whether it merely incorporates the term used in conflict of laws has been considered. There are statutes, however, which expressly limit their application to non-commercial associations, that is, a commercial unincorporated association could not come within its provision, while a non-commercial one does. One such statute⁴⁷ provides:

44. NEW JERSEY STATUTES ANNOTATED, § 2A64.6. Newark International Baseball Club, Inc. v. Theatrical Manager, Agents, etc., 125 N.J. Eq. 575, 7 A. 2d 170 (1939).

45. REVISED STATUTES OF NEBRASKA, 1943, § 25-313.

46. COMPILED LAWS OF MICHIGAN, 1948, § 612.12.

47. WYOMING COMPILED STATUTES, 1945, § 44-908.

Any unincorporated body, society, association or organization . . . not organized or formed for the purpose of carrying on, conducting or operating any business or branch of business . . . may take, acquire, hold and lease and convey real, personal and mixed property

If it becomes necessary at any time to protect the rights of any body, society, organization or association as defined in the last preceding section . . . the presiding officer thereof may bring suit in its own name for the benefit of the body Any such body, society, association or organization . . . may sue and be sued in the name by which it is generally known

Some statutes allow suits to be brought by or against unincorporated associations if it is formed for the promotion of mutual pleasure or recreation, or is a hunting, fishing, camping, golf or country club, or "association for a similar purpose."⁴⁸ Such an association, if it files the necessary papers, may sue and be sued in its name without the individual members being joined.⁴⁹ Although the statute provides expressly for "recreational activities," the phrase "or other such association" would probably allow a wider interpretation. However, it is doubtful that a commercial association could come within this statute.

Unincorporated societies or lodges of Elks, Knights of Columbus, Knights of Pythias, Masons, Moose and Odd Fellows or other similar fraternal organizations may be deemed corporations so far as may be necessary to take, hold, manage and use any gift or grant made to them as such, in one state.⁵⁰ Such a society may sue and be sued in regard to such property in its corporate capacity, but, by implication, only such suits would be allowed.

There exists in one state a statutory definition of a fraternal benefit society. It is defined as a corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of meetings and a representative form of government.⁵¹ Such a society may sue and be sued as such, without the joinder of any member.⁵² The chief difficulty here would seem to be the classification of a given

48. NEW MEXICO STATUTES ANNOTATED, 1941, § 52-101.

49. NEW MEXICO STATUTES ANNOTATED, 1941, § 51-105.

50. REVISED STATUTES OF NEW HAMPSHIRE, 1942, c. 272, § 11.

51. WEST VIRGINIA CODE OF 1949, § 33-8-1.

52. WEST VIRGINIA CODE OF 1949, § 33-8-17.

association as a "fraternal benefit society" within the statutory definition.

Some states have statutes which attack the problem of the proper parties in the field of unincorporated associations without prescribing a suit in the common name. The statute sets up the principle of a forced statutory representative, that is, the association sues or is sued in the name of a certain officer or member as trustee ad litem.⁵³ One such statute provides that a member or officer may sue as trustee ad litem for the association, but that in a suit against the association, an officer only can be the trustee ad litem.⁵⁴ Others provide for a certain designated officer to sue and to be sued.⁵⁵ Some of these statutes contain the proviso that the action is allowed if the suit could have been by or against all by virtue of their joint interest.⁵⁶ This does not appear to be a real limitation, since if all members could not sue or be sued for the obligation, the obligation would not appear to be an association obligation.

The above statutes apply generally to all types of unincorporated associations. However, in one state, the members of any grand lodge or division, or of any subordinate lodge or division, of Free Masons, Odd Fellows, Hermann's Sons, or Sons of Temperance, Grand Army of the Republic, or of the State Grange, or order of Patrons of Husbandry and other such groups, may elect not less than three nor more than nine of their number as trustees to take care of the property and transact all the business of the association.⁵⁷ Such trustees may sue and be sued in matters pertaining to the association.⁵⁸ Of course, such a set-up could probably be organized anywhere, since most states except from the operation of the rule of the real party in interest, trustees of express trusts. However, it is apparently the only method in this particular state outside the class suit.

Obviously, the most advanced and effective way to deal with the problem of parties is to allow the association to sue or be sued in the common name, regardless of its character as a commercial association. The statutes do not make a distinction between commercial and non-commercial associations, but not all of them allow suits both by and against the association. One such statute provides that

53. PENNSYLVANIA RULES OF CIVIL PROCEDURE, No. 2152; NEW YORK GENERAL ASSOCIATIONS LAW, § 13, 14.

54. PENNSYLVANIA RULES OF CIVIL PROCEDURE, No. 2125, 2153.

55. NEW YORK GENERAL ASSOCIATIONS LAW, § 13, 14.

56. NEW YORK GENERAL ASSOCIATIONS LAW, § 13; GENERAL LAWS OF RHODE ISLAND, 1938, c. 530, § 1.

57. WISCONSIN STATUTES, 1951, § 188.02.

58. See note 57 *supra*.

an unincorporated association may be sued and proceeded against in the commonly used name.⁵⁹ Note that such a statute does not allow a suit by an association. Another allows a suit against the association to be conducted against an officer as trustee or against the association in the commonly used name, presumably at the option of the plaintiff. However, that same state does not allow the suit by the association to be conducted in the association name, but only in the name of an officer.⁶⁰

By far the majority of statutes which allow suits to be brought or defended by unincorporated associations in the common name do not require the transaction of business. Neither do they restrict the application to suits against the association only, but allow the association to sue and be sued in the common name. The federal rule allows this when the right sought to be enforced by the association or against the association is a federal right.⁶¹ Other states have adopted statutes similar to the federal rule.⁶² Not much litigation has developed out of statutes such as these. Apparently the language is wide enough to permit sufficient flexibility.

Perhaps the question arises, what effect do the statutes discussed have on the non-statutory rules permitting suits in these situations? The decided weight of authority is to the effect that these statutes are cumulative merely, and do not exclude a class suit if the class suit could be brought, nor do they exclude a suit against the members personally.⁶³ However, although there seems to be no decision directly in point, several decisions have indicated that the remedy given by statute is exclusive.⁶⁴

59. CODE OF LAWS OF SOUTH CAROLINA, 1952, § 10-215.

60. PENNSYLVANIA RULES OF CIVIL PROCEDURE, No. 2153.

61. Rule 17 (b) (1), FEDERAL RULES OF CIVIL PROCEDURE.

62. CODE OF ALABAMA, 1940, § 7-142; COLORADO RULES OF CIVIL PROCEDURE, Rule 17 (b); GENERAL STATUTES OF CONNECTICUT, 1949, § 7797; ANNOTATED CODE OF MARYLAND (Flack 1951), Art. 23, § 134; COMPILED LAWS OF MICHIGAN, 1948, § 612.12; MINNESOTA STATUTES ANNOTATED, § 540.151 (Laws of 1947, c. 527, § 1); NORTH DAKOTA REVISED CODE OF 1943, § 45-0401; VERNON'S TEXAS RULES OF CIVIL PROCEDURE (1948 Supp.) Rule 28; VERMONT STATUTES OF 1947, § 1565; CODE OF VIRGINIA, 1950, § 8-66.

63. McNulty v. Higginbotham, 252 Ala. 218, 40 So. 2d 414 (1949); Jenkinson v. Wysner, 125 Mich. 89, 83 N.W. 1012 (1900); Davidson v. Holden, 55 Conn. 103, 10 A. 515 (1887); Lawler v. Murphy, 58 Conn. 294, 20 A. 457 (1889); Bennett v. Lathrop, 71 Conn. 613, 42 A. 634 (1899).

