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Civil Procedure -- Service of Process -- Suability of Unincorporated Associations in North Carolina

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ual process of judicial inclusion and exclusion, as the cases presented for decision may require."[32] In the *Hickman* case the court has by dictum included a situation where the witnesses are no longer available or can be reached only with difficulty,[33] and by inference it has excluded a situation where all of the witnesses are employees of the opposing party. Whether or not in a specific case an attorney will be forced to reveal his files is at the present writing unknown. If the court finds "good cause" the Supreme Court's answer apparently is "yes"; if no "good cause" is found, the answer is "no."

The result would seem to be that a district judge may find "good cause," a circuit court of appeals may find no "good cause" and the ultimate decision will rest with the Supreme Court as to whether or not "good cause" exists. While such a situation may be undesirable, it would seem to be unavoidable, if the sanctity of an attorney's files is to be invaded or not depending on the existence of "good cause."

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Civil Procedure—Service of Process—Suability of Unincorporated Associations in North Carolina

North Carolina has consistently followed the common law rule that, in the absence of an enabling statute, an unincorporated association has no capacity to sue or to be sued in its common name; for the reason that, in the absence of statutes recognizing it, such association has no legal entity apart from that of its members.[1]

In 1943, the General Assembly of North Carolina, by amendment to G. S. 1-97, added subsection (6), which provides, in part: "Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall . . . appoint an agent in this state upon whom all processes and precepts may be served. . . . If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the secretary of state of North Carolina. . . . Service upon the process agent appointed pursuant to this subsection . . . shall be legal and binding on said association . . . and any judgment recovered in any action . . .

[32] Mr. Justice Miller in Davidson v. New Orleans, 96 U. S. 97, 104 (1877).
[33] Hickman v. Taylor *et al.*, —— U. S. ——, ——, 67 Sup. Ct. 385, 394, 91 L. ed. 330, 339 (1947).

[1] Hallman v. The Wood, Wire and Metal Lathers' International Union *et al.*, 219 N. C. 798, 15 S. E. (2d) 723 (1941); Citizens' Co. v. Typographical Union, 187 N. C. 42, 121 S. E. 31 (1924); Tucker v. Eatough, 186 N. C. 505, 120 S. E. 57 (1923) noted (1932), 10 N. C. L. REV. 313; Kerr v. Hicks, 154 N. C. 265, 70 S. E. 468 (1911); Nelson v. Relief Department, 147 N. C. 103, 60 S. E. 724 (1908); *but see* Winchester v. Brotherhood of R. R. Trainmen, 203 N. C. 735, 167 S. E. 49 (1932).

shall be valid and may be collected out of any real or personal property belonging to the association or organization."[2]

Although the writer has been unable to find any suits that have been attempted either by or against an unincorporated association in its common name under this subsection, it is obvious that when such suits do arise, the immediate question will be whether this subsection does, in fact, authorize them to be brought in the name of the association.

The title of G. S. 1-97 is "Service by copy"; and its preamble states that "the manner of delivering summons in the following cases shall be as hereinafter stated." Now, subsection (4) of G. S. 1-97 provides for the service of process upon unincorporated associations "issuing certificates and/or policies of insurance"; and, in the "Parties" section of the General Statutes, G. S. 1-70 provides that "Any and/or all unincorporated, beneficial organizations, fraternal benefit orders, associations, etc., issuing certificates and/or policies of insurance, foreign or domestic, now or hereafter doing business in this state, shall have the power to sue and/or be sued in the name commonly known and/or used by them in the conduct of their business. . . ." There is no comparable provision in the "Parties" section of the General Statutes relating to such unincorporated associations as are contemplated by G. S. 1-97(6).

Whether the failure to enact a statute specifically providing that unincorporated associations, generally, shall have the power to sue or be sued in this state, on proper service of process, was due to inadvertence on the part of the legislature, or whether it was due to an attempt on the part of some legislators to achieve the end of making such organizations suable without encountering the opposition of varying interests,

[2] N. C. GEN. STAT. (1943) §1-97 (6): "Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this state upon whom all processes and precepts may be served, and certify to the clerk of the superior court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the secretary of state of the state of North Carolina. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the secretary of state, if no process agent is appointed, shall be legal and binding on said association or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection, shall be valid and may be collected out of any real or personal property belonging to the association or organization.

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

seems of little practical importance in the construction of this subsection.

