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Unincorporated Associations—Capacity to Sue and Be Sued— North Carolina and Federal Jurisdiction

In the absence of an enabling statute an unincorporated association can neither sue nor be sued in its common or association name, on the theory that such an association has no legal entity distinct from that of its members.¹ Thus at common law the action must be brought by or against the members individually. Some courts have avoided the rule without express statutory authority when its application would produce unfair and unjust results,² and others, among them a North Carolina inferior court,³ declare that whether an unincorporated association can sue or be sued as a legal entity is purely a question of procedure and a failure to raise the question before judgment is a waiver and cannot be taken advantage of after judgment.⁴ But aside from these two deviations any relief from the common law rule must be by statutory provision.

Suits by or against unincorporated associations in federal courts are governed by Federal Rule 17(b)⁵ which adopts the rule of the *Coronado Coal Case*,⁶ and provides that “. . . a partnership or unincorporated association . . . may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States. . . .”⁷ In suits not

¹ *Moffat Tunnel League v. United States*, 289 U. S. 113 (1932); *Grand International Brotherhood v. Green*, 206 Ala. 196, 89 So. 435 (1921); *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906); *Tucker v. Eatough*, 186 N. C. 505, 120 S. E. 57 (1923); *Nelson v. Relief Dept.*, 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).

² *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922). The court relied upon the concept of equitable class suits, the recognition of unions as entities expressly or impliedly in social and economic legislation, and “. . . out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such organizations as labor unions has come to be recognized.” See *Taft v. R.R. v. Amalgamated Soc. of R.R. Servants*, 1 B.R.C. 832 (1901); *Comment*, 32 *YALE L. J.* 59 (1922).

³ This judgment of the General County Court of Buncombe County is unreported, but the text is set forth in *Operative Plasters' Association v. Case*, 93 F. 2d 56, 61 (D. C. Cir. 1937).

⁴ *Beatty & Richie v. Kurtz*, 2 Pet. 566 (U. S. 1829); *Iron Moulders' Union No. 135 v. Allis Chalmers Co.*, 166 Fed. 45 (7th Cir. 1908); *Barnes v. Chicago Typographical Union*, 232 Ill. 402, 83 N. E. 932 (1908); *Contra: Proprietors of the Mex. Mill v. Yellow Jacket Mining Co.*, 4 Nev. 40 (1868).

⁵ *FED. R. CIV. P.* 17(b), 23 U. S. C. §723(c) (1940). See also *FED. R. CIV. P.* 4(d)3 and 4(d)7 which provide for service of process upon an officer, managing or general agent, or any other agent authorized by appointment or law (federal or state) to receive service.

⁶ *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922).

⁷ *Schmidt v. Peoples Telephone Union of Maryville*, 138 F. 2d 13 (8th Cir. 1943) (Fair Labor Standards Act); *Thermoid Co. v. United Rubber Workers*, 70 F. Supp. 228 (D. N. J. 1947) (War Labor Disputes Act); *United Brick & Clay Workers v. Robinson Clay Product Co.*, 64 F. Supp. 872 (N. D. Ohio 1946) (Sherman Anti-Trust & National Labor Relations Act); *Sperry Products, Inc. v. Association of American R.R.*, 44 F. Supp. 660 (S. D. N. Y. 1942) (patent infringement).

involving a federal substantive right, Federal Rule 17(b) provides that "capacity to sue or be sued shall be determined by the law of the State in which the district court is held. . . ." This makes it necessary to determine when unincorporated associations can sue and be sued in state courts.

When can an unincorporated association *be sued* as a legal entity in North Carolina? North Carolina by piece-meal legislation specifically authorizes suits against unincorporated associations where the suit concerns: (1) insurance policies issued by the unincorporated associations,⁸ (2) real estate held by the unincorporated association in its common name,⁹ and (3) acts performed by certain religious, educational, or charitable associations formed prior to 1894.¹⁰ More important than these narrow specific abrogations of the common law are the cases interpreting G. S. 1-97(6)¹¹ which, under the title, "Service by Copy," provides for service upon the process agent of any unincorporated associations doing business in North Carolina. In the *Ionic Lodge Case*,¹² the first one arising under this statute, it was held (in a suit by an unincorporated association) that an unincorporated association could *sue* or *be sued* in its common or association name, by reasoning that G. S. 1-97(6) was an expression of legislative intent to change the common law rule. But on rehearing¹³ the court reversed itself, stating that in the previous hearing G. S. 1-70 had been overlooked; that the

⁸ N. C. GEN. STAT. §1-70 (1943).

⁹ N. C. GEN. STAT. §39-24 (1950).

¹⁰ N. C. GEN. STAT. §55-13 (1950).