64. In Elliot v. Greer Presbyterian Church, 181 S.C. 84, 186 S.E. 651 (1931), it was said that the remedy was exclusive. However, just what is excluded is not clear. A suit against one member is not, since under the South Carolina law, liability is joint and several. Medlin v. Ebenezer Church, 132 S.C. 498, 129 S.E. 830 (1925). If a suit against one on his joint and several liability is not excluded, certainly a suit against all on their joint and several liability would not be, since if the greater is not excluded, the lesser should not be. So too, if a suit against all is not excluded, why should a class

Before leaving the statutes which allow suits to be brought or defended in the common name, it should be noted that some states, although not by direct legislation, have other statutes which could impart suability to the unincorporated association. These statutes usually appear in the section on service of process. They usually provide that any unincorporated association which does business in the state must appoint an agent for service of process.⁶⁵ Some courts have held that such statutes allow, by implication, a suit in the common name against the association.⁶⁶ These statutes are also discussed hereinafter in the section on service of process.

Only two things deserve any further consideration. One is the status of labor unions generally and the formulation of certain rules peculiar to that type of association. The other is the common statute in most states allowing an association to enjoin the use of a registered trade mark.

Since the vast majority of labor unions are unincorporated, what was said about unincorporated associations generally will apply equally to them.⁶⁷ It has been held, however, that equity has jurisdiction in a suit against a labor union in the common name, regardless of statute.⁶⁸ Generally speaking though, the contrary is true in most

suit be excluded, where a few sue for the benefit of all? See also *Squarre v. Polk*, 153 So. 504 (La. App. 1934), in which the court affirmed an order of the trial judge sustaining an exception of no cause of action against a petition which named as defendant seventeen members of the association. However, the court did not state that the remedy given by statute was exclusive, although it was stated that the plaintiff should have proceeded under the act. The holding of the case was that the petition did not state sufficient facts to constitute a cause of action against the seventeen defendants. Perhaps if the plaintiff had pleaded more facts, perhaps facts which showed that the defendants had authorized, participated in, or ratified the acts of the associations, the petition would have stated a cause of action.

However, Professor McMahon interprets the case as holding that the remedy given by the act is exclusive. See McMahon, *Parties Litigant In Louisiana*, 10 *TULANE L. REV.* 489, 532 (1936). He characterized the decision as "flagrantly erroneous".

The service of process statute as a whole, in which the provision is found for suing and serving an unincorporated association in Louisiana, has been held cumulative in another connection. See *Curtis v. Jordan*, 115 La. 918, 40 So. 334 (1905).

65. GENERAL STATUTES OF NORTH CAROLINA, § 1-97(6); ARKANSAS STATUTES ANNOTATED, 1947, § 27-609; REVISED LAWS OF NEW HAMPSHIRE, c. 387, § 14; REVISED STATUTES OF WASHINGTON, (Remington), § 226 (9).

66. *Stafford v. Woods*, 234 N.C. 622, 68 S.E. 2d 268 (1951); see 30 N. C. L. REV. 465 (1952). As for suit by an association in North Carolina, see 29 N. C. L. REV. 335 (1951). Accord: *Pacific T. Co. v. I.T.U.*, 125 Wash. 273, 216 Pac. 358, 32 A.L.R. 767 (1923).

67. On this whole matter, see Magill, *The Suability of Labor Unions*, 1 N. C. L. REV. 81 (1922), Anno. 27 A.L.R. 786, Supplemented in 149 A.L.R. 508.

68. *Newark International Baseball Club, Inc. v. Theatrical Managers*, 125 N.J. Eq. 575, 7 A. 2d 170 (1939); *Unkovich v. New York Central Railroad Company*, 114 N.J. Eq. 448, 168 Atl. 867 (1933).

states. And labor unions have been held to come within the provisions of class suits.⁶⁹ However, the question still remains as to whether the class suit may be used in an action at law.

Under a statute allowing suits against an association if it is transacting business in a recognized name, decisions involving labor unions have gone both ways — some courts allowing the suits,⁷⁰ others refusing on the theory that a labor union is not engaged in transacting business.⁷¹ Of course, labor unions would come within the provisions of a statute allowing suit in the common name regardless of the transaction.⁷² By statute in Florida, suits by and against a labor union are conducted as if the union were incorporated.⁷³ Some other states have similar statutes.⁷⁴

As is well known, the United States Supreme Court in the case of *United Mine Workers v. Coronado Coal Co.*,⁷⁵ held that a labor union could sue and be sued in the federal courts because a sufficient recognition was granted to the unions by certain acts of the Congress. Although the decision is not binding upon state courts regarding their own procedure, some states have expressly adopted the rule expressed in it,⁷⁶ while others have rejected it.⁷⁷ Other courts, although not expressly adopting the rule, employed similar reasoning.⁷⁸ One state allowed a suit in the common name under the Fair Labor Standards Act, reasoning that Congress had already

69. See note 16 *supra*. See *Schultz v. Chicago Flat Janitors Union*, 340 Ill. App. 278, 91 N.E. 2d 471 (1950); *Kingsley Amalgamated Meat Cutters*, 323 Ill. App. 353, 55 N.E. 2d 554 (1944).

70. *St. Paul Typothetae v. St. Paul Bookbinders Union*, 94 Minn. 351, 102 N.W. 725 (1905); *Unkovich v. New York Central Ry.*, *supra*, note 68.

71. *United Brotherhood v. McMurtrey*, 179 Okla. 575, 66 P. 2d 1051 (1937).

72. *International Brotherhood v. Wood*, 162 Va. 517, 175 S.E. 45 (1934).

73. FLORIDA STATUTES ANNOTATED, § 447.11.

74. GENERAL STATUTES OF KANSAS, 1949, § 44.811; SOUTH DAKOTA CODE OF 1939, (1952 Supp.) § 17.1102.

75. 259 U. S. 344, 42 S. Ct. 570 (1922). See WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 648 ff. (1929); cf *Dodd, Dogma And Practice In The Law Of Associations*, 42 HARV. L. REV. 977 (1929); see 42 HARV. L. REV. 967 (1929).

76. *American Federation of Labor v. American Sash & Door Co.*, 13 Labor Cases 71,720 (Superior Court, Maricopa County, Arizona, 1947), *aff'd* (without discussion of this point) *American Federation of Labor v. American Sash & Door Co.*, 67 Ariz. 189, 189 P. 2d 912 (1948); *Vardo v. Whitney*, 166 Miss. 663, 147 So. 479 (1933).

77. *District No. 21, U.M.W. v. Bourland*, 169 Ark. 796, 277 S.W. 546 (1925); *Cahill v. Plumbers, Gas & Steam Fitters Local*, 238 Ill. App. 123 (1925).