It seems obvious that any construction of the subsection other than that it authorizes suit against unincorporated associations in their common name, in proper cases, would be to deprive the words of the legislature of any force or effect whatsoever. Suability of and service of process upon unincorporated associations "issuing certificates and/or policies of insurance" is adequately provided for in G. S. 1-70 and in G. S. 1-97(4). Therefore, it cannot reasonably be contended that G. S. 1-97(6) was intended to concern itself with such associations. And to say that one may have service of process upon an unincorporated association, thus subjecting the association to the jurisdiction of the court, and at the same time, to say that such association has no legal capacity to be sued in its common name, would seem an illogical conclusion. Furthermore, elementary principles of fairness surely dictate that, if one had capacity to be sued, he must also have capacity to sue in the same manner.

Even if it be assumed that an interpretation of the subsection to the effect that it provides merely for the service of process would not, of itself, be illogical, the clear and unambiguous words of the statute itself may not be so easily disposed of. The last sentence of paragraph one of G. S. 1-97(6) provides: "Service upon the process agent appointed pursuant to this subsection or upon the secretary of state if no process agent is appointed, shall be *legal and binding* on said associations . . . and any *judgment recovered*[3] in any action commenced by service of process, as provided in this subsection shall be valid and may be collected out of any real and personal property belonging to the association. . . ."

It is a well settled rule in North Carolina that the caption and preamble of a statute may be used in aid of construction, where the meaning of its provisions is vague; but the language of neither will be permitted to control when the meaning of the text is clear.[4] Further, it seems an equally well settled rule of statutory construction that, in ascertaining the intention of the legislature, effect must be given to every word, phrase, and provision of the statute.[5]

In *ex parte Hill*,[6] the Supreme Court of Alabama was confronted

[3] Italics supplied.

[4] Bersio v. United States, 124 F. (2d) 310, 314 (C. C. A. 4th, 1941); The City of Raleigh v. Mechanics & Farmers Bank, 223 N. C. 286, 26 S. E. (2d) 573 (1943); Dunn v. Dunn, 199 N. C. 535, 155 S. E. 165 (1930); State v. Bell, 184 N. C. 701, 115 S. E. 190 (1922); Blue v. McDuffie, 44 N. C. 131 (1852).

[5] Richmond Guano Co. v. Walston, 187 N. C. 667, 122 S. E. 663 (1924); Board of Agriculture v. Drainage District, 177 N. C. 222, 98 S. E. 597 (1919); State v. Burnett, 173 N. C. 750, 91 S. E. 597 (1917); Pullen v. Corporation Commission, 152 N. C. 548, 68 S. E. 155 (1910); Nance v. Southern Railway, 149 N. C. 366, 63 S. E. 116 (1908); Fortune v. Commissioners, 140 N. C. 322, 52 S. E. 950 (1905).

[6] 165 Ala. 365, 51 So. 786 (1910).

with the question whether the language of the title of an act of the Alabama legislature: "An act to stipulate how the service of process may be effected upon certain unincorporated organizations or associations" was sufficiently broad to embrace that part of the body of the act which provided that certain unincorporated associations were suable in that state. In the course of its opinion the court used these words:

"To provide for the service of process implies the power to issue such process; and the power to issue or serve judicial process implies an action or suit pending or to be commenced by such process. The power to serve judicial process upon an individual, association, or corporation implies necessarily that such individual, corporation, or association is suable or subject to the process of the court for which such process issues. . . .

"The suing out or service of a summons is the commencement of an action. . . .[7] This being true, it certainly implies that an action against it (unincorporated association) is maintainable, or it intends to provide for the bringing of actions against such associations."

Another possible construction of the subsection that would reach the same result would be one similar to that of the *Coronado Coal* case[8]—i.e., that, even though the statute does not, of itself, confer the power to sue and to be sued upon such unincorporated associations, it does so recognize the legal entity of such associations as to justify a holding that they are suable in North Carolina courts. Admittedly, such a construction would be weak, since the *Coronado* case ruling was based, not upon recognition of the legal entity of the association in a single federal statute, but upon its recognition in numerous federal statutes, as well as the wording of the Sherman Antitrust Act.

Certainly, an enactment by the legislature of North Carolina of a statute similar to G. S. 1-70, specifically providing that unincorporated associations, generally, shall have the power to sue and be sued in North Carolina, would be the preferable method of resolving any possible question as to the true import of G. S. 1-97(6).

Assuming, for the moment, that G. S. 1-97(6) does, in fact, confer the power to sue and be sued upon unincorporated associations in North Carolina, the constitutionality of such an enabling statute is hardly open to question.[9] Indeed, the *Coronado* case, *supra,* and the subsequent embodiment of its rule into the Federal Rules of Civil Procedure,[10] seem to put the question at rest.

[7] N. C. GEN. STAT. (1943) §1-14.