¹¹ N. C. GEN. STAT. §1-97(6) (1943), "Any unincorporated association or organization, whether resident or non-resident, 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 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."

¹² *Ionic Lodge No. 72 v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Co.*, 232 N. C. 252, 59 S. E. 2d 829 (1950).

¹³ 232 N. C. 648, 62 S. E. 2d 73 (1950); Note, 29 N. C. L. Rev. 335 (1950).

common law rule still prevailed in North Carolina except as modified by G. S. 1-70, which permitted class suits and suits concerning insurance policies issued by an unincorporated association; that therefore unincorporated associations were not permitted to *sue* in their common name. The *Ionic Lodge Rehearing*¹⁴ left open the question as to whether G. S. 1-97(6) authorizes suits *against* an unincorporated association in its common name.

In *Stafford v. Woods*,¹⁵ the most recent case interpreting G. S. 1-97(6), Justice Ervin, for the unanimous court, declared that the statute ". . . when read aright provides that any unincorporated association . . . which is doing business in North Carolina . . . is subject to suit as a legal entity." In the light of this decision the only limitation to suits *against* unincorporated associations in North Carolina is the application of the words ". . . associations or organizations desiring to do business in this state, by performing any of the acts for which it was formed. . . ."¹⁶ This is basically a problem of jurisdiction, with the limitation being also applied to suits against foreign corporations.¹⁷

When can an unincorporated association *sue* as a legal entity in North Carolina? By statute North Carolina permits unincorporated associations to sue in their common name in suits concerning: (1) insurance policies held by the unincorporated association,¹⁸ (2) real estate held by the unincorporated association in its common name,¹⁹ and (3) acts performed by certain religious, educational or charitable associations formed prior to 1894.²⁰ In all other cases the common law rule applies. G. S. 1-97(6) is not construed as implying legislative intention to permit unincorporated associations to sue,²¹ though it is interpreted as implying an intention to permit suits against unincorporated associations.²² This construction of G. S. 1-97(6) forces unincorporated associations to resort to the cumbersome joinder of all its members or as an alternative in most instances they are allowed to bring a class action.²³ Most statutes dealing with this problem either

¹⁴ *Ionic Lodge No. 72 v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Co.*, 232 N. C. 648, 62 S. E. 2d 73 (1950).

¹⁵ 234 N. C. 622, 68 S. E. 2d 268 (1951).

¹⁶ See note 11 *supra*.

¹⁷ For a review of the North Carolina test of "doing business" as applied to corporations, see Note, 30 N. C. L. REV. 454 (1952).

¹⁸ N. C. GEN. STAT. §1-70 (1943).

¹⁹ N. C. GEN. STAT. §39-24 (1950).

²⁰ N. C. GEN. STAT. §55-13 (1950).

²¹ *Ionic Lodge No. 72 v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Co.*, 232 N. C. 648, 62 S. E. 2d 73 (1950).

²² *Stafford v. Wood*, 234 N. C. 622, 68 S. E. 2d 268 (1951).

²³ N. C. GEN. STAT. §1-70 (1943) authorizes the use of class actions by unincorporated associations when the question is one of common or general interest to many persons, or where the parties are so numerous that it is impractical to bring them all before the court.

specifically provide for suits by *and* against unincorporated associations²⁴ or provide for suits against unincorporated associations without mentioning suits by unincorporated associations.²⁵ The legislative intent of this latter type statute is clearly to restrict the privilege to suits *against* unincorporated associations.²⁶ G. S. 1-97(6) is not comparable to either of these classes of statutes for it merely *implies* a change in the common law rule by providing for service of process. Inasmuch as the legislative intent of the North Carolina General Assembly is not clear,²⁷ the court is not bound to construe this statute as implying legislative intent to permit suit against but not by unincorporated associations.

It seems that basic principles of fairness dictate that if one has capacity to be sued he must also have capacity to sue in a like manner. There is sentiment within the North Carolina Supreme Court to interpret G. S. 1-97(6) as implying legislative intent that unincorporated associations should have the right to sue as well as be sued even though there is no language within the statute which compels this interpretation.²⁸

If the North Carolina Supreme Court continues to hold that G. S. 1-97(6) authorizes suits against but not by unincorporated associations this will not violate the due process provision of the Fourteenth Amendment so long as the prescribed method of service extends to all unincorporated associations.²⁹

²⁴ DEL. REV. CODE §4676 (1935); IDAHO CODE §5-328 (1947); LA. GEN. STAT. §1295 (1939); MINN. STAT. ANN. §540.15 (West 1945); MONT. REV. CODE ANN. §9089 (1947); NEV. COMP. LAWS ANN. §8564 (1929); OKLA. STAT. ANN. tit. 12 §182 (1941); S. C. CODE ANN. §7796 (1942).