78. *Green County Law Library Ass'n v. Curlett*, 76 Ohio App. 337, 63 N. E. 2d 455 (1945); *Williams v. United Brotherhood*, 39 Ohio 110, 81 Supp. 150 (1948); *Clark v. Grand Lodge*, 328 Mo. 1084, 43 S.W. 2d 404 (1931); *Williams v. United States Express Co.*, 195 Mo. App. 935, 191 S.W. 2d 934 (1917); but see *Forrest City Mfg. Co. v. International Ladies Garment Workers Union*, 233 Mo. App. 935, 111 S.W. 2d 934 (1938).

impliedly recognized the entity character of the union.⁷⁹ Although the decision was very wide in the beginning, it has been narrowed and now Rule 17 (b) of the Federal Rules of Civil Procedure provides that unless a federal question is involved, capacity is governed by state law. It seems likely that in those states in which the federal rules have been adopted, the decision will be followed if and when the occasion arises.⁸⁰

The last matter to be considered concerns the action by an unincorporated association to enjoin the use of a registered trademark or label. Under the statutes of most states, an association may file with the Secretary of State any label which it uses and have it registered if it has not been registered by someone else. Statutes usually provide that the association has exclusive control and rights in the registered label or trademark. Generally, statutes also provide that the association may proceed by way of injunction to stop the unauthorized use of a trademark thus registered. Some of these statutes provide for a suit in the common name,⁸¹ others provide for the suit to be conducted by an officer for the benefit of the association,⁸² while a number of them do not provide how the suit will be conducted.⁸³ Presumably in the latter cases, the suit will have to follow the general rules, and if a general statute is in force which allows a class suit, or a suit in the common name, or a suit by a certain designated official on behalf of the association, the suit would be conducted according to such rules.

79. *Williams v. United Mine Workers*, 294 Ky. 520, 172 S.W. 2d 202, 149 A.L.R. 505 (1943).

80. See *supra*, note 23 (states adopting the federal rules). See as an example of state legislation dealing with labor unions in such a way as to impliedly recognize it as an entity, IDAHO CODE, Title 44.

81. ANNOTATED CODE OF MARYLAND, (Flack 1951), Art. 27, § 56; NEW JERSEY STATUTES ANNOTATED, § 56:3-12.

82. GENERAL STATUTES OF CONNECTICUT, 1949, § 6800; GEORGIA CODE, 1933, § 106-104; INDIANA STATUTES ANNOTATED, Burns 1933, § 66-114; IOWA CODE, § 548.9; G. S. OF KANSAS, 1949, § 81-109; LAWS OF MAINE, c. 25, § 50; MASSACHUSETTS STATUTES, § 110.10; VERNON'S ANNOTATED MISSOURI STATUTES, § 417.070; IDAHO CODE, § 44-605; REVISED CODES OF MONTANA, 1947, § 94-35-234; NEVADA COMPILED LAWS (Hillyer 1929), § 7696; REVISED LAWS OF NEW HAMPSHIRE, 1942, c. 207, § 7; OKLAHOMA STATUTES ANNOTATED, 1937, § 78-10; CODE OF LAWS OF SOUTH CAROLINA, 1952, § 66-211; WILLIAMS TENNESSEE CODE ANNOTATED, 1934, § 6767; VERNON'S TEXAS CIVIL STATUTES ANNOTATED, Art. 850; CODE OF VIRGINIA, 1950, § 59-188; WEST VIRGINIA CODE OF 1949, § 47-2-8; WYOMING COMPILED STATUTES, 1945, § 39-203.

83. FLORIDA STATUTES ANNOTATED, 506.09; MISSISSIPPI CODE OF 1942, § 4227-12; REVISED STATUTES OF NEBRASKA, 1943, § 87-109; GENERAL STATUTES OF NORTH CAROLINA, § 80-10; VERMONT STATUTES, 1947, § 7762; DIGEST OF ARKANSAS STATUTES, (Crawford & Moses 1921) § 10316.

III. *Jurisdiction Over Unincorporated Associations*

At the outset, it must be pointed out that in this section the sole consideration will be, what are the limits to which a state may go in exercising jurisdiction over unincorporated associations? The inquiry is not directed to what the states have done since that has been treated in the preceding section on parties. But rather, this section is an inquiry into the position of the outer constitutional limits imposed by the "due process" clause of the 14th Amendment as applied in the field of conflict of laws.

In addition, it must be recalled that for reasons of convenience, only in personam actions will be considered. Of course, in rem and quasi-in rem actions are possible against unincorporated associations, but in those actions, the jurisdiction of the court rests upon control of the res, not personal jurisdiction over the parties. In the usual case it is sufficient service of process in the in rem action or the quasi-in rem action for a notice to be inserted in a local paper notifying the world of the suit. Thus, in most in rem or quasi-in rem cases, it matters not if the number of persons concerned in the res is two or two thousand.

In the following discussion, the states will be divided into three categories, viz: (1) those in which the common law rules have not been changed, (2) those where the class suit is available, and (3) those where a suit in the common name is possible.

In an action at common law, since there is no entity separate and distinct from the members composing the association, each and every member of the association is a party defendant. Therefore, each and every member of the association must be brought into court personally, either by a service of process personally, or by a domicile service if that is permitted.⁸⁴

Likewise, in class suits, since the action was and is in equity, and since traditionally equity acts only in personam, there must be a personal service of process upon the persons who are named as defendants on behalf of themselves and all other members of the association, or a domicile service if that is permitted.⁸⁵

However, in actions under statutes allowing suits in the common name by express directions or by implied provisions, or by statutes recognizing the entity sufficiently to allow suits in the common name,

84. *West v. R. & O. Railway Co.*, 103 W.Va. 417, 137 S.E. 654 (1927), *RESTATEMENT, CONFLICT OF LAWS*, § 86, comment a (1934). As to jurisdiction quasi-in rem, see *Rodier v. Fay*, 7 N.Y.S. 2d 744 (1938).

85. *West v. B. & O. Ry.*, *supra*, note 4; *Simpson v. Grand International Brotherhood*, 83 W.Va. 355, 98 S.E. 580 (1919).

or by statutes providing for actions against the president or other officer as trustee ad litem, the scant authority upon the point seems to place the association in the same category as partnerships, and requires a doing of business.⁸⁶ Some of the state statutes expressly require a transaction of business before the statute allowing suit in the common name applies.⁸⁷ Others make no mention of this requirement.⁸⁸ As pointed out in the section on parties, this requirement could have two possible meanings, only one of which is relevant here, that is, the doing of any acts in the furtherance of the purpose for which it was organized. This, of course, includes profit and non-profit enterprises, as well as charitable and religious ones. However, as suggested at the outset, just where each individual state has set the limit for its own courts is not of concern here, the material consideration being where the constitutional outer limits are placed.

Of course, the basic question is, what is "doing business"? It seems that the *Restatement* has intended that the phrase as used therein means the same as applied to foreign corporations.⁸⁹ Goodrich seems to think that the same rules should apply to an unincorporated association as are applied to partnerships.⁹⁰ However, it seems that both of these are lacking in some particulars, since both foreign corporations and partnerships are usually engaged in business of a commercial nature, whereas unincorporated associations may not be. On the whole, it seems that the test set forth in a comment in the *Southern California Law Review* would be more desirable.⁹¹ The author, discussing a section of the California Code of Civil Procedure and the different interpretations placed upon the phrase "Transaction of business" in the California statute says:

Whenever, therefore, two or more individuals unite for any purpose, and such association, as a unit, performs any act of business or enters into any obligation, whether it be permanent or temporary, whether pursuant to a primary purpose or merely in-

86. RESTATEMENT, CONFLICT OF LAWS, § 86 (1934); GOODRICH, CONFLICT OF LAWS, § 74 (1949); see McGruder & Foster, *Jurisdiction over Partnerships, Nonpartnership Associations, and Joint Debtors*, 37 HARV. L. REV. 793 (1924); Holdoegel, *Jurisdiction over Partnerships*, 11 IOWA L. REV. 193 (1926).