[8] United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 (1922).

[9] Jardine v. Superior Court in and for Los Angeles County, 213 Cal. 301, 2 P. (2d) 756, 79 A. L. R. 291 (1931); United States Heater Co. v. Iron Moulders' Union, 129 Mich. 354, 88 N. W. 889 (1902); Appeal of Baylor, 93 S. C. 414, 77 S. E. 59 (1913); F. R. Patch Mfg. Co. v. Capeless, 78 Vt. 1, 63 A. 938 (1906); *see* Operative Plasterers', Etc., Ass'n v. Case, 69 App. D. C. 43, 93 F. (2d) 56 (1937), noted (1938) 37 MICH. L. REV. 141; WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS (2nd ed., 1923) 436.

[10] FED. RULES CIV. PROC., Rule 17(b): "Capacity to Sue or Be Sued:—The

Furthermore, there apparently is no valid objection to the constitutionality of the method of service of process as prescribed in G. S. 1-97(6).[11] In *Winchester v. Brotherhood of R. R. Trainmen*,[12] the Supreme Court of North Carolina held that service on the resident secretary of the fraternal insurance association was valid service on the association. (This without specific enabling statute.) And G. S. 1-105, which provides that the Commissioner of Motor Vehicles of North Carolina shall be the process agent for non-resident motorists in North Carolina, has been held constitutional.[13]

In the majority of the later cases where service of process on an unincorporated association has been provided for by statute, the question arises whether there has been service upon an agent of the association whose relationship to the association is such that it could reasonably be expected that he would give notice of the suit to the association.[14] The answer to the question is, of course, largely determined by the facts of the particular case. This question could hardly arise under the method of service prescribed in G. S. 1-97(6), for the only persons who may be served are the process agent appointed by the association and the Secretary of the State of North Carolina.

Another question that is likely to arise in the event of a suit against an unincorporated association under subsection (6) is that of the proper construction of the words, ". . . association or organization . . . desiring to do business in this state, by performing any of the acts for which it was formed. . . ." Both the federal courts and the North Carolina Supreme Court, in deciding whether a corporation is "doing business" within a state, do so under the general rule that the business must be of such a nature and character as to warrant the inference that the corporation or other business entity has subjected itself to the local juris-

capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of the state, may sue or be sued in its common name for the purpose of enforcing for or against it some substantive right existing under the Constitution or laws of the United States."

[11] See note 8 *supra*.

[12] 203 N. C. 735, 167 S. E. 49 (1932).

[13] Wynn v. Robinson, 216 N. C. 347, 4 S. E. (2d) 884 (1939); Bigham v. Foor, 201 N. C. 14, 158 S. E. 548 (1931); Ashbey v. Brown, 198 N. C. 369, 151 S. E. 725 (1930). For a discussion of due process in such non-resident motorists statutes, see Culp, *Process in Actions Against Non-Resident Motorists* (1933) 32 MICH. L. REV. 325.

[14] Brotherhood of R. R. Trainmen v. Agnew, 170 Miss. 604, 155 So. 205 (1934); Bowers v. Grand I. B. of Locomotive Engineers, 187 Minn. 626, 245 N. W. 362 (1933); *see* Operative Plasterers', Etc., Ass'n v. Case, 69 App. D. C. 43, 93 F. (2d) 56 (1937); Winchester v. Brotherhood of R. R. Trainmen, 203 N. C. 735, 167 S. E. 49 (1932).

diction.[15] The application of this rule also requires an interpretation of the facts of each particular case.

The enabling statutes of a number of states provide, in effect, that unincorporated associations shall be suiable in their associate name, judgment to be executed upon the association's property, and service of process to be made on an agent or officer of the association.[16] Under this type of statute, the question whether the association is "doing business" within the state does not arise. But a few states provide, in effect, that when two or more persons are associated in any business which is transacted in a common name, such association may be sued in its common name.[17] It has been determined in at least one of the latter states that the association need not be engaged in commercial business in order to be sued in the common name;[18] and in Oklahoma, the phrase "transacting business" is simply disregarded, and suit against trade unions is allowed without discussion.[19]

In any event, it would seem a reasonable interpretation of G. S. 1-97(6) that, by including the words "by performing any of the acts for which it was formed," the legislature has effectively precluded any question as to whether the activities of the association must be of a commercial nature in order to be subject to service of process in the manner prescribed.