²⁵ ALA. CODE ANN. tit. 7 §142 (1940); COLO. STAT. ANN. rule 17(b) (1935); CONN. GEN. STAT. §5490 (1930); MD. CODE GEN. LAWS Art. 23 §123 (1939); MICH. COMP. LAWS §14020 (Mason 1929); N. J. REV. STAT. §2-78 (1937); N. M. STAT. ANN. §19-605 (1941); N. Y. CIV. PRAC. ACT §222a (1945); N. D. REV. CODE §28-0609 (1943); TEX. STAT., REV. CIV. ART. 6133 (1936); UTAH CODE ANN. §104-3 (1943); VA. CODE ANN. §6058 (1950).

²⁶ St. Paul Typothetae v. St. Paul Bookbinder's Union No. 37, 94 Minn. 351, 102 N. W. 725 (1905); Kline v. Knights of the Golden Eagle, 113 N. J. Eq. 513, 167 Atl. 758 (1933).

²⁷ Note, 25 N. C. LAW REV. 319, 320 (1946).

²⁸ In Ionic Lodge No. 72 v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Co., 232 N. C. 252, 258, 59 S. E. 829, 834 (1950), Justice Seawell stated for the court: "It can hardly be questioned that if the association might be sued in its common name by service upon the process agent or the Secretary of State, it follows as a corollary conclusion that it might also have the capacity to sue." On rehearing, Ionic Lodge No. 72 v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Co., 232 N. C. 648, 652, 62 S. E. 2d 73, 76 (1950), Justice Devin in a vigorous dissent, with Justice Ervin concurring, said: "As a result of the decision in this case a complainant can bring an association into court and by judgment take away its property, but when the association's property has been wrongfully taken by another, it is powerless to come into court for redress. It should have the right to sue as well as be sued." See Venus Lodge v. Acme Benevolent Association, Inc., 231 N. C. 522, 58 S. E. 2d 109 (1950), where Justice Ervin expressed a similar view.

²⁹ Jardine v. Superior Court, 213 Cal. 301, 2 P. 2d 756 (1931), *appeal dismissed* 284 U. S. 592 (1932); Diamond v. Minnesota Saving Bank, 70 Minn. 289, 73 N. W. 182 (1897); Edgar v. Southern R.R., 213 S. C. 445, 49 S. E. 2d 841 (1941). The theory is that the Fourteenth Amendment does not restrict the power of a

Even when an unincorporated association is recognized as a legal entity by a state access to the federal courts is not assured. While Rule 17(b) makes unincorporated associations suable as legal entities, it does not confer federal jurisdiction upon such suits. Where jurisdiction is based on a federal question no problem arises.³⁰ In cases where federal jurisdiction is based on diversity of citizenship it is held that although the unincorporated association has been accorded capacity to sue or be sued in its common name, the citizenship of the individual members must, nevertheless, be made to appear, and their citizenship must be wholly diverse from that of the opposing parties.³¹ The fiction that for purposes of diversity jurisdiction a corporation is to be deemed a citizen of the state creating it³² has not been applied to unincorporated associations.³³ The alternative for the unincorporated association might then be the use of Rule 23(a)³⁴ which authorizes class actions where the persons constituting the class are so numerous as to make it impractical to bring them all before the court. In such class actions only the citizenship

state to determine by what process legal rights may be asserted or legal obligations enforced, provided the methods of procedure adopted for these purposes give reasonable notice and afford fair opportunity to be heard before the issues are decided. See Note, 20 HARV. L. REV. 58 (1906).

³⁰ *Bartling v. Congress of Industrial Organizations et al.*, 40 F. Supp. 366 (E. D. Mich. 1941).