87. See notes 30 and 31 *supra*.

88. See notes 55 and 56 *supra*.

89. RESTATEMENT, CONFLICT OF LAWS, § 86 (1934).

90. GOODRICH, CONFLICT OF LAWS, § 74 (3rd ed. 1949).

91. 5 SO. CAL. L. REV. 421 (1932); See *Pacific T. Co. v. I.T.U.*, 125 Wash. 273, 216 Pac. 358 (1923); RESTATEMENT, CONFLICT OF LAWS, § 167, comment a (1934).

cidental in character, then, as to such act or obligation it has transacted business within the terms of the statute.

Regarding the types of causes of action against an association which should be amenable to the jurisdiction of a court of a state in which it has done business, it has been suggested, by analogy to the principles regarding foreign corporations, that the association can be sued in the common name under the statutes only after doing business in that state, and only for causes of action arising in that state.⁹² This conclusion proceeds from the argument that the only reason that such suits are allowed in the first place is to protect economic interests within the forum state, and that when the cause of action arises outside the state, no such reason exists, and that therefore, no suit can be maintained. However, this objection should not apply to a class suit, or to suits against all members.

Since the matter under consideration is deemed waivable in the ordinary case of any person, natural or artificial, it has been held, in accordance with other general principles, that if the association appears and defends the suit, it waives the jurisdiction over the person.⁹³

IV. *Venue in Actions Against Unincorporated Associations*

For purposes of convenience the type of case which is considered in this section will again be limited to in personam actions. If it is desired that an action be brought against an association to foreclose a mortgage, or to try title to realty, the question of venue will not be unique to the unincorporated association, for in such cases, the action generally must be brought in the county where the land lies.⁹⁴ That requirement of venue, which could be compared to jurisdiction over the subject matter rather than the venue of the suit, cuts across the whole field. In this section, it is assumed that the suit is transitory in character, but for historical reasons, certain rules of venue have been developed.

For the purposes of this section, a three-fold division has been made. In the first class are those situations where the common law rule of compulsory joinder has not been changed. Secondly, those

92. Holdoegel, *Jurisdiction over Partnerships*, 11 IOWA L. REV. 193 (1926).

93. *Baird v. National Health Foundation*, 235 Mo. App. 594, 144 S.W. 2d 850 (1940).

94. See, for example, ALABAMA CODE, 1940, § 7054; CALIFORNIA CODE OF CIVIL PROCEDURE, § 392(1)(a); IDAHO CODE, 1947, § 5-401; Art. 163 LOUISIANA CODE OF PRACTICE; MISSISSIPPI CODE, 1942, § 1433; MONTANA CODE, 1947, § 93-2901; CODE OF LAWS OF SOUTH CAROLINA, 1952, § 10-301.

states which have a class action will be considered, and lastly, those states in which the common law rule has been modified to permit suit in the common name, either by statutes or by judicial decisions.

It should be obvious that in those states in which the traditional common law principles prevail, questions of venue will be solved by the general rules of venue, applicable to all cases. This would apply to cases in chancery, or to cases of an equitable nature. Hence, it is not necessary to discuss all the rules of venue, since, if the action is against all members at law, or against a few for the benefit of all in equity, general rules of venue will apply, just as they apply whenever there exists a plurality of defendants. Suffice it for the purposes of this section to point out only the most general and common.

It is almost universally conceded that if an action is against more than one defendant, venue is proper if laid in the county where one of the defendants resides.⁹⁵ Accordingly, in the ordinary situation in which all members of an association are sued as defendants, venue would be where one member resides, subject, of course, to all the general rules pertaining to the change of venue. The same rule would apply if the nature of the suit allowed a class action, or if class actions applied to actions at law as well as suits in equity. However, in some cases, possibly for geographical reasons, venue is proper if laid in a county where one party resides.⁹⁶ Thus, in such a case, venue could be where the plaintiff resides. But, regardless of the finer rules, it is to be emphasized that in suits in equity or actions at law against all members, general rules of venue are applied, not any rules which are peculiar to unincorporated associations.

In addition to the foregoing rules, it is common in many states to provide that an action may be brought where the cause of action, or a part thereof, arose.⁹⁷ Since this is a general rule of venue, it would apply to suits against unincorporated associations. Other provisions in many states allow a suit to be brought where the con-

95. See, for illustrative purposes only, ALABAMA CODE, 1947, § 7-54; CALIFORNIA CODE OF CIVIL PROCEDURE, § 395; FLORIDA STATUTES ANNOTATED, § 46.01 Art. 165(6); LOUISIANA CODE OF PRACTICE (if joint or solidary obligors); GENERAL LAWS OF RHODE ISLAND, 1938, c. 511, § 2; CODE OF LAWS OF SOUTH CAROLINA, 1952, § 10-303.

96. GENERAL STATUTES OF CONNECTICUT, 1949, § 7747; REVISED STATUTES OF MAINE, 1944, c. 99, § 9; ANNOTATED LAWS OF MASSACHUSETTS, § 223-1; GENERAL LAWS OF RHODE ISLAND, 1938, c. 511, § 2; VERMONT STATUTES, 1947, § 1286, 1604.

97. CALIFORNIA CODE OF CIVIL PROCEDURE, § 395(1).

tract is to be performed,⁹⁸ or where it was entered into. These rules, being general, also would apply to unincorporated associations.

In states where suability has been developed by judicial decision, there seems as yet no clear cut answer as to whether the association is treated as a corporation merely for purposes of becoming a party to a suit, or whether the corporate treatment will be consistently carried out, allowing a suit to be brought against an association where it does business. It would seem that the argument which prevails upon the courts in regard to corporate treatment for purposes of becoming a party should be equally, if not more, persuasive to solve a question of venue. That is, if the legislature has dealt with unincorporated associations in such a way as to force the conclusion that that body intended corporate treatment for the purposes of suing and being sued, it would also follow that the legislature intended the corporate treatment to be carried out consistently.⁹⁹ But, as yet, there seems to be no clear cut answer to the question.¹⁰⁰

In those states which have statutory provisions imparting suability in the common name, there seem to be two basic types of statutes. One type provides that the members of the association may be sued in the common name, thus implying, at least, that the real defendants are the members, even though they are being sued in the common name.¹⁰¹ The other type of statute seems really to create an entity, separate and apart from the members, by providing that "the association" may be sued in the common name.¹⁰² If there is any real distinction here, it would seem to indicate that in the first type, venue would be proper if laid in a county where one member resides, under general rules of venue, because the members are the defendants, though being sued under the common name. In the latter type, the implication would be more favorable for a corporate treatment, since the statute provides for a suit against "the association".

On the other hand, if statutes provide for venue in cases against unincorporated associations, they should be followed, although such

98. CALIFORNIA CONSTITUTION OF 1879, Art. XII, § 16; REVISED CODES OF MONTANA, 1947, § 93-2904.

99. *Adams Express Co. v. Schofield*, 111 Ky. 832, 64 S.W. 903 (1901).

100. The case of *Vardo v. Whitney*, 166 Miss. 663, 147 So. 479 (1933), could be considered only for its implications. In that case, a suit was brought against an association where one of the branch offices had an office. However, the point was not passed upon, and one cannot be sure that no members resided in that county.

101. See notes 30 and 31 *supra*.

102. See note 56 *ff. supra*. But see *Sperry Products v. Association of American Railroads*, 132 F. 2d 408, 145 A.L.R. 694 (1942).

statutes have been held cumulative and not exclusive.¹⁰³ In states where the statute provides for a suit against "the association", supplementary statutes usually,¹⁰⁴ but not universally,¹⁰⁵ accord corporate treatment as regards venue. However, if the statute does not provide for venue, or its provisions are cumulative merely, then it will be a question for judicial decision as to whether corporate treatment will be accorded.