In concluding his opinion in *Hallman v. The Wood, Wire & Metal Workers International Union,*[20] Justice Clarkson wrote:

"The defendant . . . having no legal entity, the attempted service in any way is null and void. . . . This type of action denotes a chaotic and

[15] Peoples' Tobacco Co. v. American Tobacco Co., 246 U. S. 79 (1918); Carnegie Office Appliance Co. v. Thomas A. Edison Co., 28 F. (2d) 626 (M. D. N. C., 1928); Ivy River Land and Timber Co. v. National Fire and Marine Insurance Co., 192 N. C. 115, 133 S. E. 434 (1926); Cape Fear R. R. v. Coble, 190 N. C. 375, 129 S. E. 828 (1925); Lunceford v. Commercial Travelers Mutual Accident Association, 190 N. C. 314, 129 S. E. 805 (1925).

[16] ALA. CODE (1940) 7-142-3; CONN. GEN. STAT. (1930) §5490; DEL. REV. CODE (1935) §467b; MD. ANN. CODE GEN. LAWS (Flack Code 1939) art. 23, §1109-15; MICH. COMP. LAWS (1929) §14020; N. Y. (McKinney 1942) GEN. ASSOC. LAW §13; N. D. REV. CODE (1943) 28-0609; R. I. GEN. LAWS (1938) c. 530 §1-14; S. C. CIV. CODE (1942) §7796-7798; TEX. STAT. (Vernon, Centennial ed., 1936) §6133-8; VA. CODE (Michie, *et al.*, 1942) §6058.

For a further compilation and treatment of such statutes, see WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929) 542.

[17] CAL. CODE CIV. PROC. §388; MINN. GEN. STAT. (1923) 2 Mason 1927, §9180; MONT. REV. CODE §90 (1935); OKLA. STAT. (1941) 12-182; NEV. COMP. LAWS (Hillyer, 1929) §8564.

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

[19] United Brotherhood of Carpenters and Joiners of America v. McMurtrey, 179 Okla. 575, 66 P. (2d) 1051 (1937). *Contra:* Bowers v. Grand I. B. of Locomotive Engineers, 187 Minn. 626, 246 N. W. 362 (1933) (in which case the court allowed a union to be sued in its common name, only on evidence that the union was actually engaged in commercial business).

[20] 219 N. C. 798, 15 S. E. (2d) 723 (1941).

nebulous condition—such as the world was in until the Supreme Commander said, "Let there be light, and there was light."

It is herewith submitted that the General Assembly of North Carolina has, with any reasonable interpretation of the effect of G. S. 1-97(6), provided the requisite "light."

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Constitutional Law—Due Process of Law—Waiver of Right to Counsel in State Courts

In a recent case, *Carter v. People of State of Illinois*,[1] the Supreme Court of the United States held that failure by a state court to appoint counsel for accused who pleaded guilty to murder did not constitute a denial of due process where the record showed that accused, with his rights fully explained to him, did not request that court appoint counsel, and the record contained no evidence which would indicate that the defendant was incapable of intelligently waiving his right to counsel.

The petitioner, Roy Carter, Negro, had pleaded guilty without the aid of counsel when arraigned on an indictment for murder in 1928. He received a ninety-nine-year sentence and in 1945 he brought a petition for his release on writ of error in the Supreme Court of Illinois claiming that the conviction on which his confinement was based was vitiated by the denial of his right to the assistance of counsel under the Fourteenth Amendment. Petitioner did not allege that he had requested counsel be appointed or that he was ignorant of his right to counsel. Carter was, in fact, represented by counsel on the day of sentence, appointed by the court without his request.[2] At the time of the relevant events in 1928 Carter was thirty years of age and although he could read and write, he had no formal education. He was of average mentality, quiet and industrious, had worked as a cook and mechanic for the eleven years preceding and had never before run afoul of the law. Although these facts do not appear in the common law record, they do appear in a transcript of testimony in connection with a hearing on mitigation of the offense which was attached to the record. The Illinois Supreme Court[3] affirmed the judgment of the trial court, and dismissed the writ stating that the right to be represented by counsel is one which the defendant may claim or waive as he shall determine, as no duty rests upon the court to provide legal assistance for an accused unless he states

[1] Carter v. People of State of Illinois, —— U. S. ——, 67 Supp. Ct. 216, 91 L. ed. 157 (Adv. Ops.) (1946). For cases on the general subject "Right to Counsel" see Note (1940) 84 L. ed. 383.

[2] *Id.* at ——, 67 Sup. Ct. at 219, 91 L. ed. at 160. Canizio v. People of State of New York, 327 U. S. 82 (1946). Appointment of counsel on day of sentence cured earlier defect of denial of right to counsel; a noncapital offense.

[3] People v. Carter, 391 Ill. 594, 63 N. E. (2d) 763 (1945).