³¹ *Rosendale v. Phillips*, 87 F. 2d 454 (2d Cir. 1937); *Levering & Garrigus Co. v. Morrin*, 61 F. 2d 115 (2d Cir. 1932), *aff'd*, 289 U. S. 103 (1933); *Western Mutual Fire Ins. Co. v. Samson Bros. & Co.*, 42 F. Supp. 1007 (S. D. Iowa 1941); *but see Van Sant v. American Express Co.*, 169 F. 2d 355 (3d Cir. 1948) where the court failed to distinguish the issue of capacity of an association to sue or be sued from the issue of citizenship required for jurisdiction based on diversity of citizenship. Note, 34 IOWA L. REV. 356 (1949). There are some who argue that the present federal rule of using the citizenship of each member of the unincorporated association to determine diversity jurisdiction may undergo a change, for the Supreme Court has treated a *sociedad en comandita*, an organization under Puerto Rican law which is similar to our limited partnerships, as a citizen and resident of Puerto Rico for the purpose of determining federal jurisdiction based on diversity, without regard to the citizenship of the members. *Puerto Rico v. Russel & Co.*, 288 U. S. 476 (1932); Note, 33 COL. L. REV. 540, 541 (1933), "The present case thus appears to represent not merely the overruling of a long line of decisions in the lower federal courts but carries with it the germ of the overturn of a basic Supreme Court doctrine." But the lower federal courts have not followed this case and consistently hold that it is the citizenship of the members of the unincorporated association which determines federal diversity jurisdiction. *Sperry Products v. Association of American Railroads*, 132 F. 2d 408 (2d Cir. 1942), *cert. denied*, 319 U. S. 744 (1943); *Rosendale v. Phillips*, 87 F. 2d 454 (2d Cir. 1937); *Dillner Transfer Co. v. National Warehouse Ass'n*, 58 F. Supp. 700 (W. D. Pa. 1944). The Supreme Court, when faced with the issue, may distinguish our unincorporated associations from the unique *sociedad en comandita* as at least one district court has done. *Gaunt v. Lloyds of America*, 11 F. Supp. 787 (W. D. Tex. 1935).

³² *Marshall v. Baltimore & Ohio R.R.*, 16 How. 314 (U. S. 1853); *McGovney, A Supreme Court Fiction*, 56 HARV. L. REV. 853 (1943).

³³ *Great Southern Fire Proof Hotel v. Jones*, 117 U. S. 449 (1899); DOBIE, FEDERAL PROCEDURE 198 (1928); *Russell v. Central Labor Union*, 1 F. 2d 412 (E. D. Ill., 1924).

³⁴ FED. R. CIV. P. 23(a), 23 U. S. C. §723(c) (1940).

of the representatives need appear, permitting the unincorporated association to select a representative group diverse from their adversary.³⁵

One more nick has been carved from the impractical common law rule by Section 301(a) of the Taft-Hartley Act³⁶ which provides for damage suits by or against unincorporated associations in federal courts for breach of collective bargaining contracts without regard to jurisdictional amount or the citizenship of the parties.

Because of the uncertainties and limitations of the North Carolina statutes which abrogate, in part, the common law rule as to suability of unincorporated associations, and because of the need for a simple method of suit *by and against* the many powerful and well established fraternal, religious, and trade union bodies that exist today, a specific statute allowing such suits in North Carolina courts and thereby in the federal courts sitting in North Carolina is again suggested.³⁷

HURSELL H. KEENER.

Wills—Two Methods of Probate in Solemn Form in North Carolina'

According to a recent statutory survey,¹ there are nineteen states which permit the probate of a will without requiring that notice be given to all interested parties as a condition precedent. North Carolina is listed as one of these states,² since in this jurisdiction both types of probate, common and solemn form, have been preserved.³ The author comments: ". . . it is clear that a rational basis exists for those [states] which follow the pattern of the English probate without notice, first, because estates commonly need the supervision of the executor immediately on the death of the testator; and, second, because in the vast majority of cases there is not the remotest possibility of a contest and the probate of the will can be reduced to an administrative formality. But since the heir then has no opportunity to contest before probate, he must be given that opportunity afterward."⁴ The increasing num-

³⁵ *Montgomery Ward & Co. v. Langer*, 168 F. 2d 182 (8th Cir. 1948); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 148 F. 2d 403 (4th Cir. 1945); *Philadelphia Local 192 v. American Federation of Teachers*, 44 F. Supp. 345 (E. D. Pa. 1942); *International Allied Printing Trades Ass'n v. Master Printers Union*, 34 F. Supp. 178 (D. N. J. 1940).

³⁶ 61 STAT. 136 (1947); 29 U. S. C. A. §141-147 (Supp. 1947); Note, 2 *SOUTHWESTERN L. J.* 246 (1948).

³⁷ The text of such a statute was proposed in Note, 29 *N. C. L. REV.* 335, 338 (1950).

¹ Simes, *The Function of Will Contests*, 44 *MICH. L. REV.* 503 (1946).

² See *N. C. GEN. STAT.* §31-14 (1950); *A Survey of Statutory Changes in North Carolina in 1933*, 11 *N. C. L. REV.* 263 (1933).

³ *In re Will of Chisman*, 175 *N. C.* 420, 95 *S. E.* 769 (1918). This conclusion also follows by necessary implication from *N. C. GEN. STAT.* §31-32 (1950), which governs the filing of a caveat during or after probate "in common form."

⁴ Simes, *The Function of Will Contests*, 44 *MICH. L. REV.* 503, 539 (1946).