In states where the suit is not against the association in the common name, but rather against a member or a statutorily designated official as trustee ad litem for purposes of the suit, it would seem that in the absence of statutory provisions for venue, the residence of the named officer would govern.¹⁰⁶

Obviously, if the statute provides in so many words that certain associations may sue and be sued as corporations,¹⁰⁷ or that it is deemed a corporation for the purpose of holding property, and may be sued in such corporate capacity,¹⁰⁸ the association may be sued in any county in which it could be sued if it were a corporation.

V. Service of Process Upon Unincorporated Associations

In an action against the members of an unincorporated association at common law the usual rules of service of process would apply, and to confer jurisdiction, the members of the association must be named as parties and process must be served upon each of them individually.¹⁰⁹ Thus, the general rule applies that the process must be handed to the defendant or read to him as in the usual case.¹¹⁰ Moreover, service upon some individual members of the association will not be sufficient to support a suit against all members.¹¹¹ Ser-

103. *Edgar v. Southern Railway*, 213 S.C. 445, 49 S.E. 2d 841 (1948); *But cf.* REVISED STATUTES OF NEBRASKA, 1943, § 25-314; PENNSYLVANIA RULES OF CIVIL PROCEDURE, No. 2156, where restrictive language is used.

104. ALABAMA CODE, 1940, § 7-57; ARKANSAS STATUTES OF 1947, § 27-609; ANNOTATED CODE OF MARYLAND, (Bagby) Art. 23, § 104; REVISED STATUTES OF NEBRASKA, 1943, § 25-314; PENNSYLVANIA RULES OF CIVIL PROCEDURE, No. 2156; VERNON'S TEXAS CIVIL STATUTES ANNOTATED, Art. 1995 (a).

105. NEW JERSEY STATUTES ANNOTATED, 2A:64-1; CODE OF LAWS OF SOUTH CAROLINA, 1952, § 10-429.

106. *Bacon v. Dinsmore*, 42 How. Prac. 368 (1912).

107. FLORIDA STATUTES ANNOTATED, § 447.11.

108. REVISED LAWS OF NEW HAMPSHIRE, 1942, c. 242, § 11.

109. *West v. Baltimore and Ohio Railroad Co.*, 103 W.Va. 417, 137 S.E. 654 (1927).

110. See, as illustrative statutes, ARKANSAS STATUTES OF 1946, § 27-330; CALIFORNIA CODE OF CIVIL PROCEDURE, § 411 (8); IOWA RULES OF CIVIL PROCEDURE, No. 56(a); VERNON'S ANNOTATED MISSOURI STATUTES, § 506.150(1); NEW YORK CIVIL PRACTICE ACT, § 225; CODE OF LAWS OF SOUTH CAROLINA, 1952, § 10-438.

111. *Johnson v. Albritton*, 101 Fla. 1285, 134 So. 563 (1931).

vice upon a mere agent is likewise insufficient to bring the association into court, in the absence of statutory authority.¹¹²

However, in accordance with the doctrine of virtual representation, a part of the members of an association may defend for the benefit of all. In such cases, service upon the part acting for all is sufficient.¹¹³

In some states, where, by direct legislation, associations are suable as an entity or in the common name, supplementary statutes generally provide that service may be had upon an officer,¹¹⁴ a managing official or general agent,¹¹⁵ an agent,¹¹⁶ or a member or associate.¹¹⁷ These statutes have been generally held constitutional.¹¹⁸

In some states, although direct legislation has imparted suability in the common name, there are no supplementary statutes dealing with service of process. Rather than hold that a lack of statutory authority regarding service of process is to be used as a shield by the association, the courts have sometimes held that they are to be treated as quasi-corporations for the purpose of service of process.¹¹⁹

In states which have statutes embodying a forced statutory repre-

112. *Baskin v. U.M.W.*, 150 Ark. 398, 234 S.W. 464 (1921); *Staed v. State*, 64 Mo. App. 28 (1895); *Tucker v. Eaughough*, 186 N.C. 505, 120 S.E. 57 (1923).

113. *Evenson v. Spaulding*, 150 Fed. 517 (1907); *Fitzpatrick v. Rutter*, 160 Ill. 282, 43 N.E. 392 (1896); *Slaughter v. American Baptist Publication Society*, 150 S.W. 224 (Tex. Civ. App. 1912); *National Harness Mfg. Ass'n v. F.T.C.*, 268 Fed. 705 (1920); *Bayci v. Rangp*, 304 Ill. App. 203, 25 N.E. 2d 1015 (1940).

114. ALABAMA CODE, 1940, § 7-144; GENERAL STATUTES OF CONNECTICUT, § 7776; ANNOTATED CODE OF MARYLAND (Bagby 1924) Art. 23, § 104; COMPILED LAWS OF MICHIGAN, 1948, § 613.29; NEW JERSEY STATUTES ANNOTATED, 2A:64-2; NEW MEXICO STATUTES OF 1941, § 19-101(4)(o); PENNSYLVANIA RULES OF CIVIL PROCEDURE, No. 2156; TEXAS CIVIL STATUTES ANNOTATED, Art. 1995(23); UTAH RULES OF CIVIL PROCEDURE, No. 4(e)(4); CODE OF VIRGINIA, 1950, § 8-66.

115. COLORADO RULES OF CIVIL PROCEDURE, No. 4 (e)(3); FLORIDA STATUTES ANNOTATED, § 447.11 (labor unions only); GENERAL STATUTES OF KANSAS, 1949, § 44-811; (labor unions only); LOUISIANA REVISED STATUTES OF 1950, 13:3471 (22); REVISED STATUTES OF NEBRASKA, 1943, § 25-314; also, many of the statutes noted in note 114 contain alternatives so that they could come under this note also.

116. CALIFORNIA CODE OF CIVIL PROCEDURE, § 388; CODE OF LAWS OF SOUTH CAROLINA, 1952, § 10-429; VERMONT STATUTES, 1947, § 1565; also, statutes under notes 114 and 115 might come under this note.

117. CALIFORNIA CODE OF CIVIL PROCEDURE, § 388; IDAHO CODE, § 5-323; MINNESOTA STATUTES ANNOTATED, § 540.15; REVISED CODES OF MONTANA, 1947, § 93-2827; NEVADA COMPILED LAWS, (Hillyer 1929) § 8564; NORTH DAKOTA REVISED CODE OF 1943, § 28-0609; OKLAHOMA STATUTES ANNOTATED, 1937, § 12-182; also, some statutes noted in notes 114, 115 and 116 would also come under this note.

118. *Jardine v. Superior Court*, 82 Cal. Dec. 188, 2 P. 2d 756 (1931); *Bohe v. Lloyds*, 10 F. 2d 730 (1926); *Ex parte Baylor*, 93 S.C. 414, 77 S.E. 59 (1913); *F. R. Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 Atl. 938 (1906).

119. *Hamilton v. Delaware Motor Trades*, 4 W.W. Harr. 486, 155 Atl. 595 (Del. 1931).

sentative concept, allowing a member or an officer to sue or be sued on behalf of the association, it would ordinarily follow that in accordance with general principles, a service of process must be had upon the named trustee *ad litem*. However, some courts have held that the named officer or member being sued on behalf of the association is not the only one upon whom service may be had, the statute being cumulative merely.¹²⁰ Other states having the same type of statute have supplementary statutes expressly prescribing upon whom a service may be had.¹²¹ These statutes generally adopt a corporate theory and analogous rules apply.

In some states there are no statutes which set up the capacity of an unincorporated association to sue or be sued; yet, in the part of the statutes which deals with service of process, certain provisions will be found which prescribe how service of process is to be accomplished in an action against an unincorporated association.¹²² These statutes are so worded as to allow actions against the association in the common name, and some of the courts in such states have so held.¹²³ Two forms are generally assumed by these statutes. One type simply prescribes that service may be accomplished by serving a managing official or general agent, at the usual place of business, during a business day.¹²⁴ The less common types prescribe that any unincorporated association wishing to transact business within the state must, before performing any of the acts for which it was formed, appoint an agent for service of process.¹²⁵ Presumably, a suit could then be brought against the association in the common name with service of process upon the appointed agent. In addition, some statutes provide that if the association fails to so appoint an agent, service of process may be had upon the secretary of state

120. *McGinn v. Morrin*, 158 Misc. 666, 286 N.Y.S. 410; *aff'd* 247 App. Div. 770, 286 N.Y.S. 411 (1936).

121. PENNSYLVANIA RULES OF CIVIL PROCEDURE, No. 2157 (a).

122. ARIZONA CODE ANNOTATED, 1939, § 21-305 (if subject to suit in firm name only, see *supra* note 76); ARIZONA CODE ANNOTATED, 1939, § 53-702; ARKANSAS STATUTES OF 1947, § 27-609; VERNON'S ANNOTATED MISSOURI STATUTES, § 506.150 (if subject to suit in firm name only, see *supra* note 78); REVISED LAWS OF NEW HAMPSHIRE, 1942, c. 387, § 14; REMINGTON'S REVISED STATUTES OF WASHINGTON, § 226 (9).

123. *Stafford v. Woods*, 234 N.C. 622, 68 S.E. 2d 263 (1951); *Pacific T. Co. v. I.T.U.*, 125 Wash. 273, 216 Pac. 358 (1923).

124. See note 122 *supra*. Also, see LA. REV. STAT. OF 1950, 13:3471 (22).

125. GEORGIA CODE, 1933, § 56-1621 (fraternal benefit societies); MISSISSIPPI CODE, 1942, § 5760 (fraternal insurance companies); GENERAL STATUTES OF NORTH CAROLINA, § 1-97 (all associations); REMINGTON'S REVISED STATUTES OF WASHINGTON, § 226 (9); WILLIAMS TENNESSEE CODE ANNOTATED, 1934, § 8631.1.

or some other state functionary.¹²⁶ Others are silent as to the consequence of non-appointment, but the courts have uniformly held that in such cases, process may be served as if the association were a foreign corporation,¹²⁷ that is, upon some person whose character is such that it is expected that he will give notice of the suit to the association.¹²⁸

In the final category there are neither statutes allowing associations to sue or be sued as a unit, nor statutes prescribing how service of process may be accomplished in a suit against an association; yet, for other reasons, such as implied recognition by the legislature, suits allowed in the common name, or estoppel, or waiver, the question of service is usually solved by resort to the statutory provisions regarding service upon corporations.¹²⁹

VI. *Execution of Judgments Against Unincorporated Associations*

In this area a three-fold division is again to be made. First, consideration will be given to the execution of a judgment obtained against the members of an association in an action at common law; second, to the execution of a judgment as it relates to class suits; and finally, certain problems of execution when the judgment is against the association as an entity, or against an officer as trustee.

In actions at common law, it has already been observed that all members must be made parties. Therefore, the suit is against every member individually, and the judgment binds each member, both as to all joint property, and as to any individual property. The rationalization for this is that each member is a personal defendant, each has been served with process, each has had his day in court, and each has had an opportunity to be heard.

With the development of the class suit, equity was forced to retreat from the ordinary rule that only parties are bound by decrees,

126. GENERAL STATUTES OF NORTH CAROLINA, § 1-97; WILLIAMS TENNESSEE CODE ANNOTATED, 8681.1.

127. *Heralds of Liberty v. Bowen*, 8 Ga. App. 325, 68 S.E. 1008, (1910); *Brotherhood of Railroad Trainmen v. Agnew*, 170 Miss. 604, 155 So. 205 (1934).

128. *Brotherhood of Railroad Trainmen v. Agnew*, 170 Miss. 604, 155 So. 205 (1934).

129. *Sprainis v. Lietuwishika Evangelishka Liuterishka Draughtstes*, 232 Ill. App. 427 (1924); *Fitzpatrick v. Rutter*, 160 Ill. 282, 43 N.E. 392 (1875); *Adams Express Co. v. Schofield*, 111 Ky. 832, 64 S.W. 903 (1901); *Adams Express Co. v. State*, 55 Ohio St. 69, 44 N.E. 506 (1896); *Undovich v. New York Central Railroad Co.*, 114 N.J. Eq. 448, 168 Atl. 667 (1933). (It should be noted that statutes in New Jersey now allow suits in the common name, at least if it is a commercial association); *Slaughter v. American Baptist Publications Society*, 150 S.W. 224 (Texas 1912). (It should be noted that statutes allow suits in the common name in Texas today.)

and such doctrines as virtual representation and privity of interest were formulated to rationalize the results. Ultimately, therefore, the idea of a personal service of a subpoena receded in importance.

However, in actions at law, there was no development of a class suit, hence, no retreat from the rule that only parties are bound by judgments. In time, the ideas became crystalized, so that today the idea of a personal service of process is so closely linked with a personal judgment for the payment of a sum of money that it has been raised to constitutional grounds.¹³⁰

Thus, in a class suit which was formulated by statute and in some cases allowed in an action at law, it is only natural and inevitable that the question will arise as to whether, in such a suit at law, a personal judgment can be rendered against a person not a personal defendant or party, but one who is merely represented, *i.e.*, one of the class. It is thus to be observed that most problems concerning the fusion of law and equity do not revolve around the fusion of the substantive law, but rather around the fusion of the procedures. In many states today the right of a jury trial depends upon the case's being one at law and not in equity, regardless of the fact that there may be but one form of action, and that the equity court is the same as the law court.

In its historical setting, it is generally said that all members of the class are bound by the judgment in a class suit.¹³¹ However, if those cases are examined, none will be found in which a person was held personally liable for the payment of money if the suit is against

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

131. *Litchfield v. Goodnow*, 123 U.S. 549 (1887); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 353 (1921); *Jacobs v. Murphy*, 245 Ala. 260, 16 So. 2d 859 (1944); *Grand International v. Mills*, 43 Ariz. 379, 31 P. 2d 971 (1934); *Higsby v. Ruraldale Consolidated School District*, 180 Ark. 122, 20 S.W. 2d 624 (1929); *Grief v. Dullea*, 65 Cal. App. 2d 986, 153 P. 2d 581 (1944); *New Britain Trust Co. v. Stanley*, 128 Conn. 386, 23 A. 2d 142 (1941); *Denegre v. Walker*, 214 Ill. 114, 73 N.E. 408 (1905); *Gavin v. Curtin*, 171 Ill. 640, 49 N.E. 523 (1898); *Buchan v. German American Land Co.*, 180 Iowa 911, 164 N.W. 118 (1917); *Masonic Widows and Orphans v. Hicatt Brothers*, 197 Ky. 301, 247 S.W. 34 (1923); *Malloy v. Carrol*, 287 Mass. 227, 190 N.E. 113 (1934); *Quinton's Marker Inc. v. Patterson*, 303 Mass. 227, 191, 21 N.E. 2d 546 (1939); *Mathews v. Lightner*, 84 Miss. 333, 88 N.W. 8892 (1902); *Acord v. Beaty*, 244 Mo. 126, 148 S.W. 901 (1912); *Brenner v. Title Guarantee & Trust Co.*, 276 N.Y. 230, 11 N.E. 2d 890 (1937); *Downey v. Sein*, 185 N.Y. 427, 78 N.E. 66 (1906); *Hunt v. Gower*, 80 S.C. 80, 61 S.E. 218 (1908); *Bernard v. Bernard*, 79 S.C. 364, 60 S.E. 700 (1908); *Dewey v. St. Albans Trust Co.*, 60 Vt. 1, 12 Atl. 224 (1888); *O'Hara v. Pittston Co.*, 187 Wash. 282, 166 Pac. 665 (1917); *Boal v. Wood*, 170 W. Va. 383, 73 S.E. 978 (1912); see also 8 L.R.A. (N.S.) 51; 42 L.R.A. (N.S.) 437; 97 Am. St. Rep. 766, 2 Ann. Cases 791; *RESTATEMENT, JUDGMENTS*, § 86 (1942); 26 WASH. U. L. REV. 422 (1941); 3 MOORE, *FEDERAL PRACTICE*, 3456 ff. (2d ed. 1948).

a class only. The cases which announce the above rule are all equity cases, or at least, none permit the judgment to run against a member of the class personally for a money judgment when he was not a party, and only virtually represented.

The degree to which members of a class are bound by judgments varies with each type of class suit.¹³² The so-called "hybrid class action,"¹³³ and the "spurious"¹³⁴ class suit bind only formal parties of record.¹³⁵ In the so-called "true class suit," however, it is generally said that the judgment binds every member of the class.¹³⁶ Since actions against unincorporated associations are classified as true class actions, the rules pertaining thereto will apply.¹³⁷ However, even in the "true class suit," the degree and extent to which each member of the class is bound is in doubt, for the reasons pointed out earlier. As to suits equitable in nature, they are probably bound personally.¹³⁸ In actions at law involving a class suit, one would probably be bound as to jointly owned property or a commonly owned interest. But as to his individual property it seems very doubtful that he is bound.

The reasons could probably be found historically and constitutionally.¹⁴⁰

However, as to the persons named as representatives, the court has sufficient jurisdiction over them to render a personal judgment against them, since they are parties, and were personally served.¹⁴¹

Therefore, at the present time, about all that can be said about this particular problem is that the members of an unincorporated association are probably personally bound by a judgment rendered against the class, if the suit was of an equitable nature, but if it commands the payment of a sum of money, then the members not personally served and not made parties are not personally liable as

132. For discussion of the different types of class suits, see 22 MINN. L. REV. 34 (1938).

133. 3 MOORE, FEDERAL PRACTICE 3442 (2d ed. 1948).

134. See note 133 *supra*.

135. 3 MOORE, FEDERAL PRACTICE 3456, 3465, 3468 (2d ed. 1948).

136. For a discussion of a "true class suit," see 3 MOORE, FEDERAL PRACTICE 3434 (2d ed. 1948); see also note 131 *supra*.

137. 2 MOORE, FEDERAL PRACTICE 2236 (1st ed. 1938).

138. See note 131 *supra*.

139. Blank.

140. In his concurring opinion in *Montgomery Ward v. Langer*, 168 F. 2d 182 (1948), Judge Johnson said, at page 189:

"No one, I am sure, has ever previously believed under the old equitable class action, that a federal court was entitled, on the basis of class representation alone, to enter a personal judgment of pecuniary liability against an individual who was in no other manner brought into court."

141. RESTATEMENT, JUDGMENTS, § 86, comment (i) (1942).

to their individual property, although they are probably liable to the extent of their interest in any jointly owned property.

The statutes which allow suits against an association in the common name, or against an officer as trustee for the association, very generally provide that the judgment binds the joint property.¹⁴² In those states where no statute prescribes the effect of a judgment against an association in the common name, the same result would probably be reached upon analogies to corporations.

In addition, some statutes prescribe that the individual property of those served is bound,¹⁴³ whereas others prohibit it.¹⁴⁴

In regard to the liability of the individual property of an individual not served, it would seem that the same constitutional problems would be met here as are encountered in the class suit. In the few opinions addressing themselves to the subject, the courts have found ways to sidestep the issue.¹⁴⁵ Some states expressly forbid the liability of individual property for a judgment against an association.¹⁴⁶

In both of these situations, class suits or associations sued in the common name, it has been suggested that a difference should be made between residents of the forum state and non-residents thereof. As to residents, it is argued, the court has jurisdiction by virtue of their residence¹⁴⁷ and the only requirement of due process is notice

142. ALABAMA CODE, 1940, § 7-145; CALIFORNIA CODE OF CIVIL PROCEDURE, § 388; COLORADO RULES OF CIVIL PROCEDURE, Rule 54 (e); GENERAL STATUTES OF CONNECTICUT, 1949, § 8035; REVISED CODE OF DELAWARE, 1935, § 4676; FLORIDA STATUTES ANNOTATED, § 447.11 (labor unions only); IDAHO CODE, 1947, § 5-323; GENERAL STATUTES OF KANSAS, 1947, § 44.811 (labor unions only); ANNOTATED CODE OF MARYLAND (Bagby 1924) Art. 23, § 104; MINNESOTA STATUTES ANNOTATED, § 540.151; REVISED CODES OF MONTANA, 1947, § 93-2827; REVISED STATUTES OF NEBRASKA, 1943, § 25-314; NEW JERSEY STATUTES ANNOTATED, § 2A:64-3; NEW YORK GENERAL ASSOCIATIONS LAW, § 15; NEVADA COMPILED LAWS (Hillyer 1929), § 8564; NORTH DAKOTA REVISED CODE OF 1943, § 45-0402; OKLAHOMA STATUTES ANNOTATED, 1937, § 12-182; PENNSYLVANIA RULES OF CIVIL PROCEDURE, No. 2158; GENERAL LAWS OF RHODE ISLAND, 1938, c. 530, § 4; CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1516; TENNESSEE CODE ANNOTATED (Williams 1934) § 8681.3; TEXAS REVISED CIVIL STATUTES ANNOTATED, Article 6136; UTAH RULES OF CIVIL PROCEDURE, No. 4(e) (4); VERMONT STATUTES, 1947, § 1672; CODE OF VIRGINIA, 1950, § 8-66.

143. CALIFORNIA CODE OF CIVIL PROCEDURE, § 398; DELAWARE CODE ANNOTATED, § 10-3904; IDAHO CODE, § 5-323; REVISED CODE OF MONTANA, 1947, § 93-2821; NEVADA COMPILED LAWS, (Hillyer 1929) § 8564; OKLAHOMA STATUTES ANNOTATED, 1937, § 20-182; UTAH RULES OF CIVIL PROCEDURE, Rule 17 (d); SOUTH DAKOTA CODE, 1939, § 33.0408.

144. NEW YORK GENERAL ASSOCIATIONS LAW, § 15.

145. *Jardine v. Superior Court*, 213 Cal. 301, 2 P. 2d 756 (1931).

146. GENERAL STATUTES OF CONNECTICUT, 1949, § 8035; GENERAL LAWS OF RHODE ISLAND, c. 530, § 4.

147. RESTATEMENT, CONFLICT OF LAWS, § 71(1) (b) (1934).

of the suit and an opportunity to defend and be heard.¹⁴⁸ The argument thus boils the problem down to this: was service upon the representatives of the class or upon the official of the association reasonable notice and opportunity to defend to the rest of the class or to the rest of the members? If so, then as to residents, a personal judgment could be entered against them without service of process. However, the problem is not solved as to non-residents.

One state has a statute which provides that after judgment has gone against the association in the common name, any joint property of the association members, or the individual property of any member may be levied upon for satisfaction of the judgment, without any further notice or proceeding.¹⁴⁹ The highest court of the state has sustained the validity of the statute, without mentioning the residence.¹⁵⁰ However, considerable doubt has been cast upon the constitutionality of the statute, and the soundness of the case.¹⁵¹

Most authorities indicate that the proper method to be used to reach individual property of members is by a new suit against the member, with the usual service of process.¹⁵² This method certainly would be the safest, and in the absence of a statute, would probably be the only way. Whether or not such a suit would lie, from a substantive point of view, is, of course, important, but it is outside the scope of this article. If the state has held the statute which allows a suit against the association in the common name to be an exclusive remedy, then apparently the individual liability of the member has been erased, and in its place there has been substituted joint liability.

The statutes which deal with the problem of enforcing a judgment against the association and against individual members generally provide that in the subsequent suit, there must be shown a judgment against the association, the insufficiency of the joint property,

148. 29 N. C. L. REV. 337 (1951).

149. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1516.

150. *Ex parte Baylor*, 93 S.C. 414, 77 S.E. 59 (1913).

151. See WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 554 (1929); see also 29 N. C. L. REV. 337 (1951).

152. Judge Johnson, in his concurring opinion in *Montgomery Ward v. Langer*, 163 F. 2d 182 (1948) said, at p. 190:

"... Such an adjudication (class suit resulting in a judgment) could probably also be made to serve as a foreclosure of all questions against the members of the union as a group, leaving open only the question, in favor of each individual, who might be subsequently sued and served with summons as a basis for a personal judgment, whether he had participated in, authorized or ratified such wrongful acts as the union was found to have committed." See also *Davidson v. Holden*, 55 Conn. 103, 10 Atl. 515 (1887); *Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 Atl. 938 (1906); *Tarbell v. Gifford*, 79 Vt. 369, 65 Atl. 80 (1906).

and any other fact going to make up individual liability, such as the individual's authorization, participation, or ratification of the acts.¹⁵³

In states where such a statute is not in force, the question will come up as to the effect to be given to the prior judgment against the association in the subsequent suit against an individual member. Usually, since the defendant in the subsequent suit was a member of the association, or a member of the class which had been sued, he will be in privity of interest with the prior defendants, and the prior judgment will be *res judicata* against him as to facts actually litigated in the prior suit.¹⁵⁴ However, this does not mean that he must satisfy the judgment out of his individual property, since his membership, authorization, participation, or ratification of the association or its acts were not litigated in the prior suit. Therefore, as to these matters, he has a right to prove what he can and has a right to be heard. Thus, it is to be observed that all elements of substantive liability must be made out against him, if individual liability is sought. As to facts litigated in the prior suit, such as the actual commission of the acts, their tortious character, causation, and the amount and existence of damages should be *res judicata*. A similar result should follow in contract suits, the difference requiring merely the individual authorization, participation, or ratification of the acts of the association.

VII. *Conclusions and Recommendations*

It will be readily seen that there are defects in the methods employed by various states to solve the questions and problems considered.

In the section on parties it was shown that the common law rule of compulsory joinder is not workable today, since the membership of an unincorporated association may number in the thousands. Devices which have attempted a partial solution to this problem, such as estoppel and waiver, are not satisfactory, because they are only stop-gap and make-shift provisions.

Equally apparent is the fact that the equitable class suit, while better than the common law rule, is not the best solution. True, it does circumvent the compulsory joinder rule, but in doing so the

153. See note 152 *supra*. Also, see REVISED STATUTES OF NEBRASKA, 1943, § 25-316; NEW JERSEY STATUTES ANNOTATED, § 2A:64-4; NEW YORK GENERAL ASSOCIATIONS LAW, § 16; GENERAL LAWS OF RHODE ISLAND, 1938, c. 530, § 4; VERMONT STATUTES OF 1947, § 1672; TEXAS REVISED CIVIL STATUTES ANNOTATED, Art. 6137.

154. See RESTATEMENT, JUDGMENTS, § 86 (1934). Also, see the concurring opinion of Mr. Judge Johnson in *Montgomery Ward v. Langer*, 163 F. 2d 182, (1948).

litigant must run the risk of mis-naming representative defendants: he is presumed to know which people will adequately represent the interests of the whole, a situation which may very well be false. Added to this is the doubt that a class suit may be permitted in an action at law, whether it has been reduced to statutory form or not.

The most direct and effective answer to the problem must, of course, be legislation. True, judicial decisions could reach the result, but such progress is slow and often filled with technicalities which are given up but slowly. Added to this is the necessity for some degree of predictability. These factors, it seems, demand legislation.

Of the statutes which are passed to deal with the problem, the best would be one which did not limit its application to any special type of association, or require the transaction of business, or require that the suit be on an obligation incurred for the benefit of the members. It should be so phrased as to be cumulative, and should allow suits to be brought by the association as well as against it. Such a statute might be as follows: "Unincorporated associations may sue and be sued in their common names upon any cause of action."

The problem of the unincorporated association in the field of conflict of laws centers around in personam actions. Since this is primarily a constitutional question, very little could be done by any one state, except, perhaps, to declare the principle for reasons of clarity. Because jurisdiction is so linked with service of process, such a declaration should be integrated with the provisions regarding service of process, both in actions in personam and in rem. Thus, no separate statute would be needed.

For venue purposes, perhaps a corporate treatment is the best. It should contain disjunctive language as to the alternatives, so as to be cumulative to general venue provisions. Such a statute might be as follows:

An action may be commenced against an unincorporated association in any county in which the association does business, or has an agent, or maintains an office.

The statute would be subject to the general provisions regarding a change of venue. Such was the reason for the use of the word "commenced" rather than "maintained" in the first line.

As for service of process, again perhaps an entity treatment is the best in order to be consistent. Thereby, service upon associations would follow the same rule as service upon corporations. In order to simplify the statutes and to provide for flexibility, the fol-

lowing statute is recommended:

Service of process upon an unincorporated association doing business in this state may be had upon any agent of the association.

Here it is noted that for the purpose of jurisdiction, the phrase "doing business" is inserted. While recognizing the danger of its being interpreted as applying to commercial associations only, still, it seems that such a phrase would receive the recognized interpretation and thus the association would be placed in the same category as a foreign corporation for purposes of jurisdiction. The term "agent" is also used instead of a particular officer since it may be that all associations do not have similar officers.

The execution of judgments against unincorporated associations is again closely related to constitutional law. For that reason, no attempt is here made to reach the outer limits imposed by the due process clause of the Constitution. Therefore, it is suggested that two statutes be used. The first would merely carry out the corporate theory consistently and provide for execution against joint property. The second would attempt to define the scope of the subsequent action against an individual member and to provide for the proper procedure to be used. Two divisions are made here, the first as regards non-residents, and the second as regards residents. Such a statute might be as follows:

Execution of a judgment against an unincorporated association may be levied against its property, or the joint property of its members.

Upon the return of execution levied upon the joint property unsatisfied, individual property of the members may be levied upon as follows:

- (1) If the member is a non-resident, by a new action commenced against him by regular process and service of summons, or seizure of his property by attachment.
- (2) If the member is a resident, by a notice served upon him personally after judgment, apprizing him that at the stated time and place, a motion will be made to enter judgment against him personally.

At the new and subsequent proceeding, whether it is the new action under (1) or (2), the prior judgment against the association shall be *res judicata* as to matters actually litigated therein.